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SCHOOL OF LAW

MASTER OF LAWS (LL. M)

GPR 699: PROJECT PAPER

**THE CONGRUENCE OF INTERNATIONAL LAWS AND KENYAN LAWS WITH
REGARD TO INTERNATIONAL ONLINE TRADE**

{ A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M),
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SUBMITTED ON: 9th November, 2021

DECLARATION

I, **FENARDIS ATILA BARASA** do hereby declare that this research is my original work and that the same has not been presented for an award of a degree before by anyone else within the University of Nairobi or any other University or educational institution.

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4. UNCITRAL Model Law on Electronic Commerce.
5. UN Convention against Transnational Organized Crime, 2003.
6. ICC e Terms 2004: ICC Guide to electronic contracting.
7. OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.
8. UNCITRAL Draft Model Law provisions on electronic transferable Records.
9. UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001.

List of Abbreviations

ASA	Advertising Standards Agency
CAK	Communication Authority of Kenya
CAP	Committee of Advisory Practice
CISG	United Nations Convention on Contracts for the International Sale of Goods
CPR	Consumer Protection from Unfair Trading Regulations, 2008
CRA	Consumer Rights Act, 2015
DST	Digital Service Tax
EC Directive	Electronic Commerce Directive
EU	European Union
ICO	Information Commissioner's Office
ICSID	International Centre for Settlement of International Disputes
ICT	Information Communication and Technology
IoT	Internet of Things
KEA	Kenya Evidence Act
KEBS	Kenya Bureau of Standards
KICA	Kenya Information and Communication Act
KNBS	Kenya National Bureau of Statistics
MLEC	Model Law on Electronic Commerce
MLI	Multilateral Instrument
OECD	Organisation for Economic Co-operation and Development
PEC	Privacy & Electronic Communications (EC Directive) Regulations, 2008
POS	Provision of Services Regulations

SMEs	Small and Medium Sized Enterprises
UK	United Kingdom
UK GDPR	United Kingdom General Data Protection Regulation
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

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CHAPTER ONE

Introduction and Background of the Legal and Regulatory Framework Governing International Online Trade in Kenya

1.1 Background and Introduction to the Study

The World Trade Organization (WTO) defines electronic commerce as production, advertising, sale, as well as distribution of products and services through telecommunication networks. In other words, e-commerce and other online transactions are facilitated through electronic means and the Internet.¹

The rapid growth in online transactions in the world, and particularly in Kenya is associated with the growth of the knowledge economy and the convergence and proliferation of technological developments². Technological innovation has been driving Kenya's development agenda, especially in the realm of mobile telephony, retail financial services, as well as e-commerce. The delivery of financial services using mobile payments has been radically transformed³.

While attempts have been made by various authors to analyse the legal status of local e-commerce in Kenya, this study however majors on the congruence of the same with regards to international online trade laws. It is quite clear that the Kenyan government is trying to address legal issues of e-commerce within the nation. The concern however is the interrelation of the same with the international platform.

Relatedly, the regulation of international online trade in the Kenyan context through the prevailing institutional and legal framework should be comprehensively done with a view to anticipating and resolving emerging issues arising from online transactions in Kenya.

¹ https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm Accessed on 21 February 2021

² Kiboro SW, Factors Influencing Performance of Online Businesses in Kenya: A Case of Businesses in Nairobi County (Doctoral dissertation, United States International University-Africa).

³ Guild J, Fintech and the Future of Finance.

Challenges and opportunities abound in the field of online transactions include transfer of goods across borders barriers, frictions prevalent in the enabling environment such as laws, policies, customs and international trade agreements. Restrictions on technical trading is a challenge since it inhibits international online traders from getting accurate charts or index graphs indicating the movement of products across the border so as to predict the future of their products. Kanyaru and Kyalo⁴ recommend the changing of online trade from its traditional form into modern form where technical traders can predict the future and increase their sales. other challenges to include issues of data localization, the status of intellectual property rights, restrictions on establishment, fiscal impediments, requirements on the localization of data, as well as the role played by state-owned entities and the role of public procurement in electronic transactions⁵. World Trade Organization has been largely silent and been relegated to the sidelines in the development of frameworks for digital and electronic transactions⁶.

The liberalization of international trade anticipates the guarantee of the freedom of movement of persons, goods, capital, and services. However, with the emergence of the digital economy, a new freedom must be considered: the freedom to validate an online contract and the freedom of movement of goods and services across the borders in exchange for electronic money. At the same time, the use of artificial intelligence in the rationalization of data and transactional process in digital or online transactions needs further re-examining in a data driven economy such as Kenya's.

As a consequence of the shift from traditional norms of trade into the digital realm, there is an

⁴ PM Kanyaru, JK Kyalo, Factors affecting the online transactions in the developing countries: a case of e-commerce businesses in Nairobi County, Kenya. *Journal of Educational Policy and Entrepreneurial Research*. 2015;2(3):1-7.

⁵ Ibid

⁶ F Farrokhnia, C Richards, E-commerce products under the World Trade Organization agreements: goods, services, both or neither? *Journal of World Trade*. 2016 Oct 1;50(5):793-817.

urgent need for the reconciliation of the procedures and rules for traditional trade to reflect the policies associated and being developed for the digital realm. For instance, the growth of Internet of Things (IoT) presents another avenue for the regulation of data flows emanating from online transactions as international commerce expands to new jurisdictions. For example, goods are able to be tracked from the moment they are released by the vendor until they reach the buyer across the border using the internet. This is one of the avenues of international online trade that require regulation.

1.2 Statement of the Problem

While there have been unresolved or partially resolved Municipal Legal issues of online transactions, the wider platform of international online trade poses even wider legal challenges both locally and internationally.

The Kenyan government developed a National ICT Master Plan (2008-2012) which sought to improve the accessibility of these technologies. This Plan has metamorphosed into the Kenya National Digital Master Plan 2022-2032. Effectually, this means that the government should, and is actually developing adequate and effective infrastructures for the implementation of sustainable growth in the field of online transactions⁷. The new plan is meant to leverage and deepen utilization of technologies to improve economic growth. However, this is still a plan in progress. Thus, the prevailing legal and institutional framework has not been fully adapted to the needs of the new economy, where e-commerce thrives.

While attempts have been made by the government to improve the landscape of local e-commerce through the enactment of policies, white papers, regulatory guidelines, and statutes, there remains a gap in their consolidation, as they are sparse and disjointed.

⁷ MS Kabugumila MS, S Lushakuzi, JE Mtui, E-commerce: an overview of adoption and its effective implementation. International Journal of Business and Social Science. 2016 Apr;7(4):243.

Issues of difference in state jurisdictions, which may lead to legal conflicts, lack of an addressing system in Kenya, challenges in collection of taxes⁸ and duties especially for virtual online products and services bought from foreign jurisdictions and issues of cybersecurity among others. Consumer protection and protection of intellectual property rights is also a challenge on international online trade platforms. Dispute resolution between international online traders and consumers is also a big challenge especially on matters of legal jurisdiction.

Notably, cybersecurity as an aspect of international online trade is catered for by statutes such as The Kenya Information and Communications (Amendment) Act and Computer Misuse and Cybercrimes Act. Nevertheless, other aspects of this form of trade such as money laundering remain unaddressed fully.

1.3 Justification for the Study

Online trade is rapidly gaining momentum both internationally and nationally. Relatedly, rapid advancements in ICTs have generated the need for borderless online transactions for example transactions in hotel and airline booking, financial services, online banking services⁹, and the purchase of software. Indeed, there is substantial room for further growth.

Kenyan policy makers and regulators such as the Information Communication Technology Association of Kenya anticipate the increasing value of international online trade to the country's gross domestic product. Providing a vibrant and adequate legal, regulatory, and institutional framework is therefore germane to the realization of the benefits associated with online transactions¹⁰.

⁸ E. Njaramba Gichuki, challenges on electronic commerce on tax; towards a sustainable tax policy on e-commerce for sustainable development in Kenya (2007).

⁹ AA Ali, Impact of Online Banking on Financial Performance of Commercial Banks: A Case Study of Barclays Bank of Kenya (Doctoral dissertation, United States International University-Africa).

¹⁰ S Holmberg, E-commerce in Sub-Saharan Africa: overcoming barriers to succeed in an online environment:12.

The benefits of this study include informing the development of policies. It will also recommend ways and means of fine-tuning some of the extant legislation and policies. This, it shall accomplish with a view to making amendments to guarantee the security of online transactions. It will also engender trust and confidence in businesses and customers in a bid to achieve fairness in trade and reliable e- payments.

In addition, this study is timely because of the inadequate extant literature on international online transactions, with particular emphasis on the legal and institutional framework governing the sector. The topic is contemporary in a changing world, especially in today's gig economy¹¹. The changes to the global economy and its reverberations across Kenya present an ever-present challenge to the legal architecture, whereas legal innovation and reform do not change in tandem with the modern economy.

In general, therefore, the rationale of this study is to analyse, evaluate the legal status, strengths, and deficiencies, and make legal recommendations for international online transactions of goods imported and exported outside Kenya in light of the rapid growth and expansion of ICTs.

1.4 Objectives of the Research

1.4.1 Main Objective

The main objective of this research is to analyse and evaluate municipal and international laws and policies that govern international online transactions, pertaining to goods imported and exported outside Kenya. This, it does by evaluating the strengths and weaknesses of the available laws and makes recommendations on how to tackle the weaknesses.

¹¹ P Masenge, Effect of E-Commerce Website Quality on Online Buying Behaviour amongst University Students in Nairobi, Kenya: a Case of USIU-AFRICA (Doctoral dissertation, United States International University-Africa):17.

1.4.2 Specific Objectives

1. To determine the prevailing municipal, international laws, and policies that governs international online trade transactions in Kenya.
2. To provide a robust and critical examination of the legal framework on international online trade transactions in place while assessing the prevailing challenges and effectiveness of this regime.
3. To develop recommendations on the legal and regulatory framework for international online trade transactions in Kenya in order to engender efficacy and growth in the sector while imbuing online transactions with confidence and integrity.

1.5 Research Questions

1.5.1 Main Research Question

What are the gaps, challenges, and weaknesses experienced in the existing municipal and international laws and regulations that govern international online trades resulting into importation and exportation of goods across the Kenyan borders?

1.5.2 Specific Research Questions

This research seeks to answer the following questions: -

1. What are the prevailing municipal and international laws and policies that govern international online trade transactions in Kenya?
2. What are the prevailing legal gaps, challenges and weaknesses experienced in the implementation of the laws and regulations international online trade regime?
3. What are the innovations that can be introduced to revamp the legal and regulatory status of international online trade transactions while creating the ideal organizational framework for the facilitation of the same?

1.6 Theoretical Framework

The congruence of international laws and Kenyan laws with regard to International Online Trade can be viewed from the perspective of transaction cost theory, public interest theory, and the technological neutrality theory.

1.6.1 Public Interest Theory

According to the public interest theory, the regulation of online transactions should be responsive to the need by the public to remove unfair or inefficient practices in the market¹². The government must intervene through regulatory oversight to realize these objectives. This theoretical perspective is sometimes seen as inadequate in justifying regulation since players in a specific market are likely to develop processes that fill the lacunas unaddressed through government regulations. According to Richard Posner, the assumption that the use of policies directed at regulation will be effective belies the fact that these policies may in fact prove to address the gaps.

Imbuing a system with confidence and trust is one of the main features of regulatory oversight. To this extent, the online market platforms that consumers and service providers are able to leverage in online transactions are not fully imbued with trust. Thus, the application of the trust theory is designed to correct this anomaly and engender trust in the system¹³. The legal mechanisms in place to protect data and privacy should be secure. Stakeholders have to be prepared to engage in long-term trust-building activities since it is much more difficult to build confidence in the system in online transactions as compared to traditional brick and mortar business platforms.

¹² A Omotubora, S Basu, Regulation for E-payment Systems: Analytical Approaches beyond Private Ordering. *Journal of African Law*. 2018 Jun;62(2):281-313.

¹³ WT Wang, YS Wang, ER Liu, The stickiness intention of group-buying websites: The integration of the commitment-trust theory and e-commerce success model. *Information & Management*. 2016 Jul 1;53(5):625-42.

1.6.2 Transactional Cost Theory

On the other hand, Ronald Coase's theory of transactional costs considers the costs associated with transactions from the point of view of the market as opposed to a specific firm¹⁴. In this regard, there are always costs associated with the various transactions in online markets during the exchange of information, products, and the tracking of contractual engagements. Therefore, costs of transaction are assessed from the perspective of the service providers as well as the consumers. In the end, transactional costs help determine the customer value.

Notably, these transactional costs are influential in engendering the platform with confidence, trustworthiness, and certainty. They can positively or negatively impact customer value depending on whether the costs of transactions are steep or low. A highly effective legal framework is thus critical in controlling and checking factors such as the violation of privacy and the reduction in cases involving fraud, thereby improving certainty in online transactions.

1.6.3 Technological Neutrality Theory

Karl Marx, a German philosopher, was the first major proponent of this theory which he called "Technological Determinism". He argued that technological changes are the primary influence on social and organisational structure. He argues that human social and cultural relationships tend to revolve around their economic and technological advancements. In essence, this argument suffices in this research since the current global trade has gone online with almost everything easily available online.

Achieving technological neutrality is also an essential consideration in the governance and regulation of online payments, e-commerce, and related transactions¹⁵. Ideally, the law should

¹⁴ VA Aivazian, JL Callen. The Coase Theorem and Core Theory. Man and the Economy. 2017;4(2).

¹⁵ H Kim, Globalization and regulatory change: The interplay of laws and technologies in E-commerce in Southeast Asia. Computer Law & Security Review. 2019 May 6: 35.

not be used in a discriminative way to treat different technologies differentially. According to the technological neutrality theory, favouritism should be discouraged while ensuring that the laws and regulations adopted to regulate one technology does not become obsolete once newer technologies that facilitate online transactions are developed or introduced in the market. The anticipation of future technological trends should be incorporated in the structuring of rules that regulate online transactions.

This theory outlines four rationales a state must meet in order to be said to be technologically neutral. These include:

- ✓ **Non-discrimination:** As already stated above, technology should not be seen to favor some technologies over others. There should be equal treatment to all. This gives a guarantee of continued existence/operation to competing technologies since all operate under the same legal requirement.
- ✓ **Sustainability:** This means that a government should provide regulation in an open, flexible and time-proof manner. This helps take care of the like technological changes.
- ✓ **Efficiency:** Regulation of technology must also be efficient. Such regulation must be well maintained and can be withdrawn flexibly depending on the changing status of the market. In other words, it should respond efficiently to the ever-growing market structures.
- ✓ **Consumer certainty:** The rationale behind this is that technology should be available and beneficial to all consumers in a similar manner. Segregation should not be seen to benefit some and disadvantage the others. Protection measure should equally be implemented on all customers to assure them safety in all circumstances.

The link between this theory and this research is that most international online transactions take place using various technologies and all these are required to be treated equally to ensure fair competition.

1.7 Research Methodology

This study is designed as a doctrinal mode of study, exploratory approach, library research and internet-based research.

1. Doctrinal mode of study

This research relies heavily on analysis of core, subsidiary and related legislation, as well as international instruments catering for e-commerce and international online trade environment.

2. Library Research

Additionally, this research was conducted using library research, which shall be the main form of examining secondary sources of data and information. An examination of legal documents such as statutes, journals, books, conventions, and treatises will be conducted using library research

3. Internet-based research

Internet-based research was used in the study of matters having global implications. In this regard, the Internet was a useful resource in the search of the most recent publications by stakeholders involved in the study, design, and investigation of the legal status of online transactions. An evaluation of case law and other empirical sources of data were used in grounding the study.

1.8 Introduction to Literature Review

International laws and principles are very key when it comes to international online trade in Kenya. The Constitution of Kenya, 2010 is the foundation for international online trade in

Kenya. Article 2(5) of the Constitution lays the ground for the utilization of the general rules of international law. It stipulates that “The general rules of international law shall form part of the law of Kenya.”¹⁶ Further, Article 2(6) of the Constitution clarifies that any treaty ratified by Kenya shall form part of the law of Kenya under the Constitution. These constitutional provisions are very significant to this study as they simplify the legal regime governing international online trade, which operate within the parameters set by international conventions ratified by Kenya and other general rules and principles of international as is discussed in the subsequent chapters of this study.

However, the Constitution itself is not sufficient in governing international online trade. Scholars and experts have also researched and written books and articles about international online trade, which includes trading within online contracts that result to importation and exportation of goods across international borders. Notably, international online trade introduces a whole new concept of trade that is different from the traditional forms of trade For instance, Reed¹⁷ observes that the virtual geographical nature of the internet results in overlapping functions and may produce contradictory claims that may be subjected to the national laws of the country. Van Esch, Northey, Duffy, Heller, and Striluk consider the application of the principle of country of origin as an opportunity to regulate any issues or conflicts that may arise from the complex dynamics presented by claims in various (and often) overlapping jurisdictions¹⁸. Kenya is not an exception to these issues surrounding international online trade as most of international online transactions are subjected to national laws. Still, the rights of international online traders and consumers remain ineffectively protected.

