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The Adequacy of the Tanzanian Law on E-commerce and E-contracting: Possible Solutions to be Found in International Models and South African Legislation

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Thesis Presented for the Degree of
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Declaration

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other University, that it is my work in design and execution and that all the materials contained herein have been duly acknowledged. I would like to state, however, that on 16 November 2009 my Lap Top, containing a draft copy of this thesis, was stolen when I was in Dar-es-Salaam, Tanzania and the matter was reported at Magomeni Police Station. A Police File No MAG/RB/20592/09 was opened.

Deo John Nangela

Date

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‘Knowledge is in the end based on acknowledgement.’
Ludwig Wittgenstein (1889-1951)

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Abstract

‘Law is order, and good law is good order.’

Aristotle (384 BC – 322 BC)

As the world moves ever faster towards digitisation and networked arrangements, electronic contracting, and other means of trading electronically, are now accepted methods for doing business. This technology-driven phenomenon has transformed the way people transact business globally. In many sub-Saharan African legal systems, however, the development of e-commerce appears to be slow, due partly to a lack of regulatory frameworks supporting electronic transactions. Tanzania is a system in point. Its law of contracts, which is in essence based on an outdated version of English common law, is still designed to handle only conventional modes of transacting business, namely, the use of paper-based documents.

This dissertation examines Tanzania’s legal framework in the light of the modern information and communication technologies, especially the Internet and e-commerce. The main goal is to assess the adequacy of the existing law and to provide recommendations for reforms that will reflect the borderless nature of e-contracts. These reforms must ensure the certainty and predictability needed for successful cross-border commerce. Achievement of these aims will build confidence and trust on the part of business entities and consumers, and, in addition, will enhance free trade, strengthen the growing market-based economy, and integrate Tanzania into the global economy. Throughout the dissertation it is evident that Tanzania’s poorly developed law affects economic growth and the pursuit of successful market-oriented economic policies.

The dissertation analyses issues in the law of contract including: formal requirements; difficulties arising from the use of e-agents; problems of evidence; inadequate consumer protection; and inappropriate jurisdiction and choice of law rules. To overcome these problems the thesis turns to international model laws, notably the UNCITRAL Model Laws on E-commerce (1996) and E-signature (2001) and the UN Convention on the Use of Electronic Communications in International Contracts (2005), together with initiatives in the US and the EU. It is argued that, by adopting such international measures, Tanzania can find a ready-made answer to its problems and, at the same time, contribute towards the convergence of municipal laws.

As it happens, South Africa is one of a few countries in sub-Saharan Africa to have developed a suitable legal framework to cater for e-commerce, and it made extensive use of the international models discussed above. The dissertation therefore analyses the South

African legislation in point, the Electronic Communications and Transactions Act of 2002, with a view to identifying the problems that the country sought to address – especially contract, consumer protection and conflict of laws - and the lessons that Tanzania may learn from this legislation. Overall, the South African Act reveals a pattern of problems analogous to those identified in Tanzania, thereby suggesting that African countries share similar challenges despite very different legal systems.

The thesis finds that the existing international frameworks for regulating e-commerce provide reliable methods for solving the shortcomings of Tanzanian law. Indeed, by adopting international models, Tanzania may contribute to the achievement of a harmonised global approach, which will, in turn, promote better international trade.

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Acronyms

AISI.....	African Information Society Initiative
ADF.....	African Development Forum
AC.....	Appeal Cases (Law Report)
All ER	All England Reports
ASEAN	Association of Southeast Asian Nations
ADP.....	Automatic Data Processing
AU.....	African Union
B2B	Business-to-Business (e-commerce)
B2C	Business-to-Consumers (e-commerce)
B2G.....	Business-to-Government (e-commerce)
CAD/CAM.....	Computer–Aided Design/Computer-Aided Manufacturing
Cap	Chapter
C2C	Consumer-to-Consumer (e-commerce)
ChD.....	Chancery Division
CMLR	Commonwealth Law Reports
CRDB.....	Cooperative and Rural Development Bank
CDTT	Centre for the Development and Transfer of Technology
COSTECH	Commission for Science and Technology
CISG	UN Convention on Contracts for the International Sale of Goods (Vienna, 1980)
eKLR.....	Electronic Kenyan Law Reports

EDI.....Electronic Data Interchange

ERPEconomic Recovery Programme

ESAP.....Economic and Social Action Programme

EUEuropean Union

EAEast African (Law Reports)

EAC.....East African Community

ECOWAS.....Economic Community of West African States

ECA.....Economic Commission for Africa

ECTA..... Electronic Communications and Transactions Act No.25 of 2002 (South Africa)

EULA.....End User Licence Agreement

FRD.....Foundation for Research Development

GN.....Government Notice

HCDHigh Court Digest

ICTInformation and Communication Technology

ICANN.....Internet Corporation for Assigned Names and Numbers

ICASA.....Independent Communication Authority of South Africa

IFTD.....Integrated Framework for Trade Development

IT.....Information Technology

ITUInternational Telecommunication Union

ISPsInternet Service Providers

ISPA.....Internet Service Providers Association

IMF International Monetary Fund

ILPF Internet Law & Policy Forum

KB Kings Bench

LDC Less Developed Countries

Mbps Mega bits per second (which refers to the speed of data transfer)

NEPAD New Partnership for Africa's Development

NSTP National Science and Technology Policy

NCCUSL National Conference of Commissioners on Uniform State Laws

OECD Organisation for Economic Co-operation and Development

OHADA Organisation for Harmonisation of Business Law in Africa

P2P Peer-to Peer (Systems)

PPRA Public Procurement Regulatory Authority

PRSP Poverty Reduction Strategy Paper

QBD Queen's Bench Division

R.E Revised Edition

SACU South African Customs Union

SADC Southern Africa Development Community

SAFT South African Foreign Trade Organisation

SIPRS SADC ICT Policy Regulatory Support Program

SLR Singapore Law Report

SATRA South African Telecommunication Regulatory Authority

SMEs..... Small and Medium-sized Enterprises

SWIFT..... Society for Worldwide Interbank Financial Telecommunication

TLR..... Tanzania Law Reports

TPB Tanzania Postal Bank

TANESCO Tanzania National Electricity Supply Corporation

TCRA..... Tanzania Communications Regulatory Authority

TRALAC..... Trade Law Centre for Southern Africa

UETA..... United State Uniform Electronic Transactions Act

UCITA Uniform Computer Information Transactions Act

UN..... United Nations

UNECA..... United Nations Economic Commission for Africa

UNCITRAL United Nations Commission on International Trade Law

UNCTAD..... United Nations Conference on Trade and Development

UNDP..... United Nations Development Programme

UNESCO..... United Nations Educational, Scientific and Cultural Organisation

UNIDROIT International Institute for the Unification of Private Law

USAID United States Agency for International Development

USA..... United States of America

US United States

WLR..... Weekly Law Report

WGEC..... Working Group on Electronic Commerce

WTO World Trade Organisation

International Conventions and Other Foreign Legal Instruments

Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001) OJ L12/1 (Brussels I). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF> (as accessed on 20/6/211)).

Regulation (EC) No 593/2008 of the European Parliament and the Council of June 2008 on the Law Applicable to Contractual Obligations (Rome I). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0593:EN:NOT> (as accessed on 20/6/2011).

The Hague Convention on Choice of Court Agreements (signed 30 June 2005, not yet entered into force) (2005) 44 ILM 1294 (2005 Hague Choice of Court Convention).

The UN Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/RES/60/21 (Dec. 6, 2005) (available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (as accessed on 3/6/2009)).

United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No.98-9, 1489 U.N.T.S. 59, (1984), (reprinted in 3 *International Legal Materials* (1980) 668). (Available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (as accessed on 20/6/2010)).

International Model Laws

U.N. GAOR, Comm. on Int'l Trade Law, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, G.A. Res. 51/162, U.N. Doc. A/51/628 (reprinted in 36 *ILM* 200 (1997)).

UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, U.N. Sales No. E.02.V.8 (2001), Resolution 56/80 adopted by the 85th plenary meeting of the General assembly (December 12, 2001), (available at <http://www.uncitral.org/en-index.htm> (as accessed on 15/6/2008)).

Foreign Legislation

USA Legislation

Uniform Computer Information Transactions Act (UCITA) (2002) (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010)).

Uniform Electronic Transactions Act §7, 7A U.L.A. 211 (2002), (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010)).

United Kingdom

Electronic Communications Act (2000)

Tanzania

The Law of Contract Act Cap 345[R.E. 2002]
The Sale of Goods Act Cap 216 [R.E.2002]
The Fair Competition Act, No 8 of 2003.

Canada

Canadian Uniform Electronic Commerce Act 1999 (UECA) (available at <http://www.law.ualberta.ca/alri/ulc/acts/eUECA.htm> (as accessed 12/8/ 2007))

Australia

Electronic Transactions Act, 1999 (Act No 162 of 1999 as amended by Act No. 33 of 2011) (available at <http://www.comlaw.gov.au/Details/C2011C00445/Download> (as accessed on 20/7/2011)).

South Africa

Electronic and Communications Transactions Act (ECTA) (Act 25 of 2002) Proclamation No. R 68 of 2002, Government Gazette No.7449 (available at http://www.internet.org.za/ect_act.html (as accessed on 25/7/2011)).

Consumer Protection Act, No.68 of 2008 (Government Gazette No 32186 29 April 2009) (available at http://www.saflii.org/za/legis/num_act/cpa2008246.pdf (as accessed on 16/7/2011)).

Table of Cases

Australian & New Zealand Cases

Laurel v Carrol (1958) 98 CLR 310.

BP Refinery Western Port v Shire of Hastings (1977) 180 CLR 266.

Rae v Commonwealth Disposals Commission (1951) 84 CLR 377.

Wenkheim v Arndt (NZ) 1 JR 73 (1873).

Canadian Cases

Wardsworth v McCord (1886) 12 SCR 466.

Rioux v Coulombe (1996) 19 ETR (2d) 201 (Que.SC).

English Cases

Adams and Others v Cape Industries Plc & Another [1990]1 Ch 433.

Adams v Lindsell [1818] 1 B & Ald 681.

Amin Rasheed Shipping Corporation v Kuwait Insurance Co [1984] AC 50.

Apple Corps Ltd v Apple Computer Inc (No Challenge: Preliminary Issue) [1992] FSR 431.

Aaronson Brothers Ltd v Maderera del Tropico/SA [1957] 2Lloyd's Rep. 159.

Armadora Occidental SA v Horace Mann Insurance Co [1977] 1 WLR 250.

Aratra Potato Co Ltd v Egyptian Navigation Co ('The El Amria') [1981] Lloyd's Rep 119, CA.

Attock Cement Co Ltd v Romanian Bank for Foreign Trade [1989] 1 WLR 1147.

Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Report 87.

Bell v Kennedy ((1868) LR 320 (HL).

Bonython v Commonwealth of Australia [1951] AC 201.

Bell v Lever Brothers Ltd [1932] AC 161.

Benaim & Co v Debon [1924] AC 514.

Beswick v Beswick [1966] 3All ER 1 (CA).

Boissevain v Weil [1949] 1 KB 482.

Blackpool & Flyde Aero Club Ltd v Black Borough Council [1990] 1WLR119.

Bryne v Van Tienhoven(1880) 5C P D 334.

British and American Telegraph Co v Colson (1817) LR 6 Exch 108.

Bronkibon Ltd v Stahag Stah und Stahlwarenhandels-gessellschaft mbH [1983] 2 AC 34.

Catterpillar Financial Services v SNC Passion [2004] 2Lloyd's Rep 99.

Carvalho v Hull Blyth (Angola) Ltd [1979] 3 All ER 280.

Carlill v Carboloc Smoke Ball [1893] 1QB 256.

Carver v Saudi Arabian Airlines [1999] 3All ER 61 (CA).

Chellaram v Chellaram (No. 2) [2002] 3 All ER 17.

Chevron International Oil Co v A/S Sea Team (The TS Havprins) [1983] 2 Lloyd's Rep 356.

Couturier v Hastie (1856) 5 HL Cas 673.

Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 All ER 716.

Colt industries v Sarlie (No. 2) [1966] 3 All ER 85.

Connely v RTZ Corp plc [1998] AC 854.

Coastlines Ltd v Hudig & Veder Chartering NV [1972] 2QB 34.

Cordova Land Co Ltd v Victor Brothers Inc [1966] 1 WLR 793.

Cleveland Museum of Art v Capricorn International SA [1990] 2 Lloyd's Rep.166.

Compagnie d'Armement Maritime v Compagnie Tunisienne de Navigation [1971] AC 572 (HL).

Craig vs Kanssen (1943) 1 All E. R 108.

Cundy v Lindsay [1897] AC 456.

Deschamps v Miller [1908] 1 Ch 856, 863.

Donohue v Armco Inc [2000] 1 All ER (Comm) 641.

Dunbee Ltd v Gilman & Co (Australia) Pty Ltd [1968] 2 Lloyds Rep 394.

Dunlop Pneumatic Tyre v AG Gudell [1902] 1KB 715.

Dutton v Poole 83 ER 523.

Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd [1918] AC 292.

Entores v Miles Far East Corporation [1955] 2 QB 327 (CA).

Esso Petroleum Ltd v Commissioners of Customs & Excise [1976] 1 All ER 117.

E F Hutton & Co v Moffarij [1989] 1 WLR 488.

Foster v Driscoll [1929] 1 KB 470.

Fisher v Bell [1961]1 QB 394.

Grupo Torras SA and Torras Hostench London Ltd v Sheikh Fahad Mohammed Al-Shabah [1996] 1 Lloyd's Rep. 7.

Grainger & Son v Gough [1896] AC 325.

Gienar v Mieyer (1796) 2 Hy Bl 603.

George Monro Ltd v American Cyanamid & Chemical Corporation [1944] 1 All ER 386 (CA).

General Insurance Co (UGIC) v Group Josi Reinsurance Co SA (Case C-412/98) [2001] QB 68.

Harris v Tylor [1915] 2 KB 580.

Harrods v Dow Jones [2003] EWHC 1162 (QB).

HRH Maharanee Seethadevi Gaekwar of Baroda v Wieldenste [1972] 2QB 283.

Household Fire & Carriage Accident Insurance Co Ltd v Grant (1879) 4 Ex D 216.

Henwood v Barlow Clowes International Ltd (In Liquidation) & others (2007) EWHC 1579 (Ch).

Henthorn v Fraser [1892] 2Ch 27.

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98.

IRC v Bullock [1976] 1 WLR 1178.

IRC v Duchess of Portland [1982] Ch 314.

In Re Annesley Davidson v Annesley [1926] Ch 692.

Islamic Arab Insurance Co v Saudi Egyptian American Reinsurance Co [1987] 1 Lloyd's Rep 315.

Jacobs v Crédit Lyonnais (1884) 12 QBD 589.

Jaques v Lloyd D George A Partners Ltd [1968] 1 WLR 625.

JSC Zestafoni Nikoladze Ferroalloy Plant v Ronly Holdings Ltd [2004] 2 Lloyd's Report 335.

Kennedy v Lee [1817] 3 Mer 441.

Kleinwort Son & Co v Ungarische Baumwolle Industrie [1939] 3 All ER 38 (CA).

Kuwait Airways v Iraqi Airways (No 4 & 5) [2002] 2 AC 883.

L J Korbetis v Transgrain Shipping BV [2005]EWHC 135 (QB).

La Bourgogne [1899] AC 431.

Lemenda Ltd v African Middle East Co [1988] QB 448.

Littauer Glove Corporation v F W Millington (1920) Ltd (1928) 44 TLR 746.

Libyan Arab Foreign Bank v Bankers Trust Co [1989] QB 728.

Lord Advocate v Huron & Erie Loan & Savings Co [1911] SC 612.

Lubbe v Cape plc [2000] 1 WLR 1545 (HL).

Mackender v Feldia AG [1967] 2 QB 590.

MacShannon v Rockware GlassLtd [1978] 1 All ER 625.

Mercedes-Benz AG v Leiduck [1996] 1 AC 284.

Mason v The Provident Supply &Clothing Co [1913] AC 724.

Musawi v RE International (UK) Ltd [2008] 1All ER (Comm) 607.

Mount Albert Borough Council v Australasian Temperature & General Mutual Life Assurance Society[1938] AC 224.

Newby v Van Oppen Co (1872) LR 7 QBD 293.

Nyali Ltd v Attorney General [1955] 1 All ER 646.

Oppenheimer v Louis Rosenthal & Co AG [1937] 1All ER 23.

Power Curber v Bank of Kuwait [1981] 3All ER 607.

Pena Copper Mine Ltd v Rio Tinto Co Ltd (1911) 10 LT 846.

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1All ER482.

Payne v Cave (1789) 3 TR 148.

R v International Trustee for the Protection of Bondholders Akt [1937] AC 500.

Raffles v Wichelhaus (1864) 2H & C 906.

Reuben v Time [2003] EWHC 1430 (QB).

Re Oriel Ltd [1986] 1 WLR 180.

Re Bonacina [1902] 2Ch 394.

Re Emery's Investment Trusts [1959] Ch.410.

Rossano v Manufacturer's Life Insurance Co [1963] 2 QB 352.

Richardson v Mellish 130 Eng. Rep. 294 (Ex 1824).

Richardson Spence & Co v Rowntree [1984] AC 217.

R v Wayte (1982) 76 Cr App R 110.

Roussillon v Roussillon (1880) 14 Ch D 315.

Regazzoni v K C Sethia Ltd [1958] AC 301.

Razelos v Razelos (No.2) [1970] 1 WLR 392.

Ralli Bros v Compania Naviera Sotay Aznar [1920] 2 KB 287.

Re Imperial Land Co of Marseilles (1872) LR 7 Ch App 587.

Re Dulles' Settlement (No 2) [1951] Ch 842.

R v International Trustee [1937] AC 500 (HL).

Saab Saudi American Bank [1999] 1 WLR 1861 (CA).

Seaconsfar Far East Ltd v Bank Markhazi Jomhouri Islami Iran [1994] 1 A C 438.

Scriven Bros v Hindley & Co [1913] 3 KB 564).

Smith v Hughes (1867) LR 6QB 597.

Spiliada Maritime Co v Cansulex Ltd [1987] AC 460.

Solle v Butcher [1950] 1KB 671.

Sim v Robinow (1892) 19 R 665.

Shah v Barnet London Borough Council [1983]2 AC 309.

South India Shipping Corporation Ltd v Export-import Bank of Korea [1985] 1 WLR 585.

St Pierre v South American Stores (Gath and Chaves) Ltd [1936] 1 KB 382.

Spencer & Others v Harding & Others (1869-70) LR 5C.P 561.

Tomkinson v 1st Pennsylvania Banking & Trust Co [1961] AC 1007.

The Moorcock (1889)14 P.D. 64.

The Brimmes [1975] QB 929.

The Abidin Daver [1984] 1WLR 196.

The Hagen [1903] P. 189.

The Metamorphosis [1953] 1WLR 543.

The Atlantic Star v Bona Spes [1974] 2 All ER 175.

The Komminos S [1991] Lloyd's Rep.370 (CA).

Unterweser Reederei GmbH v Zapata Off-Shore Company [1968] 2 Lloyd's Rep.158.

Vervaeke v Smith [1983] 1 AC 145,164.

Vita Food Products v Unus Shipping Co [1939] AC 277 (PC).

Vogel v R & A Kohnstamm Ltd [1973] 1QB 133.

Whicker v Hume[1858] 7 HLC 124, 160.

Whitworth Street Estates (Manchester Ltd) v James Miller & Partners Ltd [1969] 1WLR 337.

EU Cases (ECJ)

Case C-103/05 *Reisch Montage* [2006] ECR I-6827.

Case C-386/05 *Color Drack* [2007] ECR I-3699.

Case C-533/07 *Falco Privatstiftung and Rabitsch v Gisela Weller-Lindhorst* (available at <http://conflictoflaws.net/2009/ecj-judgments-on-brussels-i-regulation/> (as accessed on 31/8/2010)).

Case 14/76 *C-De Bloos v Bouyer* [1976] ECR 1497.

Case 12/76 *Industrie Tessili Italiana Como v Dunlop* [1976] ECR 1473.

Case C-440/97 *Groupe Concorde* [1999] ECR I-6307.

Case 33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183.

Case C-103/05 *Reisch Montage* [2006] ECR I-6827.

Case C-283/05 *ASML* [2006] ECR I-12041.

Case C-386/05 *Color Drack* [2007] ECR I-3699.

Case C-167/00 *Henkel* [2002] ECR I-8111.

Case C-89/91 *Shearson v TVB* [1993] ECR I-139.

ECJ, 12/14/1976 C-24/96, *Estas Salotti v Rüwa* ECR 1976, 1831.

ECJ 12/14/1976, *Serguorav v Bonakdarian* ECR 1976, 1851.

ECJ 03/16/1999, C-159/97, *Trasporto Castelletti v Trumpy SpA* ECR 1999 I-1597.

Hotel Alpenhof GesmbH v Oliver Heller (Case C-144/09) (2009/C 153/47) (Pending).

Ingmar GB Ltd v Eaton Leonard Technologies Inc C-381/98; [2000] ECR I-9305.

Petra Enger v Janus Versand GmbH (Judgment of 20th January 2005, C-27/02, ECR 2005 I-481 Ruling).

Germany Case

Nigerian Artefacts case, BGH 22.6.1972, NJW 26, 1575 (1972).

Kenyan Cases

Kisumuwalla Oil Industries Ltd v Pan Asiatic Commodities PTE Ltd & Another [1996] eKLR (available at http://www.kenyalaw.org/CaseSearch/view_preview.php?link=9424083937230425466&words (as accessed on 5/5/2010)).

Metra Investments Limited v Gakweli Mohamed Warrakah [2006] eKLR (available at <http://www.kenyalaw.org/> (as accessed on 5/5/2010)).

Peter Mburu Echaria v Priscilla Njeri Echaria [2007]eKLR 1, 5 (available at <http://www.fidakenya.org/cases/Echaria%20v%20Echaria.pdf> as accessed on 5/5/2010).

Raython Aircraft Credit Corporation vs Air Al-Faraj Ltd [2005] 2 KLR 47.

Valentine Investment Company Ltd v Federal Republic of Germany [2006] eKLR.

Nigerian Cases

Alhaji Aminu Altine & Northern General Contractors Ltd v Afribank Plc CA/K/261/96 (available at http://courtofappeallibrary.gov.ng/index.php?option=com_sobi2&sobi2Task=sobi2Details&catid=3&sobi2Id=3908&Itemid= (as accessed on 6/5/2011).

Modukolu vs Nkemdilim (1962) 1 All N.L. 587.

Pandit v Sekatawa 1964 (2) ALR Comm.25.

Skenconsult (Nig) Ltd vs Godwin Senkody Ukey (1981) 1. SC 6.

Singaporean Cases

Chwee Kin Keong and Others v Digilandmall.com Pte Ltd [2004] 2 SLR 594.

SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd [2005]SGHC58.

Scottish Cases

Mason v Benhar Coal Co (1882) 9 R 883.

USA Cases

American Online v Superior Court 90Cal App 4th 1 (Cal App 1 Dist 2001).

Arbitron Co v EW Scripps Inc 559 F Supp 400, 404 (SDNY 1983).

Asahi Metal Industries Co v Superior Court 480 US 102 (1987).

Bancroft & Masters Inc v Augusta Nat'l Inc 223 F 3d 1082, 1087 (9th Cir 2000).

Bank Brussels Lambert v Fiddler Gonzales & Rodriguez 171 F3d 779 (2Cir 1999).

Beverly Hills Fan Co v Royal Sovereign Corp 21 F3d 1558, 1569 (Fed Cir), cert. dismissed, 512 US 1273 (1994).

Bunn-O-Matic v Bunn Coffee Service 1998 US Dist Lexis 7819 (CD Ill 1998).

Burger King Corp v Rudzewicz 471 US 462 (1985).

Burham v Superior Court 495 US 604, 610 n1, 110 SCt 2105,2110 n.1, 109 L Ed 2d 631 (1990).

Bush v National School Studios 139 Wis 2d 635 (Wis1987), 642.

*Calder v Jones*465 US 783 (1984).

CompuServe Inc v Patterson 89 F 3d 1267 (6th Cir 1996).

Corinthan Pharmaceutical System Inc v Lederie Laboratories 724 F Supp 605 (SD Ind 1989).

ESAB Group Inc v Centricut LLC 34F Supp 2d 323 (DSC 1999).

Gulf Oil Corp v Gilbert 330 US 501.

Hasbro Inc v Clue Computing Inc 994 F Supp 34 (D Mass 1997).

Hilton v Guyot 115 US 113, 163-164, [1995].

Hotmail Corportation v Van Money Pie Inc C 98-20064 (ND Cal April, 20 1998).

Howard v Missouri Bone and Joint Centre Inc 373 Ill. App 3d 738.

IDS Life Ins Co v SunAmerica Inc 958 F Supp 1258, 1268 (ND Ill 1997).

Inset Systems v Instruction Set 937 F Supp 161 (D Conn 1996).

International Shoe Co v Washington 326 US 310, 318 (1945).

Keds Corp v Renee Int'l Trading Corp 888 F2d 215, 218 (1st Cir 1989).

Koster v Lumbermen's Mutual Casualty Co 330 US 518.

Larochelle v Allamian 361 Ill App 3d 217, 225 (2005).

Lefkowitz v Great Minneapoliss Surplus Stores (1957) 80 NW2d689.

Lim v. The .TV Corporation International (Cal. Ct. App. 2002).

M/s Bremen v Zapata Off-Shore Co (1972) 407 US 1.

Mactier's Adm'rs v Frith 6 Wend 103 (NY 1830).

Maritz Inc v Cybergold Inc 947 F Supp 1328 (ED Mo 1996).

McDonough v Fallon McElligott Inc 40 US PQ 2d 1826, 1828-29 (SD Cal 1996).

McGlinchy v Shell Chem 845 F 2d 802, 817 (9th Cir 1988).

Millennium Enterprises v Millennium Music 33 F Supp 782 2d 907 (D Or 1999).

Morrison v Thoelke 155 So 2d889 (1963).

Panavision Int'l v Toeppen 938 F Supp 616 (CD Cal 1996) affirmed, 141 F3d 1316 (9th Cir. 1998).

Pennoyer v Neff 95 US 714 (1877).

Perkins v Benguet Consolidated Mining Co 324US 437, 96 L Ed 485 (1952).

Piper Aircraft Co v Reyno 454 US 235.

Pollstar v Gigmania Ltd 17F Supp 2d 974(ED Cal 2000).

Publications International Ltd v Burke/Triolo Inc 121 F Supp 2d 1178 (ND Ill 2000).

Register.com Inc v Verio Inc 126 F Supp2d 238 (SDNY 2000)

Remick v Manfredy 238 F 3d 248, 260 (CA 3 (Pa), 2001).

Resolution Trust Corp v First of American Bank 796 F Supp 1333, 1338 (CD Cal 1992).

Schwarzenegger v Fred 374 F 3d 797, 802 (CA9 (Cal) (2004).

Schwarzenegger v Fred Martin Motor Co 374 F3d 797, 802 (9th Cir 2004).

Specht v Netscape Communications Corp 150F Supp 2d 585 (SDYN 2001), aff'd, 306 F 3d 17 (2d Cir.2002).

State by Humphrey v Granite Gate Resorts 1996 WL 767431 (Minn Dist Ct 1996).

Step-Saver Data Systems Inc v Wyse Technology 939 F 2d 91, 97 (3d Cir 1991) 99.

The Ticketmaster Corp v Ticket.com Inc 54USPQ2d (2000) USDist LEXIS 4553 (CD Cal March 27, 2000).

United States v Warshak, et al Nos. 08-3997/4085/4087/4212/4429; 09-3176 (at page 19) available at <http://www.ca6.uscourts.gov/opinions.pdf/10a0377p-06.pdf> (as accessed on 27/6/2011).

Williams v America Online Inc No 00-0962, 2001 WL 135825 (Mass Super Ct 8 February 2001).

Winfield Collection v MacCauley 105 F Supp 2d 746 (ED Mich 2000).

World-Wide Volkswagen Corp v Woodson 444 US 286,297, 100 S Ct 559, 62 LEd2d 490 (1980).

Yahoo! Inc v La Ligue Contre le Racisme et L'antisemitisme a French Association et al 145 F Supp 2d 11681171 (ND Cal 2001).

Zippo Manufacturing Company v Zippo Dot Com Inc 952 F Supp 1119 (WD Pa 1997).

Tanzanian & Other East African Cases

Alidina v Globe Mercantile Corporation Ltd [1968] EA 114 (T).

Alfi EA Ltd v Themis Industries & Distributors Agency Ltd [1984] TLR 256

Alibhai Aziz v Bhatia Brothers Ltd (Misc Civil App No 1 (1999) CAT (Unreported).

Abualy Alibhai Azizi v Bhatia Brothers Ltd [2000] TLR (CA).

American Express International Banking Corporation v Atul [1990-1994] EA 10.

Busoga Millers & Industries Ltd v Purshottam Patel 22 EACA 348.

Burn Blane Limited v United Construction Company Ltd [1967] HCD 156.

Cooper Motors Corp Ltd v Arusha International Conference Centre [1991] TLR 165 (CA)

Dar-es-Salaam Motor Transport Co Ltd v Mehta and Others [1970] EA 596.

Dodd v Nanda [1971] EA 58.

Govindji Mulji Dodhia v National & Grindlays Bank Ltd & Another [1970] EA 195.

GBL & Associates Ltd v Director of Wildlife Ministry of lands, Natural Resources and Tourism and Two Others [1989] TLR 195 (HC).

Ghulum Kadir v British Overseas Engineering Co (EA) Ltd [1957] EA 131.

Hussein Bachoo v Clove Growers Association of Zanzibar [1957] EA 193.

In the Matter of Patrick Ernest Hofmann, an Infant, Misc Civ Cause 39- D-71; 25/9/71; 25/9/71;(1971) HCD No. 409.

Juwata v Kiuta Civil Appeal No 29 of 1987 (Unreported).

Jirvaj v Dervaj [1968] EA 263.

Jupiter General Insurance Co v Kasanda Cotton Co 1966 (1) ALR Comm 292.

Kanti Printing Works v Tanga Municipal Council [1970] HCD n253.

Karachi Gas Co Ltd v H Issaq [1965] EA 42.

Lalitmohan Mansukhlal Bhatt v Prataprai Luximichand & Another [1964] EA 414.

Leslie and Anderson (Nairobi) Ltd v Kassam Jivraj & Co Ltd 17 EACA 84.

Leslies & Anderson Ltd v Vallabhads Kalidas & Co Ltd (1950) 17 EACA 30 (U).

Mayers v Akira Ranch Ltd [1972] EA 347.

Merali Hirji & Sons Ltd v General Tyre (EA) Ltd [1983] TLR 175.

Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (No.2) [1970] EA 469.

Nitin Coffee Estates Ltd & others v United Engineering Works Ltd & another [1988] TLR 203.

Pandit v Sekatawa 1964 (2) ALR Comm.25.

Patterson and another v Kanji (1956) EACA 106.

Patel v Lawrenson [1957] EA 9, Kassam v Kassam [1960] EA 1042.

Patel v Marealle and another Court of Appeal (CA) 5/84 (unreported).

Rashid Moledina & Co (Mombasa) Ltd v Hoima Ginnors Ltd [1967] EA 645.

Shirin Rajabali Jessa v Alipio Zorilla [1973] LRT no.84.

Star Service Station Co Ltd v Tanzania Railways Corporation [1989] TLR 1 (HC).

Tanzania Air Services Limited v Minister for Labour, Attorney General and the Commissioner for Labour [1996] TLR 217 (HC).

Tanganyika Garage Ltd v G Mafuruki [1975] LRT 23.

Tanzania Cotton Marketing Board v Corgecot Cotton Company SA [1997] TLR 165.

Tanzania Building Construction Co v Tanzania Railways Corp [1980] TRL 70.

Tarloek Singh Nayar v Sterling General Insurance Co Ltd [1966] EA 144 (K).

Trust Bank Tanzania Ltd v Le Marsh Enterprise Ltd and Others (High Court of Tanzania (Comm.Div.) at Dar-es-Salaam, Civil Case No.4 of 2000 (Unreported).

Shyam Thanki & Others v New Palace Hotel Ltd (1972) HCD no.20.

South African Cases

A to Z Bazaars (Pty) Ltd v Minister of Agriculture (1974) (4) SA 392 (C).

A to Z Bazaars (Pty) Ltd v Minister of Agriculture 1975 (3) SA 468 (A).

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).

Barclays Western Bank Ltd v Creser 1982 (2) SA 104 (T) AT 106.

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Burger v Central South African Railways 1903 TS 571.

Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A).

Cape Explosives Works v Lever Bothers SA Ltd 1921 CPD 244.

Council for Scientific and Industrial Research v Fijen 1996 (2) SA 1 (SCA).

Collen v Rietfontein Engineering Works 1948 (1) S 413 (A).

Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005(4) SA 345 (SCA).

Davis v Executors Estate WP Prinsloo (1899) 6 OR 64.

Durban's Water Wonderland (Pty) Ltd v Botha & another 1999 (1) SA 982 (SCA).

Diners Club SA (Pty) Ltd v Singh & Another 2004 (3) SA 630 (D).

Eastwood v Shepstone 1902 TS 294 302.

Ewing MacDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A).

Ex parte Rosche [1998] 1 All SA 319 (W).

Goldblatt v Fremantle 1920 AD 123.

Golden Fried Chicken (Pty) Ltd v Yum Restaurants International (Pty) Ltd 2005 BIP 269 (T).

Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A).

Guggenheim v Rosenbaum 1961 (4) SA 21 (W).

Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd 2005 (2) SA 522 (SCA).

Hugo v Wessels 1987 (3) SA 837 (A).

ISM Inter Ltd v Maraldo 1983 (4) SA 112 (T).

Improvair (Cape) (Pty) Ltd v Etablissements 1983 (2) SA 138 (C).

Jafta v Ezemvelo KZN Wildlife (2009) 30 ILJ 131 (LC).

Jamieson v Sabingo 2002 (4) AS 49 (SCA).

Jolly v Herman's Executors 1903 TS 515.

Joseph v Air Tanzania Corporation 1997 (3) SA 34 (W).

Kaap Suiwelkoöperasie Bpk v Louw 2001(2) SA 80 (SCA).

Kergeulen Sealing and Whaling Co v Commissioner for Inland Revenue 1939 AD 487.

Kempstone Hire v Snyman (1988) (4) SA 465 (T).

LA Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd (Case NoA5014/08, 17 August 2009, (Unreported).

Le Roux & Others v Viana No & Others 2008 (2) SA 173 (SCA).

Mitchell, Cotts & Co v Commissioner of Railways 1905 TS 349.

Mncube v Transnet (2009) 30 ILJ 698 (CCMA).

Ndlovu v The Minister of Correctional Services & another [2006] 4 All SA 165 (W).

Narsis v South African Bank of Athens 1976 (2) SA 573 (A).

Reid Bros v Fischer Bearings Ltd 1943 AD 232.

Reiss Engineering Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (W).

S v Harper (1981) SA 88 (D).

S v De Villiers 1993 (1) SACR 574 (Nm).

S v Mashiyi & another 2002 (2) SACR 387, (Tk) 390.

S v Howard (Unreported case No. case no.41/258/02).

S v Ndiki [2007] 2All SA 185 (Ck).

Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis 1992 (3) SA 234 (A).

Salfin (Pty) Ltd v Beukes 1989 1 SA 1 (A).

Standard Bank of South Africa Ltd v Koekemoer & others 2004 (6) SA 498 (SCA).

Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171.

Slabbert, Verster & Malherbe (Noord Vrystaat) (Edms) Bpk v Gellie Slaghuis (Edms) Bpk en 'n ander 1984 1 SA 491 (O).

Spendiff NO v Kolektor (Pty) Ltd 1992 (2) SA 537 (A).

Sublime Technologies v Jonker and Wilkinson (484/2008)[2009] ZASCA 149 (27 November 2009).

Timoney & King v King 1920 AD 133.

Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl 1965 (4) SA 47.

Tsung v Industrial Development Corporation of SA Ltd 2006 (4) SA 177 (SCA).

Tsichlas v Touch Line Media (Pty) Ltd 2004 (2) SA (W).


Van Heerden v Muir 1955 (2) SA 376 (A).

Van Staden No & Another v Firstrand Ltd & Another 2008 (3) SA 530 (T).

Wilken v Kohler 1913 AD 135.

White v Pan Palladium SA (Pty) Ltd 2005 (6) SA 384 (LC).

CHAPTER ONE: INTRODUCTION

 ‘Those who fail to anticipate the future are in for a rude shock when it arrives’¹

1. Background

In 1859, the famous English novelist, Charles Dickens, wrote a novel titled *A Tale of Two Cities*.² In that book, which was set in London and Paris prior to and during the early days of the French Revolution, Dickens described the crisis that befell both the aristocrats and peasantry. Through a literary lens he portrayed it as a blessing in disguise. To the peasantry it was a blessing, a breakthrough and the dawn of new era, while to the aristocrats it was a catastrophic moment, a day of political pestilence and untamed evils. Dickens sums up this dichotomy as follows:

[i]t was the best of times, it was the worst of times; it was the age of wisdom, it was the age of foolishnesses...it was the season of Light, it was the season of Darkness... we had everything before us, we had nothing before us....³

Dickens’ presentation of that era seems an apt description of the modern technological revolution, brought about by information and communication technologies (referred to as ‘ICTs’).

ICTs, as a ‘necessary tool for the contemporary [business] scene’⁴ have created a paradigm shift in contract formation: a shift from paper-based transactions to the use of electronic data messages. Nowadays, contracts concluded electronically constitute a large part of global commercial transactions.⁵ The application of ICTs in facilitating business has been an unprecedented success. Their success lie in the high volume of business transactions that can be executed quickly between parties stationed in any part of the world.

¹ See R G Smith, P Grabosky & G Urbas *Cyber Criminals on Trial* (2004) 156.

² See C Dickens *A Tale of Two Cities* (With a New introduction by Fredrich Busch) (1997).

³ Ibid, at 13.

⁴ See Y Hayakawa ‘Making Uniform Rules in the Era of E-transactions’ in T Kono, C G Paulus & H Rajak (eds) *Selected Legal Issues of E-Commerce* (2002) 14. See also R Schware ‘Overview: E-Development: From Excitement to Effectiveness’ in R Schware (ed) *E-Development: From Excitement to Effectiveness* (2005) xiii.

⁵ See R Schu ‘The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?’ (1997) 5 *International Journal of Law and Information Technology* 192, 193,194. See also L Gillies ‘A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union’ *Commentary* (2001) 1 *The Journal of Information, Law and Technology* (part 2.1) (available at <http://elj.warwick.ac.uk/jilt/01-1/gillies.html> (as accessed on 27/5/2010)); S Bhaloo ‘Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective’ (2004) 8 *Computer Law Review and Technology Journal* 225.

Sustaining the Dickensian dichotomy, the success of the ICTs represents ‘the best of times’ in the business community. On the other hand, in his depiction of the worst side of the French revolution, Dickens painted a picture of panic, plunder and rampage that shook the pre-existing social order. The application of ICTs, like the ‘worst of times’, has unleashed various legal challenges, which were not earlier envisaged, especially in the field of commerce.⁶

The application of ICTs to facilitate commerce, for instance, has raised questions regarding the appropriateness of the existing law, notably the law of contract.⁷ Such concerns, however, present a platform from which to analyse the role that law and technology plays in socio-political and economic development, and how the former should support the development and application of the latter. Consequently, there is ample reason to seek reforms that will situate law in a dynamic, responsive and even proactive position *vis-à-vis* the continuing reinvention of society through technological innovation.⁸

The law in many developing countries, however, is not in tune with the modern information technologies, and hence cannot protect the interests of those who rely on them.⁹ This does not portend a good future for these countries because failure to anticipate the future often creates problems for those who are ill prepared.¹⁰ In Tanzania, and in many other countries in Sub-Saharan Africa, there are no proper laws promoting and regulating the application of ICTs for commercial and other purposes. The Tanzanian law of contract, based in essence on the common law received from England, is still fashioned to support paper-based transactions. This study examines this legal framework in the light of the Internet and e-

⁶See S K Daniel (ed) *The Impact of The Regulatory Framework on E-Commerce in Singapore* Symposium Technology Law Development Group Singapore Academy of Law 5 April (2002) (available at http://www.lawnet.com.sg/legal/ln2/comm/PDF/The_impact_of_the_regulatory_framework_on_e_commerce_in_SG.pdf (as accessed on 29/6/2011)). See also Rawls who argues that, due to the current technological revolution, there is a lingering uncertainty among businesses and consumers because of the risk associated with the use of modern technologies. (See A Rawls ‘Contract Formation in an Internet Age’ (2009) 10 *Columbia Science and Technology Law Review* 200, 203). See also J Klosek *Legal Guide to E-business* (2003) 1. The author refers the Internet as ‘a legal minefield, fraught with potential liabilities.’

⁷See L Edward & C Waelde (eds) *Law and the Internet: regulating cyberspace* (1997) 4. See also J Savirimuthu ‘Online Contract Formation: Taking Technology Infrastructure Seriously’ (2005) 2 *University of Ottawa Law & Technology Journal* 105, 116-117; R A Hillman & J Rachlinski ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 *New York University Law Review* 429, 430. See also (generally) J Kooiman ‘Social-Political Governance’ in J Kooiman (ed) *Modern Governance: New Government-Society Interactions* (1993) 1-6.

⁸See Pistorius & Hurter ‘Contracting on the Internet: Formation of Contracts, Trade Practices and Online Dispute Resolution’ (no date) available at <http://docweb.pwv.gov.za/Ecomm-Debate/myweb/greenpaper/academics/pistorious.html#sdendnote14sym#sdendnote14sym> (as accessed on 20/12/2006).

⁹ See P Kalofolia ‘Electronic Bills of Lading: Legal Obstacles and Solutions’ (2004) 2 *Hertfordshire Law Journal* 45 (available at http://www.herts.ac.uk/fms/documents/schools/law/HLJ_V211_Panagiota.pdf (as accessed on 4/6/2011)).

¹⁰ See Smith et al (n1) 156.

commerce. While it appreciates that these innovations represent the ‘best of times’ in our modern era, it posits that appropriate legal measures need to be in place not only to continue to support and regulate the enjoyment of such ‘best of times’, but also to minimise the effects of the ‘worst of times’ associated with these developments.

Considering that this study examines the adequacy of the existing Tanzanian legal framework, the researcher’s responsibility is ‘primarily descriptive; it involves the identification of the “issues”, “uncertainties” and the “gaps” to be addressed by policy-makers and legislators.’¹¹ Thus, apart from discharging this responsibility, this study provides the background regarding e-commerce, its prospects, and the challenges for its development in Tanzania.