¹⁶ Constitution of Kenya, 2010; Article 2(5)

¹⁷ Chris Reed, *Internet law: text and materials*, 2nd edition, Cambridge University Press, 2004.

¹⁸ P Van Esch, G Northey, S Duffy, J Heller, M Striluk, The moderating influence of country of origin information seeking on homophily and product satisfaction. *Journal of Promotion Management*. 2018 May 4;24(3):332-48.

The globalized nature of ICTs, especially the internet, presents challenges in applying national laws. Global and national online transactions are associated with challenges of political, legal, technological, cultural, economic, and social nature¹⁹. Simplification of national regulations is vital to attune them to the resolution of seemingly complex crimes²⁰. International practices should be incorporated in these national policies to reduce the complications presented by the overlapping nature of some legal jurisdictional elements.

However, there is a shifting focus from viewing ICTs as the sole reserve of IT sectors, and there are calls for the intrusion of other sectors such as governance, law, and order in order to rationalize the Internet and online transactions while retaining its technical aspects²¹.

It is thus recommended that national laws and policies should enhance security protocols, the level of skills and confidence in the handling of these technologies. The disruptive nature of these ICTs has necessitated the need for entirely new laws and norms to govern the changing face of modern business transactions in national jurisdictions²². The poor definition of laws regulating e-commerce makes their implementation ambulatory.

For the purposes of this research, extant literature on the manner in which online transactions are regulated in Kenya is still deficient in key areas. As such, this study seeks to address the issues presented by the regulatory climate and evaluate the legal status of online transactions by assessing past, current, and future trends in regulation and institutionalization of norms.

¹⁹ AH Busalim, Understanding social commerce: A systematic literature review and directions for further research. *International Journal of Information Management*. 2016 Dec1;36(6):1075-88.

²⁰ DL Paris, M Bahari, NA Iahad, W Ismail, Systematic Literature Review of E-Commerce Implementation Studies. *Journal of Theoretical & Applied Information Technology*. 2016 Jul31;89(2).

²¹ EO Ibam, OK Boyinbode, MO Afolabi, e-Commerce in Africa: The Case of Nigeria. *EAI Endorsed Trans. Serious Games*. 2018;4(15): e3.

²² SF Lim, X Jin, JS Srai, Consumer-driven e-commerce: A literature review, design framework, and research agenda on last-mile logistics models. *International Journal of Physical Distribution & Logistics Management*. 2018 Apr 3;48(3):308-32.

Importantly, considerations such as jurisdiction, security, conflict resolution, data protection, and enforcement should be specifically addressed.

1.9 Scope and Limitation

Scope and limitation

This research was limited to the investigation and analysis of the legal aspects associated with international online trade transactions. A huge reliance is on extant literature, local legislation and international legal instruments.

Further, literatures in the form of local books are sparse and most of the books used were published in foreign jurisdictions. In addition, an examination of local case law on the topic is limited since litigation in this area is largely dominated by foreign adjudication.

This study adopted a comparative study of online transactions with the United Kingdom. The reason for this is the assumption that the UK, being a developed country and with a high technological advancement, has progressively put in place legal safeguards for online trade that Kenya can borrow from. Foreign materials on the subject were used to illustrate the manner in which some of the pertinent issues concerning the legal status of online transactions have been addressed.

Delimitation

This research did not address the socio-cultural and political considerations involved in the discourse regarding e-commerce, e-payments, and related aspects of these transactions. While it is true social, cultural and political leaning has a bearing on international online trade, this research did not delve into the specific aspect that do so. It is noteworthy that some regions within Kenya are yet to be fully exposed to online trade hence there is still some scepticism towards it.

Additionally, just like politics has a bearing on traditional international trade, the same still has a direct effect on the sister international online trade. Some countries with different political aspirations have the same affect the way they relate business-wise. This research does not endeavour to cater for these details.

1.10 Research Hypotheses

This study is based on the following hypotheses: -

- 1 In spite of the government's efforts to promote online transactions as an important aspect of the economy, the prevailing laws are yet to actualize this vision and the country has not fully actualized its immense potential nor met the challenges and opportunities presented by emerging issues precipitated by rapid changes in technology.
- 2 Legal, cultural, social, institutional, and economic factors have coalesced to produce the slow uptake and growth in online transactions in light of international principles and practices. However, using policy and law will address most of the prevailing challenges currently defining online transactions in Kenya.

1.11 Chapter Breakdown

1.11.1 Chapter One: Introduction and background of the legal and regulatory Framework governing International Online Trade in Kenya

This chapter lays out an introduction and the background to the study. It justifies the study and identifies the research problem to provide a perspective of the study, there is a theoretical framework, which is put in its proper context, by the literature review. The objective of the study and the broad argument is given followed by the hypothesis. The posed research questions follow with a view to answering the research problem. The research methodology and limitations have also been outlined in this chapter.

1.11.2 Chapter Two: The legal and regulatory framework governing International Online Transactions in Kenya

This chapter attempts to provide an analysis of the legal and regulatory framework governing international online trade transactions in Kenya.

1.11.3 Chapter Three: An analysis of the effectiveness of International Online Trade law, and legal Challenges in Kenya

This Chapter address the effectiveness international online trade law, and legal challenges faced by Kenya in enforcing the law and the what extent tic which they inhibit growth of international online trade in Kenya.

1.11.4 Chapter Four: Comparative Analysis

This Chapter conducts a comparative analysis with the laws of the United Kingdom on international online trade.

1.11.5 Chapter Five: Conclusions and Recommendations

The conclusion and recommendations towards enhancing effective legal and regulatory framework of international online trade in Kenya.

CHAPTER TWO

The legal and regulatory framework governing International Online Transactions in Kenya

2.0 Introduction

International online transactions touch on several analogies of trade. One needs to understand what it takes to execute an international online transaction, how international online trade is conducted, where it takes place, and who can enter into an international online transaction agreement. Thus, there is need to clarify on aspects such as tax revenue, intellectual property rights, dispute resolution mechanisms and internet access by relating them to international online trade regime. Consumer protection is also a key concept in such commercial transactions. This includes the capacity of individuals to enter into international online contracts. Additionally, anti-money laundering measures need to be put in place to avoid laundering of money obtained as proceed of crime through online platforms. Hence, to ensure a safe and secure online market platform for international online trade and successful importation and exportation of products, there is need to ensure that the available laws and regulations effectively cater for these aspects of modern digital trade.

Therefore, this chapter exhaustively discusses all the legal parameters relating to international online trade in relation to the above concepts of international online commercial transactions. It endeavours to outline the legal frameworks put in place by Kenya and the international community to regulate international online trade. Further, this chapter endeavours to deliberate on the place of all the national statues and international instruments that Kenya banks on when it comes to national and international online trade. Thus, through a desktop and library research, it analyses the challenges and shortcomings that exists in the Constitution, statutes, and international conventions touching on the above concepts of international online trade.

Some of the questions regarding international online trade that this chapter responds to include: whether there are laws and policies in Kenya that address international online trade and whether the available legislations are sufficient enough to demystify the challenges that are facing tax revenue collection, intellectual property rights, dispute resolution mechanisms, internet access, consumer protection, capacity to enter into international online contracts and anti-money laundering measures.

2.1 The Constitution of Kenya, 2010

As discussed in the previous chapter, the Constitution of Kenya, 2010 (the Constitution) is the supreme law of the land.²³ Through Article 2, it provides for the laws, which are legal, and forms part of it. Thus, it stipulates that the general rules of international law forms part of the country and that any treaty ratified by the Republic of Kenya shall form part of the laws of Kenya under the Constitution.²⁴ This lays the ground upon which Kenya relies on the provisions of international Treaties and Conventions to regulate issues pertaining to international online trade.

The Supreme law of the land also guides on social-economic issues including trade. It emphasises on the right to economic and social rights under Article 43 and the rights of the consumers under Article 46. One of the rights of the consumers is the right to goods and service of reasonable quality. International online trade offers some of the best goods and services that can only be imported from foreign jurisdictions. Furthermore, the *grundnorm* also emphasises that the consumers have the right to be compensated for loss or injury that may arise from defects in goods or services.²⁵ This protection extends to the consumers of online products, which may originate from a multinational enterprise.

²³ Constitution of Kenya, 2010; Article 2(1)

²⁴ Constitution of Kenya, 2020; Article 2(5) & (6)

²⁵ Constitution of Kenya, 2020; Article 46

From the foregoing, it is apparent that the Constitution does not address the issues of international online trade expressly. However, through implication, it addresses the issues by granting the socio-economic rights to consumers and traders. It also grants the Parliament the power to legislate statutes regarding the issues pertaining to national and international trade. Thus, Parliament has the power to legislate Acts for consumer protection and for fair, honest, and decent advertising on goods and services offered by public entities or private individuals.²⁶

Furthermore, the Constitution grants the legislative arm of government the power to legislate a statute that establishes a central body for the assessment and allocation of the Kenyan revenue. Revenue allocation extends to the goods and services transacted online. The Constitution does not offer express guidelines on how the collection process should be administered; however, it does warn that the process should be carried out with dignity and without discrimination of any individual or organisation.²⁷

2.2 Kenya Information and Communication Act No. 2 of 1998 (KICA)

It is without a doubt that Kenya relies heavily on the Kenya Information and Communication Act (KICA) when it comes to regulating electronic commerce (e-commerce). The Act creates the Communication Authority of Kenya (CAK) which it empowers with the authority to facilitate electronic commerce and eliminate barriers to electronic commerce pertaining to writing and signature requirements.²⁸ CAK is also empowered to promote the development of e-commerce using electronic signature to give authenticity and integrity to correspondence in any electronic medium. This is a clear indication that Kenya recognises the existence of online trade nationally and internationally.

²⁶ Constitution of Kenya Article 46(2) & (3)

²⁷ Constitution of Kenya, 2010; Article 27

²⁸ Kenya Information and Communication Act, Section 83C

KICA does not expressly address the aspect of international online trade. However, it creates a linkage between other jurisdictions and the CAK. This is provided for under Section 5(3) where it empowers CAK to enter into association with other bodies within or outside Kenya as it may desire in furtherance of the purpose for which it is established.²⁹ Hence, through this provision, the CAK can help in monitoring the international online trade to ensure that the rights of the consumers and traders of the international online trade are protected and administered substantially and procedurally. In other words, the Act proposes a means by which online multinational enterprises can be controlled and held accountable where they do not meet the standards set by the Kenyan laws and payment of revenues.

It is noteworthy that KICA, under Part VIA, provides for a way in which the online trade can be carried out. It outlines the aspects of electronic contracts including intention to create a legally binding contract, offer and acceptance, electronic signatures among others. These have been discussed below.

2.2.1 Kenya Information and Communication Act on Online Contracts

As the leading e-commerce Act in Kenya, KICA is obliged to meet all the essential elements of a transaction. These include the elements of contract such as offer, invitation to treat and acceptance. Thus, its provisions outrightly ought to be sufficient to regulate the aspects of online trade both nationally and internationally. However, this is not the case as the provisions engraved on it do not address the pertinent issues on contracts.

Section 83J of KICA provides for the formation and validity of contracts. It provides that unless otherwise agreed by the parties, an offer and acceptance of offer expressed electronically should be by means of electronic messages. It further clarifies that an online contract should not be denied

²⁹ Ibid 25; Section 5(3)

enforceability or validity on the basis that it was done via electronic messages.³⁰ However, the Section expressly forbids the application of such usage where a different method of formation of contract has been provided in another law.³¹

The above provision is plausible since it tries to address the first element of a transaction as an implication via electronic messages. However, it limits itself to offer and acceptance online. It does not address the issue of invitation to treat as one of the elements of a contract. Furthermore, KICA does not differentiate between an offer and invitation to treat as far as online contracts are concerned.³² Accordingly, it was held in the case of *Entores Ltd v Miles Far East Corporation*³³ that offer and acceptance must be communicated to the other party. In light of Section 83J, electronic messages include text messages that are not guaranteed to get to the other party. Where the electronic message does not reach the other party, it might lead to a legal dispute where one party fails to meet their obligation.

Section 83K provides for the recognition of the parties of electronic messages. It states that intention between an originator and an addressee should not be denied legal effect, validity, or enforceability on the basis that it is in the form of electronic message.³⁴ It appreciates the philosophy that a contract must be legally binding and that the parties must express their intention to form a legally binding contract.³⁵ In other words, online contracts must operate on the basis that contracts cannot exist on the ground that there is a promise between two individuals.³⁶ For, an online trader cannot claim that an individual entered into a contract with him or her on the basis of

³⁰ Ibid 26; Section 83J (1)

³¹ Ibid 27; Section 87J (2)

³² Sang Bernard Kibet; Online Contracts in Kenya: Challenges the Internet Poses as to Formation and Formalities of Contract; Submitted to the University of Nairobi; page 41

³³ [1955] 2 QB 327, CA

³⁴ n 28; Section 83K

³⁵ RW Hodgkin, 'Law of Contract in East Africa' (Kenya Literature Bureau 2007) pg. 62

³⁶ MP Furmston, 'Cheshire, Fifoot and Furmston's Law of Contract' (15th edn, OUP 2007) pg. 142

a promise to buy one of his products when they get the money. There has to be an intention to create relationship, which the parties can prove through electronic messages.

Additionally, KICA empowers the CAK with the authority to facilitate electronic transactions and cyber security through safeguarding reliable electronic records.³⁷ This is one of the provisions for statutory protection of online traders. However, the wording implies protection of only national online traders and not an inclusion of international online traders.

Finally, KICA establishes and recognises the usage of electronic signatures. It does not completely address the issues on how the signatures should be regulated but rather it empowers the Cabinet Secretary to develop regulations on the types of electronic signatures, the affixation of the signatures and the process to ensure adequate integrity, security and confidentiality of electronic records and payments. However, these Regulations are yet to be developed.

2.2.2 International Online Trade's Features and Challenges that KICA fails to address

Joshua Meltzer³⁸ acknowledges the fact that internet has developed new ways of trade conducted by most innovative companies in the world. Such companies include Facebook, Instagram, Twitter, Amazon, Apple and eBay that promote online social and commercial avenues. Thus, the growing internet platforms have increased more opportunities for consumers and merchants to trade.³⁹

Therefore, KICA should have logically and deliberately taken into consideration all the features of an online trade.

KICA should have categorised online trade into national and international platforms for online trade and provided a viable legal breakdown on what exactly amounts to an online trade. These

³⁷ n 31; Section 83C (1)(a)

³⁸ Joshua Meltzer is a fellow in the Global Economy and Development program at the Brookings Institution.

³⁹ Organisation for Economic Co-operation and Development (OECD) 2008

platforms include websites and mobile applications, which traders use to advertise their products and contact their customers.⁴⁰ Inculcating this notion will boost Kenya to compete globally by aiming at the overseas market. Failing to have a concrete legal position on digital trade in the country limits the government from accurately quantifying the total impact of online trade in the country.⁴¹

This is because international online trade is not only practised by large multinational enterprises but also small and medium sized enterprises (SMEs).⁴² Thus, statistically, SMEs have a large number of employees who are not on record and in fact, most of them have the highest annual economic growth due to online trading. Most of these revenues go unaccounted for due to lack of a proper statute to address the electronic commerce satisfactorily.⁴³

Melzer appreciates the fact that international online trade faces a number of barriers. The effects of these barriers are heavily felt in the domestic commerce. They include: inefficient internet access in some parts of the country; insecure payment systems; lack of cost-effective delivery services; tariffs on import; market access barriers to internet service providers; difference in consumer protection laws; disputes settlement mechanisms and costly customs procedure.⁴⁴

However, logically and legally, it would be impractical to expect KICA to address all the above challenges. Some of them are addressed in the statutes discussed below. Thence it will be possible to analyse whether Kenya is statutorily prepared to tackle the challenges raised above and give a

⁴⁰ Teece, D.J., 2010. Business models, business strategy and innovation. *Long range planning*, 43(2-3), pp.172-194.

⁴¹ Holt, L. and Jamison, M., 2009. Broadband and contributions to economic growth: Lessons from the US experience. *Telecommunications Policy*, 33(10-11), pp.575-581.

⁴² Meltzer, J.P., 2014. Supporting the internet as a platform for international trade: Opportunities for small and medium-sized enterprises and developing countries. *Available at SSRN 2400578*.

⁴³ Wolf, Dean. "Technique for facilitating resale of digital content over a computer network." U.S. Patent Application 11/177,792, filed January 12, 2006.

⁴⁴ Meltzer, J.P., 2014. Supporting the internet as a platform for international trade: Opportunities for small and medium-sized enterprises and developing countries. *Available at SSRN 2400578*.

legal solution to both the socio-economic status of international online trade.

To this regard, CAK admits through its website that, *“Unlike in some countries where consumer buying and selling rights on the Internet are explicitly protected, Kenya has not enacted laws to offer this sort of protection. In Kenya, online trade platforms are not regulated under the Kenya Information and Communications Act (KICA) as they do not constitute electronic services as envisaged under the act and are therefore not licensable”*⁴⁵ this is a clear indication that Kenyan online consumers and traders and traders are left vulnerable to exploitation as far as their goods and services are concerned, and the Kenya Revenue Authority is most certainly not playing their part in most of the online trading services.

2.3 Law of Contract Law Act, Cap 23 of the Laws of Kenya

The Law of Contract Act was established to apply the English common law of contract to Kenya, but with certain modification.⁴⁶ The Act is silent on online contracts. Furthermore, it emphasises that some contracts must be in writing and signed lest they fail to be admissible in courts where a suit is brought by a party.⁴⁷ This is a limitation to international online trade where a party might not be present in the country to sign the contract. Some of these contracts include loan agreements, intention to trade or other dealings and contract for the disposition of interests in land.⁴⁸

However, the Act provides a way out in which online contracts may be enforced. It stipulates that the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom are applicable in Kenya.⁴⁹ Thus, it can only be inferred that the English laws on online contracts can be a persuasive solution to shortcomings of international

⁴⁵ <https://ca.go.ke/industry/ecommerce-development/> accessed on 22nd March, 2020

⁴⁶ Law of Contract Act Chapter 23 of the Laws of Kenya; Long title

⁴⁷ Ibid 43; Section 3

⁴⁸ Ibid 44

⁴⁹ Ibid 45; Section 2

online trade.

Despite the above, one can only deduce that the Act did not intend to be applied on contracts regarding international online trade. Rather, it only purposed to address contracts on national trade unless international parties agree otherwise.

2.3.1 Effects of the Law of Contract Act's Failure to Address International Online Trade

It is notable that various jurisdictions are guided by their own judicial system. However, it is a fact that all the jurisdictions have law and policies pertaining to trade. Thus, with the modern technological changes, various countries have opted to adopt to laws that will guide them in national and international trade. Kenyan having decided to operate within the realms of the common law and the laws of England on contract, it is therefore necessary to discuss the elements of an online contract and the failure of the Act to address the challenges related thereto. Hence, it is paramount that online contracts meet all the elements of a contract.

2.3.2 Offer and Acceptance in International Online Trade

Treitel⁵⁰ defines offer as “*an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed, the "offeree"*”.⁵¹ Like KICA, the Law of Contract Act should create provisions that can be relied on to establish the point at which an offer is created and accepted pursuant to online contracts. The analogy needs to adopt the notion that was informed by the case of *Carlil v Carbolic Smoke Ball Co*⁵² where it was held that an offer can be made to the whole world. This is very much possible considering that online trades operate on advertisements that can be viewed by anyone at

⁵⁰ Treitel, GH. *The Law of Contract (10th ed.)*. p. 8

⁵¹ Ibid 47

⁵² [1893] 1QB

any part of the globe. Kenyans are not an exception to the consumption of these products. Hence, the statute needs to clarify this bit.

Another aspect of a contract that needs legislation on is acceptance. As Grubb⁵³ writes, an offer must be accepted as a way of indicating that the offeree is willing to be bound by the terms and conditions of the agreement. International online contracts also need this addressing. There is need to establish provisions that will legally address the issue of acceptance of offers made by multinational enterprises as far as Kenya is concerned. Additionally, as was decided in the case of *Entores Ltd v Miles Far East Corporation*⁵⁴, unless communication is waived by the offeror, acceptance must be communicated to the offeror.⁵⁵ The legislation should clarify on when acceptance should be deemed as communicated to the offeror in as far as international online trade is concerned.

In other jurisdictions such as the United States, click-wraps have been allowed to operate as a way of entering into trade agreements. Click-wraps operate by traders providing customers with the option to click either “YES” or “NO”. The system gives the users an opportunity to see, read and consider their option of either accepting or refusing the offer.⁵⁶

2.3.3 Consideration and Certainty on International Online Contracts

Like any other contract, international online contracts should be supported in a deed or by some mode of consideration.⁵⁷ Thus, Grubb indicates that consideration is the promise by the “promisee” to pay for a promise by doing or promising to do something in return for something else in a contract. In other words, this is benefit for one party, which is also a detrimental, or a loss to the

⁵³ Grubb A, ‘*The Law of Contract*’ (2nd Edn, Lexis Nexis Butterworths, 2003) pg 415.

⁵⁴ [1955] 2 QB 327, CA

⁵⁵ McKendrick, ‘*Contract Law, Text Cases and Materials*’ (4th edn, OUP 2010) 99.

⁵⁶ Heath, S.A., 2005. Contracts, Copyright, and Confusion-Revisiting the Enforceability of Shrinkwrap Licenses. *Chi.-Kent J. Intell. Prop.*, 5, p.12.

⁵⁷ Beale, H.G., Bishop, W.D. and Furmston, M.P., 2007. *Contract*. Oxford University Press. Pg 263

other party.⁵⁸

A good example regarding international online contract, where a Kenyan intends to purchase an aeroplane in the United States of America, the consideration would be that on one hand the buyer pays money while on the hand the seller hands over the plane. In the case of *Fredrick Muasya Musyoki v Peter Mbithi Mutunga*⁵⁹, the court agreed with the trial court that consideration need not be adequate. It therefore behoves Kenya to legislate laws on international online contracts enforced with all the relevant elements of contract including consideration.

Elliot and Quinn⁶⁰ writes, for a contract to be binding it must be clear and not vague. For the international online contracts to be clear, the contracts must contain express price for the goods and services that the parties intend to transact on. This clarity needs to involve implied terms and conditions in the statutes, any previous dealings between the parties and reasonableness amongst other terms and conditions pertaining to contracts.⁶¹

2.3.4 Capacity to Enter into International Online Contracts

The law limits particular persons from entering into contract. Such persons include minors, drunk persons, insane persons and corporations. Legally contracts executed by drunk or insane persons are binding, least the person had no capacity to understand the nature of the transactions, and the other party happens to be aware of their situation.⁶² Such contracts are voidable to the drunk or insane person. Additionally, the corporates are required by law to act within their constitutions.⁶³ Hence, international online contracts need to include these provisions. The law needs to clarify its

⁵⁸ Hodgin, R.W., 1982. *Law of contract in East Africa*. East African Literature Bureau., pg 40

⁵⁹ [2020] eKLR

⁶⁰ C Elliot& F Quinn, *Contract Law* (7thedn, Pearson Longman 2009) 20.

⁶¹ Ibid 56

⁶² Re McArdle [1951] Ch 669.

⁶³ G Applebey, *'Contract Law'* (Sweet & Maxwell 2001)184.

stand on the capacity to enter into international online contracts. This will surely protect the consumers and merchants who operate on online platforms.

From the forgoing, it is apparent that indeed the Law of Contract Act does not address the aspects of international online trade. It does not create an impression that international online trade was envisioned in the Act. It does not give even skeleton direction on how the elements of contract can be addressed. Furthermore, the lack of legal provisions on online contracts generally in Kenya cripples the modernisation of contracts, which involves online contracts.

2.4 Sale of Goods Act, Cap 31 of the Laws of Kenya

The statute was legislated to regulate the sale of goods in Kenya. The Act provides for the necessary requirements for the formation of the contract of sale, subject matter of contract, the price, conditions and warranties, sale by sample, effects of contract on the transfer of property as between seller and buyer, transfer of title, performance of contract, rights of unpaid sellers against the goods, unpaid seller's lien, stoppage in transitu, resale by buyer or seller and actions for breach of contract.⁶⁴

The Act is silent on online trade. However, it does create what amounts to a sale agreement. It stipulates that a contract for sale exists where the seller of certain goods sells or agrees to transfer the property in those goods to a buyer for a consideration called the price. It further states that a contract of sale between a part owner and another.⁶⁵ The Act further states that the capacity to enter into such transactions should be guided by the general laws of contract. It clarifies that a minor or a drunk person should pay for the goods where they have been delivered to them.⁶⁶ Thus, the law needs to clarify the goods upon which contracts between minors, drunk persons or any other

⁶⁴ Sale of Goods Act, Cap 31 of the Laws of Kenya.

⁶⁵ Sale of Goods Act, CAP 31 of the Laws of Kenya; Section 3

⁶⁶ Ibid 61; Section 4

incapacitated person may enter into an enforceable online contract. This would probably involve necessities such as food.

On issues pertaining to existing or future goods, the Act provides that the subject matter of the contract may be either existing goods, owned or possessed by the seller, manufactured or yet to be manufactured. It clarifies that the contract of sale may entail future goods also.⁶⁷ Thus, the laws on contract of sale should consider the possibility of having future goods as subject matters of the international online trade. It should define the instances upon a future good or existing goods may be available in the contract of sale.

The Act also addresses the aspect of perishable goods that were the subject matter of the contract. It enunciates that where the goods perish without the knowledge of the seller at the time when the contract was made the, contract becomes void.⁶⁸ Further, it clarifies that where specific goods perish without the fault of the buyer or the seller, before the risk passes to the buyer, the contract is avoided.⁶⁹ Hence, it is very important that the law on contract of sale should open up to the possibility that there is a likelihood of parties to enter into online contracts involving perishable goods as subject matters.

The Act also enunciates the conditions and warranties that may be implied in a contract of sale. It provides that, it is an implied condition that the seller will have the right to sell the goods at the time the property in them passes to the buyer. It also clarifies that there is an implied warranty that the buyer shall enjoy a quiet possession of the goods and that they shall be free of any charge or encumbrances in favour of a third party that has not been declared to the buyer before or after the

⁶⁷ Ibid 62; Section 7

⁶⁸ Ibid 63; Section 8

⁶⁹ Ibid 64; Section 9

contract was made.⁷⁰ Thus, the law on contract of sale should include a clause involving international online contract on implied conditions and warranties to protect Kenyan online consumers.

Furthermore, the statute indicates that where the contract is for sale of uncertain goods, the property in them shall only pass where the goods have been ascertained.⁷¹ This is a major problem in international online contracts. This is because most of the goods contracted upon are posted online. Hence, one may request for the exact goods posted on the website or other online platforms. The good may be delivered to the person without prove that it was the one online. Thus, it is a challenge to the online consumers. It therefore creates a conundrum whether the goods can be ascertained upon delivery or through selection online.

2.5 Consumer Protection Act No. 46 of 2012

As admitted by the Communication Authority of Kenya, there are no tangible laws to protect electronic commerce consumers. Similarly, the Consumer Protection Act does not expressly address issues pertaining to international online trade. However, a few Sections do provide for protection of online trade. For instance, Section 2 of the Act defines internet agreement as an agreement between the consumer and a supplier formed by text-based internet communication.

Additionally, Section 31 of the Act provides that prior to the consumer entering an internet agreement the supplier should disclose the prescribed information to the consumer and that the supplier should provide the consumer with an express opportunity to accept or decline the agreement.⁷²

⁷⁰ Ibid 65; Section 14

⁷¹ Ibid 66; Section 18

⁷² Consumer Protection Act No. 46 of 2012; Section 31

Further, the Act also provides that the supplier should deliver a copy of the agreement in writing with the prescribed period after the consumer enters the agreement. It stipulates that the copy of the agreement must include the prescribed information and that the supplier is considered to have delivered the copy of the internet agreement if the agreement is delivered in the prescribed manner.⁷³

From the foregoing provisions, one can only conclude that the provisions on internet agreements are very scant and incomprehensive. This is because they do not address pertinent issues regarding national and international online trade. The rights of consumers obtaining goods and services are not well protected as envisaged by Article 46 of the Constitution of Kenya, 2010.

2.6 Arbitration Act No. 4 of 1995

The Arbitration Act applies to domestic arbitration and international arbitration.⁷⁴ The Act permits the parties, including international online traders, to include an arbitration clause while contracting. The arbitration clause can be either in the contract or in the form of a separate agreement.

Furthermore, the Act indicates that the arbitration agreement must be in writing in a document and signed by both parties. The same must be exchanged between them through letters, telex, telegram, and electronic mail, facsimile or through any other means of telecommunication.⁷⁵

The Arbitration Act is the closest Kenya has come to full of support international online trade. This is because it gives the traders an opportunity to agree on the steps they wish to undertake whenever conflicts may arise regarding their contract. Thus, as they enter into an online agreement, they can execute such contract electronically and exchange the same online via electronic mail.

⁷³ Ibid 68; Section 32

⁷⁴ Arbitration Act No. 4 of 1995; Section 2

⁷⁵ Ibid 70; Section 4

However, one of the challenges facing arbitration is the fact that paying for the arbitration expenses is becoming more expensive every day.⁷⁶ It is therefore illogical to say that every international online trader will benefit from the wisdom of the Act. This is because SMEs comprise of the majority of international online traders.⁷⁷ They do not have the muscles to indulge in international arbitration with their online consumers.

In furtherance of the above, the parties to the arbitration are supposed to pay for the arbitral expenses. This is because, where there is an award, the parties can agree on how to settle the expenses of the arbitration and where they fail to agree the tribunal can determine the proportion that each of them is supposed to pay. Where the parties failed to agree and there is no award, each party is supposed to pay the arbitration expenses in equal shares.⁷⁸ This might be so expensive for all international online traders to afford. Hence another shortcoming of international online trade in Kenya.

Section 36(2) of the Kenyan Arbitration Act 1995 provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.⁷⁹ However, Kenya acceded to the New York Convention on with a reciprocity reservation to only recognising convention awards.⁸⁰ The Act also lay down the steps upon which a party can follow to effect the award issued under the New York Convention.

⁷⁶ Alan Redfern, M. Hunter, Nigel Blackaby, Constantine Partasides; *Law and Practice of International Commercial Arbitration*; Sweet & Maxwell; 4th edition (October 8, 2004)

⁷⁷ Ibid

⁷⁸ Ibid 73; Section 32B

⁷⁹ Arbitration Act, 1995; Section 36(2)

⁸⁰ <https://www.africalegalnetwork.com/wp-content/uploads/sites/22/2016/10/Kenya-Chapter-of-The-International-Arbitration-Review.pdf> accessed on 28 March 2020

2.7 Evidence Act, Chapter 80 Laws of Kenya

International online traders will require proof that there in deed existed an agreement between them and the consumers. Agreements and correspondences can be communicated via email addresses or through any other online social platforms like Facebook, Messenger, WhatsApp, IMO or via text messages. These correspondences can be used as prove in the court of law. Thus, Evidence Act is the law that governs the adducing and deduction of evidence to prove or disapprove a fact in issue.⁸¹

Kenya Evidence Act (KEA) permits the admission of electronic messages and digital materials in the legal proceedings. It further enunciates that the courts should not deny their admission simply because they are not in their original form.⁸² Therefore, international online trade contracts and correspondences are admissible in the court of laws in Kenya.

Furthermore, the Act provides that an electronic record printed on paper, stored, recorded or copied on optical record shall be deemed as document. It also enunciates that an electronic signature of the subscriber must be proved. It states that the courts are to assume that every electronic record purporting to be an agreement that contains an electronic signature of the parties was executed through the parties affixing their digital signatures.⁸³ It is therefore the presumption of the courts that the subscriber of the electronic signature intended to be bound by his signature when he affixed it in the online contract. All these provisions shade light into the fact that parties are at liberty to enter into legally binding online contracts and the law should come in to regulate the transactions.

⁸¹ Evidence Act, CAP 80 Laws of Kenya; Section 3

⁸² Ibid 77; Section 78A

⁸³ Ibid 78; Sections 106A, 106B, 106C, 106D, 106E, 106F, 106G, 106H & 106I

In *R v Barisa Wayu Matuguda*⁸⁴ the court cautioned that electronic evidence would only be admitted if it satisfies the provisions under Section 106B of the Evidence Act. The Section demands electronic evidence to be accompanied by a certificate signed by the owner of the evidence. This means that electronic evidence is admissible in Kenya if it is accompanied by a valid and authentic certificate.

In *Noni Gathoni Njenga and Another v Catherine Masitsa and Another*,⁸⁵ the litigants wanted the defendants imprisoned due to contempt of court. Conversely, the respondents objected to the admissibility of the electronic documents the litigants relied on to argue their case. The accused argued that the DVDs had been obtained illegally in a blatant violation of their property rights. The litigants countered that they had relied on Sections 106A and 106B of the Evidence Act and that their responsibility to them was limited to tendering a certificate from the person who provided the electronic evidence.

The above cases indicate the possibilities and challenges in adducing electronic evidence in courts. The question is how possible it is to get the certificates from individuals who are beyond the borders of Kenya. The process would take longer which will slow down the legal process.

2.8 Value Added Tax Act No. 35 of 2013

This Act was legislated to provide for the imposition of value added tax on supplies made in or imported into Kenya. The Act identifies taxable goods and goods that deem taxable. It states that goods obtained through digital markets are also taxable. It further clarifies that a digital market place is a platform that enables the buyer and the seller to obtain goods supplied through electronic

⁸⁴ (2011) eKLR.

⁸⁵ (2014) eKLR.

means.⁸⁶

The above definition of a digital market shows that the tax master does not leave anything to chance. At this point, the law comes in to appreciate the fact that there are online traders who operate online in their daily dealings. This is because the Act categorically stipulates that online traders are supposed to be taxed in accordance with the Act.⁸⁷

The Act stipulates that importation of taxable goods is charged as if they were duty of customs and are payable by the importer at the time of importation. It further states that tax of supplied imported goods is the liability of the person receiving them and that the payment is due upon the supply.⁸⁸ Hence, Kenyan international online traders who import goods are required by the law to pay taxes. However, this only benefits the government through collection of taxes since their rights remain unprotected by the law.