(a) The Thesis Statement

This study argues that the lack of a comprehensive legal regime for e-contracts in Tanzania undermines the prospects for the successful development of its e-commerce. The study submits that the seemingly slow legal response to the modern electronic ways of transacting business may affect the country’s economic growth and the pursuit of successful market-oriented economic policies. This slow response denies the country not only the potential economic benefits and developmental opportunities flowing from e-commerce, but also creates uncertainty in e-contracting processes. Consequently, the country is put in a disadvantageous economic position for three reasons.

First, e-commerce is no longer just a prospect, but a reality, with the potential to create economic benefits and opportunities for all countries.

Secondly, communicating via the Internet has become an indispensable way of doing business. Hence, it is vital to ensure that, while the existing regulatory environment responds positively to the needs of the new economy, it also takes into account the interests of vulnerable groups, such as consumers. Moreover, as once noted, while ‘customers who know you well may be less concerned about the law... the law may help to build trust among those who do not [know you].’¹² Thus, for e-commerce to flourish there is a need for laws that

¹¹See Griffith Law Review Call for Papers: ‘Special Symposium 2011 The Laws of Technology and the Technology of Law– Overview’ (available at http://www.griffith.edu.au/__data/assets/pdf_file/0019/218053/Call-for-Papers-Laws-of-Technology-and-the-Technology-of-Law.pdf (as accessed on 27/6/2011)).

¹² See UNCITRAL Secretariat ‘Raising Confidence in E-commerce: The Legal Framework’ Vienna, Austria (available at http://www.unescap.org/tid/projects/ecom04_s4sorieul.pdf (as accessed on 13/10/2010)).

sufficiently and openly promote technological innovation while also promoting ‘confidence in both the business community and the public.’¹³

Thirdly, appropriate legal infrastructure for e-commerce has the potential to promote the creation of new markets for goods and services in and from the developing countries. However, while ‘good laws alone [may not] create the market ... inadequate laws may shut the door of a potential market.’¹⁴ And, as some authors predict, ‘countries that do not take time now to create appropriate infrastructures that support the Internet will find their economies plummeting in a matter of years’¹⁵ In order to avoid such an eventuality, this study submits that Tanzania needs to ensure that its current legal infrastructure can appropriately address the legal and technical problems ensuing from the modern technologies. In other words, the law must not only support the development and wide application of these technologies but should also protect commercial interests in online mediated transactions as well as shielding other personal interests arising out of such transactions.¹⁶

(b) The Structure of this Chapter

This chapter introduces the main argument, which forms the basis of the discussion in this work and delineates the scope of the analysis of e-commerce *vis-à-vis* the law of contract in Tanzania. It is divided into five parts. Part one consists of two sections: the first emphasises, in general terms, the need for an appropriate legal framework to facilitate e-commerce; the second outlines the structure of this chapter.

Part two is divided into three parts:

- first, it frames the research problem within the existing demand for legal certainty in e-commerce;

¹³See G Jones ‘Failings in the Treatment of Electronic Signatures’ (2003) 1 *Hertfordshire Law Journal* 101. See also R Dagada, M M Eloff & L M Venter ‘Too Many Laws but Very Little Progress: Is South African Highly Acclaimed Information Security Legislation Redundant?’ *Proceedings of the 8th Annual ISSA Conference*, 6 -8 July 2009, University of Johannesburg's School of Tourism and Hospitality facility, Auckland Park Johannesburg Gauteng South Africa, (available at <http://uir.unisa.ac.za/bitstream/10500/2660/1/dagada.pdf> (as accessed on 12/10/2010)).

¹⁴See UNCITRAL Secretariat (n12).

¹⁵See M van der Merwe & F J van Vuuren ‘Internet Contracts’ in Buys R (eds) *Cyberlaw@ SA* 1ed (2000) 155-192, 155. Indeed, according to Christensen, the ‘decentralised’ nature of the Internet has totally changed the way commerce is being undertaken nationally and internationally. (S Christensen ‘Formation of Contracts by Email – Is it just the same the post?’ available at <http://www.austlii.edu.au/au/journals/QUTLJJ/2001/3.html> (as accessed 21/9/2007)). See also Smith et al (n1).

¹⁶ See Groffith Law Review Call for Papers, above (n11).

- thereafter it sets out the objectives and the significance of this research; and
- finally, it delineates the scope and limit of this study.

Section three of this chapter consists of two parts, each of which defines certain basic terms and concepts used in the study.

- The first one defines e-commerce as a business concept, the history of e-commerce, and the various types of e-commerce and the prospect for their development in Tanzania. It also analyses the role of ICT and e-commerce in economic growth, and maps the current development roadmap that a company, wishing to embark on an e-commerce journey may follow. In addition, this first section discusses the benefits and challenges of accommodating e-commerce in Tanzania.
- The second part defines the e-contract and expounds on various types of e-contracts.

Section four establishes the socio-economic and political context within which this study is set, while section five provides a comprehensive chapter synopsis for the entire thesis.

2. E-commerce and the Need for Legal Certainty

(a) Framing the Research Problem

Risk taking is a common phenomenon in human activity. Ordinarily, people in any society ‘want to know under what circumstance and how far they will run the risk of coming against what is so much stronger than themselves.’¹⁷ From a business viewpoint, the necessity for such foreknowledge rests on the need to count not only the benefits but also the risks of a proposed action.¹⁸

In the field of e-commerce, legal uncertainty is a risk factor that undermines the spirit

¹⁷See O W Holmes ‘The Path of the Law- The Symposium: The Path of the Law Today’ (1998) 78 *Boston University Law Review* 699.

¹⁸See J P Reid ‘Law and History’ (1993) 27 *Loyola of Los Angeles Law Review* 193. See also Justice Kennedy ‘The Unification of Law’ (1910) 10 *Journal of the Society of Comparative Legislation* 212. The author states at pages 214-215 that, from a commercial standpoint, ‘it is the trader’s sense of security from risk which is the requisite basis of all enterprise and extension of business.’

of enterprise.¹⁹ Entrepreneurs may shy away from new ventures, however promising they might be, because they find the risk too great. Coupled with the problems of remoteness and anonymity, uncertainty in e-commerce makes consumers unwilling to rely on web merchants.²⁰ Overall, legal uncertainty reduces the level of trust and confidence that are ‘a valuable facilitator of many forms of exchange.’²¹

In a traditional face-to-face scenario, trust and certainty constitute important aspects in the consummation of commercial transactions.²² Although it is easy to establish these values in such an environment, it is difficult to do so when parties transact electronically.²³ Even so, trust, security and certainty of online transactions may be enhanced through a linkage between law and technology by, for instance, legally supporting the use of certain technical infrastructures, such as e-signatures and secure payment systems.²⁴

In this era, when contracts are concluded electronically, existing principles and established contract rules face immense technical challenges. While courts may be striving through the common law approach to adapt the existing rules to suit the requirements of modern technologies, the technological terrain in which they are currently operating is itself fast changing. As a result, such efforts become redundant at some point as they often fail to adequately protect the various interests of the parties to electronic transactions.²⁵ Indeed, it is clear that reform through judge-made law is not always suitable, since it has strict limits. These

¹⁹For a lengthy discussion on Legal uncertainty see A D'Amato ‘Legal Uncertainty’ (1983) 71 *California Law Review* 1.

²⁰See L E Ribstein ‘Law v Trust’ (2001) 81 *Boston University Law Review* 553, 585. See also L F De Duca, A H Kritzer & D Nagel ‘Achieving Optimal Use of Harmonization Techniques in an Increasingly Interrelated Twenty-First Century World of Consumer Sales: Moving the EU Harmonisation Process to a Global Plane’ (2009) 27 *Pennsylvania State International Law Review* 641.

²¹See K H Lim, K Leung, C L Sia & M K O Lee ‘Is eCommerce boundary-less? Effects of Individualism-Collectivism and Uncertainty Avoidance on Internet shopping’ (2004) 35 *Journal of International Business Studies* 545, 546. See also J C Dugan, E M Egan, A D Kraus & E M Hancock ‘Privacy & e-commerce in the United States’ in M E Plotkin, B Wells & K Wimmer (eds) *E-commerce Law & Business* Vol I (2003); D E Morrison & J Firmstone ‘The social function of trust and implications for e-commerce’ 19 (2000) *International Journal of Advertising* 599.

²²See S X Komiak & A Benbasat ‘Understanding Customer Trust in Agent-Mediated Electronic Commerce, Web-Mediated Electronic Commerce, and Traditional Commerce’ (2004) 5 *Information Technology and Management* 181.

²³See Dagada et al (n13) 3. The authors state that the question of security in e-commerce has been regarded as Achilles’ heel. See also Ribstein (n20) 585. See also G J Udo ‘Privacy and Security Concerns as a Major Barrier for E-commerce: A Survey Study’ (2001) 9 *Information Management and Computer Security* 165.

²⁴See E A O’Hara ‘Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection’ (2005) 153 *University of Pennsylvania Law Review* 1883, 1896. The author argues that such security measure ‘can work to decrease (if not eliminate) the extent of vulnerability associated with [e-commerce].’ See also UNCITRAL Secretariat (n12).

²⁵According to Pound, the law must guarantee its subjects that, whenever a dispute arises there are established mechanisms in terms of rules and procedures to handle it. See R Pound *Jurisprudence* Vol III Part 4 & 5 (1959) 16.

include the slowness of the process and the fact that currently the technological changes are outpacing the law.²⁶ These limitations create further uncertainty among e-contractants and cast doubt on the effectiveness of the existing contract rules.

Essentially, law must not only assist those it serves to make the right decisions but should also seek to discharge its core functions, namely: to ‘answer to the need for certainty, predictability, order and safety.’²⁷ From a commercial perspective this means that the law must be able to direct, regulate and support technologically mediated transactions. In addition, as an instrument of public policy,²⁸ it must enable the best routes towards successful economic growth, which includes securing and nurturing the environment that promotes such growth.²⁹

As noted earlier,³⁰ in many African countries, including Tanzania, there is a mismatch between the existing legal frameworks and the increasingly rapid technological progressions. This raises doubts as to the adequacy of the existing legal frameworks on the continent to handle issues of e-commerce, such as formation of e-contracts and evidentiary issues (for instance, validity of e-signature and the admissibility of electronic evidence in court). Failure to address these and related issues denies African countries the opportunities offered by ICTs through e-commerce and widens the digital divide between Africa and the rest of the world.³¹

In Tanzania, for instance, the extent to which the existing contract law framework offers legal protection to parties in an e-contract, and whether it can adequately support e-contracts, is uncertain. Currently, many Tanzanians are concluding online contracts either by way of e-mail or via the Internet. The online purchase of motor vehicles from Japan, for instance, has grown significantly in recent years.³² Given the current legal position,

²⁶ Chandler has argued that ‘legal doctrines and judicial processes may indeed be limited in their ability to regulate technology.’ See J Chandler ‘“Science Discovers, Genius Invents, Industry Applies, and Man Adapts Himself”’: Some Thoughts on Human Autonomy, Law, and Technology’ (2010) 30 *Bulletin of Science, Technology & Society* 14.

²⁷ See V Aubert *Continuity and Development in Law and Society* (1989) 76. See (generally) L B Edelman ‘Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality’ (2004) 38 *Law & Society Review* 181, who compares law to a river.

²⁸ See Groffith Law Review Call for Papers, above (n11).

²⁹ See E S Mchome *Evictions and the Rights of People in Conservation Areas in Tanzania* (2002) 4 (see generally Chapter 1 & 2).

³⁰ See part 1 above.

³¹ See C Fuchs & E Horak ‘Africa and the digital divide’ (2008) 25 *Telematics and Informatics* 99. These authors define digital divide as ‘a phenomenon linked not only to the topic of access to the Internet, but also to the one of usage and usage benefit.’

³² Various Japanese companies with interactive websites, such as www.autorec.co.jp, <http://www.inter-fairline.com>, or <http://www.lucusjapan.com>, have attracted many Tanzanian customers to the extent that the company decided to open its office in Dar-es-Salaam in 2008.

participants in such e-contracting processes may find themselves lacking legal protection. It is also doubtful whether the current legal framework can successfully handle disputes arising from e-contracting activities and the new internet-driven economy in general. The prevailing legal uncertainty therefore exposes the commercial interests of various business enterprises to unnecessary risks, discourages foreign investors, and undermines the spirit of local entrepreneurship, eventually retarding economic growth.

In view of the current uncertainty, and considering the fast changing technological and socio-economic environment, there is a need to thoroughly re-examine the existing contract rules. Claiming that the existing 'old [rules] are ready [to] cover every case ... is to pretend to a certainty and regularity that cannot exist in fact. The effect of that pretension is to increase practical uncertainty and social instability.'³³

Indeed, legislation in many African countries may be considered 'old rules' owing to the era of their promulgation. In Tanzania, for instance, modern contract law owes its origin to the colonial era.³⁴ As will be discussed in chapter two, the Tanzanian Law of Contract Act is based on the Indian Contract Act of 1872,³⁵ which was imported and applied by the British in Tanganyika since 1920.³⁶ The law governing sales of goods (the Sales of Goods Act) was enacted in 1931.³⁷ Considering the era when these statutes were enacted, and taking into account current technological developments and the need to integrate the Tanzanian economy into the global economic system, these Acts, only contemplating face-to-face or paper-based contracts, are clearly out of date.³⁸

The Sale of Goods Act, for instance, did not deal with sale of services. As its name suggests, it was enacted largely to govern the sale of tangibles. Buying goods at an auction is another example. Section 59(1)(b) of the Act contemplates the common law 'fall of the

³³See J Dewey 'Logical Method and Law' (1914-1925)10 *Cornell Law Quarterly* 17, 26.

³⁴ See A L Diamond 'Sale of Goods in East Africa' (1967) 16 *International and Comparative Law Quarterly* 1045. For a discussion about Africa and colonial legacy see S F Joireman 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 *Journal of Modern African Studies* 571.

³⁵See the Indian Acts (Application) Ordinance Cap 2. Other imported laws to Tanganyika from India included the Indian Company Act, No. VII of 1913, which was made applicable in Tanganyika by virtue of the provisions of Application of Laws Ordinance, No.7 of 1920, (until when the Companies Ordinance, Cap 212 was enacted in 1932) and the Indian Evidence Act, 1872. This company ordinance was based on English Company law as it was at the time and was in many respects in *pari materia* with the English Companies Act, 1929.

³⁶See I R Macneil *Contracts Instruments for Social Cooperation in East Africa* (1968) 732.

³⁷This Ordinance was based on the English Sale of Goods Act, 1893. See also Diamond (n34).

³⁸This is the case even though certain rules, for instance, the rule regarding the need for a contract to be supported with a valid consideration are still valid. See a position paper by the Law Reform Commission of Tanzania (at page 30 (available at <http://www.lrct-tz.org/Positionpaperone-COMMERCE.pdf> (as accessed on 21/07/2007)). This position paper will be hereafter referred to as LRCT's position paper.

hammer' principle.³⁹ Today, however, auctions are conducted online,⁴⁰ and the current law cannot effectively regulate the situation.

Ordinarily, in any contractual arrangement parties have issues of common interest. For instance, they wish to know with certainty the rules governing their relationship, the terms and conditions governing their contract, their identity and legal existence, the enforceability of their agreements, and, most important, whether they have a binding agreement. Take, for instance, situations involving international contracts. Since transactions over the Internet disregard political boundaries, choice of law and choice of forum are all matters of importance.⁴¹ In an online contract, unless parties have carefully considered these issues when negotiating the agreement, problems may arise.

Choice of law in consumer contracts is a special problem. It involves the need to protect freedom of contract, on the one hand, and the need to protect consumers from the risks associated with online contracting on the other. E-contracts, where goods ordered by a consumer, pursuant to an on-line contract, either fail to be supplied or, if they are, find the goods to be defective, raise this problem in an acute form. As will be discussed in chapter two, in Tanzania a number of online purchasers of used motor vehicles from Japan have been defrauded by bogus suppliers.⁴² According to a statement from the Tanzanian embassy in Japan, Tanzanian nationals have lost a total of US\$91,554 due to fraud.⁴³ Most of them failed to obtain legal redress either due to the costs involved or due to the nature of their contracts with the suppliers or the inadequacies of the existing contract law.⁴⁴

Thus, several questions need to be asked regarding e-contracting. If parties to an online consumer contract did not choose a governing law or, if they chose a law that provided only weak protection for the purchaser, how should the purchaser be protected? One may as

³⁹ See *Payne v Cave* (1789) 3 TR 148. This case developed the the general rule that putting up goods for sale in an auction is not an offer but an invitation to bidders to make offers. The auctioneer signifies his acceptance by fall of the hammer. See also the LRCT's position paper (n38) 5.

⁴⁰Section 59(1)(b) provides that 'a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and until such announcement is made any bidder may retract his bid.'

⁴¹ See R S Zembek 'Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace' (1996) 6 *Albany Law Journal of Science & Technology* 339, 343.

⁴²This is in accordance with a press release statement by the Embassy of Tanzania in Japan to Tanzanians. The statement was released to the public by the Ministry of Foreign Affairs in October 2009. See a daily Kiswahili newspaper *Tanzania Daima* (6th November, 2009) narrating the story. (This is available at <http://www.freemedia.co.tz/daima/habari.php?id=10104> (as accessed on 5/2/2010)) with a title: 'KUAGIZA MAGARI JAPANI HATARI' literally meaning that 'online import of vehicles from Japan is a risky business.'

⁴³Ibid.

⁴⁴Ibid.

well ask whether courts will uphold the parties' chosen law even when it manifestly infringes rights that an ordinary consumer should have enjoyed under his or her domestic law. Furthermore, should choice of law in online consumer contracts be considered as an exceptional case? These questions are problematic and call for a careful legal analysis.

Apart from jurisdiction and choice of law issues (which will be discussed further in Chapters III and IV) other problems regarding e-contracting can also manifest differently given the current legal position regarding contracts in Tanzania. Take, for instance, the requirement of consent in the course of contract formation. The current law demands that there should be a meeting of the minds (*consensus ad idem*).⁴⁵ Traditionally, reaching consensus in contract entails exchange of promises in the form of an offer made by one party and its acceptance by the other.⁴⁶ This process involves negotiations, and when the two minds are *ad idem*, together with other requirements, such as existence of a lawful consideration and capacity of the parties to contract, a contract comes to existence.⁴⁷

Whereas the law described above fits well in the conventional face-to-face or paper-based contracts, certain web-based contracts present problems.⁴⁸ In most cases, a typical website-based contract lacks an active human mind on the vendor's side.⁴⁹ In the so-called 'browse-wrap agreements', for instance, mere browsing of a particular merchant's website may bind the browsing party to the terms and conditions of use of such a website even though she may not have expressly consented to those terms or conditions.⁵⁰ Consequently, it is doubtful whether the parties are fully *ad idem* as regards such terms and conditions. Considering that browse-wrap agreements are common in e-commerce, and since the law in Tanzania, as it

⁴⁵See section 10 and 13 of the Law of Contract Act, Cap 345 [R.E. 2002].

⁴⁶See section 2(1)(a) & (b) of the Law of Contract Act, Cap 345 [R.E. 2002].

⁴⁷Section 10 of the Act provides that '[a]ll agreements are contracts if they are made by the **free consent** of parties competent to contract, for a lawful consideration and with a lawful object....' (Emphasis added). Section 13 further states that 'two or more persons are said to consent when they *agree upon the same thing in the same sense*'. (Italics added).

⁴⁸Consider, for instance browse-wrap agreements. These are contracts with terms and conditions of use that do not require the express agreement of a user. For a review of the law regarding 'browse-wrap' and similar agreements see (generally) D Block 'Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements and the Future of Consumer Interaction with Websites' (2002) 14 *Loyola Consumer Law Review* 227. See also the discussion in part 3(b) (iv) of this chapter.

⁴⁹See J D Gregory 'The Proposed UNCITRAL Convention on Electronic Contracts' (2003) 59 *Business Lawyer* 313, 332.

⁵⁰See C L Kunz, J Ottaviano, E Ziff, J M Moringiello, K Porter & J Debrow 'Browse-wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59 *Business Lawyer* 279. These authors have referred to, for example, <http://www.quickbook.com/legal.html> where mere entering to the site is a signification to be bound by its terms and conditions of service.

currently stands, stresses *consensus ad idem* as an essential element in validating a contract, there is a fundamental legal problem.

There are obviously other problems that need to be explicitly addressed if e-commerce is to be a success in Tanzania. One such relates to financial infrastructure. Although this is an area worth independent research, a financial service environment that is secure and user-friendly is a pertinent issue in the development of e-commerce.⁵¹ This includes an expanded usage of other technology-enabled facilities in the financial market,⁵² such as credit and debit cards. Analysis of these issues, however, is beyond the scope of this thesis.

Overall, this study identifies seven major areas in the Tanzanian law of contract that are problematic, and which need to be addressed in the light of the current use of the Internet and other related technologies. These areas are:

- (i) contract formation and the requirement of *consensus ad idem*,
- (ii) formalities,
- (iii) online mistakes or input errors,
- (iv) proof,
- (v) consumer protection,
- (vi) jurisdiction of the courts, and
- (vii) choice of law.

⁵¹ Indeed, credit card usage in e-commerce is one of the most common means of online payment option. However, their application demands a high level of security infrastructure since they are vulnerable to fraud. See B C Boynton 'Identification of Process Improvement Methodologies with Application in Information Security.' *Proceedings of the 4th Annual Conference on Information Security Curriculum Development '07* ACM New York, September 28-29 (2007) available at <http://delivery.acm.org/10.1145/1410000/1409939/a28-boynton.pdf?key1=1409939&key2=3621096821&coll=GUIDE&dl=GUIDE&CFID=108407726&CFTOKEN=82589189> (as accessed on 12/10/10). See also D N Chorafas *The Internet Supply Chain: Impact on Accounting and Logistics* (2001) 250; Dagada et al (n13) 3.

⁵² Although the card based technology (used in ATMs) has gained momentum in Tanzania, this service is only used in the major cities. Major reforms in this area are still needed including allowing the wide application of credit card and other schemes within the financial sector. Financial reforms must also take into account the need to speedup rural integration into the new economy by expanding the domain of banking industry into the rural areas, as well as introducing new mechanisms of encouraging savings among the people in both rural and urban areas. More research on the banking laws and their inadequacy or adequacy in regulating a country wide usage of credit or debit card is, however, needed.

(b) Research Objectives

This study examines the adequacy of the existing contracting legal environment in Tanzania and the problems associated with e-contracts. It also asks whether the traditional rules on jurisdiction and choice of law apply effectively to modern e-contract disputes, and whether consumers are adequately protected when they engage in online transactions.

The study pursues the following goals:

- (i) proposing the establishment of a requisite legal framework which will assist Tanzanian businesses to function more effectively in the online environment. This includes adopting necessary measures to address the identified inadequacies in the law with a view to promoting e-commerce. Doing so will in turn enhance free trade, strengthen the growing market-based economy and integrate Tanzania into the global economy.
- (ii) to promote confidence in the use of e-commerce by ensuring that Tanzanian consumers are effectively protected when they transact online; and
- (iii) to promote the much needed coherent and harmonised rules to reflect the borderless nature of e-commerce at national level, and to ensure certainty and predictability in cross-border contracts.

The study draws lessons from other countries, notably South Africa, and takes into account the proposals of the United Nations Commission on International Trade Law (UNCITRAL) through its Model Laws on e-commerce and e-signature,⁵³ and the UN Convention on E-contracts.⁵⁴ It also reflects to a lesser extent on developments in other regions such as the EU, the USA and East Asia.

The importance of this study is three-fold. Firstly, it is expected to be a catalyst for reforms in the existing legal and policy framework governing commercial undertakings in Tanzania. Such reforms are necessary in order to promote confidence in the ICT-led economy. As a developing country, Tanzania cannot successfully build a strong economy without paying

⁵³The UNCITRAL Model Laws on E-commerce and E-signature are available from: http://ananse.irv.uit.no/trade_law/doc/U.N.Electronic.Commerce.Model.Law.1996.toc.html (as accessed on 27/7/2007).

⁵⁴The Convention was adopted in 2005 by the General Assembly. See UNGA A/RES/60/21, 9th December 2005. The UN Convention on E-contracts is available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (as accessed on 27/7/2007).

attention to the current developments in the area of ICT, especially e-commerce. And, because e-commerce has the potential to promote greater participation in the global economy,⁵⁵ its development in Tanzania will only be possible if the country embarks on technology conscious legal reforms.⁵⁶

Secondly, it paves the way for the government, individuals and the business community in Tanzania to appreciate the significant role that e-commerce can play in the economy and the need to address obstacles to its development.

Finally, this work contributes to other efforts to establish an enabling environment for e-commerce in Tanzania. The existence of such an environment increases the ability of a developing country like Tanzania to participate in international commerce.

(c) The Scope and Limits of This Study

E-commerce is a business term that has gone global and raises diverse legal questions in all countries. Such questions relate to a variety of fields, such as contract formation, consumer protection, intellectual property, cybercrimes, online advertising, e-procurement, competition (antitrust) law and taxation.⁵⁷ E-commerce thus spans a vast terrain and still ‘in many ways ... an uncharted new frontier.’⁵⁸ Defining its exact scope has never been straightforward. Every inquiry, however, must have its limits. Consequently, this work does not cover each and every aspect of e-commerce. Although it deals with e-contracts, and the general implications of e-commerce to contract law, it does not include e-procurement contracts.⁵⁹

In particular, this work only discusses issues relating to contract formation in the online environment, consumer protection, jurisdiction and choice of law. Its analysis of the legal developments in South Africa is also confined to these issues. Geographically, its scope of inquiry is confined to the Mainland–Tanzania. Zanzibar, though forming part of the United

⁵⁵See S Madon ‘The Internet and Socio-Economic Development: Exploring the Interaction’ (2000) 13 *Information Technology & People* 85. See also D Morales-Gomez & M Melesse ‘Utilising information and communication technologies for development: the social dimensions’ (1998) 8 *Information Technology for Development* 3.

⁵⁶ See, for instance, O Chiochan, D Lindley & T Dunn ‘The adoption of information technology: a foundation of E-commerce development in Thai culture’ in T Theerasak (ed) *E-commerce and Cultural values* (2003) 17. The author argues that e-commerce can only be possible where a country adopts ICT.

⁵⁷ See J K Winn ‘The Emerging Law of Electronic Commerce’ in M Shaw, R Blanning, T Strader & A Whinston (eds) *Handbook on Electronic Commerce* (2000) 692. See also J Noll ‘European Community & E-commerce: Fostering Consumer Confidence’ (2002) 9 *Electronic Communication Law Review* 207.

⁵⁸See M J Shaw ‘Electronic Commerce: State of the Art’ in M Shaw, R Blanning, T Strader & A Whinston (eds) *Handbook on Electronic Commerce* (2000) 3.

⁵⁹This is due to the fact that e-procurement is a wide area befitting an independent study.

Republic of Tanzania, has its separate law regulating contracts, and it is therefore beyond the scope of this research.⁶⁰

3. Definition of Terms and Concepts

(a) E-commerce

According to May, there has never been an agreed definition of e-commerce.⁶¹ In attempts to define it, however, there have been both narrow and wide approaches. The latter would include 'all financial and commercial transactions that take place electronically, including electronic data interchange (EDI) and electronic funds transfers (EFT).'⁶² The former is limited to online retail sales to consumers.⁶³ Simpson & Docherty also define e-commerce narrowly to mean 'the buying and selling of goods and services on the Internet.'⁶⁴ In this narrow sense, it includes 'advertising, invitations to treat and the negotiation and conclusion of contracts and performance.'⁶⁵ In turn, the European Commission views it broadly as a practice which involves:

doing business electronically, encompassing many diverse activities including electronic trading of goods and services, online delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, collaborative design and engineering, online sourcing, public procurement, direct consumer marketing and after-sales services.⁶⁶

This thesis adopts the narrow view. It therefore considers e-commerce to mean online transactions between suppliers of goods and services. It is also important to note that e-business, which is another term related to the use of electronic technology in business

⁶⁰ It is important to note, however, that in essence the law of contract in Zanzibar does not differ from the law of contract in Tanzania.

⁶¹ See P May *The Business of E-commerce: From Corporate Strategy to Technology (Breakthrough in Application Development)* (2000) 2. See also *The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Social Agenda* OECD (1999) 28, (available at <http://www.oecd.org/dataoecd/3/12/1944883.pdf> (as accessed on 26/10/2007)); Moodley 'Competing in the Digital Economy? The Dynamics and Impacts of B2B E-commerce on the South African Manufacturing Sector.' *Discussion Paper No.2002/79 WIDER* United Nations University August (2002); see further, *Defining and measuring e-commerce: a status Report* OEDC DSTI/ICCP/IIS (99)4/FINAL (available at <http://www.oecd.org/dataoecd/12/55/2092477.pdf> (as accessed on 26/10/2007)).

⁶² See May (n61) 2.

⁶³ See May (n61) 2. See also A Rosen *The E-commerce Question and Answer Book: A Survival Guide for Business Managers*, 2ed (2002) 4-5. See further, C Anderson 'Electronic Commerce: In Search of the Perfect Market' (1998) 26 *IEE Engineering Management Review* 67.

⁶⁴ See M Simpson & A J Docherty 'E-commerce adoption support and advice for UK SMEs' (2004) 11 *Journal of Small Business and Enterprise Development* 315, 313. See also H Chan, R Lee, T Dillon & E Chang *E-commerce: Fundamentals and Applications* (2001) 2.

⁶⁵ See Simpson & Docherty (n64) 313.

⁶⁶ See 'A European Initiative in Electronic Commerce' Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM (97) 157 at 2 (available at <http://www.cordis.lu/esprit/src/ecomcom.htm> (as accessed on 2/10/2007)).

facilitation, should not be confused with e-commerce. The term 'has a wider perspective than e-commerce' and the latter is considered a subset of the former.⁶⁷ Some authors, however, use the two terms interchangeably or they refer to e-business when discussing e-commerce in a broader sense.⁶⁸

(i) History of E-commerce

Although e-commerce is considered a novel way of doing business, its earliest form can be noted from 'mid-1800s when the first contract was entered into using telegraph or telephone.'⁶⁹ According to Brinson et al, the 'Request and Reply' system introduced by the American Airlines in 1930s represents the earliest form of e-commerce.⁷⁰ This system had 'an inventory control at a central point for telephoning in changes with replies to requests received via teletype.'⁷¹ The use of Electronic Data Interchange (EDI) technology, introduced in the late 1970s, is another early example of e-commerce.

Currently, however, e-commerce constitutes a unique phenomenon because it has moved from the previous closed proprietary business-to-business networks to more open networks, such as the Internet. The peculiar advantage of the Internet lies in its ability to provide 'universal connection from any location world-wide' and its accessibility 'from any Internet-linked computer.'⁷² Because of the speed of the Internet and its global inter-connectivity character, corporate entities as well as individuals use it for commercial transactions.⁷³ Indeed, in certain commercial sectors, like banking, the current use of online banking and mobile phones presents a completely new phenomenon.⁷⁴

⁶⁷ See Chan et al (n64) 3.

⁶⁸ See Chan et al (n64) 3. See also G P Schineder *Electronic Commerce* 7ed (2007) 5.

⁶⁹ See A Davidson *The Law of Electronic Commerce* (2009) 1.

⁷⁰ D J Brinson, B Dara-Adams, D Dara-Adams, J Masek, R McDunn & B White *Analysing E-commerce & Internet Law* (2001).

⁷¹ Ibid at 131.

⁷² See O Henry 'Internet banking, e-commerce and related supervisory challenges' – a paper presented during the XVIII Annual Conference of the Caribbean Group of Banking Supervisors, May 18th-19th (2000) Curacao, Cayman's Islands, (available at http://www.cimoney.com.ky/uploadedFiles/Media_Centre/Speeches/20000705.pdf (accessed on 8/11/2007)).

⁷³ See *A European Initiative in Electronic Commerce* Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions (COM (97) 157) (1997) 2 (available at <http://www.cordis.lu/esprit/src/ecomcom.htm> (as accessed on 2/10/2007)).

⁷⁴ 'Online banking' or 'Internet banking' refers to the use of secure Internet based websites by customers to conduct banking transactions.

(ii) Different Types of E-commerce and the Prospects for their Development in Tanzania

E-commerce facilitates a huge market for businesses, the service industry being one of the greatest beneficiaries.⁷⁵ As a business model it can be classified into four types namely: Business-to-Business (B2B), Business-to-Consumer (B2C), Consumer-to-Consumer (C2C), and Business-to-Government (B2G).⁷⁶

▪ Business-to-Business (B2B) E-commerce

B2B e-commerce involves one organisation buying products and services from another, while relying on modern technologies, especially the Internet. In most cases, it involves manufacturers and merchant wholesalers. Initially B2B e-commerce was based on Electronic Data Interchange (EDI) technology.⁷⁷ The advent of the Internet, however, has changed the EDI practice.⁷⁸ Consequently, B2B e-commerce transactions based on the Internet have been given greater attention as a modern way to improve traditional paper contracting.⁷⁹ The use of e-agents, for instance, has continued to shape B2B e-commerce relations. With the Internet and other modern technologies at hand, 'buyers [are now] in control of the transaction[s] and "pull" products and services from suppliers rather than having suppliers "push" products and services onto [them].'⁸⁰ Increased reliance on the Internet in B2B e-commerce is further exacerbated by the ongoing globalisation, which encourages commercial intercourse between diverse global partners.⁸¹

Although prospects for growth of this type of e-commerce exist in Tanzania, both the government and the business community need to put more effort into its development.⁸²

⁷⁵See ITU 'Policy Considerations for Electronic Commerce Discussion Paper' World Telecommunication Day (1999) (available at <http://www.itu.int/newsarchive/wtd/1999/intro-dp.html> (as accessed on 23/8/06)).

⁷⁶ Ibid.

⁷⁷ For a discussion about this technology see part 3(b)(i) of this chapter. See also J Morell 'Promoting Electronic Data Interchange: Building a Foundation for Support to Small Business' Industrial Technology Institute (1995) (available at http://www.jamorell.com/Jonny/web_new/EDI_survey/finalrpt.pdf (as accessed on 27/6/2011)).

⁷⁸ See (generally) A Boss 'The Uniform Electronic Trade Transactions Act in a Global Environment' (2001) 37 *Idaho Law Review* 276.

⁷⁹See S Angelov & P Grefen 'The Business Case for B2B E-Contracting' in M Janssen, H G Sol & R W Wagenaar (eds) *ICEC'04, Sixth International Conference on Electronic Commerce* (2004) 31 (available at <http://delivery.acm.org/10.1145/1060000/1052225/p31-angelov.pdf?key1=1052225&key2=9829134821&coll=GUIDE&dl=GUIDE&CFID=101551626&CFTOKEN=34696352> (as accessed on 16/6/2010)).

⁸⁰See J Botha, C Bothma & P Geldenhuys (eds) *Managing E-commerce* (2004) 97.

⁸¹Ibid at 31.

⁸²See C Majuva *Development Dynamics and Future Prospect of Electronic Commerce for Developing Countries: A case of Tanzania* (Unpublished MBA Dissertation, University of Dar-Es-salaam, 2000).

Indeed, as Majuva asserts, prospects for an efficiently thriving e-commerce in a developing country like Tanzania rest on three pillars. These are business, technology, and regulation.⁸³ The three are interactive and support one another.

Majuva's analysis, though useful, is not exhaustive. For instance, she has not analysed difficult regulatory issues concerning B2B e-commerce (or even B2C e-commerce), such as formation or validity of e-contracts. Furthermore, she has not addressed some key questions regarding where and when an e-contract is formed for the purpose of determining conflict of laws issues. Consequently, although her work is useful for understanding the general dynamics regarding the development of e-commerce in Tanzania, there is a knowledge gap that needs to be addressed.

Currently, there is a general emphasis on the importance of ICT for greater economic growth, and various SMEs in developing countries like Tanzania are being encouraged to increase usage of this technology in various ways, including developing e-commerce websites.⁸⁴ Indeed, some organisations including those in support of SMEs in Tanzania have invested in ICT in order to grasp the benefits offered by the Internet technology.⁸⁵

Earlier in 2000, Internet usage and interactions over the Internet among commercial organisations in Tanzania were still a new phenomenon.⁸⁶ Computer usage trends at the time

⁸³Ibid.

⁸⁴For instance, UNCTAD noted that the more the Internet becomes part of the daily life creates a room for the possible rapid development of local e-commerce. See UNCTAD *Ecommerce and Development Report* (2001).

⁸⁵See, for instance, the Small Industries Organisation (SIDO) website in which various activities and programmes to promote SMEs in Tanzania are advertised. The website is available at <http://www.sido.go.tz/Web/Index.aspx> (as accessed on 26/6/2011). See also role of The Financial Sector Deepening Trust (FSDT) (available at <http://www.fsd.or.tz/> (as accessed on 26/6/2011)). SMEs and government department involved in tourism business have also taken the initiative to use ICT to promote their business around the world. See for instance the Tanzania Tourist Bords website <http://tanzaniatouristboard.com/index.php> (as accessed on 26/6/2011); Aardvark Expeditions (a SME based in Arusha and involved in tourism (see <http://www.aardvark-expeditions.com/> (as accessed on 26/6/2011)). Online directory about tourist attractions and tour operator in Tanzania is also available. See Tanzania Tour Operators (available at <http://www.guideforafrica.com/tanzania/tanzania-tour-operators.html> (as accessed on 26/6/2010)).

⁸⁶See B Mutagahywa & J Kajiba 'Connectivity and E-commerce in Tanzania' - Economic and Social Research Foundation (ESRF)-Report (2000) (available at <http://www.tzonline.org/pdf/e-commerce.pdf> (as accessed 22/8/2007)). See also 'FAHAMU-Learning for Change' *Distance -Based Learning in Global Health for Africa* (available at <http://tall.conted.ox.ac.uk/globalhealthprogramme/report/tanzania.pdf>) where it is reported that though e-commerce is at early stages a subsidiary of the ISP, CATS-NET Ltd is offering business to consumer (B2C) solutions to the Tanzanian and global market. E-Biz Solutions Ltd (<http://www.ebiz.co.tz>) offers a subscription service for buyers and sellers on its website, as well as web development, hosting, and list management.

were still marginal and Internet connectivity in Tanzania was low.⁸⁷ These trends, however, have changed over time and the recent landing of the SEACOM fibre-optic cable in Dar-es-salaam provides a new dimension in terms of connectivity and enhanced data traffic.⁸⁸

A recent survey conducted between June and September 2010 by the Tanzanian Communication Authority (TCRA) with a view to ascertaining the level of penetration and usage of internet services in Tanzania indicates that, out of 68 Application Services Licences (ASLs) present in the country 46 of them (equal to 67 percent) are operational, 20 of them (equal to 30 percent) could not be traced, and 2 (equal to 3 percent) are not operational.⁸⁹ The trend depicting their growth from 2000 to 2010 is shown below in Figure 1. The Survey Report further notes that ‘total available internet and data capacity in Tanzania [was] 3,459Mbps, out of which 1,475 Mbps (43%) [was] from satellite and 1,984 Mbps (57%) [was] from fibre optic.’⁹⁰ As of June 2010, however, only 2,239 Mbps (65 percent) were in use, 49 percent from fibre optic and 51 percent from satellite.⁹¹

⁸⁷ See Mutagahywa & Kajiba (n86). See B Furuholta, S Kristiansen & F Wahid ‘Gaming or gaining? Comparing the use of Internet cafe’s in Indonesia and Tanzania’ (2008) 40 *The International Information & Library Review* 129.

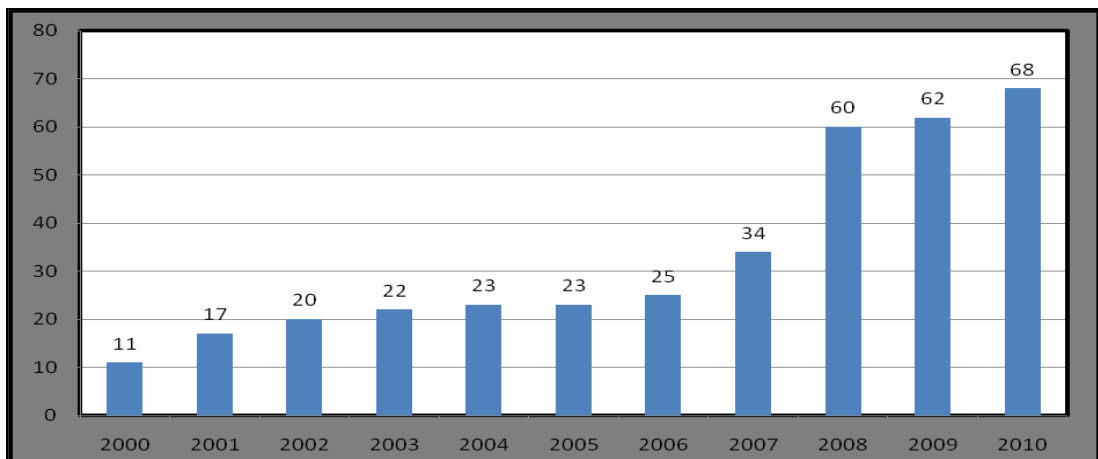
⁸⁸ SEACOM is a privately owned company involved providing broadband services connecting Africa to Europe and India. It has built, owns, and operates submarine fibre-optic cable connecting communication carriers in south and east Africa (see <http://www.seacom.mu/> (as accessed on 29/6/2011)). Its fibre optic cable landing in Dar-es-salaam came into completion in 2010. Even before the landing of SEACOM fibre optic in Tanzania there has been positive trends concerning internet usage. Malimbo notes, for instance, that between 2000-2005, ‘Tanzania experienced a very rapid growth in Internet use. ... [T]he country’s local Internet user base is growing. [as] the number of Tanzanians accessing the Internet increased from 60,000 to more than 333,000.... The number of Internet hosts has also increased by 300 percent in the same period.’ (See P Malimbo ‘The Internet leaves n footprints in Tanzania’ (available at <http://2009.inwent-ij-lab.org/?p=106> (as accessed on 23/6/2011))). Rural connectivity has also increased. For more on this see S Sheriff *Rural Access: Options and Challenges for Connectivity and Energy in Tanzania*, Findings of a study carried out for the International Institute for Communication and Development (IICD) (available at <http://www.iicd.org/files/Rural-Connectivity-Tz-2007-Suhail-Sheriff.pdf> (as accessed on 25/6/2011)).

⁸⁹ See TCRA *Report on Internet and Data Services Supply in Tanzania: A Supply-Side Survey* (2010) at 3 (available at <http://www.tcra.go.tz/publications/InternetDataSurveyScd.pdf> (as accessed on 27/6/2011)).

⁹⁰ Ibid.

⁹¹ Ibid.

Figure 1. Trends of ASLs from April 2000-June 2010



(Source of Data TCRA Report 2010)⁹²

Overall, earlier research on developing countries' technological terrain has shown that '[t]he principal barrier to achieving the potential benefits of B2B e-commerce [include] insufficient investment in the telecommunication infrastructure and the high costs of connectivity.'⁹³ These observations do not portray a healthy scenario for successful B2B e-commerce. Low internet connectivity is not only a sign of limited knowledge about ICT's usefulness, but also an absence of effective government initiatives to generate policies that support a digitised economy.⁹⁴

The observations above reveal the difficult terrain over which many developing countries are treading and the future prospects for e-commerce in a country like Tanzania. They are also a reminder that effective B2B e-commerce demands foresight, vigilance and political will on the part of not only the government (through its development policies) but also the private sector (which is currently being co-opted as a partner in the development process). Commitment towards change is also vital.