2.9 The Income Tax (Digital Service Tax) Regulations, 2020

Through the Finance Act 2020, Kenya introduced the Digital Service Tax (DST) as a means to collect taxes from services or goods offered through digital market place.⁸⁹ The Income Tax (Digital Service Tax) Regulations, 2020 were introduced as a way to guide the implementation of the DST in Kenya. The Regulations defines various terms such as digital marketplace provider, digital service, digital service provider and a digital platform.⁹⁰ It defines digital platform to include either a website or a mobile application.⁹¹

⁸⁶ Value Added Tax Act No. 35 of 2013; Section 5(7)

⁸⁷ Ibid 82; Section 5(1) & (7)

⁸⁸ Ibid 83; Section 5(5) & (6)

⁸⁹ Kenya Revenue Authority, *Introducing Digital Services Tax*, 2020

<https://www.kra.go.ke/images/publications/Brochure--Digital-Service-Tax--final.pdf> Accessed on 24 February 2021

⁹⁰ The Income Tax (Digital Service Tax) Regulations, 2020; Regulation 2

⁹¹ Ibid.

DST applies to downloadable digital contents such as films and e-books, streaming television shows, music, films, and podcasts among other subscription based digital contents such as magazines, newspapers and journals. It also applies to electronic bookings such as tickets. DST also applies to other digital platform services such as online data warehousing, cloud storage services and website hosting.⁹²

DST is applicable to residents and non-residents individuals who accrue revenue through provision of digital services in Kenya. The tax paid by the resident or non-resident is offset by the tax that is payable by the individual for the financial year. DST paid by the non-resident is final.⁹³ The Regulations also clarify on the location of the users of such digital tax. Hence, it provides that one is liable for DST if he or she provides or facilitates digital service to a user located in Kenya.⁹⁴

Moreover, the Regulations specify that a user of a digital service is deemed located in Kenya if he or she receives such services through terminals such as computer, mobile phone or tablet located in Kenya. Furthermore, location of the user is pointed to Kenya where the debit or credit transactions are made through a financial institution registered in Kenya. The service user is deemed to be located in Kenya where such internet protocol is registered in Kenya or through an internationally recognised code that belongs to Kenya.⁹⁵

The Regulation requires the providers of digital service in Kenya to register with the Commissioner.⁹⁶ However, despite the fact that Kenya has made a milestone progress in ensuring that there are legal provisions for taxing the digital services, the same is silent on international online trade. The Income Tax (Digital Service Tax) Regulations, 2020 fails to expressly address the

⁹² The Income Tax (Digital Service Tax) Regulations, 2020; Regulation 3

⁹³ The Income Tax (Digital Service Tax) Regulations, 2020; Regulation 4

⁹⁴ The Income Tax (Digital Service Tax) Regulations, 2020; Regulation 5

⁹⁵ The Income Tax (Digital Service Tax) Regulations, 2020; Regulation 5(2)

⁹⁶ The Income Tax (Digital Service Tax) Regulations, 2020; Regulation 9

issues of trade but rather it focuses on taxation of online services.

Further, some online traders sell goods such as furniture, apparel, cosmetic products, and electronic gadgets among other. The Regulation is silent on these products. Therefore, one can only conclude that the government is steadfast in ensuring that no loophole is left when it comes to taxation. Traders and consumers of international online trade products are less catered for under the law. However, with the requirement by the Regulations for digital service providers to register with the Commissioner gives consumers hope that their commercial and consumer protection rights shall be protected.

2.10 Data Protection Act No. 24 of 2019

The main legislation governing data protection is the Data Protection Act No. 24 of 2019. This Act came into effect on 25th November, 2019. Subsequently, it was followed by the Data Protection (General) Regulations, 2021, the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021, and the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021.

The Act creates the Data Commissioner's Office.

2.10.1 Sanctions & non-compliance: Administrative sanctions; Criminal sanctions:

The Act creates both Administrative and Criminal sanctions. Administratively, the Data Commissioner is empowered by the Act to impose fines where a person or entity fails to comply with the Act. Compensation to affected persons as a result of failure to comply is also another right under the Act.

Criminal sanctions created by the Act include illegal access, sale and unlawful disclosure to third parties or in any other way of personal data in such a way that it is incompatible with the reasons for which it was collected. Additionally, failure to register, giving misleading information and

obstruction of the Data Commissioner's office whenever it is necessary to conduct investigations is an offence.

2.10.2 Registration / notification / authorisation

All Data Controllers and processors are required by the Act to register with the Data Commissioner's office as long as your annual turnover is over Kshs. 5,000,000/= and with less than 10 employees. There are various exemptions to this requirement.

Such registration is a way of offering protection to online traders to ensure that personal data is not misused for illegal purposes. The challenge is however the implementation of the same on the international platform.

2.10.3 Main obligations and processing requirements:

The Act requires Data Processors and Controllers to follow data processing principles including right of privacy; Fairness and transparency; specificity and legitimacy; purpose limitation; Accuracy among others. It is the duty of Data Controllers and processors to notify the data subjects of their right and the use for which their data is being placed. Section 30 of the Act requires the Data Controllers and processor to use the data in lawful processes only. Retention of this data is only allowed for as long as it is essential. It should be erased once its use has come to an end. Data sharing is only allowed under lawful circumstances. Data centres and servers for processing specific data meant for the state's strategic interests are required to be located in Kenya.

2.10.4 Security, breach notification and Direct marketing

The Act tasks Data Controllers and Processors with the responsibility of making sure they put in place organizational and technological measures that ensure security of their data. Equally, they are required to report within 24 hours to the Data Commissioner any incidences of data breach by third parties. The same may be necessary to be communicated to the data subject. Marketing of personal

data is illegal unless expressly permitted under the Act.

2.11 Intellectual Property Laws

2.11.1 The Constitution

Articles 40 and 69 of the Constitution of Kenya 2010 provides for the protection of Intellectual Property Rights. The Constitution provides for compensation or royalty payment, protection of biodiversity, indigenous knowledge and genetic resources of various communities. In essence this means that any product sold whether physically or online should have its intellectual property protected. Any violation is an offence. The challenge is how to implement such a protection in international online trade where different jurisdictions are involved.

2.11.2 Industrial Property Act, 2001

This Act caters for the protection of technovations, utility models, patents and industrial designs. It establishes Kenya Industrial Property Institute (KIPI) which is tasked with the duty of processing applications and managing a registration system for the same. The Act also provides for registrability, terms of protection, contractual licenses, civil as well as criminal enforcement of the offences created by the Act.

Some of the protected utility models and industrial designs by this Act find themselves in international markets including the online platform. Some product designs find copycats being marketed online by other businesses operating in other jurisdictions and becomes difficult to find legal redress against such copycats. Locally Kenya has put in place this Act to offer legal redress to those affected locally. The international market depends on international instruments to do the same. However, enforcement is still a challenge.

2.11.3 Trade Marks Act, Cap 506

The Trade Marks Act came into effect to offer protection to trade and service marks used by various individual and entities. The same needs to be registered by the owner in order to be sufficiently protected by the law. Registration remains in place for the initial period of ten year after which the owner is entitled to renew it for a subsequent ten years.

Online business whether local or international uses domain names that are registered and are specific to a specific individual or business entity. While some are registered, genuine and carrying out authentic business, some are illegal and have been registered with the aim of duping unsuspecting consumers of online products and services. Some unscrupulous traders go to the extent of registering domain names that bear a resemblance with well known ones purposely to illegally gain from unsuspecting customers. Some also sell products belonging to other genuine owners online. Since some consumers can't tell the difference, they end up buying from wrong traders or end up buying the wrong products.

Kenya still finds it a challenge to deal with such illegal traders when it comes to international online trade. There are no technological or legal mechanisms to sufficiently deal with such illegal traders.

2.11.4 The Copyright Act, 2001

The Copyright Act is one of the main Acts in Kenya that help protect literary, broadcasts, sound recordings musical and artistic work of various individuals and entities. Most of these works are sold or shared online hence they stand the risk of being counterfeited. It is thus illegal to share such works without express permission from the copyright owner. No one is allowed to import, distribute or export such works without the consent of the owner.

The Act establishes the KECOBO, the Kenya Copyright Board tasked with the responsibility of

administering the Act such as licensing and periodical inspections.

International online trade carries a large distribution network for such works. Most of the materials is either shared for free, on a subscription basis or one-time online sale. The challenge however is that there are a lot of digital platforms that illegally distribute these works hence denying the copyright owner the financial benefit they would derive from the same. Some people buy and download the genuine downloadable materials and then end up distributing them either freely or at a lower price. Consumers end buying the “cheaper” version of the material hence no money reaches the actual owner. A lot of software is distributed in such a manner. Unfortunately to the unsuspecting consumers, some of the said “cheaper” versions are incorporated with malware that could end up corrupting certain computing devices, systems or other software and access sensitive personal or company data. It is always prudent to get the right digital materials from genuine traders.

2.11.5 Anti-Counterfeit Act, 2008

This Act prohibits the sale or distribution of Counterfeit products. As already insinuated earlier, the online platform is full of counterfeit digital products. It is one of the largest avenues for distribution of illegally modified products, reverse engineered products, illegally “cracked” licenses for various products, illegal distributions of software “keys” among others. While Kenya is trying to help prevent such activities locally, the international online trade is still a challenge to control. Even then, the Anti-Counterfeit Act is mainly concerned with physical products and it does not expressly cater for online digital products. Many online consumers may not have the technical knowhow as to what is genuine and what is not genuine online. So many fake electronics such as phones, watches, radios, laptops, kitchen appliances, etc have and still find their way into the international online platforms and many consumers fall prey to such fake products.

2.11.6 Other Kenya Laws related to IP and Illicit Trade

The Standards Act, Cap 496 cater for the quality of the goods manufactured, imported and sold within the country; Pharmacy and Poisons Act to cater for drugs sold and consumed within the Nation, Cap 244; Customs and Excise Duty Act, Cap 472 caters for products coming into Kenya through the borders.

2.12 East African Regional Instruments on International Online Trade

2.12.1 Draft EAC Legal Framework for cyberlaws

The East African Community came up with the Framework for Cyberlaws in 2008. The Partner states in conjunction with the EAC Secretariat came together to form the EAC Task Force on Cyberlaws which was charged with the formulation of this “Framework”. With the support of UNCTAD. The Framework gave a number of recommendations as follows⁹⁷:

- i. To ensure proper use of data security systems
- ii. To prevent unscrupulous behaviour that lowers confidentiality and integrity of ICTs
- iii. To provide protection to consumers using the e-commerce environment

These recommendations were aimed at reforming the legal process between the EAC Partner States in addition to reflecting international best practice

⁹⁷ Draft EAC Legal Framework for cyberlaws

2.12.2 Legal Framework and Recommendations

Issues catered for by the Framework include:

Electronic transactions

The main objective of the Framework was to facilitate the use of electronic mode of communication when getting into legal relations. Thus, it recognises the use of electronic communication in transactions. This was aimed at enabling both domestic and international business to take place efficiently. In effect this is an advantage to international online traders as it shall create easy e-commerce across the East African Borders. The other aim was to see to it that filing of documents with the government is made easy by electronic means. Public confidence would also be boosted within the region if e-commerce is well regulated.

The issue of validity has also been catered for by the Framework. Such issues include the requirements of form, formation of contract and keeping of records and issues of contractual evidence. Mode and process of communications is also captured by the Framework. The acts of government in relation to online transactions is looked at as to whether they are supportive or not. Other issues catered for by the EAC Framework are Liability for third-party content and Institutional implications.

Electronic signatures and authentication

The EAC Taskforce recommends to Partner States to give cognisance to electronic signatures. The Partner states are advised to come up with institutions that can draft regulations concerning electronic signatures.⁹⁸

Computer crime

The EAC Framework recognises the fact that computer or cybercrime is an issue in online

⁹⁸ Rule. 13 EAC Framework.

transactions. it recommends to partner states to come up with legislation that defines both substantive and procedural laws that shall apply to such internet-based crimes. Ways of curbing such crimes should also be put in place to cushion innocent of users of the cyber-space.

Consumer protection

The following measures have been widely adopted internationally to provide a clear level of protection for consumers in a cyberspace environment:

The Framework makes reference to developments with regard to online trade in other legal platforms internationally. Such developments have had a positive impact towards protecting the rights of online consumers. They include:

- **Information requirements:** This requirement ensure online traders provide relevant information to consumers before, during and after carrying out an online transaction. This relates to the identity of the trader, terms and conditions, delivery processes, modes of payment, tax payment and remittance, etc. the Framework recommends to member states to come up with legislation that provides such protection.
- **Cancellation right:** the Framework, while noting the cancellation right in other jurisdictions, advises member states to adopt this right within their legislation to ensure a consumer can get out of a contract where the conditions are not favourable to them or are against their initial agreement.
- **Payment fraud:** Technology has come with its weaknesses as well. Hackers have found a way of hacking into people's accounts and even made payment without their knowledge. This is normally realized after losing money to an unknown transaction. Such a consumer who has made payment without their knowledge should be allowed to retrieve their money from the vendors as long as they can prove that they didn't make such payments. Partner

states are advised to put in place mechanisms as well legal provisions protecting such innocent persons.

- **Performance obligations:** Where a consumer enters a contract online, laws should be put in place by member states ensuring that the online traders perform their part of the contract especially delivering the right product and on time under the agreed conditions. Of course the consumers too must perform their part.

Data protection and privacy

The Framework recognises the critical aspect of “Data Protection”. It takes note of the fact that this has been largely left to the governments of the various member states and a few private entities.

Private information about individuals and organisations if not well protected can lead to misuse by frauds. Issues of identity theft come because of access to private personal details by the said frauds.

This leads to legal consequences both civil and criminal to the persons whose data has been stolen and misused elsewhere.

2.13 International Instruments on International Online Trade

2.13.1 United Nations Convention on Contracts for The International Sale of Goods, adopted on 11th April, 1980 in Vienna.

This Convention was created by the United Nations Commission on International Trade Law (UNCITRAL) and adopted on the 11th day of April, 1980.⁹⁹ The Convention was a modification of an amalgamation of two Conventions, that is, one on the international sale of goods and the other for the formation of contracts for the international sale of goods. The Convention applies to contracts of sale of goods between parties whose places of business are in different states who are contracting states to the Convention. It also applies in an instance where the rules of the private

⁹⁹ <https://www.cisg.law.pace.edu/cisg/text/p23.html> accessed on 25 March 2020

international law recommend the application of the laws of a contracting state.¹⁰⁰

2.13.1.2 Application and General Provisions of the Convention

The Convention enunciates the need to disregard the parties' nationality, civil or commercial characters of the parties or of the contracts when determining the application of the Convention.¹⁰¹

This provision is plausible for the international online traders since the consumers and traders have an equal footing when it comes to the application of the Convention.

However, the Convention limits its application to goods that are not bought for personal, family or household use. The seller is exempted from this provision where he or she, before the conclusion of the contract, never knew that the goods were bought for such use via auction, on execution or by the authority of the law, of stocks, shares, investment securities, negotiable instruments, or money or of shipments, vessels or aircraft.¹⁰²

Practically, the above provision denies most of the online consumers from applying the convention to their benefit. This is because most of the goods bought online are household items. For example, people purchase household items such as electronic gadgets, music instruments, clothes among others from online traders such as Alibaba, Amazon, OLX amongst others online. Moreover, SMEs mostly do business that touch on the direct livelihoods of the consumers.

Article 3 of the Convention distinguishes between a contract of sale and contract for services.¹⁰³ It stipulates that contracts for the supply of goods to be manufactured or produced are considered sales unless the party who orders them undertakes to supply a substantial part of the materials that are necessary for their manufacture or production. It further states that where the preponderant part

¹⁰⁰ United Nations Convention on Contracts for the International Sale of Goods; Article 1

¹⁰¹ Ibid 86; Article 1(3)

¹⁰² Ibid 87; Article 2

¹⁰³ <https://www.cisg.law.pace.edu/cisg/text/p23.html> accessed on 25 March 2020

of the obligations of the party who furnishes the goods comprise of labour or other services, the Convention does not apply.¹⁰⁴

It is noteworthy that the Convention only applies to the formation of contract, the obligation, and the rights of the seller and the buyer arising from a contract. The Convention is also very clear that unless otherwise provided by the contract, it does not apply to the validity of the contract or any of its provisions or any other usage and the effect, which the contract may have on the property in the goods being sold.¹⁰⁵

The Convention encourages its interpretation to lean towards promoting uniformity in its application and the observance of good faith in international trade.¹⁰⁶ It further stipulates that questions regarding matters governed by the Convention and which are not expressly settled in it are to be settled in conformity with the general principles on which the Convention is based and where there are no such principles then it should be in conformity with the general principles of international private law.¹⁰⁷ This creates a loophole where international online trade issues concerning contracts for sale of goods can be addressed. This is because, if the general principles of the Convention fail to apply to the international online trade, the general principles of private international law can be applied.