⁹² See TCRA Report (n89) 13.

⁹³ See M N Kinyanjui & D McCormick 'E-commerce in the Garment Industry in Kenya: Usage, Obstacles and Policies.' *Report for Project e-commerce for Developing Countries: Building an Evidence Base for Impact Assessment* (August 2002) at 1, (available at http://www.ids.ac.uk/UserFiles/File/globalisation_team/B2BKenyagarmentsfinal.pdf (as accessed on 27/3/2008)). See also S Vatanasakdakul, W Tibben & J Cooper 'What Prevent B2B eCommerce Adoption In Developing Countries?: A Socio-Cultural Perspective, 17th Bled eCommerce Conference EGlobal Bled, Slovenia, June 21 - 24, 2004 (available at [http://ecom.fov.uni-mb.si/proceedings.nsf/0/1a2a660a13eca91bc1256ee00038be7f/\\$FILE/51Vatana.pdf](http://ecom.fov.uni-mb.si/proceedings.nsf/0/1a2a660a13eca91bc1256ee00038be7f/$FILE/51Vatana.pdf) (as accessed on 4/10/2010)).

⁹⁴ See UNCTAD *Building Confidence: E-commerce and Development Report* (UNCTAD/SDTE/MISC.11). (2000)

For its part, the government has a special role to play. This includes establishing a reliable regulatory framework that ensures safety, transparency and certainty of transactions in an information economy where the 'private sector continues to take the lead.'⁹⁵ In this way the government will be a catalyst to both business entities and the general consumers.

According to Panagariya, developing countries stand to gain more from e-commerce than the developed ones because they have the opportunity to skip some of the stages that developed nations had to go through.⁹⁶ Whether this view is plausible and whether there is a short cut to development is arguable. Nevertheless, this can only be a reality if developing countries assist their SMEs to take part in e-commerce by creating the necessary policies and legal framework that address electronic transactions and encourage development of ICT-skilled manpower.⁹⁷

There are plenty of reasons why Tanzanian firms need to be encouraged to participate in B2B e-commerce and why the laws governing contractual relations need to be reviewed.⁹⁸ Adherence to traditional paper-based contracting hinders companies from accessing new trading opportunities offered by e-commerce,⁹⁹ and increases 'contracting cost and time requirements.'¹⁰⁰ Moreover, companies fail to gain competitive advantage because they face new business scenarios that cannot be supported 'by means of traditional paper contracting.'¹⁰¹ For instance, companies using e-agents to form contracts in a B2B scenario, have the

⁹⁵ See S Wilson 'Towards an Australian strategy for the information economy' Ministerial Council for the Information Economy, July 1998 (available at <http://www.noie.gov.au/nationalstrategy/index.html> (as accessed on 25/3/2008)). See also Q Hu, X Wu & C K Wang 'Lessons from Alibaba.com: government's role in electronic contracting' (2004) 6 *Info* 298 (available at <http://webuser.bus.umich.edu/wux/paper/Alibaba.pdf> (as accessed on 23/5/2011)).

⁹⁶ See A Panagariya *E-commerce, WTO and Developing Countries* UNCTAD Policy Issues in International Trade and Commodities Study Series No. 2 (2000) 15. See also The White House *A Framework for Global Electronic Commerce* (July 1st, 1997) available at <http://www.ta.doc.gov/digeconomy/framework.htm> (as accessed on 20/5/2007).

⁹⁷ See Panagariya (n96) 16. Developing countries with skilled labour are best positioned to benefit from e-commerce. India is, for instance, cited as a developing country that has greatly benefited from online outsourcing of skilled labour. However, this country has heavily invested in higher education, a fact which should be emulated.

⁹⁸ See (generally) OECD Report *Electronic Commerce: Opportunities and Challenges for Government*, OECD (1997). See also L Vasiliu *et al Personal Information Issues in B2C E-commerce: A Theoretical Framework* COLLECTeR (2002); A Goldstein & D O'Connor 'E-commerce for Development: Prospects and Policy Issues' (2000) OECD Development Centre Technical Papers No 164 (available at <http://www.oecd.org/dev/publication/tp1a.htm> (as accessed on 5/10/2007)); R Heeks 'Analysing e-commerce for development,' (2000) (available at http://idpm.man.ac.uk/publications/wp/di/short/di_sp04.doc (as accessed 24/11/2006)); A Singh & J Tanburn 'ICTs and enterprises in developing countries: Hype or opportunity?' *Seed Working Paper*, Number 17 (2001).

⁹⁹ See Angelov & Grefen (n79) 31.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

advantage of using the same system to ‘monitor the responsibilities of each contractual party and the performance of the obligations.’¹⁰² This is not the case in a paper-based setting. Consequently, to firms in developing countries like Tanzania, B2B e-commerce is a not-to-be-miss opportunity.

It is also true that Tanzania, as a country with unique traditional products (for instance, coffee, spices from Zanzibar, Makonde Carving, Tanzanite gemstone, national parks and other tourist attractions), can gain ‘considerably from sustainable e-commerce activities.’¹⁰³ Despite the many natural resources and products available in Tanzania, however, there is very limited information about them in the global market. Through B2B e-commerce these resources can be advertised to the outside world, and in this way, Tanzanian firms will secure more access to international markets.¹⁰⁴

▪ **Business-to-Consumer (B2C) E-commerce**

B2C ecommerce involves ‘marketing and selling to individual consumers online.’¹⁰⁵ Strategically, B2C e-commerce is about ‘mass marketing.’¹⁰⁶ Several websites, such as Amazon.com or eBay are characterised as online B2C interactions.¹⁰⁷ Whereas it is also possible for a ‘business that sells to end consumers’ to maintain trading relations with other businesses on the supply side,¹⁰⁸ B2C is seen as ‘the end-point of a business-to-business value chain.’¹⁰⁹

¹⁰²See L Xu & P De Vrieze ‘E-contracting Challenges’ in M Khosrow-Pour (ed) *Encyclopaedia of Information Science and Technology* 2ed (2009) 1237-1243 (available at <http://www.adaptivity.nl/articles/E-contracting.pdf> (as accessed on 2/5/2010)).

¹⁰³See G S Oreku, J Li, K Kimeli & F J Mtenzi ‘State of Tanzania E-Readiness and E-Commerce: Overview’ (2009) 14 *Information Technology for Development* 302.

¹⁰⁴It has been stated that through e-commerce, even small firms can significantly increase their access to international markets. For instance, they can do so by exploring available opportunities to extend their geographical reach for new customers or establish new business relationships such as offering *teleservices*. See ‘Economic and Social Impact of E-commerce: Preliminary Findings and Research Agenda’ *OECD Digital Economy Papers* No. 40 OECD Publishing (1999) 17. Teleservices, as a promising business in Africa, involves using the Internet to deliver contracted services such as accounting, translation, and transcription over the internet. See ‘Promoting E-business Exports in Uganda’ a Study Conducted for UNDP in Uganda by Perwit International (2002) (available at [http://www.foodnet.cgiar.org/scrip/docs&databases/ifpriStudies_UG_nonScrip/pdfs/COMPETE_conference%20\(February%202002\)/UNDP_E-Business_Report_Jan_2002.pdf](http://www.foodnet.cgiar.org/scrip/docs&databases/ifpriStudies_UG_nonScrip/pdfs/COMPETE_conference%20(February%202002)/UNDP_E-Business_Report_Jan_2002.pdf) (as accessed on 30/6/2009)).

¹⁰⁵See Botha et al (n80) 97.

¹⁰⁶Ibid at 97.

¹⁰⁷See other B2C websites such as Travelocity.com (<http://travelocity.com>); Expedia.com (<http://www.expedia.com>); Dell.com, (<http://www.dell.com>) or Netbank.com (<http://www.netbank.com>).

¹⁰⁸See Botha et al (n80) 97.

¹⁰⁹Ibid at 97.

B2C e-commerce in most 'less developed countries' is a viable venture if, for instance, B2C portals are specifically created to target expatriates from these countries working in the diaspora.¹¹⁰ B2C e-commerce portals such as <http://www.EthioGift.com> and <http://www.ghanamall.com.gh> represent good examples.¹¹¹ According to Lake these online enterprises 'are succeeding in operating profitable online businesses by serving the Ethiopian and Ghanaian diaspora respectively.'¹¹² Lake has also pointed out that Radio One, a Tanzanian Internet radio station, reported 'unexpectedly high numbers of people (presumably Tanzanian expatriates) tuning in.'¹¹³ This indicates that an online market for traditional and cultural goods and services, such as local music, is available for Tanzanian citizens in the diaspora.

Certain obstacles, however, need to be overcome. These 'include the high costs involved in developing a quality website and acquiring online clients, expensive fulfilment costs, problematic online payment issues, exclusivity of distribution channels and the lack of a domestic market.'¹¹⁴ In addition, the level of Internet penetration among the Tanzanian population is also a matter of concern.¹¹⁵

The 2010 TCRA Report¹¹⁶ reveals that as of June 2010 the total number of internet users stood at 4.8 million. Of this number, 5 percent access the Internet through cybercafés, 55 percent do so from organisations or institutions and 40 percent from households. In terms of penetration, as at June 2010, only 11 percent of all Tanzanians were able to access and were using the Internet.¹¹⁷ However, certain ICT-related sectors, such as the mobile telecoms service, are making good progress in the country. Currently, the telecoms market in Tanzania

¹¹⁰See S Lake 'E-commerce and LDCs Challenges for Enterprises and Governments' –a paper presented to an e-commerce and LDCs Round Table Discussions, Kathmandu – Nepal – 30-31 May 2000 Electronic Commerce Section, SITE / UNCTAD (available online at http://r0.unctad.org/ecommerce/event_docs/kathmandu_background.pdf (as accessed on 28/6/2009)).

¹¹¹See Lake (n110) at 3.

¹¹²Ibid.

¹¹³Ibid.

¹¹⁴See L Zhongzhou 'E-commerce business models in the Developing Countries: Some Examples from a Survey by UNCTAD' *The Courier ACP-EU Dossier* (May-June, 2002) 62, 63.

¹¹⁵See, for instance, TCRA Report (n89) 4; S R Kassim *Internet usage for Commercial purposes in Tanzania* (Unpublished MBA Dissertation University of Dar-es-salaam, 2000). See UNCTAD Report (n94); S Mafu 'From the Oral Tradition to Information Era: The Case of Tanzania' (2004) 6 *International Journal on Multicultural Societies* 53.

¹¹⁶ See TCRA Report (n89) 4, 18. It is also noted that most of the Internet Cafes are concentrated in the major towns. See I Nnafie *Internet cafes in Dar es Salaam: Problems and Opportunities: Recommendations for e think tank Tanzania* Msc. Thesis Eindhoven University of Technology (2002) (available at <http://www.tzonline.org/pdf/surveyoninternetcafesindsm.pdf> (as accessed on 2/5/2007)). See also B Furuholt & S Kristiansen 'Rural-Urban Digital Divide? Regional Aspect of Internet Usage in Tanzania' (2007) 31 *Electronic Journal of Information Systems in Developing Countries (EJISDC)* 1, 3 (available at <http://www.ifipwg94.org.br/fullpapers/R0090-1.pdf> (as accessed on 26/6/2011)).

¹¹⁷ See TCRA's Report (n89) 4.

is one of the most competitive on the continent, as the level of mobile market penetration has passed the 50 percent mark since 2010.¹¹⁸

The TCRA's Report, when compared to a previous research on ICT usage in Tanzania, shows that the past five years (ie from 2005 to 2010) have shown a steady development. A study conducted in 2005 shows that only 2 percent of the Tanzanian population had e-mail addresses. For the purposes of access to Internet and computer use in the household, only 2 percent were found to have a working computer.¹¹⁹ In Dar-Es-Salaam, which is the central business city, only 6 percent of households were found in possession of a computer, half of which had a printer and 15 percent of which had a scanner.¹²⁰ Out of these households only 15 percent had Internet connection.¹²¹ The table below summarises the growing trends from 2001-2005. Overall, despite positive growth indications, the levels of Internet penetration in Tanzania is still low since: only 11 percent of an estimated population of more than 40 million people have access to the Internet.¹²²

Table 1-Internet use and PCs in Tanzania¹²³

	Year	Internet				PCs	
		Hosts	Hosts per 10000 inhabitants	Users (000s)	Users/100 Inhabitants	Total (1000)	Per 100 inhabitants
Tanzania	2001	1,478	0.44	60.0	0.18	120	0.36
	2005	5,908	1.57	333.0	0.89	278	0.74
Africa	2005		4.92		3.72		2.24
World	2005		421.63		15.17		13.3

Table 1 reveals the difficulties for developing e-commerce in Tanzania, especially the B2C model. Overall, although the TCRA Report¹²⁴ shows steady developments, increased

¹¹⁸ See 'Tanzania - Telecoms, Mobile, Broadband and Forecasts' (available at <http://www.budde.com.au/Research/Tanzania-Telecoms-Mobile-Broadband-and-Forecasts.html> (as accessed on 28/6/2011)).

¹¹⁹ See I Ngilindwa & B Mutagahywa 'Chapter 10. Tanzania' in A Gilwald (ed) *Towards and African e-index household and individual ICT access and usage across 10 African countries* (2005) 158.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² According to a Population Census Report issued by the National Bureau of Statistics (NBS) in 2006, the total population in 2002 was 34.4 million. See The United Republic of Tanzania *Analytical Report Vol X* National Bureau of Statistics Ministry of Planning, Economy and Empowerment Dar es Salaam August (2006) 1 (available at <http://www.nbs.go.tz/pdf/2002popcensus.pdf> (as accessed on 28/6/2011)). The current estimates according to the CIA World Fact Book stands at 42,746,620 (July 2011 est.) (available at <https://www.cia.gov/library/publications/the-world-factbook/geos/tz.html> (as accessed on 28/6/2011)).

¹²³ Source: ITU Statistics, International Telecommunication Union (2006) (available at <http://www.itu.int/ITU-D/ict/statistics/> (as accessed on 25/4/2009)). See also Furuholt & Kristiansen (n116) 4.

efforts to improve Internet access for people or households and improving financial infrastructures by introducing credit and debit card systems are still needed in order to promote B2C e-commerce activities in the country.

In Canada, for instance, in the year 2003 alone an estimated 3.2 million Canadian households actively participated in e-commerce and accessed the Internet from various locations, including their homes.¹²⁵ While one may argue that Canada is ‘another world’ compared to Tanzania, the latter ‘cannot afford to be left behind too long due to globalisation of business across the world.’¹²⁶ As part of the networked global society Tanzania needs to take appropriate measures to bringing its economy ‘into the centre of the e-commerce revolution.’¹²⁷

The limited internet access in Tanzania, however, does not mean that there are no prospects for the development of B2C e-commerce.¹²⁸ In the financial sector, for instance, some banks have introduced smart-card technologies, including VISA online shopping, hence contributing to the growth of e-commerce. These include the CRDB 1997 Ltd, with its well-known TemboCard VISA, and the Tanzania Postal Bank (TPB) that developed the UHURUCard.¹²⁹ In 2005, the CitiBank (T) introduced Electronic Funds Transfer services, making it the first bank in Tanzania to launch an online domestic funds transfer service.¹³⁰ The recent introduction of mobile phone money transfers services, such as Vodafone M-Pesa¹³¹ or

¹²⁴ See TCRA Report (n89).

¹²⁵ See *The Daily*, September 23, 2004 ‘E-commerce: Household Shopping on the Internet, 2003’ (available at <http://www.statcan.ca/Daily/English/040923/d040923a.htm> (as accessed on 28/11/2007)). See also Bhaloo (n5) 225.

¹²⁶ See J Kabalimu, B Corbitt & T Thanasankit ‘Implementing IT policy and the bedevilment of post-colonialism-A case study of Tanzania’ in T Thanasankit (ed) *E-commerce and cultural values* (2003) 83. See also Smedinghoff & Bro who argues that since ‘great change pre-dominates the world... unless we move with [it] we will become its victims.’ See T J Smedinghoff & R H Bro ‘Moving with change: Electronic Signature Legislation as a vehicle for advancing E-commerce’ (1999 17 *John Marshall Journal of Computer and Information Law* 723, 724.

¹²⁷ See Kabalimu et al (n126) 83.

¹²⁸ Indeed, although low access to internet is a serious concern it should not curtail efforts to examine the prospects for e-commerce or promotes its development in a country like Tanzania. And, as once said, the inability to visibly see the end of the road should not stop us from embarking on an essential journey. Currently various Japanese companies are increasingly targeting the Tanzania and the entire East African Market visit the following websites: <http://ippmedia.com>; <http://www.autorec.co.jp>; <http://www.kyoei.co.jp> or <http://www.tradecarview.co.jp>. (All these wevbsites were last accessed on 28/6/2011).

¹²⁹ Most cards used in Tanzania are debit (pre-paid) cards. See CR2 Channel Banking Innovation Case study: *CRDB Bank introduces smart card services to Tanzania with TemboCard April 2005* (available from http://www.cr2.com/pdf/CRDB_Apr05.pdf (as accessed on 27/10/2007)). See also E Sulla E Sulla *Performance of Card-Based Payment Systems on Customer Satisfaction in Financial Institutions in Tanzania, Case study of CRDB Bank Ltd* (Unpublished MBA Dissertation, University of Dar-es-Salaam, 2004).

¹³⁰ See *The Financial Times* (available at <http://www.ippmedia.com/ipp/financial/2005/10/12/51652.html> (as accessed on 5/6/2007)).

¹³¹ See Vodafone (April 8 2008) *Vodacom Announces Intention to Launch Vodafone M-PESA Mobile Money Transfer Service in Tanzania* (available at

Zantel's Z-Pesa,¹³² is another remarkable development that can potentially influence m-commerce¹³³ between the 'unbanked' rural populations and the urban areas.¹³⁴

Although B2C e-commerce is growing, albeit at a slow pace, those engaging in it may face difficulties where a dispute arises concerning enforceability of contracts purported to have been formed online by use of, let us say, an e-mail.¹³⁵ Consider the following hypothetical case.

Madelaine from Florida, USA wants to spend her Christmas holiday in Tanzania. With a view to arranging for her accommodation and possibly an excursion trip to Mount Kilimanjaro, she has quickly browsed through the Internet for suitable hotel accommodation and a tour operator. She was lucky to find a website belonging to a tour operating company in the name of Kilimanjaro Tour & Hotel Operator. The website provided a personal e-mail for correspondence, the company's bank account (and a SWIFT Code for payment purposes) and a cell phone number for further contacts. She decided to e-mail one Adrian Mjanja (this being the contact person whose e-mail address was available on the website) and she wrote:

Dear Adrian,

I will spend my summer vacation in Tanzania and will want to see Mt. Kilimanjaro. I have seen and agree that your prices for rooms and excursion are reasonable, and I am happy with them. Kindly reserve 2 suitable hotel rooms for my family from December 15th to 25th 2009. Payments will shortly be made into your account as soon as I hear from you.

Regards.

Madelaine.

http://www.vodafone.com/start/media_relations/news/group_press_releases/2007/vodacom_announces.html (as accessed on 29/1/ 2009). 'M' stands for mobile while 'Pesa' is a Kiswahili word for money.

¹³²Zantel is a telecommunication company registered in Zanzibar and offers mobile phone money transfer services.

¹³³M-commerce or mobile commerce is a form of e-commerce which is carried out using an individual's mobile phone to settle several transactions of commercial nature. (For more about it see R Rannu 'Mobile Services in Estonia: Policy Analysis No2' PRAXIS Center for Policy Studies (2003) 12 (available at http://siteresources.worldbank.org/EXTDEVELOPMENT/Resources/Praxis_Estonia_m-gov.pdf?resourceurlname=Praxis_Estonia_m-gov.pdf (as accessed on 22/7/2011).

¹³⁴See M Reed 'M-money is an idea whose time has come' (available at <http://www.telecoms.com/174/m-money-is-an-idea-whose-time-has-come> (as accessed on 30/3/ 2009).

¹³⁵According to Kamuzora about 25-50% of all communications between the tourists and tour operators or those involved in the tourism business cycles e.g. hotel booking or selling local curios, are mostly through e-mails. See F R Kamuzora *E-commerce for Development: eTourism as a Case Show* (2006) 43.

Suppose after some few minutes she received a reply from Adrian stating:

Dear Madeleine,

Thank you for your e-mail. Our prices are always reasonable. Terms and conditions will have to apply.

Regards.

Adrian.

Suppose Madeleine, believing that a contract was made, paid for the hotel online while in Florida and travelled with her entire family to Tanzania only to find that no arrangements were made by the hotelier and no rooms were reserved for her. After incurring more expenses than she had planned, Madeleine's family secured accommodation in another hotel but could no longer enjoy an excursion trip to see Mount Kilimanjaro. They ended up in Zanzibar. Madeleine feels disappointed by what transpired and wants to sue the tour operating company for breach of contract. Given these facts, one may wish to raise several questions. Was there a contract? By relying on no more than the e-mail communications can she successfully sue the company? If there was a contract, when and where was it formed?

Suppose Adrian disputes some of the contents of the e-mail which Madeline intends to rely upon, how could Madeleine establish its authenticity? As will be discussed in chapter two, these issues, and others, are likely to arise in the B2C environment, and may well arise in other e-commerce types. Resolving them on the basis of the existing law may not be easy.

▪ **Consumer-to-Consumer (C2C) E-commerce**

C2C e-commerce exemplifies a situation where a private individual or a consumer deals with another consumer online.¹³⁶ It is characterised by the growth of electronic market places and online auctions, and it manifests in at least three forms: auctions facilitated at a portal (such as eBay, to allow online real-time bidding) peer-to-peer (P2P) systems (for example, Napster file sharing model),¹³⁷ and classified advertisements at portal sites, (for example, the Excite Classifieds (<http://classifieds.excite.com>) or eWanted (<http://www.ewanted.com/>)). Although

¹³⁶See Botha et al (n80) 97.

¹³⁷For more on P2P and its challenges see G K Arora, M Hanneghan & M Merabti 'P2P Overlay Network to Support E-commerce' available at <http://www.cms.livjm.ac.uk/pgnet2006/Programme/Papers/2006-101.pdf> (as accessed on 7/10/2008).

the prospects for C2C e-commerce growth in Tanzania exists, for instance, in the music industry, it has not been well established due to various factors, such as the lack of an effective intellectual property regime, the lack of an effective payment system and the lack of functional local websites.

▪ **Business-to-Government (B2G) E-commerce**

‘Players in e-commerce today are not only Business and Consumers but also the Government.’¹³⁸ Thus, ‘B2G’ e-commerce refers to business interactions between business entities and the public sector or governmental institutions,¹³⁹ especially where a country has adopted an e-government strategy. Basically, B2G interactions in an e-government scenario are a fertile ground for e-business growth.¹⁴⁰ Through such interactions ‘governments create a positive business climate by simplifying relationships with businesses and reducing the administrative steps needed to comply with regulatory obligations.’¹⁴¹ Additionally, B2G interactions provide significant contributions to the growth of e-business culture. Many transactions and other important government-related operations, such as e-procurement or licensing procedures, can be executed electronically. This has overall positive effects on the development of e-commerce because it inculcates into the minds of the general public a sense of confidence and a demand for a wider application of ICT.

Additionally, governmental involvement in e-commerce creates a ‘spillover effect...to businesses, [forcing them] to improve efficiency by adopting e-commerce strategies.’¹⁴² The end result is improved services and expanded e-business opportunities in and outside the country. At the moment, however, prospects for B2G development in Tanzania are few as most government departments do not have established interactive and transactional websites

¹³⁸See Y Moriuchi ‘e-Government’ Global Business Dialogue on Electronic Commerce (GBDe)-Tokyo recommendations September 14th (2001) 41 (available at http://www.gbd-e.org/IG/eGov_top.html (as accessed on 1/10/ 2007)).

¹³⁹See B Mutagahywa, C Kinyeki & J Ulanga *A Review of E-Government Related Interventions in PSRP Phase I and Advise on a Strategy Framework towards PSRP Phase II*. A Report submitted to the United Republic of Tanzania, President’s office Public Service Management (2007) 26. See also M Backus *E-Governance and Developing Countries*, IICD Research Report –No 4 April (2001) 10 (available at <http://www.ftpiicd.org/files/research/reports/report3.pdf> (as accessed on 24/9/07)).

¹⁴⁰‘eBusiness’ as referred to here is a broad term that includes e-commerce. It involves ‘servicing customers and collaborating with business customers electronically, as well as conducting transactions electronically between and within organisational entities.’ See R W Okot-Uma & J Onunga *Electronic Governance: An Eastern African Perspective* (2004) 99.

¹⁴¹See Okot-Uma & Onunga (n140).

¹⁴²See J Kaaya ‘Implementing eGovernment services in East Africa: Assessing status through content analysis of government websites’ (2004)2 *Electronic Journal of E-government* 39-54, 41, (available at <http://www.ejeg.com/volume-2/volume2-issue-1/v2-i1-art5.htm> (as accessed on 29/9/2007)).

where interactions with the business community, such as tendering and other procurement processes, can take place. Although the relevant authority that regulates public procurement - the Public Procurement Regulatory Authority (PPRA) - has established an online presence,¹⁴³ this is only an initial, though positive, step. In the absence of a functioning e-government strategy, growth of B2G e-commerce in Tanzania will be slow in coming, and thus need not delay us unduly.

From the foregoing discussion, it suffices to state that, although the e-commerce types discussed above constitute a huge market for businesses in Tanzania, three types, namely B2B, B2C and C2C e-commerce are the most likely to develop in the near future. The reasons are, firstly, that Tanzania has largely liberalised its economy by adopting market-based policies to attract more investments from outside (and hence international merchants). Thus, businesses outside the country are now targeting customers or business partners in Tanzania.¹⁴⁴

Secondly, the private sector in Tanzania is currently growing and an increasing number of SMEs seek to harness the new technologies. More SMEs will want to embrace e-commerce in the form of B2B or B2C, both locally and internationally. As ICT penetrates the tourism industry, for instance, it has given rise to the so-called e-tourism,¹⁴⁵ consequently introducing this industry to e-transactions.¹⁴⁶ Thirdly, because some banks in the country have introduced smart-card technologies, a growing number of Tanzanians can shop online. In view of these reasons, and, given the future trend of e-commerce in Tanzania, whether in the nature of B2B or B2C, we can expect online transactions with foreign-based companies to generate more and more problems regarding conflict of laws and consumer protection.¹⁴⁷

¹⁴³See <http://www.ppra.go.tz/> and <http://www.mca-t.go.tz/> (as accessed on 23/5/2010).

¹⁴⁴Companies from countries like China and Japan have, for instance, established links with Tanzanian businesses or opened offices in the country with a view to supplying their goods to the rest of East and Central Africa. See, for instance, (n128) above.

¹⁴⁵The term *eTourism* signifies a body of knowledge resulting from the interaction between ICTs and Tourism. For more about this see Kamuzora (n135) 12-13. See also F Kamuzora 'eTourism for Empowering Small and Medium Tourism Enterprises in Poverty Eradication in Tanzania' in F Ayadi (Ed) *African Business and Development: Strategies for Economic Growth and Poverty Alleviation* Vol 6 Dar es Salaam IAABD (2005) 363-371; F Kamuzora 'The Internet as an Empowering Agent for Small, Medium and Micro Tourism Enterprises in Poor Countries' (2005) *3e-Review of Tourism Research (eRTR)* 82 (available at <http://ertr.tamu.edu> (as accessed on 23/5/2010)).

¹⁴⁶According to UNCTAD, tourism sector is 'a perfect fit for e-commerce.' See UNCTAD *E-commerce and Development Report* (2003).

¹⁴⁷See, for instance, J A Ismail & J E Mills 'Contract Disputes in Travel and Tourism: When the Online Deal Goes Bad' (2001) 11 *Journal of Travel & Tourism Marketing* 63.

(iii) E-commerce and the Transforming Power of ICT

The importance of ICT and its role in global economic growth cannot be overemphasised. It has exerted a considerable impact on society, such as 'improved communication, increased accessibility of news, the beginnings of e-commerce, the emergence of Internet cafes, to name but a few.'¹⁴⁸ Information technology has become 'the single most important factor shaping the structure of the economy and society.'¹⁴⁹ In the past, communication pattern used to be on a 'one-to-one' basis but currently, through technological developments, the pattern is no longer linear but has multiple ends. It is now possible to communicate on a 'one to many' pattern by a simple click of a mouse.

In the field of commerce, ICT has simplified the manner of executing and handling of business information while enabling customers to access information concerning prices or even drive pricing.¹⁵⁰ Thus, as some scholars put it, ICT has created a 'third wave of civilisation.'¹⁵¹ With increased innovations, ICT is bound to have a significant influence on various sections of the economy.¹⁵² Its effects are felt in a number of legal areas, from conclusion of contracts to the protection of intellectual property, taming of 'cybercrimes' and 'cybertorts', to mention but a few.

Currently, producers and marketers can globally relay information about products and services online to their potential customers and among themselves. Such technology-enhanced interactions have led to growth of e-commerce, referred to by some as 'a new game in town'¹⁵³

¹⁴⁸See B Peacey 'Socio-Economic Impacts of ICT' *E-government@ the Local Level – A Discussion Paper* ICT and Community Series (*Working Paper 1*) (2002) 6 (available at http://www.slis.indiana.edu/faculty/hrosenba/www/1574/pdf/peacy_egov.pdf (as accessed on 23/06/10)). See also E M Crenshaw & K K Robison 'Globalization and the Digital Divide: The Roles of Structural Conduciveness and Global Connection in Internet Diffusion' (2006) 87 *Social Science Quarterly* 190; N Dholakia, R R Dholakia, D Zwick & M Laub 'Electronic Commerce and the Transformation of Marketing' (available at <http://ritim.cba.uri.edu/working%20papers/Fritz-2nd-ed-Transformn-Mktg-v2%5B1%5D.pdf> (as accessed on 20/12/2007)).

¹⁴⁹ See J F Coates 'Law and Technology in the Twenty-First Century' (1996) 52 *Technological Forecasting and Social Change* 255. See also H Brechbühl, R Bruce, S Dynes & M E Johnson 'Protecting Critical Information Infrastructure: Developing Cybersecurity Policy' (2010) 16 *Information Technology for Development* 83.

¹⁵⁰See Simpson & Docherty (n64) 319.

¹⁵¹See, for instance, D Bell *The coming of post-industrial society* (1976). See also M Waters (ed) *Modernity: Critical Concepts* (1999); Botha et al (n80) 13.

¹⁵²See M Fan, S Srinivansan, J Stallaert & A Whinston *Electronic Commerce and the Revolution in Financial Markets* (2002).

¹⁵³See M De Kare-Silver *E-shock: the new rules – Internet strategies for retailers and manufacturers* 2ed (2001) 7. See also Dagada et al (n13).

or ‘a “trading centre” without restrictions from territorial and geographical factors.’¹⁵⁴ In this virtual market transactions valued in billions of US dollars take place annually.¹⁵⁵ In 1999, for instance, the worldwide e-commerce levels hit US \$145 billion while in 2004 projected trends were above US \$6.8 trillion.¹⁵⁶ Total online consumer spending reached US \$170 billion in 2006.¹⁵⁷

According to the Eurostat press release, a total of 12 percent of enterprises’ turnover in the EU was generated from e-commerce in 2008.¹⁵⁸ In China, the China Daily reports that China’s e-commerce turnover had increased by 22 percent in 2010,¹⁵⁹ while in Kenya in 2010 M-payment services carry more than 12 percent of the country's GDP.¹⁶⁰ Overall, the continuing rise of e-commerce globally suggests that ICT has the potential to drastically transform the socio-economic dynamics of a given society even in other areas such as education, health, and business procurement.¹⁶¹

It is also clear that the current technological support for e-commerce has led to the creation of an almost perfect state of free competition by reducing market entry barriers and lowering transaction costs. In order to facilitate an easy harnessing of all these benefits and to allow ICT to contribute towards socio-economic growth, however, there is a need for a legal framework that supports wider application of ICT. And, because e-commerce requires a high level of trust and legal certainty of its transactions, countries, like Tanzania, wishing to fully participate in e-commerce are obliged to not only establish the basic technological capabilities in terms of ICT infrastructure development but also appropriate supporting legal

¹⁵⁴See A A Guilherme, A Avila & V Bancanoska ‘Promoting E-commerce in Developing Countries’ Internet Governance & Policy-Discussion Paper’ (*no date*) (at 6), (available at <http://www.diplomacy.edu> (as accessed on 24/3/2008)).

¹⁵⁵Crenshaw & Robison argue, for instance, that ‘50% of the economic production in the OECD countries is now generated by knowledge-based industries.’ See Crenshaw & Robison (n148) 1. According to Savirimuthu this technology born ‘trading centre’ constitutes ‘a new dynamic forum for socio-economic relations.’ See Savirimuthu (n7) 110.

¹⁵⁶See Boss (n78).

¹⁵⁷See ‘Online Consumer spending to hit \$170 Billion in 2006’ (available at http://www.metrics2.com/blog/2006/10/26/online_consumer_spending_to_hit_170_billion_in_200.htm (as accessed on 8/7/ 2007)).

¹⁵⁸See Eurostat Press Release (available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/4-19012010-BP/EN/4-19012010-BP-EN.PDF (as accessed on 20/6/2011)).

¹⁵⁹ See Xinhua ‘China’s E-commerce turnover up 22% in 2010’ (available at http://www1.chinadaily.com.cn/china/2011-01/19/content_11877124.htm (as accessed on 28/6/2011)).

¹⁶⁰ See World Digital Economy - E-Commerce and M-Commerce Trends (available at <http://www.mobilecommercetrends.com/world-digital-economy-e-commerce-and-m-commerce-trends-new-market-report-and-analysis/> (as accessed on 28/6/2011)).

¹⁶¹See a Joint Statement made in Washington DC by the then US Vice President Al Gore and the former British Prime Minister Tony Blair (January 30, 1999) (available at <http://www.usembassy.org.uk/it71.html> (as accessed on 5/6/2006)). See also United Nations Development Programme (UNDP) *Human Development Report* (2001).

frameworks.¹⁶²

(iv) The Road Map of E-commerce Development

Development of e-commerce is an evolutionary process. It progresses in phases, namely: presence, interaction and transaction, integration and transformation, and an on-going evolutionary stage.¹⁶³ The first stage, presence, is when a company establishes an online contact by, for instance, opening an e-mail address. At this point, the company relies on the services provided by the Internet Service Providers (ISPs) to communicate with its clients.

In the second stage, interaction and transaction, 'a company becomes more e-enabled and may create a transactional e-commerce site as part of its development cycle.'¹⁶⁴ In this way, the company makes its online presence more presentable and can interact with customers. This stage is followed by greater integration of its business whereby 'its Web front-end [is integrated] with its back-end systems.'¹⁶⁵ The company's transaction interface 'may be linked to its inventory management systems [to create] a 'hands-off approach.'¹⁶⁶ The company may, however, go further to the extraneous spheres and become fully connected with 'its partners, suppliers, and customers across all of its operations' to create the so-called 'flow-through approach to information.'¹⁶⁷

The final stage of a company's e-commerce evolution involves continuing transformation whereby a firm creates a new path as a result of changes in technology, detaching itself from the old business models, and embracing new and innovative ways to serve its clientele.¹⁶⁸ Duncan's¹⁶⁹ diagrammatic presentation of a company's e-commerce roadmap is reproduced in Figure 2 below.

¹⁶²See UNCTAD Report (n94).

¹⁶³See Botha et al (n80) 98-99.

¹⁶⁴Ibid at 98.

¹⁶⁵Ibid.

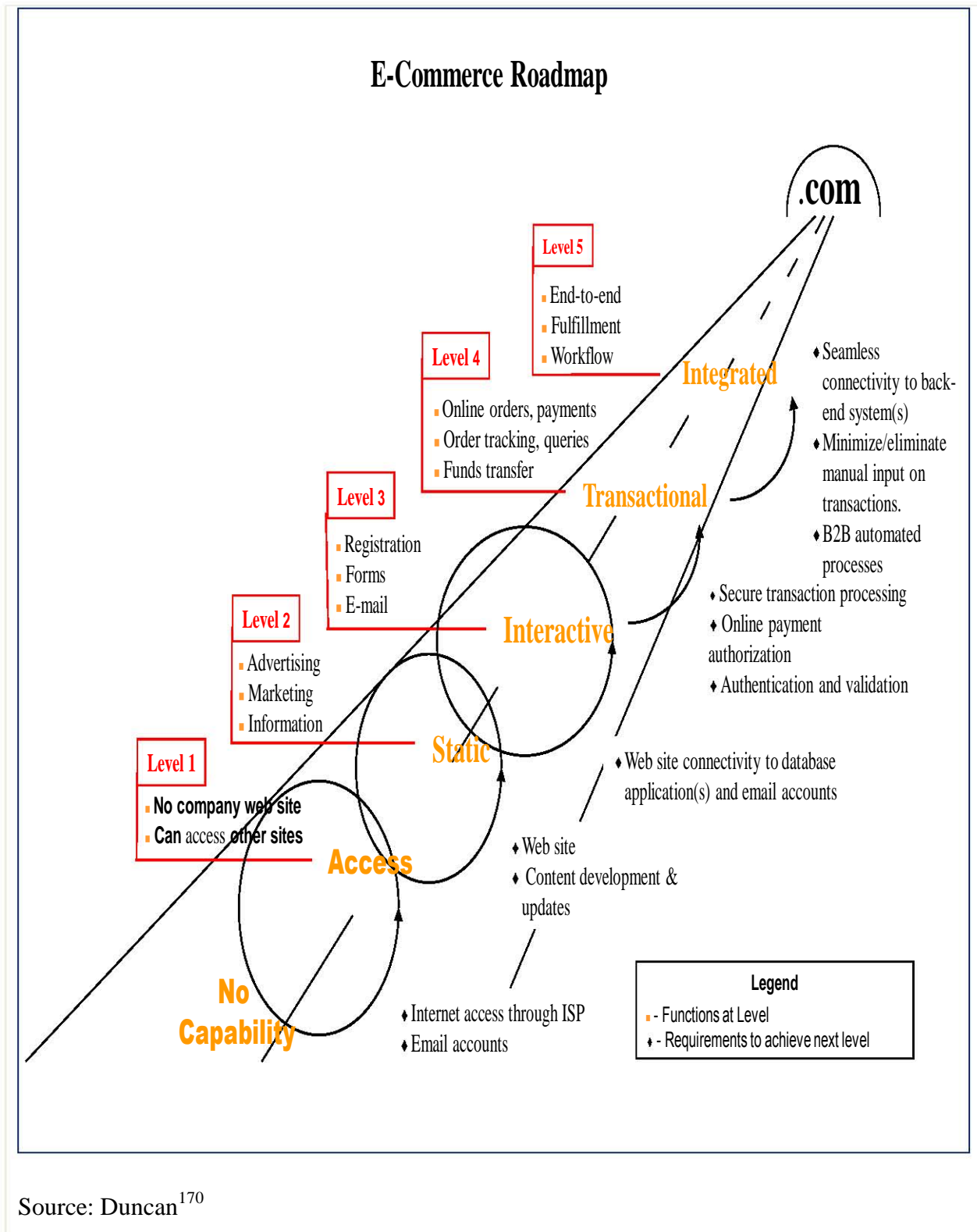
¹⁶⁶Ibid.

¹⁶⁷Ibid at 99.

¹⁶⁸Ibid.

¹⁶⁹Available at http://srdc.msstate.edu/ecommerce/events/01conf/duncan_beth.ppt (as accessed in 23/03/2007). See also Kamuzora (n135) 43.

Figure 2 E-commerce Road Map



Source: Duncan¹⁷⁰

¹⁷⁰See above (n169).

(v) Benefits and Challenges of Accommodating E-commerce in Tanzania

Although e-commerce has caused tremendous changes in the operational landscape of many businesses worldwide,¹⁷¹ there is a dearth of materials regarding its overall impact on businesses in Tanzania.¹⁷² Nevertheless, from a general viewpoint, it constitutes one of the significant opportunities for an economic breakthrough. Apart from giving consumers a wider online forum for choosing with whom to transact, e-commerce presents itself as an opportunity to increase business competitiveness.¹⁷³ Through it, businesses can adapt to changes in market conditions, reduce paper work, cut down costs, automate and control their inventories, and cooperate with partners.¹⁷⁴ They can also access existing markets more effectively and create new markets that are accessible globally.

If examined in the context of the existing legal framework in Tanzania, e-commerce is both an opportunity to be harnessed and a challenge.¹⁷⁵ It is an opportunity because of the various economic benefits associated with it—for instance, increased business efficiency and output and reduced costs—and it is a challenge because Tanzania lacks an appropriate legal framework to respond to the exigencies brought about by modern technologies.

It is worth noting that due to ‘the dynamism of the contemporary economic, cultural, and technological evolution’ existing legal frameworks must adapt themselves ‘to the modern demands.’¹⁷⁶ This is crucial because technology, apart from changing very fast, continues to

¹⁷¹See Kassim (n115). See also Majuva (n82); UNCITRAL ‘Legal Aspect of Electronic Commerce: Work by the United Nations Commission on International Trade Law (UNCITRAL)’ (LMM (99) 7, a paper prepared for the Commonwealth Secretariat by UNCITRAL, and produced in 1999- Meeting of Commonwealth Law Ministers and senior officials, Port Spain Trinidad and Tobago 3rd-7th May 1999 Memoranda Vol 2, at 281.

¹⁷²See J K Magille ‘Impact of E-Commerce on Taxation.’ A Presentation to Stakeholders Forum on Impact of E-Commerce on Taxation organised by the Tanzania Revenue Authority and—held on 6th July 2006, available at http://www.tanzaniagateway.org/docs/eCommerceImpactonTaxation_July2006.pdf (as accessed on 23/ 7/ 2007).

¹⁷³See Goldstein & O'Connor (n98). See also L H Li *How to Identify eCommerce Opportunities: Developing the Electronic Commerce Business Value (EBV) Framework—A Joint Publication with Infocomm Development Authority of Singapore (IDA) Cap Gemini Ernst & Young Consultants Singapore Pte Ltd and Infocomm Development Authority of Singapore (IDA) (2000)* (available at <http://www85.homepage.villanova.edu/timothy.ay/MIS3030/ecommerceOpp.pdf> (as accessed on 29/6/2011)).

¹⁷⁴See the LRCT’s position paper (n38) 3. See also Goldstein & O'Connor (n98). Some of the direct cost savings in e-commerce include savings on paper, postage, and fax charges. Time is considerably reduced as documents need not be sent back and forth. Indeed, the saying that ‘time is money’ comes true in e-commerce context since electronic trading is a speedy process that create income and save costs. See also J Coetzee ‘Incoterms, Electronic Data Interchange and the Electronic Communications and Transactions Act’ (2003) 15 *South African Mercantile Law Journal* 1.