2.13.1.3 Formation of a Contract under the Convention

Regarding the formation of contract, the Convention states that a contract of sale does not need to be in writing and does not require to have a particular form. However, contracts can be proved by other means such as witnesses.¹⁰⁸ It further elaborates that any contract proposal addressed to one

¹⁰⁴ n 88; Article 3

¹⁰⁵ Ibid 90; Article 4

¹⁰⁶ Ibid 92; Article 7

¹⁰⁷ Ibid 93; Article 7

¹⁰⁸ Ibid 94; Article 11

or more specific persons amounts to an offer where the person making the offer expresses his intention to be bound in case of an acceptance. The proposal must definitely include the provision for quantity and price of the goods to be traded.¹⁰⁹ Thus, a proposal other than one addressed to a specific person is considered merely an invitation to make offers, unless the person making the proposal indicate the contrary.

Further, the Convention stipulates that an offer only becomes effective upon reaching the offeree. The offer may be revoked before the offer reaches the offeree or if the withdrawal reaches the offeree at the same time with the offer.¹¹⁰ Additionally, an offer is terminated when the rejection reaches the offeree.

The Convention clarifies that an offer is accepted through a statement or conduct of the offeree indicating assent to an offer as an acceptance and that the acceptance only becomes effective once it reaches the offeror. It cautions that silence or inactivity of the offeree does not amount to acceptance. It further indicates that an oral offer must be accepted immediately unless the circumstances indicate otherwise.¹¹¹ The acceptance may also be withdrawn before or at the same time it reaches the offeror.

Article 19 of the Convention elaborates that where the response to an offer purports to be an acceptance but it contains another suggestion, indications or limitations, which does not amount to an offer but rather a counter offer.¹¹²

2.13.1.4 General Provisions on Sale of Goods

Generally, the general duties of the seller are to handover the goods, any document relating to the

¹⁰⁹ Ibid 95; Article 14

¹¹⁰ Ibid 96; Article 15

¹¹¹ Ibid 97; Article 18

¹¹² Ibid 98; Article 19

goods and transfer the property in the goods as per the contract and the Convention. The goods delivered by the seller must be of the quantity, quality and the description as per the contract.¹¹³ The seller has the duty to inspect the goods and give notice of lack of conformity with the contract within a reasonable time. The buyers are expected to pay for the goods and accept their delivery as per the contract.

From the foregoing, the Convention does not expressly address issues pertaining to international online trade. However, it does appreciate the fact that international trades operate on contract of sale of goods. Therefore, it is a window for the traders to enter into agreements conforming to the provisions of this Convention to protect the rights of the consumers and traders as far as international online transactions are concerned.

2.14 United Nations Convention on the Use of Electronic Communications in International Contracts, adopted on 23rd November, 2005 in New York

The United Nations Convention on the Use of Electronic Communication in International Contracts enables the use of electronic communication in international trade by guaranteeing that contracts concluded and other correspondences exchanged electronically are as valid and enforceable as their traditional paper-based equivalent.¹¹⁴

The Convention introduces new ideas in international trade, which creates ways around the limitations concerning the use of electronic communications that might have been brought about by other Conventions such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) or Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Thus, this Treaty offers the means upon which electronic

¹¹³ <https://www.cisg.law.pace.edu/cisg/text/p23.html> accessed on 25 March 2020

¹¹⁴ <http://tfig.unece.org/contents/convention-use-e-communication.htm> accessed on 25 March 2020

communication can have the same effect as written communication.¹¹⁵

The Convention is very key as far as international online trade is concerned. This is because it aims at harmonising the existence between the tradition means of entering into contracts and the modern day means of communication through which parties create contractual obligations. It also encourages harmonisation of rules regarding domestic electronic commerce. This by providing countries that have not yet legislated on electronic commerce a guideline on how to create a modern, uniform and carefully drafted laws on e-commerce.¹¹⁶

2.14.1 The UN Convention on the Use of Electronic Communications in International Contracts' Key Features

The Convention is an expansion of the other Conventions created by the UNCITRAL, that is, UNCITRAL Model Law on Electronic Signatures and UNCITRAL Model Law on Electronic Commerce.¹¹⁷ The Convention creates three principles of international electronic trade, which are non-discrimination, technological neutrality and functional equivalence. Further, the Convention applies to each and every electronic communication between the parties whose place of business are in different states and that one of the parties has its place of business in a contracting member state.¹¹⁸ However, the parties can consensually agree to adopt the Convention in their contract. They can also exclude the application of the Convention or derogate from or vary from the effects of its provisions.¹¹⁹

Article 9 of the Convention stipulates that communication of a contract should not be made in a particular manner, and where it is required that the contract or communication must be in writing,

¹¹⁵ Speidel, R.E., 1995. The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods. *Nw. J. Int'l L. & Bus.*, 16, p.165.

¹¹⁶ Winn, J.K. and Wright, B., 2000. *The law of electronic commerce*. Aspen Publishers Online.

¹¹⁷ <http://fig.unece.org/contents/convention-use-e-communication.htm> accessed on 25 March 2020

¹¹⁸ United Nations Convention on the Use of Electronic Communications in International Contracts; Article 1

¹¹⁹ Ibid 105; Article 3

an electronic copy of the same shall suffice.¹²⁰ In other words, this provision gives an equal effect of written documents as those in electronic form.

The Convention also establishes the time and place of dispatch and receipt of electronic communications by modifying the traditional rules and norms on the legal concepts to fit the electronic communication concept in cognition of the modern law on electronic commerce.¹²¹ For instance, Article 9 of the Convention establishes that the time of the dispatch of the message is the time it leaves the originator's information system and the time of receipt is the time it is capable of being retrieved by the addressee.¹²²

The Convention encourages legal recognition of electronic communication. It clearly states that a contract or communication should not be denied enforceability solely on the basis that is in electronic form. However, it does not force a party to use or adopt electronic contract or communication but its agreement to do so may be inferred from its conduct.¹²³

The Convention also provides that a natural person can enter into an electronic contract with an automated machine. Thus, a contract created between the two cannot be denied legitimacy and enforceability because there was not natural person involved in the process of creating the contract.¹²⁴ International online traders who offer gaming services may benefit from this provision.

Additionally, the Convention directs that a proposal to conclude a contract that is not directed to one specific individual does not amount to an offer but instead it amounts to an invitation to make offers.¹²⁵ Thus, the invitation to treat does not bind the person who makes the proposal until an

¹²⁰ Ibid 106; Article 9

¹²¹ Ibid 107

¹²² Ibid 108; Article 10

¹²³ Ibid 109; Article 8

¹²⁴ Ibid 110; Article 12

¹²⁵ Ibid 111; Article 11

offer is made and accepted to bind both parties.

The Convention also creates remedies for breach of electronic contracts. It does this through Article 14 of the Convention where it states that,

“1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.”¹²⁶

2.15 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting,

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting is also known as the Multilateral Instrument (MLI). The Convention was created to narrow the gaps existing between international tax laws and rules. It eliminates double taxation or double non-taxation of persons who operate international business transactions.¹²⁷ The MLI is authored within the precincts of Article 30 of the Vienna Convention on the Law of Treaty.¹²⁸

The MLI was also formulated to tackle the challenges that tax system has on how to deal with opportunities that promoted base erosion and profit sharing. Thus, it establishes means upon which profits can be taxed to benefit the contracting member states. The Convention also implements the agreed minimum standards to counter treaty abuse and to advance dispute resolution mechanisms

¹²⁶ Ibid 112; Article 14

¹²⁷ Agnes, B., 2019. OECD’S Action Plan on Tax Base Erosion and Profit Shifting (BEPS); Emphasis on Treaty Abuse and Avoidance of Permanent Establishments and Multilateral Instruments for the Cases Study of Uganda. *Revista Derecho Fiscal*, (14).

¹²⁸ Fitzmaurice, M., 2002. Third parties and the law of treaties. *Max Planck Yearbook of United Nations Law Online*, 6(1), pp.37-137.

while providing flexibility to accommodate specific tax treaty policies.¹²⁹

The member states are empowered by the MLI to amend the existing bilateral treaties to meet the provisions of the MLI. In other words, the members are supposed to choose which parts of their bilateral treaties need to be covered by MLI. The chosen provision will cut across all the tax treaties that the party agrees to amend.¹³⁰

This Convention majorly comes into the aid of the government since the taxpayers will not be able to avoid tax payment. This is owing to the fact that the countries will be required to exchange information given to them by taxpayers through country-by-country exchange of information.¹³¹ Regarding the tax payers, it does eliminate uncertainty to the taxpayers by introducing measures to curb double taxation.

MLI is silent on its implementation on international online trade. However, it gives the member states the right to choose which tax-treaties should be amended to meet the minimum standards put in place by the Convention. Thus, any tax-treaty that Kenya has ratified touching on any online products are most likely to affect the international online trade as far as their taxation is concerned.

2.16 UNCITRAL Model Law on Electronic Commerce (MLEC)

The Model Law on Electronic Commerce (MLEC) was adopted by UNCITRAL in 1996 to promote its harmonisation of international trade law and to avoid obstacles in international trade law such as the then emergence of computerised way of trading. The MLEC provides the national legislators or its member parties with the guideline on internationally acceptable rules aimed at

¹²⁹ <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beeps.htm> accessed on 25 March 2020

¹³⁰ https://www.mof.go.jp/english/tax_policy/tax_conventions/mli.htm accessed on 25 March 2020

¹³¹ Stasio, A., 2016. Country-by-Country Reporting: a New Approach towards Book-Tax Conformity. *MaRBL*, 1.

improving the status of international trade regarding electronic commerce.¹³²

The main idea is that the MLEC should enable member states to overcome the trading obstacles cause by the national statutes. This is by ensuring equal treatment to concluded contracts or communication made via electronic means as those in writing. Thus, accepting paperless means of communication boosts international trading, and above all, it encourages international online transaction.¹³³

The MLEC encourages the technological neutrality and functional equivalence by establishing the necessary rules for the establishment of the electronic contracts, data messages, sending and receipt of messages, that is, the determination of time and place of the receipt of the messages.¹³⁴ The MLEC is also accompanied with a guide to direct the national legislators on how to go about the drafting and enactment of such legislations.

2.17 International Centre for Settlement of International Disputes (ICSID)

International Centre for Settlement of International Disputes (ICSID) is an international arbitration institute that regulates international investment dispute settlement. It was established in 1966 through the Convention on the Settlement of Investment Disputes between States and Nationals of other States.¹³⁵ ICSID is an independent institution free from politics or international influence with the aim of building the parties' confidence in its operations. It provides dispute settlement to state-to-state investment parties, free trade agreements, and acts as the registry for such agreement.

Article I of the ICSID Convention establishes the Centre to provide facilities for conciliation and

¹³² <http://tfig.unece.org/contents/uncitral-model-law-ecommerce.htm> accessed on 25 March 2020

¹³³ Martin, C.H., 2005. The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided. *Pace Int'l L. Rev.*, 17, p.261.

¹³⁴ Ibid 120

¹³⁵ <https://icsid.worldbank.org/en/Pages/about/default.aspx> accessed on 28 March 2020

arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the Convention.¹³⁶ Thus, it maintains a panel of conciliators and a panel for arbitrators.¹³⁷

The uniqueness of ICSID is that, unlike other international commercial arbitrations where either the consent of the parties emanates through the arbitration clause or separate from the contract, the consent of the parties occurs by virtue of the parties being signatories to the treaty.¹³⁸

Article 25 of ICSID limits the jurisdiction of arbitration tribunals to nationals of contracting parties. This implies that parties with dual citizenships are barred from investment arbitration under the Convention. Thus, it would be appropriate for the dual-citizenship parties to consider another alternative that will handle their cases conclusively.

The question that comes with ICSID is whether it can be implemented on international online transactions. Can there be an investment agreement concluded online? In practice, most of the investment agreements are concluded in writing and signed by the relevant persons with the authority. However, considering all the other international trade instruments, should the parties deem it fit the contracts to be executed online and that the rules of ICSID to apply in the agreement then the online contract should not be denied enforceability or legality.

2.18 UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Arbitration Rules operate where the parties to a written contract agree that in the event that a dispute relating to that contract arises, the dispute should be referred to arbitration under the UNCITRAL Arbitration Rules. Thus, the dispute shall be settled under the arbitration

¹³⁶ ICSID Convention; Article 1

¹³⁷ Ibid 123; Article 3

¹³⁸ <https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/> accessed on 28 March 2020

rules but with the modification if the parties.¹³⁹

The arbitration tribunal derives its jurisdiction from the agreement between the parties to refer such dispute to the tribunal. Thus, the UNCITRAL Arbitration Rules stipulates that the parties to such agreement should be treated with equality and each party shall be given a full opportunity of presenting his case.¹⁴⁰

The UNCITRAL Arbitration Rules prescribes on the formation of arbitral tribunal. The number of arbitrators as agreed on by the parties. It is also noteworthy, that the Rules do not address on the form of contract at hand. It does not specify whether online contracts should be exempted from the arbitration under the Rules. Thus, one can infer that where the parties agree to via an online contract, they should be granted the audience without any discrimination. Their arbitral award should also be effected and enforced without denial of legality where it was acquired within the precincts of the Rules.

2.19 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention is also referred to as the New York Convention. It demands that contracting party states should recognise and enforce foreign arbitral awards made by foreign states that seek the enforcement of such awards as though they were made domestically. The implementation of this Convention has been made possible by the growing number of the signatory states, currently totalling to 157 states who have ratified the convention including Kenya.¹⁴¹

In other words, the Convention creates equality between the awards made in other jurisdictions and

¹³⁹ UNCITRAL Arbitration Rules; Article 1(1)

¹⁴⁰ UNCITRAL Model Laws of International Commercial Arbitration; Article 18

¹⁴¹ <https://www.nortonrosefulbright.com/en/knowledge/publications/04f14b2a/a-comparison-of-the-enforcement-regimes-under-the-new-york-and-washington-conventions-mdashbra-tale-of-two-cities> accessed on 28 March 2020

the awards made domestically. This, it does by ensuring that the national courts do not interfere with the awards entered in the foreign state and that the parties adhere to the commercial agreements they enter into.¹⁴²

The New York Convention also recommends that the parties who wish to enforce the foreign awards in a particular state should respect and abide by the national laws of that particular state they wish to enforce the foreign award. This is an indication that the Convention respects the sovereignty of the member states to make their own arbitration rules but within the guideline of the Convention.¹⁴³ For instance, the New York Convention guides on the grounds upon which a party may challenge the application for recognition and enforcement of foreign arbitral awards.

These grounds may include: the arbitration agreement was invalid; a party was denied procedural unfairness; the arbitrators acted beyond the scope of their power; the subject matter of arbitration cannot be settled by arbitration according to the laws of that country or enforcing the award would be against public policy.¹⁴⁴

The above provision opens the window for international online traders who acquire arbitral awards from another jurisdiction. They can apply to Kenya or move to another signatory member state to the New York Convention and seek enforcement of the award there. However, the parties are warned to fully obey and abide by the arbitration rules of the country they seek to enforce the foreign award.

2.20 Conclusion

International online trade is fairly a new concept in Kenya. It lacks concrete laws to regulate in

¹⁴² New York Convention; Article I

¹⁴³ Ibid 110; Article III

¹⁴⁴ Ibid 130; Articles V and VII

Kenya. The Statutes that touch on the concept are very scant and some are less implemented as internationally recommended. This leaves the consumers of online goods and services with no protection as to their rights.

However, international trade law comes in to the rescue of Kenyans dealing with international online trade products. The Conventions created by UNCITRAL are very rich in protective provisions that come in to aid Kenyans where the domestic laws are not able. To some extent, some international instruments such as MLI come in to save them from the double jeopardy of double taxation.

Moreover, international trade law creates uniformity across the international community as far as international online trade is concerned. It prescribes for the same remedies and procedures which puts everyone equal before the law including Kenyan online traders. Furthermore, the principle of non-discrimination on the electronic communications and contract enhances the freedom of people to trade globally as the world is day by day drifting away from the handwritten means of communications. It prepares the world for the digital transformation.

CHAPTER THREE

An Analysis of the Ineffectiveness of International Online Trade Law, and Legal Challenges in Kenya

3.0 Introduction

From the previous chapter, it is apparent that international online trade in Kenya largely relies on international laws to carry out international online transactions. The available laws attempt to cater for all the parameters required to shape and effectuate international online trade. In this chapter, this study seeks to evaluate the issues raised in the problem statement as it addresses the gaps and challenges faced by the laws in attempting to cater for trade parameters such as tax revenue collection by the government of Kenya; consumer protection rights of the consumers, intellectual property rights for those who import and export products outside Kenya; resolution of disputes arising from international online trade; anti-money laundering barriers and internet access.

This study seeks to evaluate the above challenges by comprehensively analysing the effectiveness of domestic and the international laws pertaining to international online trade in Kenya. It seeks to respond to the questions as to whether their presence in the country is profound enough for them to sufficiently regulate the international online trade platform for international and local traders whose businesses depend solely on the online platform.

Pertinence to these issues are matters to do with technology in online trade, sufficiency in professionalism in the area of international online trade, the effectiveness of the institutions in charge of international online trade in Kenya and the international relations regarding international online trade. Finally, this chapter discusses to what extent these issues inhibit the growth of international online trade in Kenya.

3.1 The Ineffectiveness of International Online Trade in Kenya

The problem statement of this research has noted that the Kenya National Digital Master Plan 2022-2032 which aims to expand digital infrastructure in the country is still a plan in progress.