¹⁷⁵See N Horn ‘Banking in the Electronic Age: Legal Issues’ in N Horn (ed) *Legal Issues in Electronic Banking, Studies in Trans-national Economic Law* Vol17 (2002) 3-27.

¹⁷⁶See D L Kidd & W H Daughtrey ‘Adapting contract law to accommodate electronic contracts: Overview and suggestions (1999-2000) 26 *Rutgers Computer & Technology Law Review* 215. See (generally) B P Keller

change the ways we interact socially and economically. Consequently, law, as an instrument for socio-economic development, must learn to keep pace with technology.¹⁷⁷

(b) E-contracts: Meaning and Types

The major interest in this thesis is in the law relating to e-contracts, especially consumer contracts. E-contracts are those created wholly or in part through communications over the Internet either by exchange of e-mails or otherwise (for instance, by clicking on a button on a particular website to indicate consent to be bound by terms governing the contract). This concept, in essence, applies to contracts created by the aid of electronic communications, such as the Internet, e-mail or sms.

Traditionally, legally binding contracts have either been oral or in the form of paper documents written and signed by the parties.¹⁷⁸ Such contracts have been well supported by established rules and concepts.¹⁷⁹ Extensive reliance on the Internet, however, has created a world of digital alternatives,¹⁸⁰ which have given rise to a variety of e-contracts as further discussed below.

(i) Commercial Contracts in the form of EDI

Electronic Data Interchange (hereafter referred to as 'EDI') involves electronic transfer of agreed standard-structured information from one computer to another.¹⁸¹ This technique developed with advances in the computing industry in the 1970s which came to replace use of

'Condemned to Repeat the Past: The Re-emergence of Misappropriation and Other Common law Theories of Protection of Intellectual Property' (1998) 11 *Harvard Journal of Law & Technology* 401, 428.

¹⁷⁷ See Kidd & Daughtrey (n176) 215. See (generally) Keller (n176) 428. See also *United States v Warshak, et al* Nos. 08-3997/4085/4087/4212/4429; 09-3176 (at page 19) available at <http://www.ca6.uscourts.gov/opinions.pdf/10a0377p-06.pdf> (as accessed on 27/6/2011).

¹⁷⁸ See S Angelov & P Grefen 'A Case study on Electronic contracting in on-line advertising -status and prospects' (no date) at 3 (available at <http://is.tm.tue.nl/staff/sangelov/Doc/External/AngelovProVe06.pdf> (as accessed on 26/11/2007)). See also Brinson et al (n70).

¹⁷⁹ See G Heinrich 'Harmonised Global Interchange? -UNCITRAL's Draft Model Law for Electronic Commerce Data Interchange' (1995) 3 *Web JCLI* Part 1 (available at <http://webjcli.ncl.ac.uk/articles3/contents3.html> (as accessed on 12/10/2007)).

¹⁸⁰ See Angelov & Grefen (n178) 2. See also J B Foster & R W McChesney 'The Internet's Unholy Marriage to Capitalism' (2011) 62 *Monthly Review* (available at <http://monthlyreview.org/2011/03/01/the-internets-unholy-marriage-to-capitalism> (as accessed on 28/6/2011)).

¹⁸¹ See C Glatt 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 *International Journal of Law and Information Technology* 34, 37. See also Article 2 of UNCITRAL *Model Law on Electronic Commerce*. The Model law is available at <http://www.un.or.at/uncitral/english/texts/electronic/ml-ec.htm> (as accessed on 28/8/2007). For more discussion on EDI see Heinrich (n179); S Eiselen 'The Electronic Data Interchange Agreement' (1995) 7 *South African Merchantile Law Journal* 1.

paper.¹⁸² Data under an EDI system involve ‘contractual or trade-related information, such as orders, invoices, specifications or parts lists, and increasingly, the information required for “electronic funds transfer” for the settlement of invoices.’¹⁸³

Essentially, EDI-based contracts follow the conventional contracting approach.¹⁸⁴ They involve an ongoing business-to-business (B2B) relationship typically carried out within an underlying prior agreement called Trading Partners Agreement.¹⁸⁵ As the Internet becomes a useful business tool, EDI contracts are increasingly being formed via this medium.¹⁸⁶ Legal problems concerning the Internet-enabled EDI contracts, such as the question where, when and how the contract was concluded, cannot be avoided.

(ii) E-mail-Based contracts

E-mail communications constitute the greatest part of traffic on the Internet.¹⁸⁷ Communication through e-mails is common among businesses and individuals. Currently, e-mails are used to create contracts.¹⁸⁸ Parties may exchange e-mails and send attachments embodying the terms of their contract. When a sender’s server sends a message to the receiver’s mail server, however, such e-message may travel through a number of servers before reaching the recipient or may even be stored in a server for a while before being sent on its way.¹⁸⁹ From a legal standpoint, this new technique has its own peculiarities and issues needing careful consideration.

¹⁸²See Heinrich (n179) Part I. According to Saxby EDI can be categorised into (1) Transaction Data Interchange which can further be sub-divided into (a) general trading documents such as invoices, purchase orders and customs declarations, (b) specific types of communications such as Electronic Fund Transfers; and (2) Technical Data interchange such as Computer-Aided Design/Computer-Aided Manufacturing (CAD/CAM) applications. See S Saxby *Encyclopedia of IT Law* (1990). EDI is sometimes referred to as ‘paperless trading’. See also Coetzee (n174) 1.

¹⁸³See Glatt (n181) 37.

¹⁸⁴See Z A Zainol ‘Electronic Data Interchange (EDI) and Formation of Contract: A Malaysian Perspective’ (1999) 7 *International Journal of Law and Information Technology* 256. (It is important to note that, in Tanzania, consideration is an essential element in a contract. In some legal systems (eg, in South Africa), it is not essential in a contract.

¹⁸⁵See C Pacini, C Andrews & W Hillison ‘To agree or not to agree: Legal issues in online contracting’ (2002) 45 *Business Horizons* 43. See also S Eiselen ‘E-commerce’ in D van der Merwe D van der Merwe, A Roos, T Pistorius & S Eiselen *Information and Communication Technology Law* (2008) 143.

¹⁸⁶See Z Milosevic & A Bond ‘Electronic Commerce on the Internet: What Is Still Missing?’ (no date) (available at <http://www.isoc.org/HMP/PAPER/096/html/paper.html>) (as accessed on 29/8/2007). See also Eiselen (n181) 143.

¹⁸⁷See L Davies ‘Contracts formation on the Internet: Shattering a few Myths’ in Edward & Waelde (n7) 97-120.

¹⁸⁸As it was for telephone, facsimile or telex, it is also possible to form a contract via the Internet through exchange of e-mail.

¹⁸⁹See Davies (n187).

(iii) Click-wrap Agreements

Click-wrap agreements are web-based agreements setting out the rights and obligations of the involved parties.¹⁹⁰ A web merchant relying on a click-wrap agreement requires clients to express their willingness to be bound by its terms and conditions. Consent is expressed through clicking on an icon which indicates ‘agreeing’ or ‘accepting’ such terms before concluding a transaction or downloading or installing a purchased software.¹⁹¹ Unlike other web-based agreements, in click-wrap agreements, users have constructive notice of the terms.¹⁹²

(iv) Browse-wrap Agreements

Browse-wrap agreements are web-based agreements that do not require users to indicate consent before accessing an online product or service. They are typically used ‘where commercial considerations make click-wrap agreements undesirable.’¹⁹³ Their lack of express demand for consent, however, has exposed them to criticism and objections.¹⁹⁴

(v) Shrink-wrap Agreements

A shrink-wrap agreement is an unsigned licence agreement with terms and conditions binding purchasers of particular licensed products or software when they either open it, or use it or by some other specified means.¹⁹⁵ In the context of e-commerce, a shrink-wrap agreement may be

¹⁹⁰See F M Buono & J A Friedman ‘Maximizing the Enforceability of Click-Wrap Agreements’ (1999) 4 *Journal of Technology Law and Policy* 1 (available at <http://journal.law.ufl.edu/~techlaw/4-3/friedman.html> (as accessed on 27/8/2009)).

¹⁹¹See M Robertson ‘Is Assent Still a Prerequisite for Contract formation in Today’s Economy?’ (2003) 78 *Washington Law Review* 265, 277. See also M Moringiello & W L Reynolds ‘Survey of the Law of Cyberspace: Internet Contracting Case in 2004-2005’ (2005) 61 *The Business Lawyer* 433.

¹⁹²See *Hotmail Corporation v Van Money Pie Inc* C98-20064 (ND Cal April 20 1998). In this case click-wrap agreements were held to be enforceable.

¹⁹³See B R Suffredin ‘Practical Guidelines for Creating Enforceable Online Agreements’ (2003) 2 *International IT Outsourcing News Letter* 1 (available at <http://www.mayerbrown.com/publications/article.asp?id=1817&nid=6> (as accessed on 5/4/2010)).

¹⁹⁴See R C Anderson ‘Enforcement of Contractual Terms in Click-wrap Agreements’ (2007) 3 *Shidler Journal of Law, Communications & Technology* (available at <http://www.lctjournal.washington.edu/Vol3/a011Cormier.html> (as accessed on 24/7/2007)).

¹⁹⁵See Robertson (n191) 275. For more discussion about these agreements see also M A Lemley ‘Terms of Use’ (2006) 91 *Minnesota Law Review* 459, 467; G P Smith ‘“Tear-open Licences” — Are they Enforceable in England?’ (1986) 2 *Computer Law and Practice* 128; R H Stern ‘Shrink-Wrap Licences of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?’ (1985) 11 *Rutgers Computer & Technology Law Journal* 51. See further S Chalton ‘Software Licensing Implications of the Copyright, Designs and Patents Act’ (1989–1990) 1 *Computer Law and Security Report* 6; D Einhorn ‘The Enforceability of “Tear-me-open” Software Licence Agreements’ (1985) 67 *Journal of the Patent and Trademark Office Society* 507; M J McNeil ‘Trade Secret Protection for Mass Market Computer Software: Old Solutions for New Problems’ (1987) 51 *Albany Law Review* 293; M Schwartz ‘Tear-me-open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion’ (1986) 7 *Computer Law Journal* 261.

used to accompany goods purchased online. These have also been open to criticism, since it is wrong to assume that the act of tearing the shrink-wrap package is sufficient to signify consent. As Robertson argues, consent cannot be obtained before reading the terms that are included inside the package.¹⁹⁶ Consequently uncertainty has existed in some jurisdictions regarding enforceability of these agreements.

4. The Context of this Research: The Political and Socio-economic Paradigm-shift in Tanzania

(a) The Arusha Declaration and the Adoption of Socialist Policy: The Economic Isolation Period (1967-1980)

The issues raised in this thesis are discussed within the context of an understanding that the ongoing technological developments are fundamental in promoting a market-oriented economy.¹⁹⁷ In order to comprehend their genesis, it is important to analyse Tanzania's past and present socio-political and economic policies and their effects on the development of ICT. Doing so is imperative because ICT development is either positively or negatively influenced by various factors, including the laws and policies that a state adopts.¹⁹⁸ Indeed, the historical journey of ICT development in Tanzania substantiates this assertion.

The application of computer technology in Tanzania started when the country was still under the British colonial rule. In 1956, the colonial government introduced the Hand-Punch input device for computer cards.¹⁹⁹ This device 'was used to capture data for processing elsewhere.'²⁰⁰ In 1961, Tanzania became an independent state and started to shape its own national developmental vision. From the mid 1960s to late 1980s it pursued the ideals of socialism and self-reliance. As a single party state, the ruling party at the time was the only organ mandated to shape the future direction of state policies.

¹⁹⁶ See Robertson (n191) 275.

¹⁹⁷ As for the role of science and technology in promoting economic growth see See, for instance, *Tanzania's National Science & Technology Policy* (1996), para 9. See also S Tanigaki 'Reshaping Japan: The Role of Science and Technology' in *AAAS Science and Technology Yearbook* (1999) part 3.8 (available at <http://www.aaas.org/spp/yearbook/contents.htm> (as accessed on 25/9/2005)).

¹⁹⁸ See (generally) A Addis, B Selassie & R Seidman 'On Research on the State, Law, and the Legal Process of Development' in A Seidman & F Anang (eds) *21st Century Africa: Towards a New Vision of Self-Sustainable Development* (1992) 243-247. These authors argue (in pages 258-259) that the kind of laws and policies a state adopts affect its socio-economic, political, and technological development. See also S Chamarik & S Goonatilake (eds) *Technological independence- The Asian experience* (1994).

¹⁹⁹ See H M Twaakyondo, J L Ndalichako & E P Bhalalusesa 'Factors Shaping Successful Public Private Partnership in the ICT Sector in Developing Countries: The Case of Tanzania' (2002) at 4 (available at [http://www.cpsu.org.uk/downloads/Annex3 .pdf](http://www.cpsu.org.uk/downloads/Annex3.pdf) (as accessed on 14/06/2011)).

²⁰⁰ Ibid.

In 1967, the first major policy changes came into effect when the country adopted the Arusha Declaration. Being named after the town where it was promulgated, the declaration intended to develop a centralised command economy.²⁰¹ Consequently, ‘all privately owned business entities, including banks, telecommunications, marine services, insurance, and mining companies, were nationalised.’²⁰² The government created state-owned corporations (referred to as Parastatals) to take over all nationalised assets. In this economic set-up, the government marginalised the private sector in favour of the public sector’s dominance.²⁰³ These steps had negative economic and technological implications as the country became isolated from effective participation in the global economy, and the private sector, which should have been the engine for economic growth, became stagnant.²⁰⁴

(b) The Socialist Policy: Its Effects on ICT Development

In 1968, a Tanzanian National Scientific Research Council (UTAFITI) was established.²⁰⁵ Despite its establishment, the government failed to pay serious attention to science and technology.²⁰⁶ Gaillard contends that the National Scientific Council did not have a defined mandate, and, its functions were thus limited.²⁰⁷ The country lacked specific national policy to guide the development of science and technology.²⁰⁸ Moreover, diverse transfer of technology

²⁰¹Ibid. See also L Cliffe ‘Tanzania- Socialist Transformation and Party Development’ in L Cliffe & J S Saul Vol 1 *Socialism in Tanzania: An interdisciplinary Reader* Vol 1 (1972) 266.

²⁰²See D J Nangela ‘E-commerce and the Law in Tanzania: Developments and Constraints’ (2004) 4 *Oriental Journal of Law and Social Sciences (OJLS)* 18, 21. See also T S Nyoni ‘Entrepreneurship and the Nyerere Legacy: Towards Self –Reliance and Poverty-Free Tanzania’ in A Mbelle, G Mjema & A A L Kilindo (eds) *The Nyerere Legacy and Economic Policy making in Tanzania* Dar-Es-salaam University Press Dar-es-salaam (2002) 23-37; P Neersø ‘Selected Aspects of Tanzania’s Policies on Foreign Investment’ (1974) 2 *World Development* 139.

²⁰³See J L M Shitundu ‘Industrialisation and the Nyerere Legacy: Missing Links and Lessons for Future Policy in Tanzania’ in Mbelle et al (eds) *The Nyerere Legacy and Economic Policy making in Tanzania* Dar-Es-salaam University Press Dar-es-salaam (2002) 134-149.

²⁰⁴See Nangela (n202) 33.

²⁰⁵The National Scientific Council was established by the Act of Parliament, No.57 of 1968. See J Gaillard *Science in Africa at the Dawn of the 21st Century* European Commission, DG XII Final Country Report-Tanzania (2000) (available at http://horizon.documentation.ird.fr/exl-doc/pleins_textes/divers07-09/010033553.pdf (as accessed on 20/7/2011)).

²⁰⁶See A T Nguluma ‘The role of Law and Administrative Mechanisms in the Development of Science and Technology: Policies and Strategies in Post-independence Tanzania’ *Technology Policy Studies in Eastern Africa: EA Technology studies Network IDRC-MR 242e* (1986).

²⁰⁷See J Gaillard *Tanzania: A Case of ‘Dependent Science’ Science Technology & Society*, (2003) 317-343, (available at <http://sts.sagepub.com/cgi/content/abstract/8/2/317> (as accessed on 20/7/2007)).

²⁰⁸Ibid. It is also important to note that only recently Tanzania adopted an overall National Research and Development Policy to guide and coordinate research activities in the country. Accordingly, ‘[t]his policy constitutes a milestone geared towards providing a framework through which linkage, coordination and harmonisation of existing and new mechanisms will support other policies and initiatives to achieve the national vision of a middle income country by the year 2025.’ See the *National Research and Development Policy* Ministry of Communication, Science and Technology, United Republic of Tanzania (2010) 2.

to Tanzania was not feasible due to the lack of private-public partnership within the then socio-economic policy.²⁰⁹

The early years of independence, however, envisaged a need to embrace the new post World War II technologies, such as computerisation. In 1965, the government embarked on an ambitious computerisation project aiming at key sectors and ministries.²¹⁰ The Ministry of Finance was the first to start computerising its operations, when it installed an ICT Hollerith 1500 Computer model in its offices. By the year 1974 there were a total of seven computers in the country.²¹¹

Much as the computerisation programme was a significant initiative, it faced problems, including the lack of sound policy co-ordination, guidance, and qualified indigenous personnel.²¹² Consequently, it failed and occasioned a huge financial loss to the government. Exclusion of private sector involvement in this project was a contributing factor too. As one scholar argued, it is 'the investment policy of private enterprise *vis-à-vis* that of public institutions which accounts for computer developments and utilisation.'²¹³

The failure of the computing initiative and the loss it occasioned to the government, created disappointment, anger and confusion. In 1974, without reasonable foresight, the government made a decision to restrict all importation of computers into Tanzania.²¹⁴ If any import was to be made, it needed the clearance of the responsible minister.²¹⁵ This decision

²⁰⁹See Nangela (n202) 20. See also Nguluma (n206).

²¹⁰See S G Mhayaya *A Study of the Potential Usage of ICT (E-Government) in improving efficiency and effectiveness of 'Executive Functions' of the Government including delivery of public services- Case of Tanzania* (Unpublished MscEM Dissertation, University of Dar-es-salaam, 2004). See also K Mgaya Mgaya 'Development of Information Technology in Tanzania' in E Drew & F G Foster (eds) *Information Technology in Selected Countries Tokyo United Nations University Press* (1994) 134-148 (available at <http://www.unu.edu/unupress/unupbooks/uu19ie/uu19ie0i.htm> (as accessed on 23/5/2011)). See further D C P Masalu 'Evolution of information and communication technology in Tanzania and its impact on oceandata and information management' (2005) 48 *Ocean & Coastal Management* 85.

²¹¹See Mhayaya (n210).

²¹²*Ibid.* See also M Tedre, N Bangu & S I Nyagava 'Contextualized IT Education in Tanzania: Beyond Standard IT Curricula' (2009) 8 *Journal of Information Technology Education* 101.

²¹³See L K Shayo 'The Role of Computers in Developing Countries with reference to East Africa' Doc. IC/84/224-Marked 'Internal Report (Limited distribution)-IAEA & UNESCO International Centre for Theoretical Physics, (June 14th 1985) at 2-3 (available at <http://streaming.ictp.trieste.it/preprints/P/84/224.pdf> (as accessed on 5/7/2007)).

²¹⁴The ban was made by the Government through The Imports Control (Electronic Computer and Television Sets) (Prohibition) Order, 1974 published on 14th June 1974, GN 142. The said Government Notice was made under section 15(1) of the Imports Control Ordinance (Cap 292). For more on this see B E K Mganga 'The Use of Electronic Evidence in Administration of Justice in Tanzania' unpublished Advanced Course Work Paper 2, submitted to the Faculty of Law University of Dar-Es-Salaam (2008) 2.

²¹⁵See The Imports Control (Electronic Computers and Television Sets) (Prohibition) (Amendments) Order Government Notice No.202 /1974 (to be referred hereafter as GN.No.202/1974.)

was another setback for the ICT industry. According to a survey conducted in 1993, the country had:

- in 1965, one Main Frame Computer,²¹⁶
- in 1978, five mainframes, seven minicomputers,²¹⁷
- in 1984, 13 mainframes, 15 minis, 79 micros,²¹⁸
- in 1986, 16 mainframes, 37 minis, 470 micros,²¹⁹ and
- in 1993, 570 micros imported during the second quarter alone.²²⁰

Importation of these computers to the country, especially after the ban, was by way of special permission from the relevant ministry²²¹ (especially where they belonged to specified public corporations, such as the Tanzania National Electricity Supply Corporation (TANESCO)). Those owned by individuals were imported through clandestine routes to avoid the ban.

(c) Transformation Period (1980's Onwards): Liberalisation and Reform Strategies

Transformation from a centrally planned to a market-based economy began in the 1980s. This was essential as the Tanzanian economy was fast deteriorating due in part to the 1970s oil crisis, and in part to the socialist economic policy.²²² The country never became self-reliant despite the Arusha Declaration.²²³ Instead Tanzania was (and has continued to be) economically dependent on foreign aid.²²⁴ Between 1967 and the 1980s, economic growth slowed down and the Tanzanian economy was 'growing at a rate of 3-4% per annum.'²²⁵ The

²¹⁶See S Baker 'The Survey of IT in Tanzania' Report submitted to the Tanzania Commission for Science and Technology (1993).

²¹⁷Ibid.

²¹⁸Ibid.

²¹⁹Ibid.

²²⁰Ibid.

²²¹See GN No.202/1974.

²²²See (generally) S Horton & J McLaren 'Supply Constraints in the Tanzanian Economy: Simulation Results from a Macro econometric Model' (1989) 11 *Journal of Policy Modelling* 297. See also J M Due 'Liberalization and Privatization in Tanzania and Zambia' (1993) 21 *World Development* 1981.

²²³See B M Nyagetera 'Investment, Foreign Aid and Self-reliance in Tanzania: A State-of-the-Art Review.' ESRF Discussion Paper Series No.001 ESRF (no date) (available at <http://www.esrftz.org/pdf/Discussion001.pdf> (as accessed on 1/2/2007)).

²²⁴Ibid.

²²⁵Ibid (at v). See also J H Wagao 'Adjustment of Policies in Tanzania, 1981-1989: The Impact of Growth, Structure and Human Welfare' Innocent Occasional Papers, Number 9, UNESCO (1990) (available at

challenging economic climate of the 1980s shook the country's political and socio-economic foundations. As a result, the policies pursued between 1967 and 1985 had to be abandoned in favour of a more market-oriented model.²²⁶

In order to embrace a meaningful transformation process, the country adopted policies and strategies that favoured liberalisation. This on-going reform process was at its peak when the government privatised the erstwhile nationalised corporations in the early and mid 1990s. Moreover, in order to rebuild the economy, the World Bank introduced a set of comprehensive socio-economic strategies. These included the Structural Economic Programmes, in the form of the Economic Recovery Programme (ERP), introduced in 1986, followed by the Economic and Social Action Programme (ESAP) in 1989.²²⁷ These programmes led to a shift from a centrally planned economy to a market-oriented system, the top priority being rehabilitation of key economic infrastructures that were by then fast deteriorating.²²⁸

The need to attract capital from private investors was another reason for policy reforms in Tanzania.²²⁹ As part of the process, and having realised its inability to be the master of everything, the government finally changed its attitude towards the private sector.²³⁰ It

http://www.unicef-irc.org/publications/pdf/eps9_low.pdf (as accessed on 24/6/2011)). In comparison, according to the Bank of Tanzania, the economy attained a real growth of 7.1 percent in 2007 and the 2008 projections stood at 7.8 percent growth. See the 'Bank of Tanzania: Summary of economic developments for the period January – March 2008' (available at <http://www.bot-tz.org/Publications/EconomicDevelopmentsJan-Mar2008.pdf> (as accessed on 4/11/2008)). In 2009 the country's GDP grew by 6.0 percent the slow down being attributed to the Global Financial Crisis (GFC). See 'The United Republic of Tanzania: The Economic Survey 2009' (available at <http://www.tanzania.go.tz/economicsurveyf.html> (as accessed on 25/6/2011)). According to the 2011 budget speech the overall economic growth in 2010 stood at 7.0 percent (see <http://www.tanzania.go.tz/budgetspeech/2011/hali%20ya%20uchumi.pdf> (as accessed on 25/6/2011)).

²²⁶See O Nielinger 'Creating an Environment for ICT in Tanzania– Policy, Regulation and Markets' *Institut Für Afrika-Kunde-Hamburg Institute of African Affairs* (2004) (available at http://www.tanzaniagateway.org/docs/Creating_an_environment_for ICT_in_Tanzania_policy_regulation_markets.pdf (as accessed on 4/03/2007)).

²²⁷Ibid. See also Nyagetera (n223) 15-16. G Hyden & B Kalstrom 'Structural Adjustment as a Policy Process: The Case of Tanzania' (1993) 21 *World Development* 1395.

²²⁸See Nielinger (n226).

²²⁹See UNCTAD *Investment Policy Review: The United Republic of Tanzania*, UNCTAD/ITE/IPC/Misc.9 United Nations, Switzerland, (2002) 3, 64. See also S J Sitta 'Integrity Environment and Investment Promotion: The case of Tanzania' A Conference Paper Presented to *Alliance for Integrity Government & Business Roles in Enhancing African Standards of Living* Co-organised by the OECD, NEPAD, UN Global Compact and Transparency International, in Addis Ababa on 7-8 March 2005, at 5. (This paper is available at <http://www.oecd.org/dataoecd/11/37/34571058.pdf> (as accessed on 21/7/2011)).

²³⁰According to ITU reforms in many developing countries from the early 1990's were 'buoyed in part by pressure by development partners, especially the World Bank through its structural adjustment programs (SAPs), governments of developing states realized that they could no longer allocate public resources for programs that were "bankable", and were clearly good opportunities for private sector intervention, for instance, the provision and modernization of telecommunication services.' See ITU *East Africa Regional Information Infrastructure Report– Volume I* ITU Geneva (2007) 9 (available at http://www.itu.int/dms_pub/itu-d/opb/ldc/D-LDC-ICTEARI-2007-PDF-E.pdf (as accessed on 3/3/2009)).

recognised this sector as a crucial engine for sustainable economic development.²³¹ Since then the private sector has become a vital partner in the development of the country's economy.²³²

(d) Liberalisation: Its Effects on ICT Development

The adoption of a liberalisation policy in Tanzania necessitated legal reforms and facilitated transfer of technology to the country, which was impossible during the era of the socialist economy. With this new economic policy in place, more foreign investments have been attracted, thus encouraging more transfer of technology to Tanzania.²³³ It is within this context of liberalisation that ICT development in Tanzania was revived.

Between 1985 and 1994, deliberate efforts were made to expedite effective use and sustainable transfer of technology. In 1985, for the first time, Tanzania adopted a National Science and Technology Policy (NSTP). This policy, having been revised in 1995, seeks to 'develop and manage science and technology in a manner consistent with physical and human endowments of [the] country.'²³⁴ It also seeks to promote public-private initiatives.²³⁵ In addition to the adoption of this policy, the government established a Commission for Science and Technology (COSTECH) and a Centre for the Development and Transfer of Technology (CDTT).²³⁶

In order to embrace a meaningful and holistic reform process, the country needed to be guided. Consequently, a National Development Vision 2025 was adopted as a major policy document in Tanzania.²³⁷ Vision 2025 considers the application of information and communication technologies as central to a competitive socio-economic transformation and a major driving force for its realisation.²³⁸ In order to concretise this vision other policy reforms

²³¹ See Nyagetera (n223) 10.

²³² See Tanzania Development Vision 2025 (available at <http://www.tzonline.org/> (as accessed on 5/2/2007)).

²³³ This has indeed been the case with regard to the development of the Internet technology in Tanzania. See N Mwang'amba *Internet Industry: Regulatory Perspectives in Tanzania* (Unpublished LLB Dissertation, University of Dar-Es-salaam, 2001). It is noted in the ITU Report (n230) 17 that Tanzania and other countries in the East African Community have 'witnessed rapid growth in tele-density in recent times' (especially in the area of mobile telecoms) this being partly attributed to 'competition, liberalization, privatisation and distinct separation of roles of key stakeholders, that has assisted in investor confidence building.'

²³⁴ See *Science and Technology Policy of Tanzania* (1996) 8 (available at <http://www.tzonline.org/pdf/thenationalscience.pdf> (as accessed on 20/6/2007)).

²³⁵ *Ibid* at 7-10.

²³⁶ *Ibid*. The Commission was established by Act No. 7 of 1986, Cap.226 [R.E 2002] to replace the Tanzania National Scientific Research Council (UTAFITI) as the principal advisory organ to the Government on all matters pertaining to scientific research, technological development and coordination of research activities in the country.

²³⁷ For more information about the Tanzania Vision-20025, (see <http://www.tzonline.org/pdf/theTanzaniadevelopmentvision.pdf> (as accessed on 25/7/2006)).

²³⁸ *Ibid*.

were necessary. Consequently, the ban on importation of electronic computers and their accessories was lifted in 1993.²³⁹ In 1996, 1997 and 2003 Tanzania adopted three policy documents, which are vital in building an ICT-led economy. These were the National Science and Technology Policy (1996),²⁴⁰ the Telecommunication Policy (1997),²⁴¹ and the National ICT Policy (2003).

(e) Moving E-Commerce Forward in Tanzania: Building Policy Support for ICT and Internet Use

Partial Internet access in Tanzania started in the early part of the 1990s.²⁴² With this technology finding its way to Tanzania, and with the adoption of the ICT policy in 2003, the country made a significant step towards the implementation of e-readiness strategies.²⁴³

The ICT policy recognises the need to promote e-commerce.²⁴⁴ Because this policy is an important tool in winning the battle against poverty, it has also been linked to other policies and strategies, such as the Poverty Reduction Strategy Paper (PRSP).²⁴⁵ To make this a success, however, emphasis on the use of ICT and e-commerce to explore new markets is

²³⁹See Government Notice No 245 /1993. This Government Notice was published on 18th June 1993 and it is cited as the *Imports Control (Electronic Computers and Television Sets) (Prohibition) (Revocation) Order*, 1993. The Government Notice revoked the Imports Control (Electronic Computers and Televisions Sets) (Prohibition) order, 1974.

²⁴⁰See Ministry of Science, Technology and Higher Education, April 1996.

²⁴¹See Ministry of Transport and Communication, October 1997.

²⁴²See S M Mutula & M Ahmadi 'The Contradictions of Tanzania Government policies on the Internet service provision: case study of Dar-es-salaam city' (2002) 20 *Library Hi Technology* 259 (available at <http://www.emeraldinsight.com/0737-8831.htm> (as accessed on 05/07/2007)).

²⁴³According to a NEPAD Report (2002) Tanzania ranked in group 1, which include countries with high a level of progress towards e-readiness. This Report is available at <http://www.eldis.org/static/DOC11488.htm> (as accessed on 28/6/2007).

²⁴⁴The *United Republic of Tanzania, ICT-Policy* (2003) (available at <http://tatedo.org/cms/images/publications/reports/ictpolicy2003.pdf> (as accessed on 2/6/2009)). It defines e-commerce as a business activity involving consumers, manufacturers, suppliers, service providers and intermediaries using computer networks, such as the Internet.

²⁴⁵See Poverty Reduction Strategy Paper 2000/01 (available at [http:// www.Tanzania.go.tz/prsp.html](http://www.Tanzania.go.tz/prsp.html) (as accessed on 2/3/2006)). According to the PRSP there is a need for concerted efforts to increase traditional export products, and, where possible, non-agricultural products of SMEs.

needed.²⁴⁶ As the World Bank indicates, ‘ICT—broadly defined—can become a ubiquitous economic tool, customised to the needs and sophistication of a particular user.’²⁴⁷

The SMEs Policy (adopted in 2000) and the Trade Policy (adopted in 2003) are also useful in the e-commerce agenda. Under the SMEs policy the government has committed itself to establishing a data bank for SMEs. This includes a national web-site for SMEs and a directory of service providers.²⁴⁸ It has also committed itself to enhancing and facilitating acquisition and adaptation of technologies, and networking between Research and Development Institutions in a bid to upgrade technologies so as to raise productivity and competitiveness.²⁴⁹ The Trade Policy on the other hand, acknowledges that trade is an engine of development in the face of a globalised world.²⁵⁰ Consequently, it emphasises the need to develop and strengthen an export-led economy by developing and harnessing the potential benefits of ICT.²⁵¹

The need to improve the country’s competitiveness, efficiency in resource allocation, raising domestic savings and investments and strengthening technological capabilities are part and parcel of the ongoing reforms in Tanzania.²⁵² Improved trade performance is also viewed as a means of enabling the country to take advantage of increasing opportunities arising from

²⁴⁶See an advice given to Tanzania by J A Estrella-Faria, a Legal Officer with the Vienna-based United Nations Commission on International Trade Law (UNCITRAL), during a workshop in Dar es Salaam. Estrella-Faria states that Tanzania should emulate Ethiopia and Ghana in using e-Commerce to sell local products to their compatriots abroad and earn much needed foreign exchange, (available at <http://www.i4donline.net/news/news-details.asp?newsid=1449> (as accessed on 20/5/2010)).

²⁴⁷See The World Bank *Improving Competitiveness and Increasing Economic Growth in Tanzania: The Role of Information and Communication Technologies* Washington DC infoDev/World Bank (2005) 3. This Report is available at <http://www.infodev.org/en/Publication.81.html> (as accessed on 20/10/2009).

²⁴⁸According to this researcher’s telephone conversation, held on 25/6/2011 with Mr. D. Massawe (the current Director of SMEs in the Ministry of Industry and Trade), preparations for all these issues are still underway in collaboration with the Financial Sector Deepening Trust (FSDT). For more about FSDT visit <http://www.fsdtr.or.tz/> (as accessed on 25/6/2011). It is also worth noting that the Tanzanian Small Industries Development Organisation (SIDO) has also established its own websites where a list of various SMEs in the country and their activities is available to the public. For more information visit SIDO website at <http://www.sido.go.tz/Web/Index.aspx> (as accessed on 25/6/2011).

²⁴⁹Small and Medium Enterprises Policy (2002). Available at <http://www.tzonline.org/policies.asp> (as accessed on 2/6/2009).

²⁵⁰Trade Policy (2003) (available at <http://www.tzonline.org/policies.asp> (as accessed on 2/6/2009)).

²⁵¹Ibid.

²⁵²See Government Consultative Report on Trade-related Assurances (referred here in short as IFTD Report), titled: The Integrated Framework for Trade Development: Volume II -Final Version / Tanzania United Republic/Ministry of Industry and Commerce Dar es Salaam (1999). This report is available at <http://www.tzonline.org/dbtw-wpd/exec/dbtwpub.dll> (as accessed on 25/10/2009). It originates from the 1996 WTO Ministerial Conference in Singapore where a decision to adopt an Integrated Framework (IF) for the provision of Trade-related assurances to the Less Developed Countries (LDCs) was made and endorsed in the subsequent WTO High Level Meeting in October 1997).

the on-going reforms, and thus, contributing to the economic growth.²⁵³ Similarly, upgrading the existing legal framework and improving infrastructures that constrain not only exporters but also producers is considered a crucial aspect of an export development strategy.²⁵⁴ Essentially, therefore, Tanzania has realised the need to build an export-oriented economy in order to stimulate economic growth.

Although e-commerce is not directly mentioned in the export strategy, the Trade Policy points to e-commerce as one of the prerequisites for achieving its objectives. Considering this, however, one would have expected reforms in the areas of law governing commercial intercourse. Delay in giving effect to positive legal reforms and the lack of a specific strategy on e-commerce casts doubt on the weight accorded to the implementation of the existing policies, some of which (for instance, the ICT Policy and the Trade Policy) were adopted in 2003.²⁵⁵

Indeed, even though efforts to reach distant and new markets for Tanzanian products were to be made, the same will be weakened by the lack of a specific policy on e-commerce promotion and a legal framework that cater for electronic transactions in Tanzania. These gaps need to be addressed since exporters will 'need e-commerce capabilities to transact with sophisticated buyers abroad.'²⁵⁶

Although the already existing ICT policy bears a vital relationship to e-commerce, it cannot be a sound basis for e-commerce. Understandably, a policy document is not legally binding. Hence, where a court, for example, rejects an e-contract, one cannot rely on a policy document that recognises the need to promote e-commerce in the absence of a clear legal provision supporting it. This is even more complicated where the Tanzanian law governing

²⁵³See Ibid. The three volumes can be accessed at (i) <http://www.tzonline.org/pdf/EDPVolI.pdf>, (ii) <http://www.tzonline.org/pdf/EDPVolII.pdf>, and (iii) <http://www.tzonline.org/pdf/EDPVolIII.pdf> (as accessed on 25/10/2009).

²⁵⁴ According to a survey of Tanzania's SMEs, it has been noted that, 'the main hurdles besetting SMEs in Tanzania [include] legal and regulatory environment, which is still cumbersome, bureaucratic, costly, and centralized; many taxes and high rates, lack of/inadequate physical infrastructure (e.g. roads, cold rooms, warehouses, power, water and communication), and limited access to finance.' See T Bekefi *Tanzania: Lessons in building linkages for competitive and responsible entrepreneurship*. UNIDO and Kennedy School of Government, Harvard University (2006) 17 (available at http://www.daedalusadvising.com/Comp_Entr_Tanzania.pdf (as accessed on 26/6/2011)). See also F Oguttu, H P Ngowi & M Millanzi 'SME competitiveness facility (SCF) SME export market prospects desk study Volume II: Detailed study output' (2006) A consultant Report (available at <http://www.marketaccessstz.org/wp-content/uploads/2011/03/SCF-FINAL-REPORT-vol-II.pdf> (as accessed on 26/6/2011)).

²⁵⁵The two policies put emphasis on the importance of e-commerce in Tanzania. The time frame set to realise the Trade policy objectives which include reform of most commercial laws in the country was the year 2007.

²⁵⁶See the World Bank Report (n247) 3.

contractual transactions raises more questions than answers as will be demonstrated in Chapter II.²⁵⁷ Although some laws, for instance those dealing with intellectual property and electronic banking, can be said to reflect some of the new developments in their areas,²⁵⁸ they nevertheless do not fill other gaps, such as the lack of an effective credit card system.²⁵⁹

It is necessary to note, therefore, that because developing e-commerce is a cross-cutting issue, for it to be effectively developed there must be not only a clear technological strategy, but also an effective and reliable legal framework.²⁶⁰ Any meaningful participation in global e-commerce will only occur in an environment where players can function without fear of legal risks in their commercial undertakings.²⁶¹ The current era of digitisation calls for strategies and coherent rules which will reflect its borderless nature at national and international levels.²⁶² Consequently, the existence of a reliable legal framework will help to establish an environment which is conducive to e-commerce growth.²⁶³

5. Chapter Synopsis

Chapter one introduced this thesis as a whole. It provided background information regarding e-commerce and e-contracts and listed the key problem areas in the law of contract that need to be examined in order to create a more reliable legal framework for e-commerce. The chapter set out the goals pursued and the socio-economic policy context within which this study has been undertaken.

Chapter two assesses the adequacy of the existing Tanzanian law of contract by expounding on the key issues outlined in chapter one. The legal issues examined in that chapter include:

- problems relating to contract formation in the online environment, for instance, the problem of establishing *consensus ad idem* in cases involving e-agents,

²⁵⁷For example, the Sale of Goods Act, Cap 214 [R.E.2002], Law of Contract Act, Cap 345 [R.E.2002] and the Civil Procedure Act, 1966, Cap 33 [R.E.2002].

²⁵⁸The recent Acts in Intellectual Property include the Copyrights and Neighbours Rights Act, Act No.7 of 1999 which repealed the Copyrights Act, Act No.61 of 1966. See also the Bank of Tanzania (BOT) *Guidelines on introduction and operation of Auditable Card Based Electronic Money Schemes in Tanzania*. Available at <http://www.bot-tz.org/PaymentSystem/PayguidefinalFeb2000.pdf> (as accessed on 10/10/07).

²⁵⁹The World Bank Report (n247) at page 4 & 57, points out the lack of an effective credit card system as a major hindrance to the development of e-commerce in Tanzania.

²⁶⁰See Nangela (n202) 25.

²⁶¹Ibid.

²⁶²See M Bangemann 'Which rules for the online world? The European Union Contribution' (1999) 1 *Info: The Journal of Policy, Regulation and Strategy for Telecommunications Information and Media* 11.

²⁶³Ibid.

establishing the distinction between offer and invitation to treat, the time and place of contracting, and validity and enforceability of web-based agreements.

- problems related to formalities, for instance, the legal requirements for writing and use of an e-signature,
- problems arising from mistakes or input errors occasioned by e-agents, and
- problems relating to proof of contract (for instance, the issues of authentication, attribution, non-repudiation and admissibility of electronic records).

Chapter two also addresses the existing problem regarding the lack of effective rules to protect consumers involved in e-contracts.

Chapters three and four build on chapter two by examining additional cross-border legal problems associated with the use of the Internet in concluding contracts. Specifically, Chapter three addresses jurisdictional issues that may affect the development of e-commerce. It examines the applicable rules in Tanzania, England, the United States of America, and the European Union, and how they address the challenges brought by the Internet. The chapter also examines how such rules promote predictability and certainty in e-commerce, especially in the area of online consumer contracts. Through a global welfare approach, Chapter three examines whether the traditional rules on jurisdiction can effectively apply to the modern e-contract disputes.

Although Chapter four is a continuation of the discussion in Chapter three, it was deemed necessary to have a separate chapter on choice of law to complement the earlier discussion in Chapters one, two and three. Because Tanzania adheres to the English common legal system, the analysis of its choice of law rules was basically an analysis of the 'traditional' English common law rules on choice of law (ie, the common law rules prior to the developments that took place in England in 1990 and onwards). The chapter further examines the developments in the European Union on this subject and how these developments address challenges brought by e-commerce, including the issue of protecting online consumers.

Chapters five and six seek to offer remedial measures that Tanzania ought to consider in the course of remedying the problems identified in all the preceding chapters. Specifically, Chapter five discusses the global trends on e-commerce regulation. It examines some

important international and regional initiatives seeking to create a regulatory environment conducive for e-commerce. The chapter analyses the UNCITRAL Model laws on e-commerce and e-signature²⁶⁴ and the UN Convention on the Use of Electronic Communications in International Contracts.²⁶⁵ The chapter examines the rules developed by these instruments and emphasises the need to adopt or incorporate these rules into Tanzania's domestic law of contract. It submits that doing so will position the country's legal framework within the context of agreed international standards.

Chapter six is a case study that examines the legislative developments regarding e-contract and consumer protection in South Africa, a country selected because it is one of the few in Africa to have enacted a law to regulate electronic transactions. The analysis in this chapter establishes the extent to which the legal developments in South Africa were influenced by the UNCITRAL Model laws and developments in other regions, especially the European Union. It also affords Tanzania the opportunity to draw meaningful lessons from these developments to enrich the country's efforts to reform its laws. Such reforms are necessary so as to enhance greater predictability in contract, promote consumer protection and confidence in e-commerce, as well as integrating the country in the global economy. Finally, Chapter seven concludes this study and suggests the way forward.