Thus, internet has not fully penetrated in all parts of Kenya due to poor infrastructure, inadequate resources and insecurity in areas such as north eastern. Online trade both local and international is therefore not effective in some of the affected areas since the traders and consumers in such areas cannot access internet.

Additionally, it is comprehensible that for international online trade to be considered to have taken place, there must be a legal exchange of goods and services for monetary means. In other words, the buyer and the seller must be able to meet their end of the bargain without legal strains. For example, a Kenyan author who seeks to supply his literary work to one of his customers in Egypt needs protection from losing his financial profits to the customer in Egypt. Admittedly, in the modern world, the internet is full of conning and theft cases, which rise daily.¹⁴⁵ Furthermore, it is important to note that most of the time, international online trade allows the buyers to acquire products that are scarce, or of less quality in their countries.¹⁴⁶

The above scenario gives a vivid image of why Kenyan traders and buyers need to be protected when it comes to international online trade. To protect them, there is an utter need to have a strong and systematic legal means to safeguard both traders and consumers operating digitally within Kenya. This entails establishing a profound legal framework and effective institutions responsible for looking out for their commercial rights. There are various types of online commercial relationships. Such relations are either consumer to consumer, business to consumer or business to business. International online trade is implementable since Kenya is considered an East African

¹⁴⁵ Sara Norden, *“How the Internet Has Changed the Face of Crime”* (Florida Gulf Coast University, 2013)

¹⁴⁶ Vasudeva P.K., *International Trade*, 1st ed. (New Delhi: Excel Books, 2011) p. 4.

regional leader in using online platform as a way of making international trade efficient.¹⁴⁷ Thus, it is important to analyse the available legal measures put in place to safeguard the rights of international online traders.

3.2 The Legal Challenges pertaining to International Online Trade in Kenya

As indicated in the problem statement of this research, Kenya has enacted legislations that have partly catered for local online trade. However, there is still room for legislative improvements especially with the ever-growing international online trade platforms. Kenya relies heavily on international conventions to cater for international trade regulation and even then, monitoring and implementation is still a challenge. There is need to put in place laws that cut across both domestic and international online trade.

Kenya is one of the developing countries that have not had the pleasure to assimilate fully the culture of online trading.¹⁴⁸ The absence of a comprehensive legal framework dealing with taxation and the legal regulation of international online trading has made it a challenge to effectively operate online trade in Kenya. This does not only affect the domestic online trade but also cross border online trade. This legal deficiency has resulted in losses to the local tax man and lack of measures to safeguard the rights of Kenyan online traders. Even though the Kenya Revenue Authority has put in place a few necessary safety measures to maximize tax revenue collection, it still losses a lot to the online market where not every good or service is linked to their data base.¹⁴⁹

The Kenya Revenue Authority has lost a number of cases related to electronic cases due to failure of the law to categorize the tax generated from online trade. for example, in the case of *Kenya*

¹⁴⁷<https://www.tralac.org/news/article/12443-information-for-trade-infotrade-in-kenya-web-portal-officially-launched-in-a-bid-to-ensure-international-trade-efficiency.html> accessed on 21 May 2020

¹⁴⁸ Musau, Benjamin. "Electronic Commerce Law with A Special Emphasis on The Kenya Legal, Tax and Regulatory Challenges." (2018).

¹⁴⁹<https://www.bmmusau.com/electronic-commerce-law-with-a-special-emphasis-on-the-kenya-legal-tax-and-regulatory-challenges/> accessed on 21 May 2020

*Commercial Bank Ltd v Kenya Revenue Authority*¹⁵⁰, where the defendant claimed that the plaintiff owed it the withholding taxes that it had gotten from Infosys Technology through its software. The court was of the opinion that the Kenya Revenue Authority had failed to categorize the tax they demanded from Kenya Commercial Bank. It can therefore be deduced that the law has not yet defined what type of taxation should be conducted on amounts obtained online through electronic means such as the use of a software. It is therefore sufficient to state that the fact that the courts have not been convinced on the domestic online trade, they cannot waste time in trying to find remedy for international online trade either.

3.2.1. Loss of Tax Revenue

As mentioned in the statement of the problem of this research, international online trade poses a number of challenges when it comes to tax collection. This is caused by the challenges arising from regulation of international online trade. Kenya, just like many other countries, has made advances in regulating local e-commerce, but the international platform still has a long way to go due to different laws of different jurisdictions. Double taxation or double non-taxation agreements have been entered into but implementation is still a challenge.

As discussed in the previous chapter, Kenya has various statutes pertaining to international online trade. Amongst the statutes is the Income Tax Act of 1972, revised in 2018. Section 2 of the Act defines permanent establishment as a fixed place of business that has been in operation for a period of at least six months.¹⁵¹ Most of the online traders do not have permanent business premises to enable the Kenya Revenue Authority collect their tax revenues. This is because most of the online businesses are operated online and an online platform cannot be equated to a permanent residence. The internet links do not link them to a specific location. Kenya's tax law is also silent on whether

¹⁵⁰ [2016] eKLR

¹⁵¹ Income Tax Act, 1972 Revised in 2018, Section 2

the physical location of a company's servers can be referred to as the permanent residence of the traders. Furthermore, most of the online traders do not have the financial capacity to have their own servers, therefore, they use leased servers.¹⁵²

However, the Income Act recognises the fact that it is possible for an individual to obtain profit through online trade. Thus, it provides for the taxation of income of certain non-resident persons deemed to have been derived from Kenya.¹⁵³ Section 9(2) of the Act provides that,

“Where a non-resident person carries on, in Kenya, the business of transmitting messages... the gains or profits from the business shall be the gross amount received for the transmission of messages which are transmitted by the apparatus established in or outside Kenya, whether or not those messages originate from Kenya, and such gains and profits shall be deemed to be income derived from Kenya.”¹⁵⁴

From the above caption, it is apparent that the law is not blind to the fact that businesses might be operated online and generate profits that is taxable within the Republic of Kenya. However, the provision does not provide for the mechanisms to ensure that online tax revenues are collected exhaustively. Therefore, most of the online businesses, especially those operated by non-residents operate online businesses without emitting the required taxes.

The deficiency of Section 3 and 9 of the Act were revealed in the case of *Stanbic Bank v Kenya Revenue Authority*¹⁵⁵ where the court in its wisdom acknowledged the fact that the Value Added Tax was applicable to transactions carried out electronically. However, it warned that it was incredibly hard to trace online transactions that could be held responsible for taxation. Thus, the

¹⁵² n 142

¹⁵³ n 144, Section 9

¹⁵⁴ Ibid 146

¹⁵⁵ [2009] eKLR

difficulty in tracing online transactions and holding them liable for taxes makes the state loses lots of tax revenue.

The Digital Service Tax (DST) Regulations have endeavoured to ensure taxation of e-commerce businesses. However, these regulations are not exhaustive and do not adequately cater for cross-border business. Monitoring international online business is still a challenge. It thus means that many digital businesses can evade tax due to ineffective monitoring.

3.2.2 Failure to Provide Consumer Protection Rights and Fair Competition in Trade

This research also brings out the issue of ineffective protection of consumers' rights as indicated in the problem statement. Notably, both state, traders and consumers suffer from the deficiency of the law regulating international online trade. The state losses approximately millions of shillings while consumers and traders have no protection over their rights to quality products and fair trade. This deficiency is caused by the failure of the Competition Act and the Consumer Protection Act to address exhaustively issues pertaining to international online trade. By way of example, a consumer who purchases an item online from an online store/website belonging to a company abroad may find it difficult to seek redress in Kenyan courts when the company fails to deliver, or delivers a wrong/defective item. Furthermore, seeking redress in the foreign jurisdiction is sometimes very expensive especially if the product initially bought wasn't very expensive. Many consumers choose to let go and do not seek any redress. This turns out be an advantage to unscrupulous online sellers who sell cheap items but target a wide base of unsuspecting customers. They eventually close business after making some good money and start another scam.

Kenyan consumers of online products do not have the express protection by the law.¹⁵⁶ Therefore, those who purchase items online cannot seek refuge in courts most of the time. Their luck depends

¹⁵⁶ <https://ca.go.ke/industry/ecommerce-development/> accessed on 22 May 2020

on the good will of the online traders. Should anything happen to them in the process of entering into transactions with the online traders, particularly those across the border, they will have no way to rely on the national commercial laws for protection. This is because even the Communication Authority does not have the capacity to register and issue permits to the international online traders.

Furthermore, the Consumer Protection Regulations, 2010 only applies to licensed entities and in this case, it cannot apply to international online trade unless there are regulations enacted to that effect.¹⁵⁷

International online trade operates on the basis of contracts created by the traders and executed by the consumers.¹⁵⁸ Most of the times, consumers have no option but to rely on the terms of the contract drafted in favour of the online suppliers. Furthermore, the state does not have a legitimate power to control level the grounds for both the consumers and the traders. Therefore, there are very few cases in the courts or the referred to the Communications Authority pertaining to international online trade.

Additionally, the Competition Act encourages consumers to register bodies that can represent them whenever their rights to consumer protection are infringed.¹⁵⁹ So far, no body has been register to represent the rights of the online consumers. This is also another challenge that consumers are experiencing in Kenya since there is no one to air their views or advocate for legislation of laws that can protect their rights.

¹⁵⁷ Ibid 149

¹⁵⁸ Munyalo Robinson Nthuli, “Legal and Regulatory Challenges Facing the Growth of e-Commerce in Kenya” (University of Nairobi, 2013) Pg. 59

¹⁵⁹ Consumer Protection Act No. 12 of 2010, Section 9(e) & (f)

3.2.3 Insufficiency in Intellectual Property Protection Rights

The problem statement in this research also mentions challenges in protection of intellectual property rights on international online trade platforms. If looked at locally, then the IP laws in Kenya may look sufficient to cater for breaches in intellectual property rights within the country. However, if taken a notch higher to the international platforms, Kenyan laws become insufficient in protecting these rights. Furthermore, there is the problem of monitoring international online platforms especially those registered and operating in foreign jurisdictions. The owners of these rights are left with the gruesome task of monitoring and bringing to the attention of authorities any form of violations. Apparently, most owners of intellectual property rights are not aware of all violations and as such many breaches go unnoticed. It should be noted that a lot of products sold or shared online are not genuine one. Some are genuine but are distributed illegally hence denying the owner revenue.

Apart from the consumer protection rights, the national laws are deficient in ensuring the protection of intellectual property rights of Kenyan or foreign manufacturers. Intellectual property law in Kenya is covered by the statutes and judicial decisions. The intellectual property laws are supposed to evolve together with the advancement in technology. Products supplied online are subject to copyright laws. However, this is quite difficult to implement since the products can be resupplied by the consumers without proper acquisition of the right to do so from the owners. Examples of this are the software that can be installed in several devices without the original developer realising.

3.2.4 Deficiency in Dispute Resolution Mechanisms

Challenges in resolution of disputes arising from international online trade transactions has also been included in the problem statement of this research. In deed it raises matters of concern especially how both parties should choose a mode of dispute resolution should there arise any in the course of the contract. It should be noted that most online contracts are drafted by the trader by

way of simply placing products and services online with their corresponding prices and shipping charges. Mostly the consumer is only required to click “BUY”, “PURCHASE”, “I ACCEPT”, “I AGREE”, etc without suggesting a dispute resolution mechanism to the trader. The challenge then comes in when a breach arises as to the mode and forum for dispute resolution. Most international online traders will prefer a dispute to be solved by their local legal forum which may be expensive and unfavourable to the consumer. Choosing the mode and forum for dispute resolution may only be tenable where an online contract is entered into through a series of communications prior to entering the contract as opposed to the automated systems which don't give such room for communication.

The seller and the buyer in traditional international business transaction have the right to choose whichever dispute resolution mechanism they wish to rely on should any dispute arise between them. International legal regimes such as the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards may come in handy where a dispute arises between parties whose countries ascribe to these regimes in traditional international trade contracts. However, this is not always the case with all the online transactions. Most of them operate on the basis of the contracts drafted by the online trader. The contracts do not have the luxury of including arbitration clause unless they are operating on the professional level such as where one offers to buy an aeroplane from a foreign company. However, this is not the case in most international online transactions since international online consumers purchase Software and other non-perishable goods such as clothes and electronic devises.

It is noteworthy that online transactions are based on trust. Usually, the buyer is required to make payment before the supplier releases the product. This poses a risk to the consumer in the event that

they find out that, what they had purchased online is faulty and that they have to deal with stubborn traders who are not within their jurisdiction. Thus, brand is a key aspect in online trade. It determines the genuineness of a product and boosts the trust, taste, and preference of the consumers to a particular product supplied by a well-established online company.¹⁶⁰ This means that the consumer willingly agrees to be vulnerable to the online trader that upon his or her payment, the trader will deliver the goods or service agreed upon by the.¹⁶¹

In the absence of proper legal provisions regarding international online trade, the courts also find it difficult to make decisions pertaining online agreements. This is because the forum of the business is online, a jurisdiction that is not easy to point out. However, a consumer may be lucky where the trader is registered in a jurisdiction whose laws protect consumers within and outside the jurisdiction. Despite all the challenges pertaining dispute resolution regarding international online trade, international law comes in to safeguard the rights of the consumers as discussed in the previous chapter.

3.2.5 International Online Trade Solely Depends on Internet

Internet is the market place for international online traders. The suppliers and consumers meet online, enter into agreements and exchange goods or services for money. The payments are made online through electronic banking systems. Thus, for there to be an efficient online trade there has to be an accessible and reliable internet across the country. Kenya has improved over the past two decades to make sure that more than 20% of its geographical area enjoys efficient internet to boost online trade.¹⁶²

¹⁶⁰ Hsu, Chao-Jung. "Dominant factors for online trust." *2008 International Conference on Cyberworlds*. IEEE, 2008.

¹⁶¹ R. Mayer, J. Davis and D. Schoorman, "An integration model of organizational trust", *The Academy of Management Review*, 21, pp. 709-734, 1995

¹⁶² MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES STATE DEPARTMENT FOR TRADE, NATIONAL TRADE POLICY "Transforming Kenya into a Competitive Export-Led and Efficient Domestic Economy", 2017 Pg. 42

However, Kenyan online traders and consumers still experience a number of challenges when it comes to online transactions. The challenges include low levels of digital access index in the country. People in the rural areas do not have the luxury to indulge in cross border online transactions or national online transactions. This is caused by the high costs of internet costs and connection fees.¹⁶³

These are some of the challenges affecting international online trade in Kenya. Online Consumers and traders are mostly found in the urban areas due to the internet connectivity and the available ready market. Kenya stands a chance to maximize its online cross border trade, therefore, as the government seeks to solve the connectivity challenges, legal aspect of the challenges should also be addressed.

3.2.6 Cybersecurity Challenges

As already mentioned in the statement of the problem, the biggest threat of international online trade is cyber insecurity. In the absence of a secure online system, person involved in online trade can incur serious losses economic losses. These losses can be either breach of the payment system or loss of the items when tracking the goods. However, it is noteworthy that cyber threat to international online trade creates a dual type of problem. The first problem is with regards to the trade policies to protect persons involved in online trade and the second one is to offer protection from the cybercrimes that are committed by cyber criminals. Even with local legislation trying to cater for cybersecurity, Kenyans are still falling for illegal online schemes, con-artists, scammers and frauds. Seeking redress for these illegalities is still a challenge. It is even worse when these illegalities are propagated by international con artists who are difficult to trace due to difference in legal jurisdictions.

¹⁶³ Ibid 155, Pg. 43

Therefore, the laws should clearly distinguish protectionism in online trade from cybersecurity legislations.¹⁶⁴ Part three of the Computer Misuse and Cybercrimes Act No. 5 of 2018 provides for offences relating to cybercrimes. It stipulates that any person who accesses a computer system without authentic authorisation to perform a function commits an offence and is liable on conviction for a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years.¹⁶⁵ The Act also criminalises unauthorised interference with a computer system or program or data.¹⁶⁶

Despite the fact that the Act is meant to provide offences pertaining to cyber insecurities and offer means for detection, investigation, and prosecution of crimes relating to computer and cybercrimes, the Act is silent on online trade.¹⁶⁷ Online traders who encounter breach of security in their line of commercial transactions can report to the authority. However, this does not make it easier for them to retrieve their losses, particularly where the offender is not a resident of Kenya but a third party committing online crimes from another state.

3.2.7 Money Laundering through Online Trade

The problem statement of this research also mentions Money Laundering as one of the challenges brought about by international online trade. Despite the fact that various anti-money laundering measures have been put in place by the responsible organs, nationally and internationally, online trade avails undetected platforms for money laundering. Notably, not all benefits from online trade are legal and genuine. Some of them are proceeds of crimes committed by criminals who do illegal businesses and look for ventures to clean their “dirty” money.