²⁶⁴Adopted in 1996 and 2001 respectively.

²⁶⁵Adopted by the United Nations General Assembly (UNGA) A/RES/60/21, 9th December 2005.

CHAPTER TWO: E-CONTRACTING AND THE LAW IN TANZANIA– AN ANALYSIS OF POTENTIAL LEGAL AND CONTRACTUAL GAPS IN THE EXISTING LAW OF CONTRACT

1. Introduction

Contract law in Tanzania has remained intact from the colonial era to the present. This chapter examines the adequacy of this law in facilitating e-commerce, including formation and enforcement of e-contracts, as well as protection of consumers who engage in online transactions. Whether in a developed or a developing country, e-commerce, as ‘a new wine’ in the business environment, has created questions in the minds of lawyers, economists, consumers and business entities. Many are sceptical or suspicious about its functional mechanisms, namely, the transparency of its processes and the quality of various products offered online.¹ The present uncertainty, however, is often associated with not only potential technological security problems but also inadequate or unclear legal norms.² Consequently, those who take part in e-commerce seek to know whether the ‘old rules’ can still insulate their concerns and interests from the various risks which they may encounter, especially in the course of e-contracting. Because legal certainty of contract is such a fundamental issue in commercial relations, the law governing contractual transactions has been one of the areas of concern.

For a country like Tanzania, where contract law is still that designed to handle conventional contracts, the basic issues for discussion, from an e-commerce perspective, are whether online contracts will be enforced and what measures are needed to address any uncertainty in the existing law. Analysis of these issues requires examination of the existing Tanzanian law of contract in order to identify areas which will hinder smooth development of e-commerce. The discussion in this chapter is organised under eight parts.

Part one consists of this introduction. Part two sets out the historical development of the law of contract in Tanzania. Part three deals with problems regarding consensus. Apart from considering the key issues arising from website marketing, such as the distinction between online offers and invitations to treat, this part also considers the problems raised by e-

¹See S Grabner-Kraeuter ‘The Role of Consumers’ Trust in Online-Shopping’ (2002) 39 *Journal of Business Ethics* 43.

²Ibid. See J K Bakari *Towards a holistic approach for managing ICT security in developing countries: A case study of Tanzania* PhL Licentiate thesis, Stockholm University and Royal Institute of Technology (2005).

agents. It examines whether they can form the necessary intention to create legally binding obligations. Additionally, part three discusses problems regarding acceptance in certain web-based agreements as well as problems regarding the time and place where a contract is formed.

Part four deals with obstacles raised by formality requirements. Part five examines the effects of online mistakes, such as wrong pricing. Part six discusses obstacles regarding proof of existence of a contract, while part seven considers problems about the lack of rules for consumer protection. Part eight is a conclusion to this chapter.

2. The History of the Law of Contract in Tanzania

The law which governs non-customary contracts in Tanzania is embodied in the Law of Contract Act³ and the Sale of Goods Act.⁴ The colonisation of East Africa (Tanganyika, Kenya and Uganda) by the British had a marked effect on the non-customary law of contract of the region: the colonial government imported the Indian Law of Contract Act into East Africa.⁵ This law was a product of the codification of English common law of contract of the mid 19th century as applied *mutatis mutandis* by the British in their Indian colony.⁶ It had initially incorporated provisions on the sale of goods⁷ but these sections were later repealed in India by the Indian Sale of Goods Act, 1930.⁸ The Indian Sale of Goods Act, 1930 was based on the English Sale of Goods Act, 1893. Its introduction to India was later followed in East Africa.⁹

After independence, Tanganyika (now Tanzania) re-enacted the Indian Law of Contract Act, 1872 (with minor changes including giving it a different name, the Law of Contract Act).¹⁰ Since then the legislation has remained unchanged.¹¹

³Cap 345 [R.E.2002].

⁴Cap 214 [R.E.2002].

⁵See R W Hodgin *Law of Contract in East Africa* (1975) 1. The Indian Law of Contract Act was enacted in 1872. The Act, however, did not apply to natives as they were governed by the native laws. See, for instance, section 13(4) of Tanganyika Order in Council, 1920 which provided that '[i]n making Ordinances, the Governor shall respect existing native laws and customs, except so far as the same may be opposed to justice or morality.' See also N N N Nditu *General Principles of Contract Law in East Africa* 1ed (2009) 15.

⁶See Nditu (n5) 15. See also M C Kuchhal *Mercantile Law* 6ed (2006) 7-8.

⁷See ss 76-123.

⁸See A L Diamond 'Sale of Goods in East Africa' (1967) 16 *International and Comparative Law Quarterly* 1045. For a better historical account of the 1893 English Sale of Goods Act which form the basis of the Indian Sale of Goods Act of 1930, see M Michael *Chalmers Sale of Goods Act* 17ed (1975); P S Atiyah *The Sale of Goods* 3ed (1966).

⁹See Diamond (n8) at 1046.

¹⁰Initially Cap 433 (now Cap 345 [R.E.2002]). See Hodgin (n5) 1.

¹¹The Sale of Goods Act enacted in 1931 also continued to apply in Mainland Tanzania to date. The Indian Law of Contract Act, 1872 also initially applied in Kenya and Uganda which share a common history with Tanzania.

While Tanganyika (now Tanzania) re-enacted the Indian Law of Contract Act with some minor changes after independence, after their independence Kenya and Uganda opted for the English law of contract.¹² Section 2 of the Kenyan Law of Contract Act¹³ repealed the India Contract Act of 1872 and provides that the English law of contract would apply. In Uganda, s 2 of the Contract Act¹⁴ also repealed the Indian Contract Act, and section 3 approved the application of the English common law as it may have been modified by equity, statutes of general application in force in England before 11 August, 1902, and other Acts of parliament.

With this brief history, two more issues need to be clarified. The first is the authority and extent to which English contract law applies to Tanzania. Although the Law of Contract Act owes its origin to India, various English common law principles and doctrines of equity have relevance to Tanzania, and where necessary may be resorted to by courts according to the Judicature and Application of Laws Act.¹⁵ This Act provides that the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 22 July, 1920, shall have force in Tanzania where the circumstances permit, and subject to such qualifications as local circumstances may render necessary.¹⁶

The second issue on which clarity is needed concerns the value and place of foreign precedents, for instance, English decisions or cases from other common law countries on contract. Initially, English cases of high authority decided before the respective reception dates in Tanzania,¹⁷ Kenya,¹⁸ and Uganda¹⁹ were, before independence, considered binding if they dealt with common law or doctrines of equity.²⁰ The English common law, however, was to be

¹²See Diamond (n8) 1049. See also the Kenyan Law of Contract Act Cap 23 (commencement date 01/01/1961) and the Ugandan Contract Act Cap 75 Laws of Uganda (1964).

¹³Laws of Kenya Cap 23 (1961).

¹⁴Cap 75 Laws of Uganda (1964).

¹⁵Cap 358 [R.E]. See also *Hussein Bachoo v Clove Growers Association of Zanzibar* [1957] EA 193.

¹⁶See s 2(3) of the Judicature and Application of Laws Act Cap 358 [R.E.2002]. See also *Nyali Ltd v Attorney General* [1955] 1 All ER 646, *Tanzania Air Services Limited v Minister for Labour, Attorney General and the Commissioner for Labour* [1996] TLR 217, 222 (HC). See also J Bing 'Tanzania: Legal Information System and Regulatory Management' (1995) 1 *International Journal of Law & Information Technology* 1, 8-9.

¹⁷The reception date for application of English common law and statute of general application in Tanzania is 22 July 1920. (See s 2(3) of the Judicature and Application of Laws Act Cap 358 [R.E 2002].

¹⁸The reception date in Kenya for application of English common law and Statute of general application is 12 August 1897. See s 3(1) of Judicature Act of Kenya, Act No.16 of 1967.

¹⁹The reception date in Uganda for application of English common law and Statute of general application is 11 August 1902. (See s 3(1)(a-c) of the Contract Act of Uganda, Laws of Uganda, Cap 75.

²⁰See *Kiriri Cotton v Dewani* [1958] EA 239.

applied with modifications to fit the local circumstances and this practice has remained in place.²¹

After independence, the East African Court of Appeal became the final appellate court in the region. The court made it clear that the courts in East Africa were no longer bound by English decisions, including decisions of the Privy Council.²² Rather, these decisions were only of persuasive value.²³ After the collapse of the East African Community in 1977, each country established its own Court of Appeal. Tanzania established its Court in 1979.²⁴ In *Juwata v Kiuta*²⁵ the Tanzanian Court of Appeal approved *Govindji Mulji Dodhia v National & Grindlays Bank Ltd & Another*.²⁶ It held that it is free to depart from its own decisions where necessary, and, that foreign cases are only of persuasive value.²⁷

3. Problems Regarding Contract Formation in an Online Environment

Consensus ad idem is an essential element in the law of contract in Tanzania.²⁸ Section 10 of the Law of Contract Act provides that:

‘[a]ll agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void’

Additionally, s 13 provides that ‘[t]wo or more persons are said to consent *when they agree the same thing in the same sense*.’²⁹ These sections reflect the classical concept of free

²¹See *Nyali Ltd v Attorney General* (n16). See also *Tanzania Air Services Limited v Minister for Labour, Attorney General and the Commissioner for Labour* (n16); *Tanganyika Garage Ltd v G Mafuruki* [1975] LRT 23.

²²The Privy Council was the highest court of Appeal in East Africa before the East African Court of Appeal was established after independence.

²³See *Govindji Mulji Dodhia v National & Grindlays Bank Ltd & Another* [1970] EA 195; *Mayers v Akira Ranch Ltd* [1972] EA 347. See also *Dodd v Nanda* [1971] EA 58; *Jirvaj v Dervaj* [1968] EA 263; *Rashid Moledina & Co (Mombasa) Ltd v Hoima Ginners Ltd* [1967] EA 645; *Lalitmohan Mansukhlal Bhatt v Prataprai Luximichand & Another* [1964] EA 414.

²⁴See the Appellate Jurisdiction Act, Act No 15 of 1979 Cap 141 [R.E.2002].

²⁵Civil Appeal No 29 of 1987 (Unreported). As for Kenya see a similar position in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007]eKLR 1, 5 (available at <http://www.fidakenya.org/cases/Echaria%20v%20Echaria.pdf> (as accessed on 5/5/2010)), and *Kisumuwalla Oil Industries Ltd v Pan Asiatic Commodities PTE Ltd & Another* [996]eKLR (available at http://www.kenyalaw.org/CaseSearch/view_preview.php?link=9424083937230425466&words= (as accessed on 5/5/2010)).

²⁶See (n23).

²⁷See also *Alidina v Globe Mercantile Corporation Ltd* [1968] EA 114 (T). See also Nditi (n5) 17.

²⁸See Nditi (n5) 174. This applies even in other common law countries. See P Atiyah *The rise and Fall of Freedom of Contract* (1979) 405-408; O Ben-Shahar ‘Contracts without Consent: Exploring a New Basis for Contractual Liability’ (2003-2004) 152 *University of Pennsylvania Law Review* 1829, 1829-1830; V Gautrais ‘The Colour of E-Consent’ (2003-2004) 1 *University of Ottawa law & Technology Journal* 189, 193.

²⁹Italics added.

consent and *consensus ad idem*.³⁰ Existence of *consensus ad idem* demarcates the pre-contractual and contractual stages. Thus, enforceable rights or obligations generally arise only when a mutually binding contract is concluded, and, from a classical theory viewpoint, this happens when the parties' minds meet, ie, they agree on the same thing in the same sense.³¹

Although the will theory has been criticised,³² s 13 above shows that *consensus ad idem* is still considered an important element in contract formation in Tanzania.³³ On this Nditi concludes that 'consent is an essential ingredient to make an agreement a contract; absence of consent will make an agreement void. Where parties are at cross purpose there is absence of consent; there is no *consensus ad idem* and therefore the agreement is void.'³⁴ His conclusion finds support in *Star Service Station Co Ltd v Tanzania Railways Corporation*.³⁵ In this case, it was held that 'existence of a valid contract presupposes that the contracting parties were *ad idem* as to the terms of the contract and that each of them willingly accepted those terms of the contract.'³⁶

It is necessary, however, to state that a court may infer an agreement from the conduct of a party even where the two minds are not *ad idem*. Such inference may arise if it is clear to the court that one party so conducted or represented himself to the other, that the other party, relying on such representations, acted or abstained from executing a particular act with a reasonable belief that the two parties had entered into a binding contract.³⁷ In other words, the injured party will be entitled to rely on the doctrine of promissory estoppel.³⁸ Three elements

³⁰Accordingly s 14 defines 'free consent' as follows: '(1) [c]onsent is said to be free when it is not caused by— (a) coercion, as defined in section 15, (b) undue influence, as defined in section 16, (c) fraud, as defined in section 17, (d) misrepresentation, as defined in section 18; or (e) mistake, subject to the provisions of sections 20, 21 and 22. (2) Consent is said to be not free when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.'

³¹See s 13 of the Law of Contract Act, Cap 345 [R.E.2002]. See also Nditi (n5) 146. However, in *Kennedy v Lee* [1817] 3 Mer 441, Lord Eldon said that it does not mean seeing that both parties must really mean the same thing, 'but only that both gave their assent to that proposition which, be what it may, *de facto* arises out of the terms of their correspondence.' See, for instance, a situation where an agreement suffers from mutual mistake (in *Raffles v Wichelhaus* (1864) 2H & C 906; *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564).

³²See M R Cohen 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553, 575-578. See also R Macneil 'The Many Futures of Contracts' (1974) 47 *South California Law Review* 691.

³³See Nditi (n5) 174. See also *Hartog v Colin & Shields* [1939] 1 ER 566.

³⁴See Nditi (n5) 174.

³⁵*Star Service Station Co Ltd v Tanzania Railways Corporation* [1989] TLR 1 (HC).

³⁶*Ibid* at 2.

³⁷See the rule as set out by Blackburn J in *Smith v Hughes* (1867) LR 6QB 597, 607.

³⁸Under English law, promissory estoppel and proprietary estoppel are regarded as 'reliance-based estoppels' See (2003) 16 (2) *Halsbury's Laws of England*. See also M Spence *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (1999) 60–66. The doctrine of promissory estoppel was applied in *Nurdin Bandali v Lombank Tanganyika Ltd* [1963] EA 304. See also *Century Automobiles Ltd v Hutchings Biemar Ltd* [1965] EA 304; *Commissioner for Lands v Hussein* [1968] EA 585; *Ruanda Cofee Estate Ltd v Ujagar Singh* [1966] EA 564

are required for the doctrine of promissory estoppel to operate. These are: (i) a clear and unequivocal representation; (ii) an intention that it should be acted upon, and (iii) action upon it in the belief of its truth.³⁹

Hence, although in modern economic life the classical view of freedom of contract may be manifestly lacking,⁴⁰ freedom to contract, which the law in Tanzania supports, maintains the idea that there should be no liability without consent embodied in a valid contract.⁴¹

In an online environment, establishing the necessary consent in the form of *consensus ad idem* between the parties may be problematic. Four issues that may be encountered in such an environment will be addressed below. The first one concerns the capacity of e-agents to conclude contracts and whether such agents can form the necessary intention to form an enforceable contract. The second issue is whether marketing on a website constitutes an offer or an invitation to treat, while the third relates to lack of a firm requirement of acceptance in certain web-based transactions and whether such transactions are valid. The final issue concerns when and where an e-contract is concluded. All these issues are closely connected to contract formation and are discussed further below.

(a) Do E-agents have the Capacity to Contract?

According to Russell and Norvig, an e-agent can be defined as ‘anything that can perceive its environment through sensors and acting within that environment through effectors.’⁴² These authors argue that while ‘a human agent has eyes, ears, and other organs for sensors, and hands, legs, mouth and other body parts for effectors, software agent has encoded bit strings as its precepts and actions.’⁴³ E-agents, therefore, are computer programs or software with the ability to perform certain functions desired by their programmer or by themselves, depending

(discussing the extent of the doctrine of estoppels); *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

³⁹See *Nurdin Bandali v Lombank Tanganyika Ltd* (n38). For more about this case see Nditi (n5) 108-112.

⁴⁰See J Beatson *Anson's Law of Contract* 28ed (2002) 4, 7.

⁴¹See Nditi (n5) 174.

⁴²See S Russell & P Norvig *Artificial Intelligence: A Modern Approach* 3ed (2010) 34. See also H G Ruse ‘Electronic Agents and the Legal Protection of Non-Creative Data Bases’ (2001) 9 *International Journal of Law and Information Technology* 295; J S T Øren ‘Electronic Agents and the Notion of Establishment’ (2001) 9 *International Journal of Law and Information Technology* 249; N Vulkan ‘Economic Implications of Agent Technology and E-Commerce’ (1999) 109 *The Economic Journal* 67.

⁴³See Russell & Norvig (n42) 34. Other authors define an intelligent agent as ‘an autonomous computing unit, which is able to interact with other agents and systems in order to communicate information in form of data and knowledge.’ See S Feliu ‘Intelligent Agent and Consumer Protection’ (2001) 9 *International Journal of Law and Information Technology* 235, 236.

on their nature.⁴⁴ For instance, some e-agents can act as search or decision-making agents while others can operate as intermediaries or both.⁴⁵

As technology in computing and the Internet enter into an advanced stage,⁴⁶ e-agents form contracts, having been ‘endowed with cognitive capability of reasoning, learning, choosing and even taking an initiative.’⁴⁷ In the course of doing so, they operate autonomously, without being directly controlled by an individual, even if the resultant effect will be attributed to an individual.⁴⁸ Reliance on these e-agents in e-contracting is currently on the increase.⁴⁹ Their effect is also well noted as they have made it possible for big companies, such as eBay or Amazon.com, to attract a high number of participants in their online transactions compared to their brick-and-mortar counterparts.⁵⁰ Owing to the increased reliance on e-agents, legal questions have arisen regarding their status and capability to form valid contracts.⁵¹

One of the obvious issues is whether an e-agent can form the necessary intent, and whether the traditional legal framework can still sufficiently establish a convincing link between them and the persons on whose behalf they are presumed to act.⁵² The fundamental nature of a contract, as it is generally understood, is that the parties must intend to be bound by the agreement.⁵³ What is the position, however, if the offeree uses an e-agent to communicate

⁴⁴Section 2(6) of the United State Uniform Electronic Transactions Act (UETA) defines “electronic agent” as ‘a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.’ See also S Gonzalo ‘A Business Outlook Regarding Electronic Agents’ (2001) 9 *International Journal of Law and Information Technology* 189.

⁴⁵ See Felio (n43) 236. See also A R Lodder & A Oskamp (eds) *Information Technology & Lawyers: Advanced Technology in the Legal Domain, from Challenges to Daily Routine* (2006) 15.

⁴⁶See L J Rusch ‘The Relevancy of evolving domestic and international law on contracts in the classroom: Assumptions about assent.’ (1997) 72 *Tulane Law Review* 2043, 2055.

⁴⁷ E Dahiyat ‘Intelligent Agents and Contracts: Is a Conceptual Rethink Imperative? (2007) 15 *Journal of Artificial Intelligence Law* 375. See also F Andrade ‘Intelligent Electronic Inter-Systemic Contracting - Issues on Contract Formation’ in D Bourcier (ed) *Legal Knowledge and Information Systems Jurix 2003: The Sixteenth Annual Conference* (2003) 149-150, 149.

⁴⁸See G Finocchiaro ‘The Conclusion of the Electronic Contracts Through “Software Agents” A false Legal Problem? Brief Considerations’ (2003) 19 *Computer Law & Security Report* 20.

⁴⁹ See M Louta, R Ioanna & P Lambros ‘An Intelligent Agent negotiation Strategy in the Electronic Marketplace Environment’ (2008) 187 *European Journal of Operational Research* 1327, 1327.

⁵⁰See Y Wan & Y Liu ‘The Impact of Legal Challenges on the Evolution of Web-based Intelligent Agents’ (2008) 3 *Journal of International Commercial Law and Technology* 112.

⁵¹See Andrade (n47) 149. See also M Bain & B Subirana ‘E-commerce oriented software agents: Some legal challenges of advertising and semi-autonomous contracting agents’ (2003) 19 *Computer Law & Security Report* 282.

⁵² See Dahiyat (n47) 375.

⁵³See E S Tuma & R C Ward ‘Contracting Over the Internet in Texas’ (2000) 52 *Baylor Law Review* 381, 395. See also G Klass ‘Intent to Contract’ (2009) 95 *Virginia Law Review* 1437, 1443.

the acceptance to the offeror? Was the offeror intending to contract with a programmed machine? Will that e-agent be regarded as a duly authorised agent for the offeree?

Beatson argues that, since the basis of communicating acceptance is to make the offeror aware that the offer has been accepted (and hence a binding contract has been formed), there is no reason (apart from one of certainty) why a third party should not be authorised to communicate the acceptance of the offer to the offeror.⁵⁴ Even so, if we consider that an e-agent should be regarded as an authorised third party, this may prompt more legal questions regarding capacity than answers.

As stated above, capacity to contract is not restricted to the parties' competence to exercise their freedom; it extends also to their ability to form the necessary intention to be legally bound in contract. According to ss 10 and 13 of the Law of Contract Act, clearly expressed and concurring intentions of the parties establish the necessary consensus to bind them. It is arguable, however, whether e-agents can validly consent to be bound in contract in the sense envisaged by the Act. Reference to 'consent' under the Tanzanian Law of Contract Act means the consent of the 'parties'. According to s 2(1)(a) and (b) of this Act, parties to a contract are the offeror and the offeree, who are referred to as persons.⁵⁵ In view of this, one immediate question that follows is whether the term 'person', as used in that section, includes an e-agent.⁵⁶

Because e-agents act autonomously, and, in the absence of human intervention to form the necessary intent to be bound by the contract, they are simply the passive tools of a merchant to facilitate his trade.⁵⁷ Dahiyat argues that the action which leads to the conclusion of a contract through autonomous e-agents 'does not usually arise from a conscious and

⁵⁴See Beatson (n40) 41-42. He, however, does not contemplate the situation where an e-agent is involved in contract formation.

⁵⁵Section 2(1)(a) and (b) says 'when one *person* signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal; (b) 'when the *person* to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted, and a proposal, when accepted, becomes a promise.' (Italics added).

⁵⁶ See B Schafer 'The taming of the sleuth – problems and potential of autonomous agents in crime investigation and prosecuting' 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World? April, 2005, *Queen's University of Belfast* (available at <http://www.bileta.ac.uk/document%20library/1/the%20taming%20of%20the%20sleuth%E2%80%93%20problems%20and%20potential%20of%20autonomous%20agents%20in%20crime%20investigation%20and%20prosecuting.pdf>) (as accessed on 2/3/2010)). The author notes, at page 1, that the controversial issue regarding the legal status of autonomous agents is centred on whether they are "persons" in the sense of private law, and hence able to enter into legal relations or incur liability.

⁵⁷See T Allen & R Widdison 'Can Computers Make Contracts?' (1996) 9 *Harvard Journal of Law and Technology* 26, 43.

positive decision of such users, but it arises autonomously from the experience and cognitive process of their agents.⁵⁸ Consequently, 'it would require a very imaginative approach to infer the actual and subjective consent of such users to terms of which they were completely unaware, or to consider that they have intended to be bound by a contract they never know about.'⁵⁹ This being the case, can it be argued that e-agents are agents of the parties?

Some authors have argued that e-agents should be considered agents of the parties.⁶⁰ In the first place, 'under the objective theory of contract a party, being unaware that a communication was prepared by an electronic agent, should be able to rely on the objective manifestations of assent.'⁶¹ The application of the objective theory in determining existence of a contract was discussed in the English case of *Shogun Finance Ltd v Hudson*,⁶² where the court held that existence of an agreement is 'not determined by evidence of the subjective intention of each party [but] by making an objective appraisal of the exchanges between the parties.'⁶³ Authors who consider e-agents as true agents further argue that courts should enforce all contracts made by e-agents if they comply with the attribution procedures recognised by the parties.⁶⁴ Consequently, these authors contend that an e-agent's response to an offer or an acceptance is manifestation of consent.⁶⁵

In the second place, proponents argue that e-agents should be considered the agents of their principals since they are programmed by them to do exactly what the principals want them to do.⁶⁶ If this view is correct, the acts of e-agents should be imputed to the acts of their programmer (their principal), which means the law of agency should be applied.⁶⁷ The question remains, however, whether an e-agent qualifies to be an agent in the sense in which this concept is understood under the law of agency.

⁵⁸ See Dahiyat (n47) 383.

⁵⁹ See Dahiyat (n47) 383.

⁶⁰ See Tuma & Ward (n53) 396. See also J P Fischer 'Computers as Agents: A Proposed Approach to Revised U. C. C. Article 2' (1997) 72 *Indiana Law Journal* 545; T Balke & T Eymann 'The Conclusion of Contracts by Software Agents in the Eyes of the Law' in L Padgham, D Parkes, J Mueller & S Parsons (eds) *Proceedings of 7th International Joint Conference on Autonomous Agents and Multiagent Systems (AAMAS)* vol2 (2008) 771-778.

⁶¹ See Tuma & Ward (n53) 396.

⁶² *Shogun Finance Ltd v Hudson* [2004] 1 Lloyd's Rep 532.

⁶³ *Ibid* at para 123.

⁶⁴ See J C Dodd & J A Hernandez 'Contracting in Cyberspace' (1998) 1 *Computer Law Review & Technology Journal* 1. It is however important to note that in EDI cases parties maintain a separate Trading Partners Agreement and can easily rely on it if a dispute arises.

⁶⁵ See Tuma & Ward (n53) 396.

⁶⁶ See Tuma & Ward (n53) 396. See also Fischer (n60) 570.

⁶⁷ See Tuma & Ward (n53) 396.

Tanzanian law recognises that an authorised agent can act on his principal's behalf and can bind his principal by so acting.⁶⁸ Section 134 of the Law of Contract Act defines an agent as 'a person employed to do any act for another or to represent another in dealings with third persons.' Furthermore, s 136 provides that, '[as] between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions of this Act.' In these definitions an agent is a person in the eyes of the law.

According to the Interpretation of Laws Act,⁶⁹ the word 'person' means 'any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated.'⁷⁰ Since entities that have been given legal personality are expressly mentioned in this definition it is clear that e-agents are excluded from the list. And the Latin maxim *expressio unius est exclusio alterius* applies. To use the words of Weitzenboeck, 'those to whom the parliament has not conferred juridical life cannot be considered persons in the eyes of the law.'⁷¹ Thus, a contract concluded by an e-agent in Tanzania falls outside the ambit of the existing law by virtue of s 2(1)(a) and (b) of the Law of Contract Act.⁷²

(b) Problems Raised by E-commerce Regarding Offers: Is Marketing on a Website an Offer or an Invitation to Treat?

Often consensus in contract formation is evidenced by the existence of a valid offer and acceptance. The Tanzanian Law of Contract Act provides that, 'when one person signifies to

⁶⁸See ss, 138-140 and s 178 of the Law of Contract Act Cap 345 [R.E. 2002]. Section 138 provides that '[t]he authority of an agent may be express or implied.' Section 139 further explains these terms. It states that '[a]n authority is said to be express when it is given by words spoken or written and to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted on circumstances of the case.' Section 140 provides that '(1) [a]n agent having on authority to do an act has authority to do every lawful thing which is necessary in order to do such act' and '(2) [a]n agent having authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.' Section 178 states that '[c]ontracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.'

⁶⁹Cap 1 [R.E.2002].

⁷⁰Section 4 of the Interpretation of Laws Act, Cap1 [R.E 2002].

⁷¹See E M Weitzenboeck 'Electronic Agents and Formation of Contracts' (2001) 9 *International Journal of Law and Information Technology* 204, 211.

⁷²Section 2(1)(a) and (b) provides as follows: '(1) [i]n this Act, unless the context otherwise requires—(a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal, (b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted, and a proposal, when accepted, becomes a promise.'

another his willingness to do or abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal.’⁷³ ‘When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.’⁷⁴

An offer must be valid, and for it to be so, it must be a final, firm and unambiguous expression of a party showing the intent to be bound to the promise made to another should that other decide to accept it.⁷⁵ If held to be otherwise, such expression will fall short of an offer, and probably be an invitation to treat.⁷⁶ The requirement for an offer to be sufficiently clear and definite is long standing in case law.⁷⁷

An offer must also be made with intent to secure acceptance or consent of the other party, and, for it to be effective, it must be fully communicated to reach the party or parties for whom it was intended.⁷⁸ According to the Law of Contract Act, communication of an offer is deemed to be made by any act or omission of the offeror by which he intends to communicate the offer, and which has the effect of communicating it.⁷⁹ The significance of attaching all these conditions is to distinguish an offer from a mere invitation to treat.

In Tanzania, an invitation to treat does not constitute an offer but reflects only the willingness of the inviting party to enter into negotiations which, if successful, will lead to formation of a contract. Merchants employ various methods to entice customers or interested parties. They may display their goods in open show rooms for sale,⁸⁰ advertise them⁸¹ or call

⁷³See s 2(1)(a) and (b) of the Law of Contract Act, Cap 345 [R.E.2002].

⁷⁴See s 2(1)(a) and (b) of Law of Contract Act, Cap 345 [R.E.2002].

⁷⁵See s 2(1)(a) of the Contract Act Cap 345 [R.E.2002]. See also *Nitin Coffee Estates Ltd & others v United Engineering Works Ltd & another* [1988] TLR 203, on the effects of uncertainty in contract.

⁷⁶See *GBL & Associates Ltd v Director of Wildlife Ministry of lands, Natural Resources and Tourism and Two Others* [1989] TLR 195 (HC).

⁷⁷See *Alfi EA Ltd v Themis Industries & Distributors Agency Ltd* [1984] TLR 256 where it was found that the offer to sell a certain machine was unclear and uncertain as to price and the agreement was void. See also *Sands v Mutual Benefits Ltd* [1971] EA 156; *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716; *Jupiter General Insurance Co v Kasanda Cotton Co* 1966 (1) ALR Comm 292; *Ghulum Kadir v British Overseas Engineering Co (EA) Ltd* [1957] EA 131; *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (No.2)* [1970] EA 469.

⁷⁸See ss 3 and 4(1) (of the Law of Contract Act, Cap 345 (R.E.2002)). See also Nditi (n5) 39 citing *Household Fire & Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216

⁷⁹Section 3 of the Contract Act Cap 345 [R.E. 2002]. The case in point here is that of *Carlill v Carbolic Smoke Ball* [1893] 1QB 256.

⁸⁰As for the effects of this see *Fisher v Bell* [1961] 1 QB 394 and *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 All ER482. See also *Grainger & Son v Gough* [1896] AC 325.

⁸¹See *Partridge v Crittenden* [1968] 2 All ER 421. However, caution need to be taken since some advertisements may constitute an offer which, if accepted will give rise to a contract. See *Carlill v Carbonic Smoke Ball Co* (n79) 256.

for tenders.⁸² All these methods are intended to invite a bargain or to promote the sale of a particular product, but they fall short of being offers. In contracts by tender, for instance, even if the tendering party fulfils all conditions to be observed and submits her tender in time, the only obligation which the inviting party has is that of opening and considering it alongside others.⁸³ The one inviting the tender is in no way obliged to accept it.⁸⁴

Whether promotion of products on a website should be treated as creating a binding offer or a mere invitation to treat constitutes one of the most controversial issues in e-commerce law.⁸⁵ Unlike Poole, who is of the view that a website generally constitutes an invitation to treat,⁸⁶ Polanski argues that it will depend on how the site is structured.⁸⁷ In an online environment there are two types of merchants. The first use their websites to offer goods for sale to their potential customers and the second use their websites to solicit offers.⁸⁸ Thus, except for minor differences, such as the extent of its reach, this latter kind of solicitation is no different from a normal advertisement or shop display of goods.⁸⁹ Nevertheless, it is possible within the technology interface to fuse display and the actual sale on the website. This may lead to problems when deciding whether what was presented to customers was an offer or a mere invitation to treat.⁹⁰

According to Durtschi et al, where the display is supported by adequate information as to price, mode of payment, terms and conditions of the contract, mode of delivery and mode of

⁸²See *Spencer & Others v Harding & Others* (1869-70) LR 5C.P 561.

⁸³See *Blackpool & Flyde Aero Club Ltd v Black Borough Council* [1990] 1 WLR119.

⁸⁴See Ndit (n5) 31. See *GBL & Associates Ltd v Director of Wildlife Ministry of lands, Natural Resources and Tourism and Two Others* (n76) 195 (HC). See also Hodgin (n5) 19, M Chissick & A Kelman *Electronic Commerce: Law and Practice* 2ed (2000) 75. However, see T I Akomolede 'Legal Analysis of formation of consumer contracts in E-commerce: The Nigerian Experience' (2002) 2 *European Journal of Social Sciences* 135, 136 (criticising the rationale of this rule in relation to digitised goods for sale, such as software).

⁸⁵See a position paper by the Law Reform Commission of Tanzania (at page 5) (available at <http://www.lrc-tz.org/Positionpaperone-COMMERCE.pdf> (as accessed on 21/07/2007)). This paper is hereafter referred to as the 'LRCT position paper'. See also P Polanski 'International electronic contracting in the newest UN Convention' (2007) 2 *Journal of International Commercial Law & Technology* 112, 116. See also C Glatt 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 *International Journal of Law and Information Technology* 34, 50.

⁸⁶See J Poole *Textbook on Contract Law* 10ed (2010) 42.

⁸⁷See P Polanski (ed) *Customary Law of the Internet: In Search for a Supranational Cyberspace Law* IT & Law Series (No 13) (2007) 26 as he submits that 'an interactive website should be presumed to constitute an offer.'

⁸⁸See Chissick & Kelman (n84). See also C Durtschi, W Hillison & C Pacini 'Web-Based Contracts: You could be burned!' (2002) 13 *Journal of Corporate Accounting & Finance* 12. Available at <http://www3.interscience.wiley.com> (as accessed on 25/8/2007).

⁸⁹See Akomolede (n84). See also *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at para 93 where the Singaporean High Court stated that, a 'website advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical.' For an extensive analysis of this case see A Phang 'Contract Formation and Mistake in Cyberspace—the Singapore Experience' (2005) 17 *Singapore Academic Law Journal* 361.

⁹⁰See *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* (n89) at para 94.

acceptance (for instance, a click of a button), there is no reason why this should not be held to constitute a direct offer by the particular web-merchant.⁹¹ Indeed, as Stone argues, in the absence of problems of limited supply, such advertisements should amount to an offer.⁹²

In *Chwee Kin Keong & Others v Digilandmall.com Pte Ltd*,⁹³ the Singapore High Court pointed out the material difference between physical goods of which stock can be limited and digital goods that are, at least theoretically, inexhaustible. In view of this possibility, the court stated that it may be impossible to ‘bail out an Internet merchant from a bad bargain, a fortiori in the sale of information and probably services, as the same constraints as to availability and supply may not usually apply to such sales.’⁹⁴ In this regard, the underlying rationale for the unique legal characteristics attributed to an invitation to treat in *Grainger & Son v Gough*⁹⁵ (concerning possible shortage of supplies of goods on the part of the seller) does not apply in its fullness to the online environment unless it is for supply of physical goods.

In view of the above discussion, an advertisement or digital image of products for sale on a website, depending on its wording, may constitute an offer.⁹⁶ Even so, one would need to make a distinction between those merchants who use their websites for mere display of goods and those who structure them in such a way that they constitute an offer capable of being accepted to create a binding contract.⁹⁷ Since the law in Tanzania has not accommodated electronic transactions, and, because no case in Tanzania has been decided on whether an online advertisement constitutes a valid offer or a mere invitation to treat, it is difficult to predict the view of the courts in Tanzania if called upon to decide such a problem. A clear rule on the status of online advertisements may therefore be necessary.⁹⁸

⁹¹ See Durtschi et al (n88) 12. See also Polanski (n87) 26; *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* (n89) para 93-94.

⁹² See R Stone *The Modern Law of Contract* 8ed (2009) 50. See also *Lefkowitz v Great Minneapolis Surplus Stores* (1957) 80 NW2d689. See also Akomolede (n84) 136.

⁹³ See *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* (n89) para 95-96.

⁹⁴ *Ibid*, at para 96.

⁹⁵ See (n80) 333–334. See also *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 All ER 117, 126.

⁹⁶ See Polanski (n87) 26. See also *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* (n89) at para 94 where the courts said ‘this is essentially a matter of language and intention, objectively ascertained Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.’

⁹⁷ See Chissick & Kelman (n84) 75-105.

⁹⁸ In some instances, in order to avoid confusion, web owners attempt to act prudently by making it clear to their online customers that when they select products or services, theirs is considered an offer to buy and not an acceptance that constitutes a contract. In that way they are at liberty to accept or reject offers. Chissick & Kelman (n84) 76 (see also T Kevan & P McGrath *E-mail, the Internet and the Law: Essential Guide to Safer Surfing* (2001) 178) have argued that by putting on such disclaimers e-businesses acquire the ability to select their

(c) Problems Regarding Acceptance in Certain Web-based Agreements

(i) Lack of a Specific Act of Acceptance in Browse-wrap Agreements

Website owners purport to regulate the use of information and services on their websites through end-user license agreements (EULA).⁹⁹ Browse-wrap agreements are one such licence and use agreement that bind a web-user to the terms and conditions of the website upon browsing the web-site. They purport to create a contract without first requiring the user to consent to the terms and conditions governing it and they are sometimes referred to as ‘non-clicking online contracts.’¹⁰⁰

Web-owners may notify web-users that the latter’s use of the website, service or software signifies consent to its terms and conditions, (hence constituting an agreement). The terms and conditions, however, may be located elsewhere far below the screen, in most cases, in inconspicuous small print or in another website accessed via a hyperlink.¹⁰¹ The user may therefore not be reasonably notified of the terms because these agreements lack an outright requirement of consent before users proceed with doing business as is the case with click-wrap agreements. Consequently, this has exposed these agreements ‘to challenge on the grounds of lack of reasonable notice and *bona fide* assent to the browse-wrap terms.’¹⁰²

In the United States, for instance, courts have arrived at varied conclusions while searching for analogical rules from cases on shrink-wrap and click-wrap agreements.¹⁰³ Cases

customers and manage their supply of goods. The problem, however, is that not all web merchants adopt that approach.

⁹⁹See D Block ‘Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites’ (2001-2002) 14 *Loyola Consumer Law Review* 227.

¹⁰⁰See R Raysman & P Brown ‘Clarifying the Rules for Click-wrap and Browse-wrap Agreements’ Thursday, November 14 (2002) 228 *New York Law Journal* —NO. 93 (available at http://www.thelen.com/resources/documents/nylj_11-14-021.pdf (as accessed on 3/9/2007)). For more on these agreements see C L Kunz, J Ottavian, E Ziff, J M Moringiello, K Porter & J Debrow ‘Browse-wrap Agreements: Validity of Implied Assent in Electronic Form Agreements’ (2003) 59 *Business Lawyer* 279. The authors refer to, for example, <http://www.quickbook.com/legal.html> where mere entering to the site is a signification to be bound by its terms and conditions of service. See further M Moringiello & W L Reynolds ‘Survey of the Law of Cyberspace: Internet Contracting Case in 2004-2005’ (2005) 61 *The Business Lawyer* 433.

¹⁰¹Gautrais (n28) 196 argues that this tendency is far from being effective from a communicative point of view ‘as it forces the buyers to scroll down to get the contract.’

¹⁰²See R G Kunkel ‘Recent Developments in Shrinkwrap, Clickwrap and Browsewrap Licenses in the United States’ (2002) 9 *Murdoch University Electronic Journal of Law* (para 51), available at <http://www.murdoch.edu.au/elaw/indices/issue/v9n3.html> ISSN 1321-8247 (as accessed on 4/9/2007).

¹⁰³See M Robertson ‘Is Assent Still a Prerequisite for Contract formation in Today’s Economy?’ (2003) 78 *Washington Law Review* 265, 276, 280. The author notes (at 275) that under the United States’ Uniform Computer Information Transactions Act (UCITA), click-wraps and shrink-wraps are enforceable provided that the user has reasonable opportunity to review the terms and manifests his/her assent in a manner sufficient to show agreement.

which have dealt with browse-wrap agreements can be categorised into two groups. The first represents cases which upheld the validity of consent in these agreements, while the second represents cases which declined to uphold its validity.

*Register.com Inc v Verio Inc*¹⁰⁴ and *Pollstar v Gigmania Ltd*¹⁰⁵ are examples of cases from the first group, ie, they upheld the validity of a browse-wrap agreement. In *Register.com Inc v Verio Inc*, the plaintiff (a registrar of domain names) was also an Internet service provider. The Defendant was a competitor in business. The Plaintiff, as a registrar of domain names, entered into an agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) for it to be accredited. The agreement required all registrars to provide an on-line interactive 'WHOIS' database, containing the names and contact information for customers who registered domain names through them. This database was accessible freely via a registrar's web page and through an independent access port. The access channel to the 'WHOIS' database allowed users to collect registrant contact information for one domain name at a time by entering the domain name into the provided search engine.

The plaintiff's website, through its terms and conditions, restricted those who submitted a 'WHOIS' query to its 'WHOIS' database from, among others things, use of its information for commercial purpose. The plaintiff's website stated as follows: 'by submitting this query, you agree to abide by these terms.' The defendant (Verio), using automated software programs, accessed the 'WHOIS' database maintained by the plaintiff, and in total disregard of the plaintiff's terms of use, used the data obtained from the plaintiff's 'WHOIS' database for commercial purposes. The plaintiff sued the defendant alleging breach of contract which was formed when the defendant submitted a query to the plaintiff's 'WHOIS' database.¹⁰⁶

The defendant challenged the enforceability of the plaintiff's terms of use arguing that the defendant was never called upon to manifest consent to those terms. Nonetheless, the court held that there was a breach of contract and that there was consent to the terms. The court relied on the notice that submitting the WHOIS query subjects the inquiring party to the terms

¹⁰⁴126 F Supp2d 238 (SDNY 2000. The judgement of this case is available at <http://www.spamseminar.com/materials/register-verio.html> (as accessed on 4/9/2007).

¹⁰⁵17F Supp 2d 974(ED Cal.2000). Available at <http://euro.ecom.cmu.edu/program/courses/tcr840/2003/pollstar.htm> (as accessed on 3/4/2009).

¹⁰⁶See *Register.com Inc v Verio Inc* (n104) 245-246.

and conditions of use. It held that, by doing so ‘Verio manifested its assent to be bound by Register.com's terms of use, and a contract was formed and subsequently breached.’¹⁰⁷

In *Pollstar v Gigmania Ltd*¹⁰⁸ the plaintiff, Pollstar, created and maintained a website from which updated concert information could be obtained. By accessing the website, an Internet user could download and use the up-to-date concert information pursuant to the conditions of Pollstar's licence agreement. One of the conditions prohibited using the information obtained from their website for commercial purposes. Users were also warned that use of the website was subject to a license agreement which was set forth on the website.

The defendant, Gigmania, downloaded concert information from Pollstar's website, and posted the information on its competing website. Pollstar sued the defendant alleging inter alia, breach of contract. The defendant, Gigmania contended that the breach of contract claim should fail since the alleged contract lacked the required element of mutual consent.¹⁰⁹ In response Pollstar argued that all users of the concert information were bound by the license agreement even if the license agreement was not set forth on the homepage but on a different web page linked to its homepage.

While agreeing with the defendant that users were not immediately confronted with a notice of the license agreement, the court held that that fact alone could not ‘dispose of Pollstar's breach of contract claim.’¹¹⁰ Although there was lack of express demand for consent in the browse-wrap agreement the court expressed its hesitation to declare the browse wrap agreement invalid or unenforceable. Instead it stated that, since ‘people sometimes enter into a contract by using a service without first seeing the terms the browser-wrap license agreement may be arguably valid and enforceable.’¹¹¹

Under the category of cases declaring browse-wrap agreements to be invalid, the following two examples will be considered. These are *Ticketmaster Corp v Ticket.com Inc*¹¹²

¹⁰⁷See *Register.com Inc v Verio Inc* (n104) 248.

¹⁰⁸See *Pollstar v Gigmania Ltd* (n105).

¹⁰⁹Ibid at 980-981.

¹¹⁰Ibid at 982.

¹¹¹Ibid.

¹¹²*The Ticketmaster Corp v Ticket.com Inc* 54USPQ2d (2000) USDist LEXIS 4553 (CDCal March 27, 2000). Some filed documents for this case are available at <http://docs.law.gwu.edu/facweb/claw/TicketsCom.htm> or <http://www.tomwbell.com/NetLaw/Ch07/Ticketmaster.htm> (as accessed on 3/9/2007). For a thorough discussion of this case see T Zynda ‘*Ticketmaster Corp v Tickets.com Inc* - Preserving Minimum Requirements of Contract on the Internet’ (2004) 19 *Berkeley Technology Law Journal* 495.

and *Specht v Netscape Communication Corp.*¹¹³ In the first case the plaintiff had created a website containing information about up-coming events, such as concerts and ball games. Users could access this information and buy tickets online. The Defendant accessed and obtained information about the upcoming events from the plaintiff's site and presented it in a different format on its own website. From the defendant's website, however, customers were directed to the interior pages of the plaintiff's website by a hyper-link hence by-passing the plaintiff's home-page. The plaintiff sued the defendant alleging, *inter alia*, breach of contract. In response the defendant filed a motion to dismiss the plaintiff's claim.

The plaintiff's browse-wrap agreement had a general statement to the effect that use of the website binds the users to its terms and conditions. The statement was followed by a link to the terms and conditions which could only be accessed in full text if the customer scrolled down to the bottom of the page. The terms prohibited, among other things, deep-linking and copying for commercial use. The defendant's acts were, therefore, prohibited under those terms. Nowhere, however, were the users called upon to consent to the terms. The plaintiff, relying on cases that upheld the enforceability of click-wrap agreements, argued that its claim on breach of contract was based on the notice on its home page, which cautioned users that continuing past the plaintiff's home page amounted to consenting to be bound by its website's terms and conditions.

Ruling in favour of the defendant, the court declined to uphold the plaintiff's arguments. It stated that it cannot be said that, by merely setting out the terms and conditions in the manner used by the plaintiff that necessarily creates a contract with anyone using the website.¹¹⁴ It therefore held that the agreement lacked the necessary consent and was hence unenforceable.

In *Specht v Netscape Communication Corp.*,¹¹⁵ the browse-wrap agreement between the plaintiffs and the defendants had an arbitration clause as one of its terms and conditions. This clause required all disputes between parties to the browse-wrap agreement to be submitted to an arbitrator. The plaintiffs, who had downloaded and used software (called Smart Download) from the defendants' website, sued the defendants, alleging that the software was transmitting information about their Internet activities to the defendants, hence violating their

¹¹³150F. Supp, 2d 585 (SDNY 2001).

¹¹⁴Ibid.

¹¹⁵Ibid.

right to privacy. The defendants filed a motion to stay the proceedings and subjected the plaintiffs to arbitration in accordance with the arbitration clause contained in the browse-wrap agreement. The defendants' website had, below the download page, a link with words stating: '[p]lease review and agree to the terms of the Netscape 'Smart Download' software license agreement before downloading and using the software.' These words were in fine print and not visible on the page without scrolling down the page.

The issue before the court was whether the plaintiffs had consented to arbitration. Did they indicate or fail to indicate their consent? Were they given sufficient notice to do so?¹¹⁶ Although the defendants argued that the mere act of downloading the software constituted consent to be bound, the court was not convinced and stated that it had always been a legal requirement in contract that 'assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective.'¹¹⁷ In view of this legal requirement, the court ruled in favour of the plaintiffs, stating that a mere download could in no way present a clear consent to an agreement.¹¹⁸

In view of the kind of problems that web-based agreements, especially browse-wrap agreements, have posed to courts, and as shown in the four cases discussed above, some scholars have argued that browse-wrap agreements should not be enforced.¹¹⁹ Robertson contends, for instance, that browse-wrap agreements affect consumers because they are against the basic contractual principles of notice and consent.¹²⁰ When viewed in the light of the existing laws in Tanzania, the cases discussed above represent the kind of problems that courts may have to face in future. So far, no case of a similar nature has been decided in Tanzania, though businesses and consumers encounter these agreements when downloading software onto their computers.¹²¹ Although courts may refer to the so-called 'ticket cases' to fill the existing gaps in browse-wrap agreements, a counter argument is that such cases may be useful in click-wrap agreements but not in browse-wrap agreements. Clear articulation of rules to govern such agreements may thus be necessary.

¹¹⁶Ibid, at 591-596.

¹¹⁷Ibid.

¹¹⁸Ibid at 595.

¹¹⁹See Gautrais (n28) 194-195. See also Robertson (n103).

¹²⁰See Robertson (n103) 296.

¹²¹See J O Koyugi *The Uneasy Case for Copyright Protection in Computer Programs: A challenge to the Copyright and Neighbouring Rights Act 1999* (Unpublished LLM Dissertation, University of Dar-es-Salaam, 2005) 98-109.

(ii) Lack of Specific Act of Acceptance in Shrink-wrap Agreements

As defined in Chapter I, shrink-wrap agreements, and other web-based contracts, are standard form contracts or contracts of adhesion. Such contracts are not new to courts in Tanzania since they have been dealt with in the so-called ‘ticket cases’, and the mechanisms for dealing with such cases form part of the law in Tanzania.¹²² The legal position with regard to the so-called ‘ticket cases’ is that terms relied upon to defend a fundamental breach will not be enforced.¹²³ Similarly, terms that are contrary to public policy will not be binding.¹²⁴ In addition, all terms or clauses incorporated into such agreements with a view to exempt, exclude, or restrict liability or a legal duty of the stronger party can only be relied upon in his favour if they are reasonable, unambiguous, and were sufficiently brought to the attention of the weaker party to obtain his or her consent, (and which was in fact obtained).¹²⁵

Generally, one problem with regard to shrink-wrap agreements is that customers do not have sufficient time to analyse the terms and conditions governing the contract until after such contract has been formed and a particular product has been opened. In view of this, can shrink-wrap agreements be enforceable under the law in Tanzania? Up to now, these agreements have never been the subject of litigation in Tanzania. Nevertheless, if the courts could be persuaded to accept that these agreements are akin to the so-called ‘ticket cases’, then the best response to such a question will come from case law dealing with such cases.

The legal status of shrink-wrap agreements has been considered in case law and statutory provisions in certain other jurisdictions, for instance, the United States of America.¹²⁶ As recently as the 1990s, the US courts were not prepared to enforce shrink-wrap agreements

¹²²See Nditi (n5) 223. See, for instance, *Cooper Motors Corp Ltd v Arusha International Conference Centre* [1991] TLR 165 (CA), *Star Service Station Co Ltd v Tanzania Railways Corporation* (n35) 1.

¹²³See Nditi (n5) 226-228. See also *Tanzania Building Construction Co v Tanzania Railways Corp* [1980] TRL 70; *Star Service Station Co Ltd v Tanzania Railways Corporation* (n35). Nditi observes that although the doctrine of fundamental breach is no longer a substantive rule of law in England, (*Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827), courts in Tanzania still apply it. For instance, in *Cooper Motors Corp Ltd v Arusha International Conference Centre* (n122) 169, it was stated that ‘[e]xemption clauses are to be read as subject to a proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it.’

¹²⁴See s 23(1)(e) and (2) of the Law of Contract Act, Cap 345 [R.E. 2002].

¹²⁵See Nditi (n5) 233-228. See also *Star Service Station Co Ltd v Tanzania Railways Corporation* (n35); *Dar-es-Salaam Motor Transport Co Ltd v Mehta and Others* [1970] EA 596. See also E Peel Treitel: *The Law of Contract* 12ed (2009) 240-244.

¹²⁶These agreements are now covered within the provisions of the United States’ Uniform Electronic Transactions Act (UETA, §7, 7A ULA 211 (1999)) and the Electronic Signature in Global and National Commerce Act (the E-Sign- 15 USC §7001 (2000)) each providing that a contract cannot be denied enforceability solely because it is signed electronically or is in electronic form.

for lack of consensus.¹²⁷ It was considered that an action by ‘a user merely opening a package or viewing terms when starting up a software programme did not constitute express assent to the terms of a shrink-wrap.’¹²⁸

As time went by, however, some courts in the USA started to accept these agreements as binding on various grounds. For instance, in one of the early leading cases on shrink-wrap agreements,¹²⁹ *ProCD v Zeidenberg*,¹³⁰ Zeidenberg had bought a telephone directory on CD-ROM produced by ProCD. Having opened the package and installed the software on his personal computer, Zeidenberg created a website and offered the information, originally on the CD, to visitors of his website for a lower price than what ProCD offered to its commercial customers. This violated the shrink-wrap agreement supplied with the product, and ProCD filed a suit against Zeidenberg. The court of first instance (district court) held that the license agreement that accompanied the product was ineffectual because its terms did not appear on the outside of the packages. The district court upheld Zeidenberg’s argument that placing the package of software on the shelf constituted an ‘offer,’ which the customer ‘accepts’ by paying the asking price and leaving the store with the goods. In that way, it was held, upholding Zeidenberg’s argument, that a contract includes only the terms on which the parties have agreed, and one cannot agree to hidden terms.

On appeal to the United States Court of Appeal, that Court ruled in favour of ProCD. The court referred to Art 2-204(1) of the Uniform Commercial Code, which provides that ‘[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognises the existence of such a contract.’ The Court held that the shrink-wrap agreement constituted a binding and enforceable contract. It pointed out that in every box containing ProCD’s consumer product there was a declaration that the software comes with restrictions stated in an enclosed license. The said license, which was encoded on the CD-ROM disks and also printed in the manual, also appeared on every user's screen every time the software ran, and would not let the user proceed without indicating acceptance.

¹²⁷See Robertson (n103) 276.

¹²⁸Ibid, citing *Step-Saver Data Systems Inc v Wyse Technology* 939 F 2d 91, 97 (3d Cir 1991) 99.

¹²⁹See J Litman ‘The Tale that Article 2B Tells’ (1998) 13 *Berkeley Technology Law Journal* 931, 934 where the author states (in footnote 14) that *ProCD v Zeidenberg* is the leading case to enforce a shrink-wrap license agreement.) See also R Wilson ‘Internet Hotel Reservations: The “Terms and Conditions” Trap’ (2007) 48 *Cornell Hotel and Restaurant Administration Quarterly* 361, 364 (available at <http://cqx.sagepub.com/content/48/4/361> (as accessed on 20/8/2010)).

¹³⁰See *ProCD v Zeidenberg* 86F 3d 1447 (7th Cir 1996).

The Appellate Court stated that ‘although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed.’¹³¹ Moreover, it was held that according to Art 2-606 of the UCC, which defines ‘acceptance of goods’, a buyer accepts goods under Art 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under Art 2-602(1).¹³² Since ProCD extended such an opportunity to the buyers should they find the license terms unsatisfactory, and Zeidenberg did not exercise the option to return it, his act of opening the package and retaining the product was also indicative of his consent.¹³³

The Appellate Court distinguished *ProCd v Zeidenberg* from earlier cases that considered shrink-wrap agreements to be invalid on the ground that they did not deal with consumer transactions. The earlier cases included *Step-Saver Data Systems Inc v Wyse Technology*,¹³⁴ in which the United States Appellate Court held that the terms of a shrink-wrap agreement were not part of the parties’ sales agreement. In another case, *Arizona Retail Systems Inc v Software Link Inc*,¹³⁵ the US Court of Appeal stated that a shrink-wrap agreement would be invalid unless it obtained express consent from both parties. In this latter case, however, the court found that the buyer knew the terms of the license before purchasing the software.

Overall, enforceability of shrink-wrap agreements in Tanzania will depend on an individual court's decision on whether it will be influenced by the ‘ticket-cases’. Even so, since reliance on courts to develop the law may not always be advisable, legislation may be needed.

¹³¹Ibid, at 1452.

¹³²Article § 2-606(1) and (2) of the Uniform Commercial Code defines what constitutes acceptance of goods by stating that ‘(1) [a]cceptance of goods occurs when the buyer (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him; (2) [a]cceptance of a part of any commercial unit is acceptance of that entire unit.’

¹³³See *ProCd v Zeidenberg* (n130) 1452-1453. Some authors in other jurisdictions have, however, viewed the *ProCD* decision as ‘controversial [on whether] it is appropriate to enforce a shrink-wrap and other mass market licences for copy righted works.’ See, for instance, T Pistorius ‘Shrink-wrap and Click-wrap agreements’ (1997) 7 *Juta's Business Law* 79, 83.

¹³⁴See *Step-Saver Data Systems Inc v Wyse Technology* (n128). (This case is available at <http://ftp.resource.org/courts.gov/c/F2/939/939.F2d.91.90-1859.html> (as accessed on 2 August 2010)). See also *Klocek v Gateway Inc* 104 F Supp 2d 1332 (D Kansas 2000).

¹³⁵ See *Arizona Retail Systems Inc v Software Link Inc* 831 F Supp 759 (D Ariz 1993).

(d) Problems regarding Time and Place of Contracting

The nature of electronic communications makes it difficult to establish the time when such communications are ‘sent’ or ‘received’, and from where exactly they were sent. Establishing the time and place of contracting is, however, an important issue. Apart from resolving questions about when the parties’ mutual rights and obligations become effective or when title or risks pass from one to another,¹³⁶ this aspect determines which law should govern the contract, especially if the parties are based in different jurisdictions.¹³⁷

Ordinarily, acceptance of an offer is governed by the expedition theory or the information theory, depending on the nature of communications used. These theories and the rules they support have been tested in courts in response to older technologies, such as the post, telephone or telex. The advent of the Internet and its application in global e-commerce, however, has created concerns regarding the utility of these theories.

(i) The Information Theory

According to s 4(2)(b) of the Law of Contract Act, communication of acceptance is complete as against the offeree when it comes to the knowledge of the offeror.¹³⁸ In the same way, revocation of an acceptance does not become effective until the offeror knows about it.¹³⁹ Furthermore, once the offeree revokes her acceptance, she cannot recall her revocation.¹⁴⁰ The offeror will only be bound after knowledge of the revocation, and this must be before she knows of the acceptance.¹⁴¹

This section indicates the application of the information theory, which applies irrespective of whether the parties are physically before each other (*inter praesentes*) or where

¹³⁶For more general discussion on this see S M Kierkegaard ‘E-contract formation: US and EU perspectives’ (2007) 3 *Shidler Journal of Law, Communication & Technology* 12. Available also at <http://www.ictjournal.washington.edu/Vol3/a012Kierkegaard.html> (as accessed on 20/2/2008). See also P M Roth ‘The Passing of Risk’ (1979) 27 *The American Journal of Comparative Law* 291.

¹³⁷See Chissick & Kelman (n84) 77, 79. See also O Kahn-Freund ‘Book Review’ (1970) 18 *American Journal of Comparative Law* 429, 435. See I Lloyd *Information Technology Law* 6ed (2011). For more discussion see Chapter IV and V of this thesis.

¹³⁸Section 4(2)(a) and (b) provides that ‘communication of an acceptance is complete—(a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; (b) as against the acceptor, *when it comes to the knowledge of the proposer*’ (italics added).

¹³⁹See s 5(2) of the Law of Contract Act Cap 345 [R.E.2002].

¹⁴⁰See s 4(3)(a) of the Law of Contract Act Cap 345 [R.E.2002].

¹⁴¹See s 4(3)(b) of the Law of Contract Act Cap 345 [R.E.2002]. This is a similar approach to the one envisaged in Art 16(1) of the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, reprinted in 3 *International Legal Materials* (1980) 668. Tanzania, however, is not a party to this Convention.

they are apart (*inter absentes*), provided they are engaged in an instantaneous communication, such as telephone, or an almost instantaneous communication, such as fax or telex, a chat room or window messenger.¹⁴² The theory also applies *inter absentes* where a contract is concluded by non-instantaneous means of communication other than post, (for instance, where a letter of acceptance is sent by a messenger to be delivered to the offeror).¹⁴³ In such circumstances, however, one must consider whether the messenger acts as an authorised agent of the offeror. If the messenger is authorised only to transmit the acceptance letter to the offeror, then the acceptance will become effective when the offeror is informed of its content.¹⁴⁴

Acceptance under the information theory is governed by the general rule - that a contract will be formed when acceptance is brought to the attention (knowledge) of the offeror.¹⁴⁵ Since this rule requires knowledge of the acceptance on the part of the offeror, fulfilment of this requirement demands that the person concerned must read, learn, hear or take knowledge of the acceptance for a contract to be formed.¹⁴⁶

The information rule seeks to ensure that the offeror knows whether her acceptance has been received, and, if not then react immediately to clear up any misunderstanding.¹⁴⁷ The English case of *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH*¹⁴⁸ firmly supports this view. In this case the parties entered into negotiations for the sale of a quantity of steel bars. While accepting the terms of the sale offered by the sellers, the buyers, an English company, sent a telex from London to Vienna. The contract, however, was not performed and the buyers sued, claiming damages for breach of contract. The court had to decide on the jurisdiction under which the contract fell on the basis of an acceptance by telex, which had been sent from London but received in Vienna.

¹⁴²See *Chitty on Contracts: General Principles* 30ed (2008) 171-172. See also Poole (n86) 70-71.

¹⁴³See *Henthorn v Fraser* [1892] 2Ch 27, 33. See also Peel (n125) 25.

¹⁴⁴See Peel (n125) 25. See also Stone (n92) 75-76 (discussing the use of private courier).

¹⁴⁵See *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327.

¹⁴⁶In *Entores Ltd v Miles Far East Corp* (ibid) Lord Denning stated that if, in the course of that communication by telephone, the phone went dead the contract would not be formed even if the offeree might have believed that his acceptance went through. He insisted that the offeror must hear the acceptance from the offeree. See also *JSC Zestafoni Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] 2Lloyd's Report 335. This case involved communications by fax.

¹⁴⁷See *Chitty on Contract* (n142) 168, 171. See also A Farooq 'Electronic commerce: an Indian perspective' (2001) 9 *International Journal of Law and Information Technology* 133, 145.

¹⁴⁸See *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH* [1982] 1 AC 34. See also *The Brimmers* [1975] QB 929; *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* [1995] CLC 1011. These latter cases discuss situations where communications are received during and outside the normal working hours.

The court concluded that the contract was not formed in London but in Vienna since telex constitutes a form of instantaneous communication. Hence, the contract came into existence where the telex was received, not where it was sent. The court stated that, 'where the condition of simultaneity is met, and where it appears to be within the mutual intention of the parties that contractual exchanges should take place in this way ... it is a sound rule.'¹⁴⁹ The court was quick to observe, however, that this notwithstanding that rule is not universal, since 'no universal rule can cover all such cases [T]hey must be resolved by reference to the intention of the parties, by sound business practice and in some cases by a judgement where the risks should lie.'¹⁵⁰ This observation indicates that the information theory is not a 'one size fits all', and, therefore, it may be inappropriate for certain situations, taking into account that technology is constantly changing, and these changes transform the way parties interact or their manner of conducting business.

With the development of new technologies, such as the use of e-mails and SMSs, it becomes problematic to decide whether the information theory will apply. Should an e-mail be treated in the same way as a fax or a telex?¹⁵¹ When and where can it be said to have been communicated? If one regards this theory as applicable to e-mail communications, acceptance by e-mail will be effective only when the e-mail comes to the knowledge of the offeror (ie, actually read). If so, does that not amount to putting the offeree at the mercy of a dishonest offeror, if the latter received the acceptance, destroyed it and pretended not to have received it?¹⁵²

In view of the above questions, it is clear that s 4(2)(b) of the Tanzanian Law of Contract Act, (which envisages the information theory) does not offer answers. Consequently, there is a gap that needs to be addressed.

¹⁴⁹See *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH* (n148) 42 B.

¹⁵⁰*Ibid*, at 42 D.

¹⁵¹ As discussed below e-mail does not fall under the expedition theory.

¹⁵² This was an argument given by a South African Judge justifying why the information theory is in applicable to e-contracts. See *Jafta v Ezemvelo KZN Wildlife* (2009) 30 ILJ 131 (LC).

(ii) The Expedition Theory

The expedition theory, and its rule governing acceptance by post, was developed in England in 1818 in *Adams v Lindsell*.¹⁵³ In this case the court was called upon to resolve when exactly a contract was formed where parties used the postal mode of communication.

Chitty on Contracts prescribes four possibilities under which acceptance sent by post could take effect.¹⁵⁴ These are: (i) when it is actually communicated to the offeror,¹⁵⁵ (ii) when it arrives at his address,¹⁵⁶ (iii) when it would in the ordinary course of post have reached him,¹⁵⁷ and, (iv) when it is posted.¹⁵⁸ This final option was preferred in *Adam v Lindsell*.¹⁵⁹ In English law, therefore, the general rule concerning acceptance according to the expedition theory is that, in the absence of a prescribed mode and where parties are not 'to all intent and purposes in each other's presence', the contract is formed when the letter of acceptance is posted.¹⁶⁰ This rule applies only if the offeror chose to rely on the post. If so, the contract becomes binding on both parties as soon as a letter of acceptance, correctly addressed and stamped is posted.¹⁶¹ The term 'posted' means, for that purpose, the letter is put in the post office's control and hence out of the offeree's control.¹⁶² The contract is formed *where* posting took place.¹⁶³

¹⁵³ (1818) 1B & Ald 681. See also the American case of *Mactier's Adm'rs v Frith* 6 Wend 103 (NY 1830) where the rule was considered for the first time in the USA. See also K O'shea & K Skeahan 'Acceptance of Offers by E-Mail -How Far Should the Postal Acceptance Rule Extend?' (1997) 13 *Queensland University of Technology Law Journal* 247, 248.

¹⁵⁴ See *Chitty* (n142) 170-171. See also Peel (n125) 26.

¹⁵⁵ See *Chitty* (n142) 170-171. See also Peel (n125) 26.

¹⁵⁶ See *Chitty* (n142) 170-171. See also Peel (n125) 26.

¹⁵⁷ See *Chitty* (n142) 170-171. See also Peel (n125) 26.

¹⁵⁸ See *Chitty* (n142) 170-171. See also Peel (n125) 26.

¹⁵⁹ See (n153).

¹⁶⁰ See *Chitty* (n142) 174. See also Nditi (n5) 40-41; Hodgin (n5) 33; M Furnston *Cheshire, Fifoot & Furnston's Law of Contract* 15ed (2007) 67; Lloyd (n137). See also *Bryne v Van Tienhoven* (1880) 5C P D 334,348; *Household Fire & Carriage Accident Insurance Co Ltd v Grant* (n78). In the United States this was discussed in *Worms v Burgess* 620 P 2d 455, 459 (Okla Civ App 1980).

¹⁶¹ See Nditi (n5) 42. See also *L J Korbetis v Transgrain Shipping BV* [2005] EWHC 135 (QB) at para 15 (concerning incorrect address leading to loss of the letter of acceptance.) Although in *Household Fire & Carriage Accident Insurance Co Ltd v Grant* (n78) it was held that a contract will arise even if the letter is lost this view was rejected in Scotland by Lord Shand in *Mason v Benhar Coal Co* (1882) 9 R 883. (This latter case is discussed in E Mckendrick *Contract Law* 8ed (2009) 39).

¹⁶² See Nditi (n5) 42.

¹⁶³ See Lord Denning's observations in *Entores Ltd v Miles Far East Corp* (n145) 332.

Although, according to the postal rule, the offeree seems to enjoy an advantageous position over the offeror in the contract formation process,¹⁶⁴ it also seems to deny her the chance to revoke her acceptance by a speedier means, such as telephone.¹⁶⁵ Even so, there are reasons behind its wide acceptance, one of these being the need to finalise the contracting process.¹⁶⁶ Treitel suggests that the rule was developed to ‘bring a rationale of necessity and predictability in contract, that is, if the contract were to come into force it can best be achieved on sending the acceptance.’¹⁶⁷ In order to measure the effectiveness of this rule, therefore, one should consider its cognisance of ‘both the business convenience of the offeree and the fair allocation of risk, as it establishes a finite date for the contract and avoids circular communication.’¹⁶⁸

Further rationalisation of this rule regarded the post office as an agent of the parties.¹⁶⁹ This line of thinking, however, is incorrect since a post office cannot be agents of the offeror.¹⁷⁰ Be that as it may, a closer scrutiny of the rule from a consensualist perspective argues that such rationalisation defies the basic contractual notion of *consensus ad idem*, since the offeror is bound even before he realises that the offeree had accepted the offer or before the promises had been exchanged.¹⁷¹ This includes the situation where the letter of acceptance does not reach him at all. In *Fourways Travel Services (Nairobi) Ltd v Associated African Dock Enterprises (Kenya) Ltd*,¹⁷² the East Africa Court of Appeal pointed out that lack of a

¹⁶⁴ See M Al Ibrahim, A Ababneh & H Tahat ‘The Postal Acceptance Rule in the Digital Age’ (2007) 2 *Journal of International Commercial Law & Technology* (available at <http://www.jiclt.com/index.php/JICLT/article/viewFile/33/20> (as accessed on 11/06/2007)).

¹⁶⁵ See Nditi (n5) 42.

¹⁶⁶ Chissick & Kelman (n84) 79.

¹⁶⁷ See G H Treitel *The Law of Contract* 8ed (1991) 24. The latter edition by Peel suggests other reasons to be: (a) that the ‘offeror must be considered as making the offer all the time that his offer is in the post, and therefore the agreement between the parties is incomplete as soon as acceptance is posted’, (b) that ‘if the rule did not exist “no contract could ever be completed by post. For if the [offerors] were not bound by their offer when accepted by the [offerees] till the answer was received, then the [offerees] ought not bound till after they had received the notification that the [offerors] had received their answer and assented to it. And so it might go on *ad infinitum*”’; (c) ‘[p]ost office is the common agent of both parties and that communication to this agent completes the contract’, and (d) the postal rule ‘helps to minimise difficulties of proof: It is said to be easier to prove that a letter has been posted than it has been received.’ See Peel (n125) 27. Nevertheless, the author considers these reasons to be insufficient and the rule still remains arbitrary. See also Poole (n86) 68 stating that ‘[t]he postal rule is no more than a rule of convenience adopted in the interest of certainty.’ See further, *Household Fire and Carriage Accident Insurance Co v Grant* (n78) 221; In *Re Imperial Land Co of Marseilles* (1872) LR 7 Ch App 587, 594.

¹⁶⁸ See Al Ibrahim et al (n164) 48. See also W Valerie ‘The Electronic Formation of Contracts and the Common Law Mailbox Rule’ (2004) 56 *Baylor Law Review* 175-204.

¹⁶⁹ See *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (n78) 216.

¹⁷⁰ Al Ibrahim et al (n164) 48.

¹⁷¹ See Lloyd (n137).

¹⁷² *Fourways Travel Services (Nairobi) Ltd v Associated African Dock Enterprises (Kenya) Ltd* [1971] EA 251.

residential address in Kenya, unlike in England, was a notable problem worthy of consideration as to the effectiveness of applying the postal rule in a developing country like Kenya.

In Tanzania, however, the law sets down different rules on postal communication from those derived from the common law. Section 4 of the Law of Contract Act, which deals with the rules regarding completion of the communication of offer and acceptance, reveals this difference.¹⁷³ While under the common law the general rule is that a contract is made immediately when the letter of acceptance, correctly addressed and stamped, is posted,¹⁷⁴ s 4 of the Law of Contract Act provides that where an offeree posts his letter of acceptance, thus putting it beyond his power, the offeror is bound, but not the offeree.¹⁷⁵ Nditi submits that this means 'a contract has been concluded in as far as the proposer is concerned but an acceptor is not bound until his acceptance comes to the knowledge of the proposer.'¹⁷⁶

Consequently, whereas in Tanzania the offeree can revoke his acceptance by a faster means before it is communicated to the offeree,¹⁷⁷ English authors submit that 'no authority exists under English law on whether a posted acceptance can be revoked by, say e-mail, telex or telephone which reaches the offeror before, or at the same time, as acceptance.'¹⁷⁸ Chitty has submitted that under English law revocation by a speedier means will have no effect, because a contract concluded by the posting of the acceptance cannot be dissolved unilaterally.¹⁷⁹

¹⁷³Section 4 of Cap 345 [R.E. 2002] provides that '[c]ommunication, when complete- (1) [t]he communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. (2) The communication of an acceptance is complete-(a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; (b) as against the acceptor, when it comes to the knowledge of the proposer.(3) The communication of a revocation is complete-(a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; (b)as against the person to whom it is made, when it comes to his knowledge.'

¹⁷⁴See *Busoga Millers & Industries Ltd v Purshottam Patel* 22 EACA 348.

¹⁷⁵Cap 345 [R.E. 2002]. Section 4(1), (2), (3)(a) and (b) in (n173) above.

¹⁷⁶See Nditi (n5) 42-43. See also Hodgkin (n5) 34-35. See also the LRCT Position paper (n85).

¹⁷⁷See s 4(2)(b). See also Nditi (n5) 43 and Hodgkin (n5) 35.

¹⁷⁸See *Chitty on Contract* (n142) 175-176. See also Peel (n125) 31, 69; Beatson (n40) 50; Mckendrick (n161) 39; Poole (n86) 69; P H Winfield 'Some Aspects of Offer and Acceptance' (1939) 55 *Law Quarterly Review* 499-513.

¹⁷⁹See *Chitty on Contract* (n142) 175-176, citing *Wenkheim v Arndt* (NZ) 1 JR 73 (1873), *Morrison v Thaelke* 155 So 2d889 (1963) and *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* (1974) (4) SA 392 (c). See also Beatson (n40) 50 who states that '[s]ince the acceptance is complete as soon as the letter of acceptance is posted, a telephone call ...revoking the acceptance would be inoperative though it reaches the offeror before the letter.' In *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (n78) 235-236, however, Bramwell LJ, in his dissenting judgement, was of the view that a revocation made before the acceptance is received would be effective. Since his were views of the minority they do not represent an authoritative position. *Dunmore v Alexander* (1830) 9 S 190, is a case which could be said to support existence of power to revoke an acceptance but authors consider it to be inconclusive. (See C Turpin 'Postal Contracts: Attempted Revocation of Acceptance' (1975) 34 *Cambridge Law Journal* 25). See also Poole (n86) 69.

Academic discussion regarding whether a letter of acceptance is revocable under English law is unsettled. Some scholars argue that it is not possible to retract (or overtake) a postal acceptance,¹⁸⁰ while others consider it possible to do so, provided the offeror is not prejudiced.¹⁸¹ Stone supports the view that, once the letter of acceptance is posted, a contract is made, and thus a revocation is impossible, but he indicates that this general rule has been modified in respect of certain consumer contracts, such as those relating to consumer credit.¹⁸² This is the case, for instance, where the law provides consumers with a ‘cooling-off’ period after concluding a consumer contract.¹⁸³ In view of this, Stone argues that the traditional rule that an acceptance is irrevocable is no longer a hard and fast rule.¹⁸⁴

With the advent of the Internet, some authors have argued that the postal rule should be abandoned.¹⁸⁵ Murray proposes its re-formulation or re-statement for the twenty-first century, focusing on the instantaneous nature of Internet communications.¹⁸⁶ Although this reasoning may be correct, it does not apply to all Internet communications since they are not always instantaneous. Certainly, it is possible under modern technology for parties to communicate *inter praesentes*. Chat rooms and video conferencing, for instance, represent this scenario, and here the postal rule is not relevant. What seems to be debatable is whether communication via ordinary e-mails can be construed as communication *inter praesentes*.

Suppose an online merchant communicates his acceptance of a customer’s offer to buy by e-mail. Is the e-mail a form of instantaneous communication? When and where exactly

¹⁸⁰ See, for instance Beatson (n40) 50 as he considers that non-retraction of a posted acceptance is a better view. See also Poole (n86) 69 indicating that those in support of this view consider it viable because ‘to allow any other conclusion would permit the offeree to ‘play the market’, i.e., to accept an offer to purchase goods at one price and later to withdraw that acceptance by a quicker method if the market conditions make the contract less profitable.’

¹⁸¹ See, for instance, Hudson, submitting that unless the offeror expressly states that the letter of acceptance cannot be revoked, since the postal rule seeks to protect the offeree it should not be used to prevent him from revoking his acceptance by a speedier means (A Hudson ‘Retraction of letters of acceptance’ (1966) 82 *Law Quarterly Review* 169). See also E Kahn ‘Some Mysteries of Offer and Acceptance’ (1955) 72 *South African Law Journal* 246, 257-261.

¹⁸² See Stone (n92) 93-94.

¹⁸³ See Stone (n92) 94 citing section 67 of Consumer Credit Act 1974; sections 5 and 6 of the Timeshare Act 1992 and the Cancellation of Contracts Made in a Consumer’s House or Place of Work etc Regulation 2008. See also the UK Consumer Protection (Distance Selling) Regulation 2000 (SI 2000/2334) (implementing the EU’s Distance Selling Directive 97/7/EC).

¹⁸⁴ See Stone (n92) 95.

¹⁸⁵ See Tuma & Ward (n54) 392. See also Poole (n86) 69 stating that those who support revocability of a posted letter of acceptance argue that ‘[n]ot only does the offeror suffer no advantage, but it might be considered unreasonable for the offeror to rely upon a postal acceptance which he knows has been retracted.’

¹⁸⁶ See D Murray ‘Entering Contracts Electronically: The Real WWW’ in L Edward & C Waelde (eds) *Law and the Internet: regulating cyberspace* (1997) 26.

is the contract between the merchant and the customer formed?¹⁸⁷ Is it formed immediately when the offeree presses the 'send' button on his computer or when the offeror's network receives the message? Is it formed when the e-mail is downloaded and read by the offeror? Which rule or theory will be relied upon by the courts to determine when and where the contract was formed? These issues have never been considered by courts in Tanzania and the Law of Contract Act does not offer an answer to them.

Tuma & Ward argue that e-mail is an instantaneous means of communication,¹⁸⁸ but, their position is erroneous given the process through which an e-mail may travel, the possibility of it being delayed in a server and the fact that not everybody accesses e-mails in real time. In view of such difficulties, Chissick and Kelman have argued differently, equating e-mails with ordinary mail and therefore proposing the application of the postal rule to all e-mail-based contracts.¹⁸⁹ Although this proposition may appear convincing there are clear differences between an e-mail and an ordinary letter.

As discussed earlier, where parties rely on postal communication and the offeree sends a letter of acceptance leaving it in the post office for further transmission, the contract will arise immediately.¹⁹⁰ Relying on existing case law, such as *Bryne v Van Tienhoven*¹⁹¹ or *Household Fire and Carriage Accident Insurance*,¹⁹² if a letter of acceptance is lost the contract will still be intact. Unlike the case with lost letters, it is well known that an undelivered e-mail bounces back to notify the sender. Considering this possibility, should the sender (offeree) of an e-mail which was not delivered, and where this fact has come to his knowledge, still be able to rely on the above case law to hold that there was a contract binding on the offeror?

Take, for instance, a situation where the offeror's e-mail specifies the time within which an acceptance must be communicated. What will be the position if the offeree communicates the acceptance and goes offline without knowing that the e-mail was never received by the addressee within the deadline? Should the court equate this with a situation

¹⁸⁷See Durtschi et al (n88) 13.

¹⁸⁸See Tuma & Ward (n54) 393 where they introduce the idea of contemporaneous e-mail serving between parties. See also Murray (n186). Beatson (n40) 43 is uncertain and states that it is probably a form of instantaneous communication.

¹⁸⁹See Chissick & Kelman (n84) 80. See also Poole (n86) 72-73 also suggests this. However, the second possibility suggested by Poole is that of adopting the 'receipt' rule. Nevertheless, this author seems to mean the information rule (actual communication) as he makes reference to *Entores v Miles Far East Corp* (n145), this being one of the cases which discussed this rule.

¹⁹⁰See, for instance, *Bryne v Van Tienhoven* (n160).

¹⁹¹See *Bryne v Van Tienhoven* (n160).

¹⁹²See *Household Fire and Carriage Accident Insurance* (n78) 216.

where the offeror insisted that acceptance should be made by way of post, but issued a wrong address, and the letter of acceptance was duly sent by the offeree using that address?

Furthermore, what is the position if the server failed to deliver the e-mail in its completeness?

Unlike an ordinary letter, which comes in its complete form, an e-mail may be delivered in a garbled form for some technical reasons or transmission problems.

All issues raised here may well engage courts in Tanzania in the absence of statutory clarification since one may argue that pressing the 'send' button is akin to dropping a letter off at a post office. The sorting and transmission is a matter beyond the sender, just as the electronic transmission of an e-mail is beyond the sender's reach.¹⁹³

4. Problems Raised by Formality Requirements

In Tanzania, the Law of Contract Act defines a contract as an agreement that is legally enforceable.¹⁹⁴ Such an agreement may be oral¹⁹⁵ or written, bilateral (where both parties exchange promises) or unilateral (where a promise is exchanged for an act). Some contracts, however, may involve certain formality requirements, which must be fulfilled before a legally enforceable contract is created.¹⁹⁶ For instance, the law governing contracts of hire purchase requires all contracts falling within its ambit to be in writing or to be evidenced in writing for them to be enforceable.¹⁹⁷ Similarly, the Land Act¹⁹⁸ requires certain contracts, such as mortgage instruments or lease agreements, to follow a prescribed form with signature and other formal requirements.¹⁹⁹ Section 25(1)(a) of the Law of Contract Act further provides that an agreement made without consideration (for instance, on the basis of love and affection between

¹⁹³ Under the postal rule, even if the letter posted is lost still the contract is binding if one follows *Household Fire Insurance Co Ltd v Grant* (n78) in which it was pointed out that a contract is made on posting a letter of acceptance even where it is lost on the way.

¹⁹⁴ See s 2(1)(h) of the Law of Contract Act Cap 345 (R.E. 2002).

¹⁹⁵ See *Buku v Magori* [1971] HCD n.161; *Merali Hirji & Sons Ltd v General Tyre (EA) Ltd* [1983] TLR 175.

¹⁹⁶ See *Hodgin* (n5) 12. See, for instance, s 64 (1) of the Land Act, Act No.4, 1999 (Cap 113.) See Form 38 for a contract of disposition of a right of occupancy. (The Form is part of the Act). See also other requirements under ss 36-40 of the Land Act, Act No.4, 1999 (Cap 113.) See also *Alibhai Aziz v Bhatia Brothers Ltd* (Misc Civil App No 1 (1999) CAT (Unreported). See also a Kenyan Case (on a similar requirement) *Metra Investments Limited v Gakweli Mohamed Warrakah* [2006] eKLR (available at <http://www.kenyalaw.org/> as accessed on 5/5/2010).

¹⁹⁷ See s 6 of the Act of the Hire Purchase Act No 22 of 1966.

¹⁹⁸ Act No 4 of 1999 (Cap 113.) See also ss 3 and 89 of the Bill of Exchange Act Cap 215 which require contracts relating to negotiable instruments to be in writing.

¹⁹⁹ See, for instance, the requirement of registration of a lease agreement under section 41 of the Land Registration Act Cap 334 [R.E. 2002]. See also ss 62 and 80(2) of the Land Act Cap 113. See *Nitin Coffee Estates Ltd & others v United Engineering Works Ltd & another* (n75) (citing *Patterson and another v Kanji* (1956) EACA 106, 111; *Patel v Lawrenson* [1957] EA 9; *Kassam v Kassam* [1960] EA 1042 and in *Patel v Marealle and another* Court of Appeal (CA) 5/84 (unreported).

parties standing at near relation to each other) will only be enforceable if it is expressed in writing and duly registered.²⁰⁰

Unless and until a contract meets the formality requirements, for example, until it is written, signed and/or registered, parties are not contractually bound.²⁰¹ Hodgkin has argued, however, that, where a statute requires a contract to be evidenced in writing, this does not necessarily mean that it must be in a special written form.²⁰² A note or memorandum ‘signed by the party to be charged or by his agent in that behalf’ may suffice.²⁰³ Section 6(1) of the Sale of Goods Act,²⁰⁴ which contains this phrase, requires any contract for the sale of goods where the purchase price exceeds Tsh. 200/= to be evidenced in writing.²⁰⁵ In *Leslie and Anderson (Nairobi) Ltd v Kassam Jivraj & Co Ltd*,²⁰⁶ however, a written contract of sale that was signed by an agent could not be enforced because it failed to identify the principal. The court was of the view that, since the writing did not contain the name or description showing who the sellers were, such contract failed to comply with the provisions of s 6(1) of the Sale of Goods Act.²⁰⁷

There are two questions that need to be addressed. The first arises when contracts, which must be in writing, must also be signed by the parties. The requirement of the signature of the maker of a particular document or a contracting party is not a novel idea. It varies, however, according to the context, the nature and subject matter of the transaction, the communication media used and the normal practices in a market governing the particular industry.²⁰⁸ In certain transactions the law makes written signature mandatory.²⁰⁹ Statutes

²⁰⁰The section states that ‘(1) [a]n agreement made without consideration is void unless—(a) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other.’

²⁰¹See *Pandit v Sekatawa* 1964 (2) ALR Comm.25.

²⁰²See Hodgkin (n5) 14. However, see also s 2(2) of the Law of Contract Act Cap 345 [R.E.2002] concerning the effects of non-compliance with formalities.

²⁰³See s 6(1) of the Sale of Goods Act Cap 214 [R.E.2002]. See also *Kanti Printing Works v Tanga Municipal Council* [1970] HCD n253; *Abualy Alibhai Azizi v Bhatia Brothers Ltd* [2000] TLR (CA).