¹⁶⁴ Joshua P. Meltzer, “Cybersecurity, digital trade, and data flows: Re-thinking a role for international trade rules” (Brookings, 2020) as read via <https://www.brookings.edu/research/cybersecurity-digital-trade-and-data-flows-re-thinking-role-for-international-trade-rules/> accessed on 22 May 2020

¹⁶⁵ Computer and Cybercrimes Act No. 5 of 2018, Section 14

¹⁶⁶ Ibid 158, Section 16

¹⁶⁷ Ibid 159, Long title

One of the most famous ways of money laundering is through security exchange. Security exchange is misused by individuals who launder money. There are two types of money laundering, that is, primary and secondary. Primary money laundering is conducted through covering the illicit sources of one's wealth while secondary money laundering is the use of legal approach to conceal the money obtained through illicit means.¹⁶⁸

There are three stages of money laundering, that is, placement, layering and integration.¹⁶⁹ At the placement stage, criminals deposit cash money into various platforms such as banks and mobile money. Layering stage enables the criminals to convert the money into assets or security exchange. One can use the soft money to buy online products across border without being detected that it is illicit money in transaction. Some of the money launderers invest in foreign businesses through offshore bank accounts which makes them undetected. Online payment system has made money laundering easy since people are not asked their sources of money when purchasing items online.¹⁷⁰

The integration stage enables the persons to access clean money without taxman or the authority detecting that it is obtained through illicit means. For instance, one can request refund for the money he or she spent when ordering an online product. The money comes back without an iota of illegality.

3.3 Conclusion

The challenges exhibited in international online trade are not only affects consumers and traders but also the state. Kenya loses millions of shillings annually due to uncollected tax revenue generated through international online trade. The loss is caused by the lack of proper legislations to

¹⁶⁸ Pemberton, G., & Police, R. C. M. (2000). Money Laundering in Securities Markets. *The Money Laundering Bulletin*, 10.

¹⁶⁹ Ibid.

¹⁷⁰ Weld, J. B. (2011). Current International Money Laundering Trends and Anti-Money Laundering Co-Operation Measures. *Resource Material Series (UNAFEI)*, 37-47.

enable the Kenya Revenue Authority collect the Revenue. The state also invests very little in taxing online trade. The Kenya Revenue Authority loses several cases on online transactions due to failure of categorization of the type of tax gained through electronic commerce.

The Consumer Protection Act, Kenya Information and Communication Act and the Competition Authority Act have been legislated with a vision to give flesh and direction to Article 46 of the Constitution. However, the three Acts have not been able to satisfactorily protect the rights of the consumers with regards to online trade. Consumers are left vulnerable to the risks that come with online trade. In other words, the laws do not define the elements of a contract as defined in the laws of the United Kingdom.

The Computer Misuse and Cyber Crimes Act No. 5 of 2018 does not assure protection on matters pertaining to international online trade. However, one may rely on the Act where his or her computer system has been hacked. Though, the shortcoming of this is that it is very difficult for him to pursue justice in Kenya where the unauthorized access was not done in Kenya.

The openness of internet for trade in Kenya is very dangerous without regulations. The unregulated platform boots trade for all sorts of products even those that are illegal or do not meet the minimum standards set by the bodies such as the Kenya Bureau of Standards (KEBS). Thus, there is a dire need to regulate the online trade to make sure that citizens are protected from unfair trade or breach of consumer protection rights. Despite all these challenges facing national legislations on international online trade, Kenya seeks to rely on the provisions of international law to protect its citizens. However, it is important for the state to be able to rely on its own national laws to protect its citizens and other traders and consumers. Therefore, it is important that Kenya comes up with a first-hand solution to regulate international online trade.

CHAPTER 4

COMPARATIVE ANALYSIS

4.1 Introduction

Some countries such as China, the United States of American, the United Kingdom and other European Union member' states are governed by national and international laws pertaining to electronic commerce. The laws enable the states to collect tax revenue and protect the consumers and suppliers from breach of consumer protection rights and the rights to fair trade. Therefore, this part does a comparative analysis between Kenya's electronic commerce and the United Kingdom.

4.2 Reasons for choosing the UK for comparison

The UK has had tremendous technological advancements as compared to Kenya. Being a developed country, it has had the opportunity to develop its laws in the same breath as the technological advancements. While some laws have taken a while to come into effect, it is noteworthy that consumer protection has been key in the UK. Online businesses have been regulated in the sense that for you to do businesses you have to meet certain requirements discussed below. Products to be sold online whether virtual or physical have to meet laid down standards. Online fraud, tax evasion, cybersecurity, etc have been catered for in various legislation

4.3 Regulatory Overview

4.3.1 UK Regulations that govern online trade

The United Kingdom is still in the transfer window, post-Brexit. Online trade in the UK is governed by various statutory instruments. This legal regime has increasingly seen harmonisation at the EU level, although it has to be noted that the UK's withdrawal from the EU is likely to give rise to disparities between UK and EU laws in the near future.

Of significance are the following regulations:

- The E-Commerce Regulations 2002 (E-Commerce Regulations) place upon commercial website operators with a range of duties and obligations. The operators are tasked with the duty to provide consumers with certain information about their business and actual services.
- The Consumer Rights Act 2015 (CRA) has endeavoured to consolidate various UK legislations on consumer rights and also added other rights such as provision for implied terms in all forms of contracts. It also provides for remedies that a consumer is entitled to in case of a breach by the sellers.
- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (Consumer Contract Regulations): this provides for further duties and responsibilities for information service providers who engage directly with consumers through their platforms by offering them a chance to cancel a contract where the information service provider doesn't meet their obligation.
- The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) is the Act that protects consumers from unfair practices by businesses. Such practices include misrepresentation and omissions that would lead to injury to consumers whether physically or financially. It goes further and enlists commercial practices that are deemed unfit and thus prohibited.
- The Provision of Services Regulations 2009 (POS Regulations) tasks information service providers with the duty to provide consumers with specified information that is necessary to the use of their products and services. Terms and conditions must be provided to the consumers. The information service providers are also required to meet certain quality standards when handling concerns raised by consumers.

- The UK GDPR (that is, the General Data Protection Regulation GDPR ((*EU*) 2016/679) provisions as implemented into UK law by the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 (SI 2019/419)) and Data Protection Act 2018 (DPA) are concerned with the protection of personal data, inclusive of data belonging to consumers of information services, i.e., online services.
- The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PEC Regulations) caters for direct marketing that takes place electronic mode of communication.
- The Online Intermediation Services for Business Users (Enforcement) Regulations 2020 (P2B Regulations) provide for additional duties and responsibilities on information service providers as a way of taking care of online consumers.

4.3.2 Institutional framework

The UK has various regulatory bodies that cater for online trade and service provision. An example is the Department of Business, Innovation and Skill which is tasked with the responsibility of overseeing subordinate legislation that is promulgated to cater for online services and offer protection to consumers.

Code of conduct and guidance is also issued by several national bodies. Although these do not enjoy legal enforcement, they have a direct influence on legal interpretation, and are sometimes binding in situations where businesses have opted to comply with self-regulatory systems. These include but not limited to:

- The Committee of Advisory Practice (CAP): This has the duty of publishing codes that govern broadcast as well as non-broadcast advertising. This includes online advertising. The Codes under CAP are implemented and enforced by the Advertising Standards Agency (the ASA).

- The Information Commissioner’s Office (ICO) which is tasked with duty to ensure compliance with:
 - PEC Regulations,
 - DPA, and
 - UK GDPR.

4.3.2 Legal requirement affecting the design of a website of app

Website Accessibility

The Equality Act at Section 4 provides that persons with protected characteristics should not be discriminated against in provision of services. Information society service providers are required to make “reasonable adjustments” that are aimed at enabling accessibility to persons with disabilities. This provision ensures that all information society service users are all treated equally whether disabled or not. The Equality and Human Rights Commission has put in place a *code of practice* to guide businesses or how to fulfil this obligation. In addition to this, *website accessibility guidelines* were published by the World Wide Web Consortium to offer further cater for persons with disability.

Children’s Access to Websites

The UK has in place the Age-Appropriate Design Code by ICO to ensure information society service providers only allow appropriate content to be accessed by children. This Code enlists a number of privacy standards that must be met when processing data that should be accessed by children.

Examples include:

- Data protection impact assessment must be conducted
- Ensure appropriate privacy notices are made available to various age groups accessing the service

- Set to “off” the processing of non-core activities by default.
- Data sharing is prohibited unless there is a compelling reason to do so.

However, it should be noted that this code isn't enforceable by law. The ICO has however made it clear to businesses that failure to comply makes it difficult to show that their way of processing data fair. This in effect may give rise to a breach of regulations under the UK GDPR.

4.3.3 Formation of an electronic contract under the UK laws and regulations

Just like the traditional way of forming a contract, online contracts must have an offer, acceptance, the intention to create legal relations and certainty of the terms of the contract.

As regards offer and acceptance, submission of an order online is deemed as making an offer and when the trader issues an order confirmation email that amounts to acceptance. Generally, an online trader is expected to provide a consumer with the terms of the contract. The English courts have not been clear on how these online terms are to be incorporated into an online contract. General practice is to design the website or online store in such a way that a consumer can only click “I AGREE” or “I ACCEPT” after reading all the terms and conditions. There are three main types of online contracts, i.e., click-wraps, shrink-wraps and browse-wraps. Click-wrap contracts are generally binding while browse-wrap and shrink-wraps are unlikely to be enforced against a customer. Each case has to be handled on its merits to confirm that the browse-wrap or shrink-wrap contract was not unfair to the consumer. The Scottish Court of Session held in *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* that a shrink-wrap licence was enforceable in a situation where a software package stated that a customer is deemed to have accepted the terms and conditions of a contract by opening it as long as the customer has the right to return it up to and until the time before he opens it.

4.3.4 UK laws governing contracting on the internet

The UK Electronic Commerce (EC Directive) Regulations provide for information society service which is referred to as services that are payable via electronic means. For example, in the case of *L'Oréal SA v. eBay Int'l AG*¹⁷¹, the United Kingdom's High Court held that since eBay was an online marketplace, it qualified to be an information society service. The Regulations have adapted the private international law principle of "the country of origin." Moreover, the Regulations still apply to those information society services that have established their servers outside the United Kingdom.¹⁷² This has been foreseen as a challenge in the near future and the UK intends to revise it to benefit the post-Brexit situation.

The Regulations also demand that where the online service provider operates on an online contract, he or she must provide the consumer with the terms of the contract in a well elaborate and a clear manner. It further stipulates that the terms must be unambiguous and easier to understand and explaining how to go by the technical steps and the language offered in the conclusion of the contract.¹⁷³

The Regulations also stipulates necessary information that should be provided by any person who wishes to become an online service provider. The law provides that any information society service provider should make it known in form to the intended recipient and the authority; the name of the service provider, the geographical address, the details such as email address for the purpose of easy contact and where the service provider is registered, the details of the registration and the details of the professional body where the service provider operates under a professional body.¹⁷⁴

¹⁷¹ 2011 E.C.R. I. 6011 (2011).

¹⁷² Electronic Commerce (EC Directive) Regulations, 2002, Regulation 4

¹⁷³ Ibid 163, Regulation 9

¹⁷⁴ Ibid 164, Regulation 6

The service provider is also expected to give the consumers the code of conducts upon which he or she ascribes to, unless the parties agree otherwise.¹⁷⁵ The parties to an online contract also have the legal capacity to rescind a contract. Thus, the Regulations provide that where a person enters a contract upon which the Regulations apply, and that the service provider does not provide him the means to correct errors on the order, he or she has the right to rescind the contract unless ordered otherwise by a court of competent jurisdiction.¹⁷⁶

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 on the other hand ensures that consumers who shop online are protected should things go wrong.¹⁷⁷ Having come into force on 13th June 2013, it protects consumers who entered into contract from the date it was effected. The Regulations grants the consumer the right to cancel an online contract. The Regulations stipulates that the online contract can be cancelled between the date upon which the order is place and 14 days after the delivery of the product to the consumer. The consumer also has the right to a refund upon returning the goods or upon exhibiting evidence of having returned the goods.¹⁷⁸

As regards the EU Digital Single Market, the EU has legislation affecting international online trade targeting consumers within the EU including

- The Unjustified Geo-Blocking Regulation ((*EU*) 2018/302). This Regulation prevents traders from discriminating consumers by virtue of their county of residence, nationality or establishment when choosing potential online consumers of their goods or services. In essence this means that international online business can be carried out without any form of

¹⁷⁵ n 160, Regulation 9(2)

¹⁷⁶ n 165, Regulation 15

¹⁷⁷ <https://www.which.co.uk/consumer-rights/regulation/consumer-contracts-regulations> accessed on 23 May 2020

¹⁷⁸ The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, Regulation 29 and 30

discrimination.

- The Portability Regulation ((EU) 2017/1128) on the other hand ensures that customers from member states temporarily visiting EU member states are assured of access to services by portable online content service providers.

It should be noted that these regulations ceased applying to the UK post Brexit, but are still necessary to businesses targeting consumers within the EU.

4.3.5 Remedies for breach of electronic contracts

Online contracts generally have similar remedies to conventional contracts.

As relates to breaches of specific regulatory requirements, more remedies are provided for such as:

- Under the E-Commerce Regulations, the customer has the right to rescind a contract where the information society service provider renegades on their obligation to give the customer a chance to make corrections on input errors.
- The UK laws also require online traders to take into consideration the provisions under the Consumer Rights Act, 2015 with regards to remedies available to customers.
- The Customer Contracts Regulations further extends the period for a customer's right to rescind a contract in case of a failure to provide such cancellation right.
- The GDPR further gives online consumers data protection rights and allows them the leeway to exercise these rights at any time. Where there is a breach by a digital service provider, an individual is entitled to raise a complaint with the ICO.

The ICO has an option of issuing monetary penalties in case of breaches under the PEC Regulations.

4.3.6 E-signatures and its limitations

The English laws recognises e-signatures. These are sometimes called digital signatures. E-

signatures are regulated by the Electronic Identification Regulation ((EU) 910/2014) (Eidas). This regulation is aimed at increasing the application of electronic identification as well as the facilities for their authentication. It also facilitates the growth of electronic documentation-related legal framework. The Brexit period saw the UK amend its electronic regulations through the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/89) as a way of getting rid of previous EU related redundant provisions.

An e-signature is considered valid if:

- If it is made through an encryption system that is managed by a certification authority
- If it is a digitized or scanned version of a manuscript/physical signature
- If it is simply a name typed electronically
- If a button labelled “I agree” or “I accept” on a website is clicked to signify signing.

The use of e-signature has limitations where the laws provide for specific modes of making a signature especially if it is not to be done electronically.

4.3.7 Data protection

Data protection in the UK is governed by the DPA and the UK GDPR. These legislations guide the collection, use and sharing of personal data. It is applicable to both data controllers and processors. The UK GDPR is being amended post Brexit to cater for changes brought about by the exit from EU. There is a Withdrawal Agreement in place relating to personal data that was being lawfully processed in the UK pre-Brexit. Such data shall continue being processed in the as provided for by this Withdrawal Agreement.

Collection, use and sharing of personal data is protected by the UK GDPR. All data controllers and processors are required to only access and use data for lawful purposes only. Sharing is strictly prohibited unless allowed by the law and/or with the consent of the owner of the data. It is compulsory for data processors and controllers to provide privacy information to online users to

give the users an option to proceed with providing their information or not. Such information includes:

- The actual type of personal data to be collected.
- The purposes for which the collected data shall be used.
- The legal provision allowing collection and processing of the said data

As relates to data retention, the UK GDPR allows information society service provider to retain personal only for specified purposes and for as long as is necessary. After this it is supposed to be deleted.

4.3.8 Government access to personal data

The government, through various regulators and authorities have the powers to compel disclosure and access of personal data relevant to the performance of their regulatory functions.

- Data processors and controllers may be required to provide personal data for purposes of the Information Commissioner's duties such as auditing. This is normally done officially in writing and is limited to data that is not legally privileged.
- The Department of Work and Pension is also empowered to compel certain organisations such as insurers and banks to provide personal data for purposes of countering fraud and money laundering.
- The Investigatory Power Act also provides instances under which communication information can be obtained from telecommunications providers.

4.3.9 Cybersecurity

Information society service providers are obligated by the PEC Regulations to securely safeguard personal data through appropriate administrative and technical measures. They must:

- Only authorise personnel can access personal data for legally approved purposes.

- All personal data should be stored in such a way that accidental or illegal access, storage, disclosure, transmission, processing, destruction, loss or alteration is prevented.
- The security policies put in place to ensure legal processing of personal data is implemented.

While encryption is not a mandatory requirement, the UK GDPR encourages information society service providers to take measures that assure consumers of top-level security of their personal data. Such measures include the use of pseudonyms and encryption of personal data. This helps prevent illegal access and manipulation. Government authorities are however empowered to compel digital service providers to decrypt certain information in the exercise of their authority. Interception of personal data communication can also be allowed in certain legally compelling circumstances.

Trusted site accreditations.

The UK has no official government trusted site accreditations for online businesses. However, there are website accreditations that may be useful to online consumers. These include:

- The ISO 27001 is the main international standard for accreditation of information security management. This can be found by checking with the British Standards Institution.
- There are also private companies that have earned a reputation over a long period of time online and are now offering e-commerce accreditation schemes such as Norton, PayPal and Symantec.
- Additionally, the tScheme also runs an industry oriented, self-regulatory system that has been designed to offer approval to electronic services, among them being qualified certificate services.