²⁰⁴Section 6(1) of Cap 214 [R.E.2002] states as follows: ‘(1) [a] contract for the sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives, the goods, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or by his agent in that behalf.’

²⁰⁵See s 6 of the Sale of Goods Act Cap 214 [R.E.2002]. This unrealistic amount has remained so from 1931 to date and it is a sure sign of how outdated this law is.

²⁰⁶See *Leslie and Anderson (Nairobi) Ltd v Kassam Jivraj & Co Ltd* 17 EACA 84.

²⁰⁷By then this Act was referred to as ‘Ordinance’.

²⁰⁸See J K Winn ‘The Emperor’s New Clothes: The Shocking Truth about Digital Signature and Internet Commerce’ (2000-2001) 37 *Idaho Law Review* 353, 367.

²⁰⁹For instance, transactions involving mortgage transfers or hire purchase must be duly signed by the parties.

concerned with disposition of land²¹⁰ or hire purchase,²¹¹ for instance, have such mandatory requirements. In that case, would an e-signature fulfil the signature requirement? The second is whether, in the course of creating such specific contracts, parties may rely on electronic means such as the Internet, and whether such contracts will fulfil the writing requirement. In other words, will an electronically formed contract be regarded as equal to an oral or an ordinary written contract under the current law in Tanzania?

Contracting electronically is a new phenomenon in Tanzania, and issues of form requirements in an electronic setting have neither been tested in courts nor legislated for. Consequently, although there is a growing consensus internationally that contract formation over the Internet should follow the general rules regarding formation of contracts,²¹² this does not absolve e-contracting from legal difficulties,²¹³ at least in the Tanzanian context.

The two questions raised above also have further ramifications. Although all other contracts may be formed orally or in writing, the parties normally memorialise their agreements in writing to avoid the difficulties which may be associated with oral contracts (for example, proving that a particular term was orally agreed upon). Can such an exercise also be accomplished electronically? The absence of specific legal provisions under the existing law in Tanzania to govern e-contracts raises important concerns which need to be addressed in order to create the necessary equivalence between contracts that must be in writing and those formed electronically.

5. Online Mistakes (Wrong Pricing)

Mistakes in the contracting scenario can either be mutual or unilateral.²¹⁴ The law on mistakes in contracts is settled both in Tanzania and the common law. Sections 20, 21 and 22 of the Tanzanian Law of Contract Act deal with the issue.²¹⁵ Section 20 caters for mutual mistakes

²¹⁰See the Land Act Cap 113.

²¹¹ See s 6 of the Hire Purchase Act, Act No.22 of 1966.

²¹²See Z A Zainol 'Electronic Data Interchange (EDI) and Formation of Contract: A Malaysian Perspective' (1999) 7 (3) *International Journal of Law and Information Technology* 256. See also R Meiring 'Electronic Transactions' in R Buys & F Cronjé (eds) *Cyberlaw @ SA II: the Law of Internet in South Africa* (2004) 82-108.

²¹³See, for example, L Davies 'Contracts formation on the Internet: Shattering a few Myths' in L Edward & C Waelde (eds) *Law and the Internet: Regulating cyberspace* (1997) 97-120. (It should be noted here that Edward & Waelde's 3ed (2009) does not contain the chapter by L Davies). See also A Farooq (n147) 135.

²¹⁴See Ndititi (n5) 162-194.

²¹⁵These sections provide as follows: 'Section 20. Agreement void where both parties are under a mistake as to matter of fact. (1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. (2) An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact. Section 21. A contract is not voidable

that nullify the consent of the parties, and mistakes that relate to a matter of fact essential to the contract. This section, read together with s 10 and 13,²¹⁶ renders a contract, tainted with mutual mistakes, void.²¹⁷ Section 22 deals with unilateral mistakes. These are also a vitiating factor that goes to the formation of a contract. Under English law it was held in *Bell v Lever Brothers Ltd*²¹⁸ that a common mistake, which totally undermines a contract, renders it void.²¹⁹ Further, in *Solle v Butcher*²²⁰ it was held that a serious common mistake in contract formation, which nevertheless falls short of totally undermining the contract, gives the adverse party a right to rescind the contract.

The use of e-agents has exacerbated the problem of unilateral mistakes. E-agents that operate autonomously make it impossible at times for web merchants to detect mistakes occasioned by them in the course of transactions. Several examples can be cited of the kind of problems that may arise.

Ismail et al, for instance, pointed out an incident which took place in the United Kingdom where an e-merchant erroneously posted a £3.99 price tag for a TV set on the web instead of £399.00, the actual price.²²¹ The computer error was discovered after selling more than 20,000 TV sets and the site had to be closed immediately.²²² Leng has also noted that United Airlines mistakenly posted a San Francisco to Paris flight for US \$24.98, and Staples.com offered a US \$40 attache case for 1 cent.²²³

because it was caused by a mistake as to any law in force in Tanzania; but a mistake as to a law not in force in Tanzania has the same effect as a mistake of fact. Section 22. Unilateral mistake. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.' (See also ss 8 and 60(2) of the Sale of Goods Act Cap 214 [R.E.2002].

²¹⁶See also s 8 of the Sale of Goods Act Cap 214 [R.E. 2002]; *Leslies & Anderson Ltd v Vallabhads Kalidas & Co Ltd* (1950) 17 EACA 30 (U).

²¹⁷See also s 56(1) of the Law of Contract Act, Cap 345 which states that '[a]n agreement to do an act impossible in itself is void.' [R.E.2002]. See also *Sheikh Bros Ltd V Ochsner* [1957] EA 86. Under s 65 of the Law of Contract Act, whoever had benefitted from a void contract must compensate the other party. The section provides that '[w]hen an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person agreement from whom he received it'

²¹⁸See *Bell v Lever Brothers Ltd* [1932] AC 161. See also *Couturier v Hastie* (1856) 5 HL Cas 673 where the subject matter of the contract had perished.

²¹⁹A common mistake in Contract Law is one shared by both parties to the contract. For more analysis of this under the common law, see D Capper 'Common Mistakes in Contract' (2009) *Singapore Journal of Legal Studies* 457.

²²⁰See *Solle v Butcher* [1950] 1KB 671.

²²¹See I A Ismail & V R Kamat 'Evaluation of legal risk for e-commerce in construction' (2006) 132 *Journal of Professional Issues in Engineering Education and Practice, American Society of Civil Engineers* 355, 357.

²²²*Ibid.*

²²³See T K Leng 'Electronic contracting: legal effects of input errors in e-Contracting' (2006) 22 *Computer law & Security Report* 157, 158. The author notes further that, in 2003, Amazon.com wrongly listed the price of

In 2001, Kodak advertised digital cameras on its website at £100 instead of £329 each. Many people placed orders, and in response ‘Kodak sent an automated order confirmation stating that £100 would be charged to the customer’s credit cards.’²²⁴ In the Kodak incident the company had to honour the orders and accept losses to the tune of several million pounds.²²⁵ Had an e-agent not concluded all these transactions a natural person would have immediately realised the mistake. All these incidents raise the following questions: was there a genuine unilateral mistake or was it negligence and irresponsibility²²⁶ on the part of the e-merchant? Was it possible for the consumers to know about the mistake? Perhaps a court will only be able to address these questions having examined the nature and surrounding circumstances of each case since every case must be heard on its own merits.

The Tanzanian Law of Contract Act recognises that where one party knows that the other is labouring under a mistake but still proceeds with the contract, the contract will be unenforceable for lack of true *consensus ad idem*.²²⁷ Even so, in online transactions the problem of establishing whether the client knew that the trader must have been at error when a commodity ordinarily fetching a high price is tagged at a very low price is exacerbated by the fact that online merchants *do* undertake promotional sales or stock clearances. Indeed, consumers may have thought in good faith that it was a promotion or a ‘clear-the-shelves’ exercise. In view of that possibility, consumers may not be taking advantage of the supplier’s mistake to unlawfully enrich themselves as one might argue. Much will depend on how a court will interpret the entire scenario and the documents or process relied upon in the course of creating the contract.

The law in Tanzania, however, is unclear about the effects of unilateral mistake. A reading of ss 21 and 22 of the Law of Contract Act suggests that ‘a mistake as to a matter of law in force in Tanzania and a mistake as to a matter of fact will not render a contract

television sets at US \$99.99 instead of US \$1049, and received 6000 orders. In the same year, Amazon.co.uk mistakenly listed HP iPAQ pocket PCs for £7.32 instead of £287.

²²⁴Ibid, at 158.

²²⁵Ibid.

²²⁶See *Rae v Commonwealth Disposals Commission* (1951) 84 CLR 377 (before the High Court of Australia). See also *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* (n89) where the court was of the view that it is incumbent on the web merchant to protect himself, as he has both the means to do so and knowledge relating to the availability of any product that is being marketed. As most web merchants have automated software responses, they need to ensure that such automated responses correctly reflect their intentions from an objective perspective (para 96).

²²⁷Consider section 2(1)(a), (b), (d) & (h) of the Law of Contract Act in relation to contract formation. See also *Shogun Finance Ltd v Hudson* (n62) para 123-124 regarding the position under English law.

voidable.’²²⁸ According to s 21, ‘[a] contract is not voidable because it was caused by a mistake as to any law in force in Tanzania; but a mistake as to a law not in force in Tanzania has the same effect as a mistake of fact.’ Section 22 provides that ‘[a] contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.’ This section is *in pari materia* to s 22 of the Indian Contract Act, 1972.²²⁹ Commenting on s 22 of the Indian Act, Kuchhal states that where the mistake results from a party’s own negligence or lack of reasonable care, then such mistake should not be allowed as a defence in avoiding the contract.²³⁰ Thus, if the unilateral mistakes caused by e-agents (as discussed above) had taken place in Tanzania, and, if it could be established that they had arisen out of the e-merchants’ negligence, then the e-merchants would have incurred loss had the customers opted to enforce their contracts.

Nditi suggests that s 22 might have been mistakenly drafted, wherein the word ‘voidable’ should have read ‘void.’²³¹ For the time being, there is no case that has interpreted s 22 of the Law of Contract Act in order to establish what Nditi has suggested. Thus, because this provision is not clear, there is a need to re-examine it, bearing in mind that online mistakes may either be occasioned by e-merchants themselves out of negligence, human error, programming of software errors and so forth or errors resulting from transmission problems in the communication systems.

6. Problems Regarding Proof of Contract: Authentication,²³² Attribution²³³ and Repudiation²³⁴ of Online Contracts

Tanzania lacks an outright definition of the term ‘signature’.²³⁵ The Interpretation of Laws Act, however, contains a definition of the term ‘sign’.²³⁶ According to this Act, sign ‘with its grammatical variations and cognate expressions, includes, with reference to a person who is

²²⁸ See Nditi (n5) 184.

²²⁹ As noted in part 2 of this chapter, the Tanzanian Law of Contract Act is a re-enactment of the Indian Law of Contract Act, 1872 (with some few minor changes).

²³⁰ See Kuchhal (n6) 84.

²³¹ See Nditi (n5) 185.

²³² Authentication seeks to confirm the integrity or genuineness of the messages sent. For more on this see S Mason ‘Authenticating Digital Data’ in S Mason (ed) *Electronic Evidence* 2ed (2010) 83-108, 88,101.

²³³ Attribution deals with the ability to assure the identity of the message sender.

²³⁴ Repudiation occurs when one party disowns a particular conduct, a data message or document as being not his. Thus non-repudiation procedures allow a receiver of an electronic message to be able to establish to a third party that the sender is responsible for generating a data message or sending a particular document.

²³⁵ From a global perspective, however, rules governing the use of signatures in the commercial and legal context have developed over a long period of time. See A McCullagh, P Little & W Caelli ‘Electronic Signatures: Understand The Past To Develop The Future’ (1998) 21 *University of New South Wales Law Journal* 452.

²³⁶ See Cap 1 [R.E.2002].

unable to write his name, “mark”, with its grammatical variations and cognate expressions.²³⁷ A literal reading of this definition leaves much to be desired, since it deals with only those who are unable to write, and hence is unclear whether those who are able to write are covered. Even so, according to the ordinary practice, and, if one examines other statutes where signatures are required, it is clear that a transaction, which is required to be in writing, will be authenticated by affixing a personal signature or other means of authentication on the relevant piece of paper.²³⁸

The need for authentication and attribution mechanisms in online transactions cannot be over-emphasised. With modern technologies, parties no longer need a face-to-face encounter in order to sign and exchange papers as the traditional practice would assume.²³⁹ In view of this, online transactions present the possibility of fraud and vulnerability to impostors and hackers.²⁴⁰ Because a contracting party may find himself entering into a contract with an unauthorised person, ‘attributing an electronic message for an offer or acceptance of an e-contract to the person who purports to send it’ is a critical issue.²⁴¹

A party engaging in an electronic transaction needs to be sure that online data messages are truly attributable to or bear the true authority of the other contracting party. An inability to attribute online communications between parties creates the fear that either may repudiate the transaction or that their communication might be hijacked and manipulated by hackers. The nature of an electronic environment makes it possible to alter an electronic document or data very easily and discreetly. This possibility raises the evidential question regarding reliability of such a document and its contents. Unless there is a mechanism, such as certification processes as used in digital signatures to ensure reliability and integrity of online communications, certainty of online transactions becomes compromised. Courts will likewise

²³⁷See s 4 of the Interpretation of Laws Act, Cap 1 [R.E.2002].

²³⁸See A Mollel & Z Lukumay *Electronic Transactions and the Law of Evidence in Tanzania* (2007) 61. According to *Stroud's Judicial Dictionary*, a signature involves ‘a writing, or other affixing, a person's name, a mark to represent his name, ... with intention of authenticating a document as being of, or as binding on the person whose name or mark is so written or affixed’ See J S James *Stroud's Judicial Dictionary of Words and Phrases* 5ed (1986) 2431.

²³⁹See Dodd & Hernandez (n64) 14.

²⁴⁰See S Haber & W S Stronetta ‘How to Time-Stamp a Digital Document’ (1991) 3 *Journal of Cryptology* 99. See also A Samelson & A Bedwell-Coll ‘The E-SIGN Law: What Does It Mean for Government Contracting Practices?’ (2003) *Journal of Contract Management* 35, 36 concerning vulnerability of e-mails.

²⁴¹See Ismail & Kamat (n221) 358. See also C Pacini, C Andrews & W Hillison ‘To agree or not to agree: Legal issues in online contracting’ (2002) 45 *Business Horizons* 43. See also T J Smedinghoff & R H Bro ‘Moving with change: electronic signature legislation as a vehicle for advancing e-commerce’ (1999) 17 *The John Marshall Journal of Computer and Information Law* 723.

want to be assured of the authenticity of a particular document or message,²⁴² say, for instance, an e-mail, which a party would want to rely on as forming part of his evidence.²⁴³ In Tanzania, however, the law is silent about mechanisms to ensure this.

Section 69 of the Law of Evidence Act in Tanzania²⁴⁴ provides for proof of the signature and handwriting of persons alleged to have signed or to have written a particular disputed document. It provides that: '[i]f a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.'

While s 69 reiterates the need to prove authenticity, it clearly reveals that it does not fit in the modern digital world. At the time, when that legislation was enacted no one contemplated today's technological advance.

It is also important to note that the Law of Evidence Act still demands the best evidence. This rule requires proof of documents to be made by primary evidence, which means production of an 'original' document in court for inspection.²⁴⁵ In Tanzania, admissibility of electronic data messages or communications and electronic records, such as computer print-outs, and questions whether such records should be regarded as 'original', are issues which have not been answered.²⁴⁶ The need to address them was pointed out nearly ten years ago by the Law Reform Commission, but the country has not made significant efforts to enact

²⁴² Indeed there is always a necessity to establish the basis and type (category) of such evidence before the court accept it in the legal proceedings. See S Mason (n232) 83.

²⁴³ As regards the dangers of tampering with digital documents, see generally Haber & Stronetta (n240).

²⁴⁴ See Tanzania Evidence Act, (TEA) Cap 6 [R.E 2002]. See also the Land Act (1999) Cap 113.

²⁴⁵ See the Evidence Act, ss 64(1) and 66. See also *Shirin Rajabali Jessa v Alipio Zorilla* [1973] LRT No.84 on the best evidence Rule in Tanzania. For a discussion on the best evidence rule and electronic evidence The Irish Law Reform Commission Consultation Paper '*Documentary and Electronic Evidence*' (LRC CP 57- 2009) Ballsbridge Dublin (2009) 30. This report is available at http://www.lawreform.ie/_fileupload/consultation%20papers/cpDocumentaryandElectronicEvidence.pdf (as accessed on 20/10/2010). The report notes (at page 72) that 'the Best Evidence Rule as the primary evidential weapon excluding documentary evidence from proceedings is no longer viable as concerns the modern means of conducting evidence inquiries.' See also *R v Wayte* (1982) 76 Cr App R 110.

²⁴⁶ Although the High Court had the opportunity to discuss the admissibility of computer print-outs, the issue has not been addressed effectively through legislative process, and in the context of the recent development of e-commerce. In *Trust Bank Tanzania Ltd v Le Marsh Enterprise Ltd and Others* (High Court of Tanzania (Comm.Div.) at Dar-es-Salaam, Civil Case No.4 of 2000 (Unreported) Nsekela J (as he then was), underscored the need for the government to enact laws that address legal issues associated with ICT. See also *Tanzania Cotton Marketing Board v Corgecot Cotton Company SA* [1997] TLR 165 in which the court reiterated the need to take into account developments brought about by technology.

legislation that comprehensively regulates electronic transactions, including electronic evidence.²⁴⁷

In 2007, pursuant to a decision of the High Court in *Trust Bank Tanzania Ltd v Le Marsh Enterprise Ltd and Others*,²⁴⁸ the Tanzanian parliament amended the Law of Evidence Act, with regard to the admissibility of electronic records. These amendments, however, were mostly restricted to criminal proceedings.²⁴⁹ In respect of civil proceedings, they are relevant only with regard to banking transactions, ie, when a document in question falls under the definition of a ‘banker’s book’.²⁵⁰

These recent amendments to the Law of Evidence Act are thus inadequate since they do not provide for mechanisms for establishing authenticity of an electronic document or record. It must be borne in mind that admissibility of electronic data as evidence in any proceeding must be accompanied by a mechanism to ensure security, reliability and credibility of the electronic data in question. No provision is made for this too under the current Law of Evidence Act. Consequently, admissibility of electronic evidence in civil proceedings generally has not been adequately addressed.

²⁴⁷See the LRCT position paper (n85) 6. See also A Mollel ‘The Legal and Regulatory Framework for ICT in Developing Countries: Case Study of ICT and the Law of Evidence in Tanzania’ (available at <http://cs.joensuu.fi/tpid2008/abstracts/Mollel%20Andrew ICT4D%20PAPER.pdf> (as accessed on 25/7/2008); A Mollel & Z Lukumay (n238) 92.

²⁴⁸*Trust Bank Tanzania Ltd v Le Marsh Enterprise Ltd and Others* (n246).

²⁴⁹See ss 33, 34 and 35 of the Written Laws (Miscellaneous Amendments) Act, 2007. Section 33 (which amends the Law of Evidence Act) introduces a new section 40A which reads as follows:

‘[i]n any criminal proceeding-

- (a) an information retrieved from a computer systems, networks, or servers; or
- (b) the records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission, and communication facilities;
- (c) the audio or video recording of acts or behaviors or conversation of persons charged,

shall be admissible in evidence.’

²⁵⁰Section 34 of this Act amends s 76 of the Law of Evidence Act by adding a definition of a banker’s book. It defines a ‘banker’s book’ to include ‘ledgers, cash books, account books and any other records used in the ordinary business of the bank or financial institution, whether the records are in written form or data message or kept on an information system including, but not limited to computers and storage devices, magnetic tape, micro-film, video or computer display screen or any other form of mechanical or electronic data retrieval mechanism.’ Furthermore, s 35 amends the Law of Evidence Act by introducing a new section, section 78A concerning electronic records. Section (78A) reads as follows:

‘(1) [a] print out of any entry in the books of a bank on micro-film, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process by which in itself ensures the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection 2 of section 78 that it was made in the ordinary course of business, and that the book is in the custody of the bank it shall be received in evidence under this Act.

(2) Any entry in the banker’s book shall be deemed to be primary evidence of such entry and any such banker’s book shall be deemed to be a “document” for the purpose of subsection 1 of section 64.’

7. Lack of Rules on Consumer Protection

The term ‘consumer’ has no uniform definition.²⁵¹ Instead, it has been conceived in both broad and narrow senses.²⁵² Viewed broadly, consumer includes ‘any person who buys or hires goods or services, or any person who uses such goods or services’²⁵³ or ‘any person, who is affected by the use of goods or services, whether or not he or she bought, hired or used them.’²⁵⁴ The Tanzanian Fair Competition Act²⁵⁵ contains a definition that falls between the broad and the narrow meanings. It defines a consumer as ‘any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.’²⁵⁶

The EC Directive on Distance Contracts opted for a narrower meaning and defines a consumer as ‘a natural person who is acting for purposes outside his or her trade or profession, on the one hand, and a party, who is acting for purposes within his or her trade or profession.’²⁵⁷

The concept of consumer protection, as considered here, entails the safeguards, legal or otherwise, which are put in place to shield the interests of a class of people who are in an economically weak bargaining position.²⁵⁸ Such safeguards are designed to discourage abuse of the superior bargaining power by suppliers of goods and services, thereby serving as safety measure against unfairness between suppliers and consumers.²⁵⁹

²⁵¹See Z S Tang *Electronic Consumer Contracts in the Conflict of Laws Studies in Private International Law Vol.1* (2009) 21.

²⁵²See D McQuoid-Mason (ed) *Consumer Law in South Africa* (1997) 1.

²⁵³See AS Hornby & A P Cowie *Oxford Advanced Learner’s Dictionary* 5ed (1995) 248.

²⁵⁴See McQuoid-Mason (n252) 1.

²⁵⁵Act No.8 of 2003.

²⁵⁶*Ibid*, see s 2 of the Act. In my view this definition is narrow as it seems to be restricted only to natural persons. See Art 2(2) of Directive 97/7/EC on the protection of consumers in respect of distance contracts, 1997 O.J (L 144) 19.

²⁵⁷See Art 2(2) of Directive 97/7/EC on the protection of consumers in respect of distance contracts, 1997 O.J (L 144) 19.

²⁵⁸See M J Trebilcock ‘The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords’ (1976) 26 *University of Toronto Law Journal* 359. See also E P Van Eeden ‘The Regulation of Trade Practices: A Comparative Study’ (Unpublished PhD Thesis, University of South Africa, 1984) 43.

²⁵⁹See J Huffmann ‘Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops’ (Unpublished LLM Dissertation, University of Cape Town, 2004) 3-4.

In the online environment, businesses to consumer (B2C) contracts are occupying a significant portion of day-to-day e-commerce.²⁶⁰ With this increase there have been a number of concerns regarding consumer protection. One of the concerns raised is the extent to which the existing laws have fully taken into account issues of fairness and access to justice when a consumer is involved in an online transaction. Moreover, it is doubtful whether poor, inexperienced and unsophisticated consumers will be able fully to protect their interests in e-contracts with suppliers. Understandably, contractual anonymity, technological inscrutability and legal or economic imbalances are increasingly making the task of protecting consumers more difficult.²⁶¹

Colossal problems beset consumers and accentuate the need for their effective protection in the wake of Internet technology and globalised markets. According to a study conducted by Consumers International (CI), out of 151 items ordered online from Internet sites in 17 countries, one in every 10 items never arrived.²⁶² Furthermore, a total of 44% of the contracted suppliers delivered the goods without issuing a receipt, while a total of 25% never indicated their physical contact addresses or phone numbers on their web sites.²⁶³

As stated in Chapter I,²⁶⁴ the Tanzanian Embassy in Japan issued a press statement advising Tanzanians to be careful when buying cars online, because it had received several complaints from Tanzanians who were defrauded to a total of US\$91,554.²⁶⁵

Reports from car dealers in Japan show that some companies involved in the supply of used motor vehicles to developing countries in Africa, such as Tanzania, Kenya, Zambia, Zimbabwe and Mozambique, have warned against companies engaged in fraudulent practices.

²⁶⁰ See R Schu 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?' (1997) 5 *International Journal of Law and Information Technology* 192, 193-194.

²⁶¹ See Van Eeden (n258) 48-49.

²⁶² See E Goldsmith & L T McGregor 'E-commerce: consumer protection issues and implications for research and education' (2000) 24 *Journal of Consumer Studies & Home Economics* 124, 125.

²⁶³ Ibid.

²⁶⁴ See Part 2(a) of Chapter I.

²⁶⁵ This is in accordance with a press release statement by the Embassy of Tanzania in Japan to Tanzanians. The statement was released to the public by the Ministry of Foreign Affairs in October 2009. See a daily Kiswahili newspaper *Tanzania Daima* (6 November, 2009) narrating the story. (Available at <http://www.freemedia.co.tz/daima/habari.php?id=10104> (as accessed on 5/2/2010) with a title: 'KUAGIZA MAGARI JAPANI HATARI' literally meaning 'it is risky to import vehicles from Japan online.'

For instance, a B2B Japanese car dealer company's website (www.tradecarview.com) had the following information (see Table 2 below) concerning unscrupulous companies.²⁶⁶

Table.2 Internet companies engaging in fraudulent practices.

S N	Company Information	Nature of Complaints	Date Listed
1	Global Trading Co., Ltd 7-1-24 Ohashi-Dori Nakamura Kochi 787-0033. Telephone:+81880345050. President: Noriyuki Miyoshi. Person(s) in charge: Yuu Tamura, Jun Yoshida and Satoshi Kawazoe	<ul style="list-style-type: none"> No shipment after payment. (Reported from Kenya, Tanzania, Uganda, Guyana and Netherlands. 	8/8/ 2009
2	Dragon Create.Japan Co. Ltd 702-18, simizu toyoba Toyoyama-chou, Aichi City 480-0202 Japan. Tel.+81- 90-9946-7495 Name of President: Junsho Ohe	<ul style="list-style-type: none"> Document (B/L) not received after shipment. No response after payments No shipment after payments Reported from Tanzania, New Zealand and Zambia.	6/3/2009
3	Advance next 2407 Nakasima, Kurasaki-city Okayama- pref, Japan. Tel.+81-86-4860712 Name of President: Koji Iwase Person in charge: Yoshihiko Sakamotonoriyuki Miyoshi	<ul style="list-style-type: none"> Clients received a different or damaged car. No shipment after payments. No response after payments. Reported from Uganda, Kenya and Tanzania.	11/12/2008
4	Y's Trading 11-43, Hamacho Daitoh Osaka, Japan. Tel.+81-90-2192-8359. Name of President: Yoshita Kamoto	<ul style="list-style-type: none"> Document (B/L) not received after shipment. No response after payments. Reported from Tanzania.	12/1/ 2009
5	UCT Company 3-45-102 Nishi 6, Kita 40, Kita-ku Sapporo-shi, Hokkaido, 001-0040 or 10-2 Inamoto Miuchi, Aomori-shi, Aomori-ken. Tel +81-90-7513 8662. Name of President: Kenichiro Yoshizaki	<ul style="list-style-type: none"> After buyers transferred money to the seller they lost contact with Mr.Yoshizaki. Reported from South Africa). 	7/11/2008

(Source: <http://www.tradecarview.com> (as accessed on 4/10/2009).

The facts in Table 2 above, and those highlighted by Consumers International,²⁶⁷ indicate the important role that governments play in protecting online consumers.²⁶⁸ Goldsmith

²⁶⁶Visit <http://www.tradecarview.com/help/blacklist/> (as accessed on 4/10/2009)

²⁶⁷See Goldsmith & McGregor (n262) 125.

²⁶⁸See Lanza 'Personal Jurisdiction Based on Internet Contacts' (2000) 24 *Suffolk Transnational Law Review* 125, 148 arguing that the government must 'provide a clear, consistent legal framework, promote consumer protection, and support private sector leadership.' Gluck adds that, '[t]o the extent that consumer transactions and monopolistic or quasi monopolistic situations are outside the parameters of contract theory, even in its modified form, strict and prescriptive legislation is appropriate.' See G Gluck 'Standard Form Contracts: The Contract Theory Reconsidered' (1979) 28 *International and Comparative Law Quarterly* 72, 87. Indeed, the Tanzanian Law Reform Commission in its position paper on e-commerce was of the view that 'the current commercial laws are likely to be affected by these rapid e-commerce changes, inviting alternative regulatory approaches that would not impede e-commerce while advancing and ensuring consumer protection interests.' (See the LRCT position paper (n85).

and McGregor note that, although ‘businesses favour a self-regulatory approach to buying and selling on the Internet’ the effectiveness of such approach is uncertain.²⁶⁹

Nevertheless, a different approach may be necessary to regulate online activities, ‘especially for business novices who may not have considered all the aspects of consumer protection’,²⁷⁰ and also due to the fact that the Internet allows the operations of businesses ranging from sole traders working from their homes to well-known multinational corporations.

Legislative protection of consumers in Tanzania is diverse, embracing both private and public law controls. The Law of Contract Act,²⁷¹ the Sale of Goods Act,²⁷² the Fair Competition Act²⁷³ and the common law of torts are important means by which a consumer may find remedies in private law. The Law of Contract Act was considered earlier in this chapter, particularly with regard to online standard form contracts, such as shrink-wrap and browse-wrap agreements, and its inadequacies concerning consumers were pointed out.²⁷⁴

A limitation of the general law of contract in Tanzania, which is detrimental to consumers, is evident in the doctrine of privity of contract. In terms of this doctrine a stranger to a contract between ‘X’ and ‘Y’ is barred from benefiting from that contract even if she might have furnished the necessary consideration to the promisor.²⁷⁵ Under s 2(1)(d) of the Law of Contract Act, a stranger can furnish consideration but the law is silent as to whether she can sue on the contract.²⁷⁶ Since the law is silent, the common law position will fill the gap according to the Judicature and Application of Laws Act.²⁷⁷

²⁶⁹See Goldsmith & McGregor (n262) 125.

²⁷⁰Ibid.

²⁷¹Cap 345 [R.E.2002].

²⁷²Cap 214 [R.E.2002].

²⁷³Act No.8 of 2003 (previously Fair Trade Act No.4 of 1994).

²⁷⁴See the discussion in parts 3(ii) and (iii) of this Chapter.

²⁷⁵In Tanzania this doctrine was considered in *Burn Blane Limited v United Construction Company Ltd* [1967] HCD 156. See also *Tarlok Singh Nayar v Sterling General Insurance Co Ltd* [1966] EA 144 (K). As for English cases discussing it see *Dunlop Pneumatic Tyre Co Ltd v Selfridge* [1915] AC 847. See also *Dutton v Poole* 83 ER 523 and *Beswick v Beswick* [1966] 3All ER 1 (CA) where Lord Denning criticised this doctrine.

²⁷⁶Section 2(1)(d) provides that unless the context otherwise requires ‘when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.’ See also Nditi (n5) 118.

²⁷⁷See s 2(3) of Judicature and Application of Laws Act Cap 358 [R.E. 2002]. Under English common law strangers may not benefit under a contract to which they are not party pursuant to the doctrine of privity of contract. If, for instance, ‘Y’ gives money to ‘X’ requesting him to purchase a product online on behalf of ‘Y’ and ‘Y’ finds the product to be defective or of a substandard quality, it is only ‘X’ who will be entitled to sue under the contract, even if it was ‘Y’ who furnished the consideration. The doctrine therefore affect a consumer’s right to

In Tanzania the Sale of Goods Act is also deficient in protecting consumers engaging in e-commerce. The Act defines a 'buyer' as 'a person who buys or agrees to buy goods'.²⁷⁸ This definition does not show whether she should be the immediate user or any other user of the goods so purchased. It is also evident that the reference to 'goods' (with no mention of 'services') reflects the time of its enactment, when tangibles rather than intangibles were contemplated. This is also evident from the title 'Sale of Goods Act'. As many consumers are involved in online contracts with service providers, it is necessary to reform this law to make it more responsive to commercial realities.

The Sale of Goods Act also gives effects to the doctrine of privity of contract. Hence an affected consumer, who is a beneficiary or a third party, (such as a child of the buyer) may not sue a manufacturer or supplier of a defective product in contract.²⁷⁹ In other jurisdictions, privity of contract is no longer a bar to such claims.²⁸⁰ The law in India, for instance, defines a consumer to include a person who benefits from goods bought by or services supplied to another person who furnished consideration for such goods, provided that the goods were not bought for resale or for any other commercial purpose but solely for consumption.²⁸¹

Because the current market economy and its socio-economic structure is far more complex than before, there is a need to reform the existing contractual legal framework in favour of consumers.²⁸² Moreover, under the Sale of Goods Act, any breach of a contract term that is not severable can only be treated as a breach of warranty and not as a ground for rejecting the goods or treating the contract as repudiated, unless there is an express or implied

access to justice, especially where, for instance, in the above example, X is no longer available or is not interested to seek the necessary remedy.

²⁷⁸See s 2 of the Sale of Goods Act, Cap 214 [R.E. 2002].

²⁷⁹See D D Ndumbaro 'A Critical Assessment of the Law Relating to Consumer and Consumer Protection in Tanzania: A Particular Emphasis on Food Law and the Protection of Infants' (Unpublished LLM Thesis, University of Dar-es-Salaam, 2003) 40. See also N N N Nditi '*Consumer Protection Law and Practice: Its Relevancy and Reality in Developing Economy with Special Reference to Tanzania*' (Unpublished PhD Thesis, University of Dar-es-Salaam, 1987).

²⁸⁰See J V S Kumar 'Consumerism in India' (2008) 2 *Orient Journal of Law and Social Sciences* 57.

²⁸¹See s 2(1)(d)(i) of the Indian Consumer Protection Act 1986. This section defines 'consumer' as any person who:

'(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payments, when such services are availed of with the approval of the first-mentioned person.'

²⁸²See Ndumbaro (n279) 44.

contract term to that effect.²⁸³ Given recent technological advancements, the common law distinctions between breach of a condition and a warranty may pose difficulties to lay consumers.²⁸⁴

The Tanzanian Fair Competition Act²⁸⁵ has an entire part devoted to consumer protection.²⁸⁶ According to its preamble, this law seeks to ‘promote and protect effective competition in trade and commerce, and to protect consumers from unfair and misleading market conduct.’ Under this law, issues that are relevant to cross-border consumer contracts, notably, conflicts of laws, have been addressed.²⁸⁷ The Act provides that any term (or terms of contract incorporated by reference) that purports to exclude, restrict or modify the application of the provisions of the Act (specifically those seeking to protect consumers), or contract terms, which limit a consumer’s ability to exercise the rights available to her under the Act, are void.²⁸⁸

The Fair Competition Act requires that all terms and conditions in standard form consumer contracts falling within the purview of the Act must be registered with the Fair Competition Commission in accordance with regulations made under the Act.²⁸⁹ A closer analysis of this Act, however, reveals that, although it was enacted after the development of the Internet, it does not sufficiently contemplate the protection of online consumers. Indeed, although it takes into account supply of services including the provision, use or enjoyment of facilities for amusement, entertainment, recreation, education or instruction, there is no direct

²⁸³See s 13(3) of the Sale of Goods Act Cap 214 [R.E.2002].

²⁸⁴See Ndumbaro (n279) 47.

²⁸⁵The Fair Competition Act, Act No.8 of 2003 is a replacement of the previous Fair Trade Practices Act of 1994 (Act No. 4 of 1994). It was passed by Parliament and Assented by the President on May 23, 2003. For a comment on this Act, see UNCTAD *Handbook on Competition Legislation: Note by the UNCTAD secretariat* Trade and Development Board Intergovernmental Group of Expert on Competition Law and Policy, TD/B/COM.2/CLP/50 27 February (2006) 28 (available at http://www.unctad.org/en/docs/c2clp50_en.pdf (as accessed on 17/8/2010)).

²⁸⁶See Part VI of the Fair Competition Act, Act No.8 of 2003.

²⁸⁷Section 26 of the Act, for instance, deals with conflict of laws. The section states provides in sub-section 1 and 2 that ‘[w]here (a) the proper law of a contract for the supply by any person of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of the United Republic; or (b) a contract for the supply by any person of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of this Part. (2) This Part shall apply to any type of contract made or entered between parties under this Act.’ For more about conflicts of laws in Tanzania see chapter III and IV of this thesis.

²⁸⁸ See s 27(1)(a-d) and (2) of the Fair Competition Act, No.8 of 2003. Section 35 to which s 27(1)(d) refers deals with rights which a consumer is entitled to including right to rescind a contract and return goods.

²⁸⁹ This in accordance with s 36 of this Act which reads provides that ‘[w]henver the terms and conditions which are to governing consumer transaction are to be included, whether wholly or in part, in a standard form contract the terms and conditions shall be , registered with the Commission in accordance with the regulations, under this Act.’ The Fair Competition Commission is established under s 62 of this Act.

mention of services offered online through websites. The fact that the Act does not provide any clue why online transactions are not covered, is a serious shortcoming.

It is also clear that the definition of the concept 'consumer' under this Act omits a third party who may have furnished consideration or is affected by goods or services ordered by another for consumption.²⁹⁰ Thus, similar arguments on matters of privity to contract, as those raised above, apply.

From the above discussion, it is also clear that online consumers in Tanzania are not given the full protection they deserve.²⁹¹ In particular, the existing legal framework do not provide for disclosure requirements in online transactions. Because e-commerce is not a face-to-face encounter, 'timely [and] effective disclosure of important information such as terms of a deal is essential.'²⁹² Apart from helping to minimise deception, it enables customers to make informed decisions before they commit themselves to a transaction.²⁹³ Indeed, as Sommer argues, 'if the people are given information they have the sense and sensibility to adequately protect themselves.'²⁹⁴

It is important to note, however, that, although disclosure of certain information regarding online merchants, such as their full names and physical addresses, telephone numbers (and other contact details), their legal status and adequate description of the kind of goods or services they offer is useful, it is not sufficient to guarantee consumer protection in online transactions. As Table 2 above indicates, even when disclosure of such basic information is at hand, the information can be false, or if not false, the business concerned can be unscrupulous or downright fraudulent in its dealings. While such instances do not undermine the importance of disclosure requirements in an online environment, they reflect the difficulties of protecting consumers in this era of electronic commerce, and the reason why

²⁹⁰See s 2 of Act. It defines a "consumer" to include any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.

²⁹¹ See the LRCT position paper (n85) 6-7.

²⁹²See J Braucher 'Delayed Disclosure in Consumer E-commerce as an Unfair and Deceptive Practice' (2000) 46 *WVne Law Review* 1805, 1806.

²⁹³ Ibid.

²⁹⁴ A A Sommer Jr 'Random Thoughts on Disclosure as "Consumer" Protection' (1971) *The Business Lawyer*, 85.

states need to take additional steps individually and collectively in order to effectively resolve such problems.²⁹⁵

The above discussion also reveals that the existing legal framework does not guarantee important rights to an online consumer, such as the right to review, cancel or withdraw from an online contract before it is concluded with a supplier, or rights to a secure payment system. Other important issues, such as privacy, protection against spam, identity theft or fraud in online environments, are also pertinent issues which are not covered under the existing law. Discussion of the conflict of laws issues under the Fair Competition Act will be deferred until Chapter IV.

8. Conclusion

This chapter has identified problems in the current law of contract in Tanzania, which can potentially affect development of e-commerce in this country because they create uncertainty in contract. Such problems include:

- establishing *consensus ad idem* in the course of e-contracting, difficulties arising from use of e-agents,
- problems regarding offers: whether marketing on a website is an offer or an invitation to treat,
- establishing the time and the place where an e-contract is concluded,
- formalities (including use of e-signatures),
- lack of authentication mechanisms and attribution of data messages.

In view of the above issues, the discussion in this chapter reveals that the existing law is inadequate to handle online transactions. As a result, it exposes parties to an e-contract to unnecessary risks and uncertainty. The current legal framework, therefore, needs to be reformed to accommodate modern commercial realities.

²⁹⁵ Apart from governmental involvement Rothchild suggests that the private sector should also be involved in devising solutions to consumer protection problems arising from e-commerce. (See J Rothchild 'Protecting the Digital Consumer: The Limits of Cyber Utopianism' (1999) 74 *Indiana Journal of Law* 893.

Lack of effective consumer protection rules is also a problem identified in this chapter. Consumers have been exposed to multitude of risks in the wake of Internet technology and globalised markets. Consequently, rules that are capable of addressing their plight in an online environment must be promulgated. Such rules need to reflect existing international best practices.

Finally, since e-commerce is a cross-border phenomenon, issues concerning conflicts of laws also constitute problems that demand attention. These issues, and the necessity to adopt rules that effectively facilitate and promote not only online domestic but also cross-border transactions, are further discussed in the next chapter.

University of Cape Town

CHAPTER THREE: E-CONTRACTS AND CONFLICT OF LAWS– THE QUESTION OF JURISDICTION

1. Introduction

Although the world formally seems to be ‘compartmentalised’ into independent territorial legal units, people interact across boundaries and perform acts which create legal relations.¹ These interactions have been far more complex in the light of the Internet technology. The advent of this technology has levelled the old barriers to trade and commerce,² and has made the modern international and political boundaries more porous³ (though not invisible).⁴ Such boundaries are easily ‘crossed’ by people⁵, transactions and events.⁶ The levelling effect resulting from this technology has also given individuals who previously were unable to take part in the international markets, now to do so electronically.⁷ And, in addition, those who do so are sometimes unaware that they have traversed terrains outside their home country.⁸ With such increased cross-border interactions, especially through e-commerce, there has been additional ‘opportunities for the creation of difficult jurisdictional problems.’⁹

¹See J Walker *Castel & Walker Canadian Conflict of Laws* 6ed (2005) 1.1. See also AT von Mehren ‘Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology’ (1974) 88 *Harvard Law Review* 347, 349; H E Yntema ‘The Historic Bases of Private International Law’ (1953) 2 *American Journal of Comparative Law* 297.

²See Meg Whitman (President & CEO eBay) ‘The Internet Breaking Down Barriers to a Better World’ *Leaders in Technology Dinner CES Keynote Presentation* January 9 (2002) 1 (available at <http://www.mclellancreative.com/portfolio/speeches/eBayCEOMegWhitman-CESKeynote.pdf> (as accessed on 23/5/2010)).

³See D L Burk ‘Patents in the Cyberspace: Territoriality and Infringement in Global Computer Networks’ (1993) 68 *Tulane Law Review* 1, 50.

⁴See A Weiss ‘National Borders in Cyberspace’ (2002) 6 *The Myth of Global Village* 20 (available at http://delivery.acm.org/10.1145/1010000/1008574/p20-weiss.pdf?ip=137.158.152.210&CFID=28091574&CFTOKEN=26656833&__acm__=1307698115_fd2a293d20d4c0a021c6adb565c4ccf3 (as accessed on 15/4/2011)).