4.3.10 Regulation of electronic payments

Payment services providers in the UK are governed by the Payment Services Directive ((EU)

2015/2366) (PSD2). Implementation of this directive is done by the Payment Services Regulations 2017 (PSRs) which gives strict requirements to be adhered to by payment service providers. Among these requirements is a strong customer authentication, security and protection of consumers' personal data.

In general, online traders are free to accept electronic payments as long as they adhere to the laid down security requirements.

Where online traders operate a recurrent mode of electronic payment involving debiting consumers' bank accounts or any other electronic money platforms, laws governing the banking industry must be adhered to. It may be necessary to follow the Direct Debit Guarantee vetting process.

The online platform is full of subscription-based models where consumers are required to make periodical subscriptions to access certain products and services. Consumer protection laws come into play to cater for such subscription terms and conditions.

4.3.11 Taxation of online sales

A non-UK resident is subject to UK taxation. This tax is charged on any profits accruing to the non-resident by virtue of carrying out trade in the UK. However, this is subject to any double taxation treaty in place between the country of residence of the non-resident and the UK. This tax extends to non-resident companies operating in the UK through physical branches in the UK or having a representative/employee in the UK.

The UK government opted to phase out Digital Service Tax (DST) in October 2021. The DST was charged at 2% of the revenue of online information society service providers. The UK has opted to adopt the two-pillar plan of the OECD as a way of reforming international corporate tax. This is meant to push multinationals to transfer part of their taxing rights to jurisdictions where value is actually created as opposed to only remitting these rights to jurisdictions of residence.

Additionally, the UK has the Diverted Profits Tax (DPT) which is charged on multinationals that choose to divert profits from the UK leading to tax mismatch.

Online companies with a presence in the UK are required to register and account for the VAT payment in the UK on sale made in the UK. This is applicable where the UK VAT registration threshold is exceeded. Equally, online companies without a presence in the UK have to register for UK VAT if their supplies are made in the UK in circumstances where the threshold on VAT registration does not apply. This rate is normally 20%

4.3.12 Copyright infringement, defamatory or harmful content

The UK requires that all digital content targeting the UK must be lawful within the UK. The following requirements must be adhered to:

- It is a requirement that if a digital service provider uses content from third parties, such content must be used with the owner's permission. Otherwise use without rights may give rise to claims of copyright trademark infringement.
- Failure by a trade to observe the provisions of certain regulatory requirements such as the ones under consumer protection may lead to enforcement by government authorities. The trader may be enjoined to comply with eth provisions or may even have fines imposed on them. In extreme circumstance imprisonment may be necessary.
- Where an online trader publishes defamatory content, the Defamatory Act as well the common law may grant the victim an injunction or damages. The trader may be compelled to remove the defamatory content from their online platform.
- The Obscene Publications Act of the UK further provides for offences that can be committed through the publication of certain content online. Pornography falls under this category especially if published without following the laid down guidelines. The Public

Order Act also prevents publication of racially inflammatory content. As already discussed earlier, the Data Protection Act also makes it a criminal offence to publish personal data without obtaining express consent from the owner.

- Currently, the UK has the Online Safety Bill in parliament aimed at legislating against illegal and harmful content online.

4.3.13 Lessons that can be borrowed from the UK

- The UK has codes of practice in addition to the World Wide Web Consortium's Website Accessibility Guidelines to cater for PWDs. While the Constitution of Kenya and other legislation make provisions against discrimination of persons with disability, there is no legislation that is internet-specific when it comes to access of online services by persons with disability. It is not clear how a visually impaired person can access online services and how they are protected by the laws. Kenya should put in place laws that can compel online traders to cater for persons with disability in accessing their services.
- The UK has a clear legal and institutional framework for ensuring only appropriate content is accessed by children online. Kenya has also made strides in putting in place laws that protect children from inappropriate content online. However, the implementation part is the problem. It has proved a challenge for the government to monitor all content being shared online. Kenya should come up with a clear legal and institutional framework that can ensure implementation of the laws intended at protecting children from accessing illegal or harmful content online.
- As regards formation of an electronic contract, the UK laws and regulations recognise electronic contracts. UK case law has also expanded the validity of contracts formed online and explained whether shrink-wraps, browse-wraps or click-wraps are contracts or not.

Kenya is still growing in this area. While electronic contracts are held valid, a clarity is still yet to be made as to the specific types and mode of formation that makes electronic contracts valid. Legislation should be put in place to cover as much as possible what constitutes an electronic contract and to what extent is it valid.

- In reference to laws governing contracting on the internet, the UK laws provide for information that must be provided by an online trader to a consumer in order to qualify a contract between them as valid. This information includes name, geographical address, email, registration details, professional body allied to, code of conduct, right to cancel contract, right to return product, terms and conditions among other. Kenyan laws are not clear on these especially with regard to international online trade. Legislation should be put in place to cater for this. Better still, such legislation should bear in mind online trade on the international platform and not just local e-commerce.
- In relation to remedies, while the UK Laws clearly allow an online consumer to rescind an online contract in case of a breach, the Kenyan laws rely on the Law o Contract to effect this. Laws should be put in place to clearly state the circumstances when an international online contract can be rescinded.
- Both the UK and Kenya has laws on Data Protection. The challenge in Kenya is implementation of these laws. Many Kenyans have had their data illegally accessed online due to ignorantly accessing content that is not protected. National authorities are trying to cater for personal data shared locally but a lot still needs to be done. The worst part is Kenyans sharing personal data with online platforms managed by owners in other jurisdictions. Awareness creation should be done to educate Kenyans on the dangers of accessing online data without confirming its security features.
- Online payments are done both by local and international online payment service providers.

While it is possible to trace local payments, it is still an uphill task especially when making payments on an unregistered online store. It is even more difficult to make follow ups with payment platforms belonging to companies outside Kenya. As a country, laws should be put in place to all payment platforms operating in Kenya must also be registered in Kenya for ease of follow up purposes.

- The UK has phased out Digital Service Tax (DST) and has opted to follow the two-pillar plan of the OECD as a way of reforming international corporate tax. Kenya on the other side has recently enacted the DST Act. Kenya can borrow from the UK and also adopt the said two-pillar plan of OECD.

CHAPTER FIVE

Conclusion and Recommendations

5.1 Conclusion

This thesis has demonstrated the fact that Kenya's legal framework acknowledges the existence of online trade. However, the legal framework is not exhaustive as far as commercial law is concerned. The governing Acts of Parliament such as the Kenya Information and Communication Act and the Evidence Act are inconclusive since they do not display the basic elements of a contract. These provisions not only limit the national online trade but also the international online trade. Scholars and researchers have researched the topic and made recommendations but the same is yet to be implemented.

This study has also revealed the plight of international online traders. They are not guaranteed competitive fairness in online trading platforms. Furthermore, they are not protected from avoidable losses since it is very challenging for them to protect their businesses under Kenya's laws on electronic commerce. However, their hope lies in the common law and the principle of stare decisis following the decisions made in developed countries' courts such as the United Kingdom.

Additionally, this study has outlined the absence of consumer protection rights for international online transaction consumers. The Constitution of Kenya, 2010 provides that consumers, including international online trade product consumers, have the right to goods and services of merchantable quality, the necessary information that will enable them to gain full benefit from the services and goods. The constitutional provisions are not sufficient to cater for all the issues arising for the international online trade consumers.

The government also loses huge amounts of tax revenues owing to the unavailability of a complete comprehensive legal framework for taxing online trade. The Kenya Revenue Authority does not have an upper hand when it comes to performing its roles under the Kenya Revenue Authority Act. The tax authority is obliged to abide by Kenya's tax law, which is defined in the Tax Procedure Act as the Income Tax Act, Value-Added Tax, and Excise Duty Act. Kenya's tax law does not provide succinct provisions categorising tax revenue collected from the international online trade. Thus, the Revenue Authority constantly loses case battles in courts on failure to identify the type of tax to collect from the online traders.

In an attempt to fill the gap in the legal framework, the Constitution of Kenya, 2010 creates a monistic state where the general rules and principles of international law form part of Kenya's laws and the treaties or convention ratified by Kenya form part of the law under the Constitution.¹⁷⁹ Thus, there are several Conventions regarding international online trade that Kenya has ratified. These treaties guide international online trade. They categorically guide on the offer and acceptance in international online trade. The treaties also guide the countries on what to include or not include in the domestic laws. It is upon the international instruments and the best practices in some countries that the recommendations in this study are derived.

5.2. Recommendations

5.2.1 Formation of International Online Contracts

The technological invention has seen the evolution of commercial law from handwritten contracts to typed and printed contracts and now contracts are written and executed online where the parties are miles apart from each other. Kenya has not been left behind in these technological

¹⁷⁹ The Constitution of Kenya, 2020, Article 2(5) & (6)

advancements. Therefore, in the same manner, the Law of Contract Act provides for paper-based contracts, there ought to be laws governing electronic contracts. The electronic contracts should not lose the elements of a contract as provided in the statutes and the common law. Therefore, the Kenya Information and Communication Act¹⁸⁰ (KICA) should categorically state the constituents of an offer and acceptance made electronically.

To achieve the above, this research recommends that KICA borrows a leaf from two Conventions, that is, the United Nations Convention on Contracts for The International Sale of Goods¹⁸¹ and the United Nations Convention on the Use of Electronic Communications in International Contracts.¹⁸² The Convention on Contracts for the International Sale of Goods disregards the concerns about the nationality, civil, and commercial characteristics of the parties.

KICA disregarding the nationality, civil and commercial characteristics of the parties makes them appear to be in equal footing when it comes to international online trade. This is also one of the ways to guarantee consumer protection rights under international online trade. Additionally, the Convention stipulates that the contract need not be in writing but rather can be witnessed by someone else. KICA should also provide for provisions that will enable international online trade contracts to take another form such as oral.

The United Nations Convention on the Use of Electronic Communications in International Contracts stipulates that electronic contracts have the same effect as the written ones. The Convention also recommends a harmonised electronic commercial law in the member states. KICA should provide for provisions that distinguish invitation to treat from offers. For example, an

¹⁸⁰ Chapter 411A of the Laws of Kenya

¹⁸¹ 1980 in Vienna

¹⁸² 2005 in New York

advertisement on the website of a trader should be considered an invitation to treat and not an offer.

KICA appreciates the fact that communication in electronic commerce is done electronically.

However, considering the fact that international online contracts are entered into by parties who are in various parts of the world and their timelines vary, it can also define the time upon which the contract comes into effect.

In addition to the above illustration, this research proposes that the time of the contract should be the time that the electronic devices of the parties receive the offer and acceptance through the electronic messages. Furthermore, it is advisable that a registered recipient or sender of the electronic message should include their registered residence when responding to the message and in the contract.

A natural sender or recipient of such an electronic message should also include their place of residence. KICA should provide for remedies where a party breaches the online contract. It should also allow the parties to agree on the applicable laws on the contracts. Where the parties fail to agree, KICA should guide on the appropriate law that should be implemented. Such can be the provisions of an international instrument such as the Convention on the Use of Electronic Communications in International Contracts or the provisions of KICA.

KICA should borrow from the United Kingdom's Electronic Commerce Directive Regulations on the terms and conditions of the contract. The terms and conditions of the contract should not be ambiguous and any ambiguity should be interpreted on a *contra proferentem* basis. Further, KICA should provide that any person who wishes to supply products online should be registered with the authority and provide the necessary details including their registered place of residence, the address and contacts and the services or goods that they intend to supply.

KICA should also provide for the procedure upon which a consumer can cancel or rescind a contract. For example, the Act should make it a right of the consumer to cancel a contract entered into with the supply between the date the contract was entered upon and seven days after the delivery date where he or she finds that the goods are different from what he or she ordered. The Act should also grant the Consumer the right to refund where he or she cancels the contract.

Finally, where the online supplier does not provide the consumer with the provision on how to cancel the goods in the contract, the consumer should be allowed to rescind the contract. The supplier should also be allowed to claim damages where the consumer is at fault. For example, where he or she cancels the contract having damaged the goods on receiving them or cancelling the contract after the prescribed number of days.

5.2.2 Formalities of International Online Contracts

5.2.2.1 International online Contract to be in Writing

The Law of Contract requires some contracts to be in writing, for example, contracts on issues dealing with lands such as transfer or lease. Thus, where an individual wants to buy a parcel of land, he or she will put the agreement into writing. KICA is also clear that electronic commerce needs to be in writing. However, the Act should consider the fact that some agreements are entered into verbally via voice or video call and it should, therefore, include a verbal contract as one of the formalities of international online contracts.

5.2.2.2 Signature should be a Requirement

KICA allows the use of an electronic signature as one of the means of executing a contract. However, KICA should expand its meaning of signature to include an electronic symbol, electronic voice or a logical process that has been adopted by the party as his or her way of signing the

document.¹⁸³ KICA also lacks regulations pertaining to electronic signature. The Cabinet Secretary responsible under the Act should fast track the formation of the regulations.

KICA should borrow a leaf from the United Kingdom's Regulations on Electronic Signature.

KICA'S Regulation should indicate what the signature providers are supposed to meet first to be certified to utilize the electronic signature. Though this might prove to slow down international online trade, it is one of the means that the government can use to protect its consumers by ensuring that the electronic signatures by the purported online traders are legit.

5.2.3 Taxation of the international online trade

Kenya's tax law including the Income Tax Act, Value-Added Tax, Tax Procedure Act and the Excise Duty Act ought to be revised to include taxation of the online platform. Moreover, the laws should be amended to conform to the provisions set in the Income Tax (Digital Service Tax) Regulations, 2020. For instance, the Acts should expressly acknowledge online trade and provide for a systematic taxation of the revenue generated through the trade. The Income Tax (Digital Service Tax) Regulations, 2020 should expound on the definition of an online buyer, and online seller and when such trade can be taxed. The amendment should be within the perimeters set in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in order to avoid double taxation of the online traders.

Moreover, taxing of the online traders should abide by the bilateral treaties that Kenya has ratified between it and the states from which the international online traders operate. This will enable the government to retrieve the huge amounts of taxes lost through tax evasion. In the absence of bilateral treaties between Kenya and those states, Kenya can initiate the making of the treaties to

¹⁸³ Uniform Electronic Transactions Act of the United States

guide the two states on how to go about tax collection from the international online traders. Online trade is here with us in the 21st Century, the sooner Kenya secures its online traders the more revenue will be generated, and consumers will be protected.

5.2.4 Adequate provision of Consumer Protection Rights and Fair Competition in Trade

It is necessary for Kenya to include in its legislations provisions that expressly provide for protection of consumers in the international online trade. Specific laws meant for this specific sector may guide traders as to how to meet their obligations towards international online consumers. As it is now such protection can only be inferred from provisions meant for general consumers of local products and services.

5.2.5 Adequate provision of Intellectual Property Protection Rights

International online trade involves a lot of digital products and services. Some of these products are illegally distributed online hence raising a matter of breach of intellectual property rights. While there exist both local and international legal instruments aimed at protecting these rights, the implementation bit is the problem. There are thousands of online platforms distributing materials that would help generate revenue for actual owners. Laws and mechanisms should be put in place to both locally and internationally to help monitor infringement online and help curb the same.

5.2.6 Inclusion of requirement for Dispute Resolution Mechanisms in online contracts

Just like it is necessary to include a dispute resolution mechanism in traditional international online contracts, it would be wise to also make it a requirement for international online contracts. Kenya can amend its laws to make it a requirement for online traders to allow a consumer choose a mode and forum for dispute resolution in case of any breaches. International legal instruments should also make this provision mandatory to help offer protection to international online consumers.

5.2.7 Expansion of internet access by the government

It should be noted that the government through its Kenya National Digital Master Plan 2022-2032 has made strides in infrastructural development aimed at improving access to technology-related services. Various international organizations have also been supportive in building technological infrastructure in various parts of the world, all aimed at improving access to the same. However, this access is still limited. Kenya on its part still has a huge part of it with little or no access to internet and telecommunication in general. It should endeavour to expand internet access by building more infrastructure aimed at enabling more access.

5.2.8 Legal and operational measures to be put in place to curb cybersecurity

This being the biggest concern when it comes to online transactions whether local or cross-border, it is prudent to have laws, organizational structures and operational structures aimed at ensuring security of online platforms. Of importance are areas of data protection and modalities of forming an online contract. Kenya already has in place the Data Protection Act, the Computer Misuse and Cybercrimes Act, KICA among others. The biggest concern of this research is the implementation of these measure when it comes to international online trade. It becomes quite a challenge for Kenyan institutions to follow up on data emanating from or being stored and processed in foreign jurisdictions. Laws should be put in place to cater for collaboration with foreign jurisdictions on data processing. Equally, international instruments should provide for such a collaboration among different international jurisdictions when it comes to international online trade. Sharing of such data should be agreed upon as long as it is done within the law and where necessary with the consent of the owner.

5.2.9 Legal and operational measures to be put in place to curb online money laundering

As already indicated in this research, money laundering is a rising matter in international online

trade. With the advent of various payment modes including cryptocurrency, it is necessary for Kenya and other countries to come up with measures to prevent the same. It should be noted that some payment modes are not legal in some jurisdictions although they are still used by the consumers of such jurisdictions. Failure to fully regulate online businesses and payment modes opens loopholes that can be used by money launders to their advantage. Money laundering laws should therefore be expanded to include international online trade.

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