⁵See S Snail ‘Electronic Contracts in South Africa – A Comparative Analysis’ 2008 (2) *Journal of Information, Law & Technology (JILT)* 18 (available at http://go.warwick.ac.uk/jilt/2008_2/snail (as accessed on 15/5/2010)). See also G I Zekos ‘State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction’ (2005) 13 *International Journal of Law and Information Technology* 1, 2. See further N Elkin-Koren & E M Salzberger ‘Law and Economics in Cyberspace’ (1999) 19 *International Review of Law and Economics* 553, 553.

⁶See P J Borchers ‘Tort and Contract Jurisdiction via the Internet: The ‘Minimum Contacts’ Test and the Brussels Regulation Compared’ (2003) *Netherlands International Law Review* 401, 402. See also O Lando ‘CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law’ (2005) 53 *American Journal of Comparative Law* 379.

⁷See I Colón-Fung ‘Protecting the New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transactions’ (2007) 12 *Fordham Journal of Corporate & Financial Law* 233.

⁸See R S Zembek ‘Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace’ (1996) 6 *Albany Law Journal of Science & Technology* 339, 343.

⁹*Ibid.* See also M S Keplinger ‘The Protection of Rights in the Information Society’. Available at http://www.ictparliament.org/NewsEvents/conf_rome0307/speeches/06.keplinger.pdf (as accessed on 13/06/2010).

As e-commerce becomes a widely popular mode of transacting business, consumers, being naturally weaker parties in online contracts demand assurance that ‘they will not have to bear the (financial) burden of litigation in a distant forum’ when disputes with e-merchants arise.¹⁰ Furthermore, because web-sites are accessible in multiple jurisdictions, e-merchants are equally concerned about the risks of being dragged into multinational litigation.¹¹ The two scenarios create a need to reconcile and to protect the interests of all participants in e-commerce without compromising efforts to promote its growth or the development of the Internet technology. In view of this, clarity and simplicity of rules which provide foreseeability and certainty to cross-border online transactions have been important issues.¹² The current and the next chapter seek to examine conflict of laws rules in light of the Internet and e-commerce.

Conflict of laws is a subject derived from situations where courts need to know which rules, from two or more territorially conceived systems of law, should be applied to solve a particular dispute.¹³ From a global economic perspective, it ‘provides a regulatory framework for the facilitation of cross-border commerce’,¹⁴ and, protects individuals or companies from ‘being exposed to multiple and conflicting obligations.’¹⁵ In addition, it is there to protect or advance the interests of the foreign country whose law the forum seized with the dispute seeks to apply.¹⁶

There are three main issues regarding conflict of laws: (i) jurisdiction, (ii) choice of law, and (iii) recognition and enforcement of foreign judgments.¹⁷ In this study, however, only the first two elements will be considered. The third aspect (ie, recognition and enforcement of foreign judgements) will not be considered due partly to limitations on the permissible length of this thesis but also to the fact that e-commerce seems to presents most problems in areas of jurisdiction and choice of law.

¹⁰See M Keller ‘Lessons for The Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States’ (2004) 23 *John Marshall Journal of Computer & Information Law* 1, 2.

¹¹ Ibid.

¹² Ibid.

¹³ See Cheshire, North & Fawcett *Private International Law* 14ed (2008) 3. See also P M North & J Fawcett *Cheshire and North’s Private International Law* 13ed (1999) 5.

¹⁴ See G P Calliess ‘The Making of Transnational Contract Law’ (2008) *Indiana Journal of Global Legal Studies* 1, 5.

¹⁵ See U Kohl ‘Eggs, Jurisdiction, and the Internet’ (2002) 51 *International and Comparative Law Quarterly* 555, 558.

¹⁶ See A J E Jaffey *Topics in Choice of Law* (1996) 1. See also J Unger ‘The Unknown Province of the Conflict of Laws’ (1957) 43 *Transactions of the Grotius Society: Problems of Public and Private International Law, Transactions for the Year 1957* 87. See also Cheshire, North & Fawcett (n13) 4-5.

¹⁷ See Cheshire, North & Fawcett (n13) 3-4.

This chapter addresses the first issue concerning the question: which court has jurisdiction to determine an e-contract dispute? It examines the effects that the Internet and other related technologies have had on jurisdiction, and questions whether the traditional rules on jurisdiction can effectively apply to the modern e-contract disputes.

Overall, this chapter adopts a global welfare approach, arguing that since many of Internet-based transactions assume an inter-jurisdictional character,¹⁸ and because contracts arising out of these transactions will have a lot to do with conflict of laws,¹⁹ then, harmonisation of rules is imperative to achieve a goal of uniform decision making.²⁰ It is submitted that harmonisation will enhance certainty and predictability of the governing jurisdiction and choice of law rules.²¹ It will also improve collaboration in not only the practice of formal law making but also that of codification of trade usage.²² Moreover, it will create 'general consistency in substantive outcomes' which, from the viewpoint of commercial law, instils a higher level of confidence in those who transact in a global market place.²³

In terms of its structure, the chapter is organised in three parts. Part one sets out the purposes and scope of this chapter. Part two discusses the concept of jurisdiction, the theoretical basis of jurisdiction rules and their challenge in the context of e-commerce.

Part two also considers jurisdictional rules over foreign defendants from four different legal regimes, namely, Tanzania, the United Kingdom, the USA and the European Union. As Tanzania's legal system is derived from the British colonial legacy of the common law, it,

¹⁸ See E Longworth 'Role of contracts in trans-border data flow: EU directive and implications for international business' (2001) 8 *Privacy Law & Policy Reporter* 27 (available online at <http://www.austlii.edu.au/au/journals/PLPR/2001/27.html> (as accessed on 23/3/2008)). See also C Chen 'United States and European Union Approaches to Internet Jurisdiction and their Impact on E-Commerce' (2004) *University of Pennsylvania Journal of International Economic Law* 423; P Valcke 'Legal Aspects of Electronic Commerce' at 2, (available at http://www.katelco.kz/UNESCO/presentations/EC/Peggy_Valcke.doc (as accessed on 24/3/2008)).

¹⁹ For more discussion on this, see E Lanza 'Personal Jurisdiction Based on Internet Contacts' (2000) 24 *Suffolk Transnational Law Review* 125, 147.

²⁰ For a discussion on harmonisation attempts see P Swire 'Elephants and Mice Revisited: Law and Choice of Law on the Internet' (2005) 153 *University of Pennsylvania Law Review* 1975, 1983-1999.

²¹ See R Goode *The Hamlyn Lectures: Commercial Law in the Next Millennium* (1998) 81-105. The author has titled the fourth chapter of his work 'Commercial Law in an International Environment: Towards the next Millennium.'

²² See Goode (n21) 81. See also C A Cutler 'Locating "Authority" in the Global Political Economy' (1999) 43 *International Studies Quarterly* 59, 60; S Zamora 'NAFTA and Harmonisation of Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12 *Arizona Journal of International and Comparative Law* 401.

²³ See A Rosett 'Unification, Harmonisation, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 *American Journal of Comparative Law* 683.

therefore, follows the English conflict of laws rules.²⁴ There is, however, a dearth of material regarding the conflict of laws in the area of contract law in Tanzania, hence, the heavy reliance on English precedents together with those from other countries following the common law tradition. Overall, the analysis of the jurisdictional rules in part two seeks to identify which rules seem to fit well in the context of e-commerce, and provides a better view as to possible future developments. Part three concludes the discussion in this chapter.

2. Mapping the Jurisdictional Landscape in Light of E-commerce

Jurisdiction is an age old legal concept.²⁵ It refers to ‘the power or competency of a court when it is called upon to determine a dispute.’²⁶ Defining jurisdiction in that way, however, makes it suitable for a purely domestic context.²⁷ In a transnational context, it connotes different or wider meanings depending on where it is being used.²⁸ Broadly defined, jurisdiction refers to ‘the regulatory competence or power of a State *vis-à-vis* other States: the right to regulate.’²⁹ In the conflict of laws context, jurisdiction refers more specifically to the power of a court to adjudicate cases involving foreign elements. Exercise of this power, when examined in the light of the Internet and its very habit of being ‘a respecter of neither geographic nor jurisdictional boundaries,’³⁰ poses a difficult legal issue.³¹

Ordinarily, for a court to exercise jurisdiction over a civil dispute, a nexus between the claim, the person or property in question and the forum is an essential requirement.³²

Previously, the ‘physical proximity’ of most economic activities and their ‘legal effects’ were

²⁴ The Tanzanian legal system also accommodates Islamic or customary laws, the latter sources of law being called upon in personal or family matters.

²⁵ See C W Pappas ‘Comparative US & EU Approaches to E-commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signature and Taxation’ (2002) 31 *Denver Journal of International Law & Policy* 325, 327.

²⁶ See B Cameron ‘Jurisdiction and the Internet’ (2000) 42 *Computer and the Law* 13. See also J G Collier *Conflict of Laws* 3ed (2001) 71; S L Snail ‘An Overview of South African e-consumer law in the context of the Electronic Communications and Transactions Act (part 2)’ 15 *Juta Business Law* 54, 58; Chen (n18) 423; J Kumar ‘Determining Jurisdiction In Cyberspace’ (2006) 1 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=919261 (as accessed on 24/3/2008)).

²⁷ See U Kohl *Jurisdiction and the Internet: A Study of the Regulatory Competence Over Online Activity* (2007) 14.

²⁸ See Cheshire, North & J Fawcett (n13) 199.

²⁹ *Ibid.* But it can also denote a physical territorial area.

³⁰ See S Anil ‘Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues,’ (2001) 9 *International Journal of Law and Information Technology* 93.

³¹ See J P Trachtman ‘Cyberspace, Sovereignty, Jurisdiction, and Modernism’ (1998) 5 *Indiana Journal of Global Legal Studies* 561, 569. See also Z S Tang *Electronic Consumer Contracts in the Conflict of Laws Studies in Private International Law Vol 1* (2009) 12-13. See also E F Scoles, P Hay et al *Conflict of Laws* 3ed (2000) 281.

³² See J K Barnes ‘Telemedicine: A Conflict of Laws Problem Waiting to Happen-How will Interstate and International Claim be Decided?’ (2006) 28 *Houston Journal of International Law* 491, 505.

matters closely connected to a particular geographically defined area.³³ In that sort of arrangement, whenever parties to a disputed transaction needed judicial attention, courts would find no difficulty in exercising their powers. This, however, is not the case with the Internet, because it has created a web of cross-border interactions, a one-to-many contact, with the potential to trigger the legal machinery into action from different bases. And, as Johnson and Post argue, the Internet seems ‘to undermine the relationship between legally significant (online) phenomena and physical location’, thus, creating problems to the traditional elements that define a State's geographical boundary, ie, ‘power, effects, legitimacy and notice.’³⁴

(a) Theoretical Bases of Jurisdiction

Three theoretical bases justify states’ authority to regulate jurisdiction. These are:

(i) Sovereignty

The classical doctrine of sovereignty considers each state all powerful within its political boundaries. Under this doctrine the courts’ power to subject persons to legal process is considered a sovereign's ‘right and might’ confined within its boundaries.³⁵

Ordinarily, on the strength of the doctrine of sovereignty, courts are debarred from asserting jurisdiction in circumstances that amount to an interference with the internal affairs of other sovereign states.³⁶ The nature of this restriction derives from public international law, the principle of sovereign equality.³⁷ ‘Sovereignty demarcates the line between one nation state and others in an international system.’³⁸

³³See B Raut *Determining Judicial Jurisdiction in the Transnational Cyberspace* Thesis Submitted in Total Fulfilment of the Requirements of Doctor of Juridical Science (SJD) School of Law Queensland University (2004) 7, 21 (available at <http://eprints.qut.edu.au/15830/> (as accessed on 15/6/2010)). See also D Wille ‘Personal Jurisdiction and the Internet Proposed Limits on State Jurisdiction over Data Communications in Tort Cases’ (1998) 87 *Kentucky Law Journal* 95, 100, 118-120.

³⁴See R P Johnson & D Post ‘Law and Borders-The Rise of Law in the Cyberspace’ (1996) 48 *Stanford Law Review* 1367, 1370. See H H Perritt (Jr) ‘The Internet as a Threat to Sovereignty? Thoughts on the Internet’s Role in Strengthening National and Global Governance’ (1998) 5 *Indiana Journal of Global Legal Studies* 423; K Aoki ‘Considering Multiple and Overlapping Sovereignties: Libertarianism, National Sovereignty, “Global Intellectual Property, and the Internet”’ (1998) 5 *Indiana Journal of Global Studies* 443.

³⁵See J Lookofsky & K Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European and International Law* 2ed (2004) 125. See also Cheshire, North & Fawcett (n13) 4.

³⁶See *Buck v AG* [1965] Ch 745.

³⁷See H Kelsen ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1944) 53 *Yale Law Journal* 207. See also T H Lee ‘International Law, International Relations Theory, and Pre-emptive War: The Vitality of Sovereign Equality Today’ (2004) 67 *Law and Contemporary Problems, Case Studies in Conservative and Progressive Legal Order* 147.

³⁸See H Stacy ‘Relational Sovereignty’ (2003) 55 *Stanford Law Review* 2029, 2030.

(ii) Territoriality

Under traditional international law 'rules relating to jurisdiction and competence incorporate a notion of territoriality',³⁹ ie, law and regulation are organised on the assumption that all activities are geographically limited to the territory of a state.⁴⁰ A better understanding of this principle can be drawn from the history of public international law by which all states are regarded as territorial entities.⁴¹ The 1648 Peace of Westphalia Treaties,⁴² which brought to an end the Thirty Years war, finally introduced a legal order based on individual state sovereignty and respect for the principle of territorial integrity.⁴³ The principle of territoriality seeks 'to protect the territorial integrity of a state against encroachment from others.'⁴⁴

Ever since, jurisdictional rules have been territorially based,⁴⁵ and, as a general rule, a state's law applies throughout its territorial borders' not elsewhere.⁴⁶ This rule means that national courts can competently exercise their powers over everything situated in, and over every person present within their territorial borders.⁴⁷

The courts' jurisdictional powers can thus be categorised as *in rem* or *in personam*. Jurisdiction *in personam* relates to the exercise of a court's power over a defendant in an *inter partes* action (that is to say, action *in personam* 'designed to settle rights of the parties as

³⁹ See T Jones 'Courts' jurisdiction' (available from [http://butterworths.uct.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.uct.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) (as accessed on 4/4/2008)). This international law principle is often expressed in a Latin maxim '*extra territorium ius dicenti impune non paretur.*'

⁴⁰ See Kohl (n27) 4.

⁴¹ Berman notes that important factors, such as expansion of mercantile capitalism in Europe in 14th -15th centuries, the declining influence of the church during that era, and advanced new military technology, which empowered rulers to exert effective control over their geographical territories and overseas territorial claims, led to development of territorially based sovereignty. Territorial demarcation was considered a useful strategy to claim exclusive possession and control of the new found colonies. See P S Berman 'The Globalisation of Jurisdiction' (2002) *University of Pennsylvania Law Review* 311, 447 (citing the work of H Guntram 'National Identity and Territory' in H H Guntram & D H Kaplan (eds) *Nested Identities: Nationalism, Territory, and Scale* Rowman & Littlefield Lanham Maryland (1999) at 11, where the author states that '[o]verseas discoveries also revealed the advantages of using a territorial definition of power, because it allowed for the exclusive and unambiguous claims to new possessions without the need to know what these exactly entailed').

⁴² See Berman (n41) (citing, at footnote 24, the Treaty of Peace Between Sweden and the Empire and Treaty of Peace between France and the Empire, Oct. 14, 1648, 1 Consol. TS 119, 119-356). See also L Gross 'The Peace of Westphalia, 1648-1948' (1948) 42 *The American Journal of International Law* 20.

⁴³ See Berman (n41) 319-320 (pointing this at note 24 of his article).

⁴⁴ See Kumar (n26) 26.

⁴⁵ See Berman (n41) 319.

⁴⁶ See E M Dodd Jr 'Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws' (1926) 39 *Harvard Law Review* 533, 537.

⁴⁷ See Kumar (n26) 3. Here the Latin maxim *Quid quid est in territorio es estian de territoria* applies. See also: Zekos (n5); Kohl (n27) 4; Lookofsky & Hertz (n35) 12.

between themselves’).⁴⁸ Dicey and Morris define an action *in personam* as one ‘brought against a person to compel him to do a particular thing, for instance, the payment of a debt or damages for breach of contract or for tort, or the specific performance of contract; or to compel him to do something, eg, when an injunction is sought.’⁴⁹

In rem jurisdiction, on the other hand, relates to the power of the court over real or movable property located within the territory, typically, of course, land.⁵⁰ Under the English law, an action *in rem* determines the status of the thing itself.⁵¹ Such actions are common in Admiralty courts against a ship or a cargo associated with it.⁵² Our concern in this chapter is primarily with jurisdiction *in personam* in e-contracts since actions *in rem* concerning such contracts are only rare.

As will be elaborated upon later in this chapter, the Internet and globalisation, however, have destabilised the concept of territorial state and the principle of sovereignty.⁵³

(iii) Physical Presence

This principle overlaps with that of territoriality. Physical presence of a foreign defendant within a state is an age old basis for a court’s exercise of jurisdiction.

However, establishing whether the foreign defendant has a physical presence within the courts’ jurisdiction when the Internet has been used as a business tool becomes far more intricate, posing a problem for establishing this component of the nexus required to establish jurisdiction.

The following hypothetical case will demonstrate the inadequacy of the traditional underpinnings of establishing jurisdiction, and thus jurisdictional uncertainty that ensues with the advent of e-commerce.

⁴⁸See Cheshire, North & Fawcett (n13) 353.

⁴⁹See Dicey & Morris *The Conflict of Laws* 13ed Volume I (2000) 263.

⁵⁰See Lookofsky & Hertz (n35) 15. See also C E Wade (Jr) ‘Jurisdiction: *In Rem Symposium on Conflicts of Law in Oklahoma*’ (1965)18 *Oklahoma Law Review* 431. See also G C Lilly ‘Jurisdiction over Domestic and Alien Defendants’ (1983) 69 *Virginia Law Review* 85, 93-94; Scoles et al (n31) 283.

⁵¹See Lookofsky & Hertz (n35) 15.

⁵²See Cheshire, North & Fawcett (n13) 414. The authors note, at 415, that since ‘[t]he person is the ship ... it is essential that it should be “so situated as to be within the lawful control of the state under the authority of which the court sits”.’

⁵³See S Fazio *The Harmonisation of International Commercial Law* (2007) 5. See also J A Estrella-Faria ‘Drafting and Negotiating History of the Electronic Communications Convention’ in A H Boss & W Kilian *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Source Book* (2008) 17.

Andy, a computer software dealer and specialist in Madagascar operates his online company named 'Andy's Compuserv', a purely virtual company. The e-company is not registered but maintains an interactive website: '<http://www.Andy/CompServ/Cons.Com>' hosted by servers located in South Africa and in the Maldives. From the website, buyers can buy various computer software programs and effect payments online by credit cards, payments being wired and deposited in Andy's account in Mauritius.

Matembele, a local researcher in Tanzania comes across Andy's web page and finds an advertisement concerning new research software. Matembele is interested and makes an online purchase after signing a click-wrap agreement while in an Internet Café in Zambia. Two days after installing the programme Matembele's Lap Top, which contained four year's of work on a data project worth US\$ 50,000 assigned to him by the World Bank, and which was on the brink of final submission, was corrupted irretrievably due to the malfunctioning of the software he had purchased from Andy.

Upon visiting Andy's website he found a warning and a regret note to buyers that the programme was discovered to be fatally defective and that they are advised to uninstall it *immediately* and replace it with an 'approved' version. Matembele also found an e-mail from Andy in his inbox as an apology to all customers who purchased the software programme and the advice to uninstall the programme and replace it with the 'approved' version. Jacobs in Australia, Dede in Brazil and Morris in Singapore suffered similar problems to Matembele's.

In conclusion, then, the establishment of jurisdiction, in general terms, requires a close connection between the defendant, the act in question and the forum.⁵⁴ The following sections will demonstrate, via an analysis of the relevant law in Tanzania, England, the USA and the EU, that the nexus required for jurisdiction *in personam* may be founded on either the residence of a defendant in the state in question or, in case of a contract for delivery of goods, the place of performance.⁵⁵

⁵⁴ In *Adam v Cape Industries plc* [1990] 1Ch 433, 455 the High Court, Scott, J had held that the jurisdiction of a foreign court over defendants could be established either on a territorial basis by showing that the defendants were present with the territory of the foreign court or on a consensual basis by showing that the defendants had.

⁵⁵ See, for instance, *In the Matter of Patrick Ernest Hofmann, an Infant, Misc Civ Cause 39- D-71; 25/9/71; 25/9/71;*(1971) HCD No. 409.

A1 Exercise of Jurisdiction *in Personam* in Tanzania

Jurisdiction of the courts in Tanzania is a statutory issue.⁵⁶ For purposes of civil jurisdiction the relevant statutes include the Judicature and Application of Laws Act, 1961,⁵⁷ the Magistrates Courts Act, 1984⁵⁸ and the Civil Procedure Act, 1966.⁵⁹ These enactments limit the jurisdiction of the courts to their localities, and within the Tanzania mainland territory⁶⁰ to the exclusion of Zanzibar (which has its own laws and a separate court system).⁶¹

Because Tanzania adheres to the common law legal system, its jurisdictional rules on the exercise of jurisdiction over a foreign defendant have also been determined by the common law.⁶² For instance, and as discussed in the chapter, the common law principles of natural justice, are an important element when courts exercise jurisdiction against a defendant in Tanzania.

According to section 7 of the Civil Procedure Act, courts in Tanzania have jurisdiction to hear all suits of a civil nature unless otherwise expressly or impliedly barred from doing so. Section 18 of the same Act provides that ‘every suit must be instituted in a court within the local limits of whose jurisdiction:’

- (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;

⁵⁶It was held in *Shyam Thanki & Others v New Palace Hotel Ltd* that ‘[a]ll courts in Tanzania are created by statute and their jurisdiction is purely statutory.’ (1972) HCD no.20 at 24.

⁵⁷Cap 358 [R.E.2002].

⁵⁸Cap 11 [R.E.2002].

⁵⁹Cap 33 [R.E.2002].

⁶⁰This restriction reflects the earlier discussed general principle of territoriality which, in particular, confines the competence of domestic courts to the territorial limits of their own State. However, the 1961 Judicature and Application of Laws Act provides that courts in Tanzania shall also exercise their jurisdiction in conformity with the substance of the common law, the doctrines of equity and statutes of general application in force in England on the 22 July, 1920. The application of common law is, however, subject to qualifications as local circumstances “render necessary” (as per Lord Denning, in *Nyali Ltd v Attorney General* [1955] 1 All ER 646. See also *Tanzania Air Services Limited v Minister for Labour, Attorney General and the Commissioner for Labour* [1996] TLR 217 (HC) at 222.

⁶¹Although Zanzibar has its separate court system, appeals from the High Court of Zanzibar are heard and determined by the Court of Appeal of Tanzania whose jurisdiction cater for both parts of the United Republic of Tanzania.

⁶²See s 2(3) of the Judicature and Application of Laws Act Cap 358 [R.E.2002], for instance, permits the application of common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and subject to such qualifications as local circumstances may render necessary. See also *Nyali Ltd v Attorney General* (n60), *Tanzania Air Services Limited v Minister for Labour, Attorney General and the Commissioner for Labour* (n60). The status of English decision in Tanzania was discussed in Chapter two of this thesis.

- (b) any of the defendants, where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; provided that in such case either the leave of the court is given, the defendants who do not reside or carry on business, or personally works for gain, acquiesce in such institution; or
- (c) the cause of action wholly or part arises.

(a) An Analysis of section 18 of the Civil Procedure Act

An analysis of s 18 indicates that the close connections required for the exercise of courts' jurisdiction *in personam* is founded on i) residence of the defendant, or ii) submission to the court's jurisdiction, or iii) the place of performance.

(i) The Concept of 'Residence'

While the term 'residence' is not defined in the Act, it is important to note its difference from the concept of 'domicile'.⁶³ Although the two are regarded as connecting factors in conflict of laws they should not be confused.

According to well established English cases, such as *Whicker v Hume*,⁶⁴ domicile means a 'permanent home'. This concept has been defined as 'the act of residence and the intention to remain there permanently.'⁶⁵ As a matter of legal definition, every individual must be a domiciliary of a particular place,⁶⁶ and no person can have more than one place of domicile at any one time.⁶⁷

By contrast, 'residence' is relevant where a person does not intend to stay at a place permanently.⁶⁸ In *IRC v Duchess of Portland*,⁶⁹ it was defined to mean physical presence 'as an inhabitant.' Physical presence, however, is less than residence, because a person may be

⁶³ See *Bell v Kennedy* (1868) LR 320 (HL).

⁶⁴ [1858] 7 HLC 124, 160. See also *IRC v Bullock* [1976] 1 WLR 1178, 1183.

⁶⁵ See B Marvin *Private International Law in Common Law Canada, Cases, Text and Materials* (1997) 121.

⁶⁶ See *In Re Annesley Davidson v Annesley* [1926] Ch 692,695 (citing *Wardsworth v McCord* (1886) 12 SCR 466 which held that '[n]o man can at anytime be without a domicile.' See also Dicey & Morris (n49) 110.

⁶⁷ See A Briggs *The Conflict of Laws* 2ed (2008) 22. See *Henwood v Barlow Clowes International Ltd (In Liquidation)* [2008] All ER (D) 330.

⁶⁸ See A E Anton & P R Beaumont *Private International Law* 2ed (1990) 124. These authors state that in UK the traditional definition of domicile 'excludes all persons who do not intend to stay there permanently.'

⁶⁹ [1982] Ch 314, 318-319.

physically present in a state 'A' but resident in state 'B'.⁷⁰ Mere presence is therefore not sufficient: there must be some degree of permanency.⁷¹

Thus, reference to where the defendant 'actually and voluntarily resides, or carries on business, or personally works for gain' in s 18, refers to residence adopted by the defendant voluntarily and for some purposes. Such purposes, however, must have a certain degree of permanency within the jurisdiction, for instance, a known place of habitation, place of business or employment.

Defendant's residence according to section 18 applies to individuals as well as corporate entities, even if the business may be headquartered outside the country. The corporation must have a presence in the forum state.⁷²

(ii) Submission

As s18(b) of the Tanzanian Civil Procedure Act indicates, a defendant's –including a foreign defendant's - voluntary submission to the court's jurisdiction with a view to enter appearance to defend the case amounts to acquiescence to both the institution of a suit against him and the jurisdiction of the court. A foreign defendant may acquiesce to the institution of a suit if, for instance, he appears to defend the case on merits or engages an agent to do so on his behalf.

However, appearance for the purpose only of contesting the jurisdiction of the court, however, is not submission.⁷³ Similarly, choosing a particular law to govern the parties'

⁷⁰ See Collier (n26) 55.

⁷¹ See J D McClean 'The Meaning of Residence' (1962) 11 *International & Comparative Law Quarterly* 1153, 1155. In *IRC v Bullock* (n64) 1184 it was stated that a person may move to work in another country but without intending to reside there after he ceases to be so employed. See also *Bell v Kennedy* (n63) 321 where it was held that 'residence may be some small *prima facie* proof of domicile'

⁷² It may, for instance, be having a business office in the forum state. According to Tanzanian law, a foreign company is deemed to carry on business in the country if it has established a 'subordinate office' therein. See the *Civil Procedure Act* Cap 33 [R.E. 2002], section 18, *explanation II*. See ss 124-127 of *Companies Act*, Cap 212. In England, the question of residence of companies was considered in *Adam v Cape Industries plc* [1990] 1 Ch 433. It was stated (at 455) that, 'courts will be likely to treat a trading corporation incorporated under the law of one country ('an overseas corporation') as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on *the overseas corporation's* business in the other country at or from some fixed place of business.' See *Littauer Glove Corporation v F W Millington (1920) Ltd* (1928) 44 TLR 746. See also *Vogel v R & A Kohnstamm Ltd* [1973] 1QB 133 at 141. See P Rogerson 'The Common Law Rules of Jurisdiction of the English Courts over Companies' Foreign Activities' in P J Slot & M Buttermann (eds) *Globalisation and Jurisdiction* (2004) 91-102. See also Cheshire et al (n13) 359; *Saab v Saudi American Bank* [1999] 1WLR 1861 CA.

⁷³ See *Harris v Tylor* [1915] 2 KB 580, 583. See also *Re Dulles' Settlement* (No 2) [1951] Ch 842.

contract does not amount to submission.⁷⁴ In *Adams and Others v Cape Industries Plc & Another*,⁷⁵ the court insisted that a defendant's voluntary submission or agreement to submit to the court must be based upon consent: '[a]n actual consent is, in principle, necessary.'⁷⁶

(iii) Place of Performance: 'Where the Cause of Action Wholly or Partly Arises'

Section 18(c) of the Civil Procedure states that a Tanzanian court will have the power to exercise jurisdiction over a defendant if the cause of action wholly or partly arose in Tanzania.

(b) Service of the Court Process and Order V of the Civil Procedure Act

Although s18 provides three foundations for establishing jurisdiction *in personam*, under English common law, which also applies in Tanzania, the competency of a court to hear cases is closely connected to a procedural requirement that the defendant is properly served. In fact, Nyng and Davies baldly state that service of the claim is the foundation of jurisdiction *in personam*,⁷⁷ and Chissick and Kelman succinctly sum up the importance of this further factor by stating that the key issue is 'whether the defendant can be physically served with a writ.'⁷⁸

Generally, the purpose of service of the court process to either defendants who are within the jurisdiction of the court or to foreign defendants is to give them notice of pending suits so that they are not taken by surprise,⁷⁹ a requirement likened to the principle of fair hearing. In *Alhaji Aminu Altine & Northern General Contractors Ltd v Afribank Plc*, the Nigerian Court of Appeal once stated that, 'where a defendant has not been served with the writ of summons and has no knowledge, actual or constructive, that he has been sued by a plaintiff, cannot be said to be aware of the existence of a suit against him.'⁸⁰

⁷⁴ See *Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* [1968] 2 Lloyds Rep 394.

⁷⁵ See *Adam v Cape* (n54) 455.

⁷⁶ *Adam v Cape* (n54) 458.

⁷⁷ See P E Nyng & M Davies *Conflict of Laws in Australia* 7ed (2002) 265.

⁷⁸ See M Chissick & A Kelman *Electronic Commerce: Law and Practice* 2ed (2000) 110. See also H A Deveci 'Internet Jurisdiction-Personal jurisdiction: Where cyberspace meets the real world -Part 1' (2005) 21 *Computer Law & Security Report* 464, 466.

⁷⁹ See *Craig vs Kanssen* (1943) 1 All E. R 108, 113 where the court stated that 'failure to serve process where service of process is required, is a failure which goes to the root of our conception of the proper procedure in litigation.' See D McClean & K Beevers *Morris: The Conflict of Laws* 17ed (2009) 114. See also Scoles et al (n31) 215; C K Burdick 'Service as a Requirement of Due Process in Actions in Personam' (1922) 20 *Michigan Law Review* 422.

⁸⁰ See *Alhaji Aminu Altine & Northern General Contractors Ltd v Afribank Plc* CA/K/261/96, at 7 (available at http://courtofappeallibrary.gov.ng/index.php?option=com_sobi2&sobi2Task=sobi2Details&catid=3&sobi2Id=3)

In Tanzania, Order V of the Civil Procedure Act governs matters of service of court process generally. Accordingly, where a suit has been duly instituted, the defendant may be summoned to appear to answer the claim on a specified day. This summons may either be a ‘summons to appear’ or a ‘summons to file a defence’.⁸¹ If a defendant is within the jurisdiction, according to the common law practice, the court will have automatic power over him provided he has been duly served.⁸²

Service to a defendant who is present within the jurisdiction is seldom a problem.⁸³ The difficult issue in respect of service of process, but relevant to conflict of laws, is when the defendant happens to be outside the territorial limits of the issuing court (ie, outside Tanzania).

Procedurally, service outside the country, other than in Kenya, Uganda, Malawi and Zambia, is governed by a procedure detailed under Order V rule 33 and it is based on the discretion of the court.⁸⁴ Order V of the Civil Procedure Act also governs the mode or transmission of the summons to the defendants who are within⁸⁵ and those who are outside the country.⁸⁶ Order V rule 33 links to s 18(b) of the Civil Procedure Act since this section indicates that, in situations other than where a foreign defendant submits to the jurisdiction of the court, exercise of jurisdiction over him is possible only if ‘leave of the court is given’.

The plaintiff must, in the first place, apply *ex parte* for leave to serve the court process to the defendants outside the country before the procedure detailed in Order V rule 33 applies.

908&Itemid= (as accessed on 6/5/2011). See also *Modukolu vs Nkemdilim* (1962) 1 All N.L. 587, 594; *Skenconsult (Nig) Ltd Vs Godwin Senkody Ukey* (1981) 1. SC 6.

⁸¹See Civil Procedure Act, Cap 33 [R.E. 2002], Order V rule (1)(a) & (b).

⁸²See *John Russel & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298, 302, *per* Lord Haldane.

⁸³See the Civil Procedure Rules contained in Order 1 rule 8 & 10(5), Order V (generally), Order VI rule 2, Order XXVII rule 3, Order XXVIII rule 2, Order XXIX rule 3, Order XXXIX rule 10 & 14 and Order XLII rule 3. Service within the country is governed by ss 23 and 24 of the Civil Procedure Act, 1966, read together with the rules contained in the 1st Schedule to the Act, (commonly referred to as ‘Orders’) depending on the nature of the process to be served. Section 23 provides that ‘[w]here a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.’ Section 24 provides as that ‘(1) [a] summons may be sent for service to another court in Tanzania within the local limits of whose jurisdiction the defendant may be believed to be residing. (2) The court to which such summons is sent shall, upon receipt thereof, proceed as if it has been issued by such court and shall then return the summons to the court of issue together with the record (if any) of its proceedings with regard thereto.’

⁸⁴Specific rules apply to these countries. See Order V rules 28 and 33(2) of the Civil Procedure Act, Cap 33 [R.E. 2002]. Rule 28 provides that ‘[w]here the defendant is believed to reside in Kenya, Uganda, Malawi or Zambia and has no known agent in Tanzania empowered to accept service, the summons may be served- (a) where the plaintiff has furnished the postal address of the defendant, by post; (b) in any other case, through the courts of the country in which the defendant is believed to reside; (c) by leave of the court, by the plaintiff or his agent.’ Rule 33(2) provides that [w]here the defendant is believed to reside in Kenya, Uganda, Malawi or Zambia the court which issued the summons may send the original and a copy thereof for service direct to any court having civil jurisdiction in the place where the defendant is believed to reside.

⁸⁵See Civil Procedure Act, Cap 33 [R.E. 2002], Order V rules 9, 10, 12, 13 to rule 31.

⁸⁶Civil Procedure Act, Cap 33 [R.E. 2002], Order V rules, rule 32-33.

This is evident in the words ‘leave has been given’ in sub-rule 1(a) and (b) of rule 33. Such terms appear also in section 18(b) of the Civil Procedure Act. It therefore means that the court must determine whether to grant orders sought or not, and, in the course of doing so, it will have to determine whether it has jurisdiction over the defendant to warrant issuing a summons. In this regard, the court enjoys discretion to grant the application or reject it.

The courts’ discretion needs to ‘be exercised with extreme caution and with regard in every case to the circumstances’⁸⁷ because service outside the jurisdiction ‘conflicts with the general principles of comity between civilised nations.’⁸⁸ A court should not unnecessarily ‘interfere with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected.’⁸⁹ This position will certainly be followed in Tanzania since service outside the country is not automatic but depends on the plaintiff’s application and on the judicious exercise of the court’s discretionary powers.⁹⁰

If leave of service outside Tanzania is granted, Order III rule 3(1) of the Civil Procedure Act provides that service on a foreign defendant may be made to his recognised agent if any.⁹¹ Such a service will be deemed effectual as if it had been served on the party in person, unless the court otherwise directs.⁹² The defendant may also appoint in writing any person within the jurisdiction to be his agent to accept service.⁹³

From the above analysis, one needs to ask whether the Tanzanian rules on jurisdiction can effectively handle issues arising out of Internet transactions, especially e-consumer

⁸⁷See *Cordova Land Co Ltd v Victor Brothers Inc* [1966] 1 WLR 793, 796. See also *The Hagen* [1903] P. 189, 201; *The Metamorphosis* [1953] 1WLR 543, 549.

⁸⁸See *Mackender v Feldia AG* [1967] 2 QB 590,599 (per Lord Diplock). In *Hilton v Guyot* 115 US 113, 163-164, [1995], the US Supreme Court defined comity as ‘the recognition which one nation allows within its territory to the legislative ... Acts of another nations, having regard both to international duty and convenience’

⁸⁹Per Scott LJ in *George Monro Ltd v American Cyanamid & Chemical Corporation* [1944] 1 All ER 386, 388, (CA).

⁹⁰See Order V rule 33(1)(a) and (b) of Civil Procedure Act, Cap 33 [R.E. 2002]. See also Order V rule 33(3) which provides that courts in Tanzania will not send summons for service to other courts or designated authorities of any other country unless the plaintiff has deposited with the court or secured a sum sufficient in the opinion of the court to cover the expenses of service.

⁹¹Order III rule 2(1) defines recognised agents of parties by whom such appearances, applications and acts may be made or done to include (a) persons holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties and (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.

⁹²See Order III rule 1 of the Civil Procedure Act, Cap 33 [R.E. 2002].

⁹³See Civil Procedure Act, Cap 33 [R.E. 2002], Order III rule 6(1) and (2).

contracts.⁹⁴ No cases on contract law relating to the conflict of laws in Tanzania are reported, at least before or in the course of this study, which is some indication that Tanzanian courts have not been seized with jurisdictional problems involving cross-border contracts.⁹⁵ English or other foreign cases will be persuasive authorities, so what follows next is an analysis of jurisdiction *in personam* in other jurisdictions, elected for the purpose of this thesis, to adjudicate whether these fare better in this regard.

B1 The English Common Law Rules on Exercise of Jurisdiction over a Foreign Defendant

As a general rule, - and as will become evident, the Tanzanian legislation mirror the common law in this regard - courts in England will exercise jurisdiction *in personam* on the basis of the following: (a) where the defendant is present in England,⁹⁶ (b) where the defendant submits to the jurisdiction⁹⁷ or (c) where the court exercises its assumed jurisdiction under the Civil Procedure Rules, which allows the court, upon an application made by the plaintiff, to order service of summons to a defendant who is outside the jurisdiction of the court.⁹⁸ However, according to Dicey and Morris, the English court ‘has jurisdiction to entertain an action *in personam* if, and, only if, the defendant is served.’⁹⁹ Deciding whether a foreign defendant should be subjected to the adjudicatory power of the court, however, has never been a simple thing,¹⁰⁰ especially when he is outside England.¹⁰¹

⁹⁴See a position paper by the Law Reform Commission of Tanzania (at page 8) (available at <http://www.lrc-tz.org/Positionpaperone-COMMERCE.pdf> (as accessed on 21/07/2007)).

⁹⁵If there is any case, then that might have skipped my attention in the course of this research since most of the High Court and Court of Appeal cases are unreported and even the unreported ones are not properly kept to enable an easy accessibility.

⁹⁶See Briggs (n67) 55. See also Collier (n26) 72-74; C M Schmitthoff *The English Conflict of Laws* 3ed (1954) 422-423; *Razelos v Razelos (No.2)* [1970] 1 WLR 392.

⁹⁷ See Briggs (n67) 55. See also Collier (n26) 72-74; Schmitthoff (n96) 422-423.

⁹⁸See Rule 6.12 and the entire section IV of Part 6 (especially Rule 6.36-37) of the English Civil Procedure Rules (CPR). See also North & Fawcett (n13) 286; *Chellaram v Chellaram (No. 2)* [2002] 3 All ER 17; L Collins 'Some Aspects of Service out of the Jurisdiction in English Law' (1972) 21 *International and Comparative Law Quarterly* 656.

⁹⁹See Rule 22(1) in Dicey & Morris (n49) 263. See also L A Collins 'Some Aspects of Service out of the Jurisdiction in English Law' (1972) 21 *International and Comparative Law Quarterly* 656.

¹⁰⁰See J Fawcett 'A New Approach to Jurisdiction over Companies in Private International Law' (1988) 37 *International and Comparative Law Quarterly* 645.

¹⁰¹See Briggs (n67) 55.

It is, however, important to note that ‘[s]ince 1987 a series of instruments taking effect in English law and operating alongside the traditional rules, has radically altered the jurisdiction of English courts in civil and commercial matters.’¹⁰²

Specifically, the English rules on jurisdiction have been altered by the Brussels Convention (now Brussels Regulation I).¹⁰³ Nevertheless, the English traditional rules on jurisdiction still apply if the EU related instrument is wholly inapplicable.¹⁰⁴ In other words, the traditional English rules on jurisdiction are left to fill the gaps only.¹⁰⁵ If, however, the Brussels Regulation confers jurisdiction on an English court, the service of court process may be made as of right, within England or outside England (provided that the appropriate certification of the court's jurisdiction under the Regulation is obtained).¹⁰⁶ The Brussels Regulation I, which also applies in the UK, will be discussed later when examining the EU developments.

But where the Brussels Regulation I is not applicable, generally, the foundation of jurisdiction *in personam* by an English court is service of a writ, and the English courts are competent to try an action *in personam* against a foreign defendant on three main grounds: (a) where there has been service of the claim to the defendant; (b) where the defendant has submitted to the court's jurisdiction, and (c) where there has been service to him outside the jurisdiction.¹⁰⁷

These three grounds will be analysed in greater detail, specifically with e-contracts in mind.

(a) Service of the Claim on the Foreign Defendant who is in England

A foreign defendant's presence, which makes him amenable to service of the court process, may result from a voluntary submission to the court or mere presence therein, even if for a

¹⁰²See Briggs (n67) 55.

¹⁰³See Brussels Convention of 27 September, 1968. The Convention was replaced by Regulation (EC) 44/2001, [2002] OJL 12/I. In the UK this convention was enacted as Schedule I of the Civil Jurisdiction and Judgments Act 1982, as amended from time to time. The Brussels I Regulation will be discussed later in this chapter.

¹⁰⁴ See Article 4 of the EC Regulation 44/2001, Annex I. See also Rule 22(2) in Dicey & Morris (n49) 263; Briggs (n67) 56; Cheshire et al (n13) 199.

¹⁰⁵See Briggs (n67) 56. See also J Harris ‘The Brussels I Regulation and the Re-Emergence of the English Common Law’ (2008) 4 *The European Legal Forum* I-182.

¹⁰⁶ See also the Civil Procedure Rules, rule 6.19 (Practice Direction to CPR Part.6). See also Briggs (n67) 57.

¹⁰⁷ See Cheshire, North & Fawcett (n13) 354. See also McClean & Beevers (n79) 114-134.

short duration of stay.¹⁰⁸ This is the case ‘even though the cause of action has no factual connection with England.’¹⁰⁹ The manner of service to the defendant, according to the Civil Procedure Rules, includes personal service, service by post, or by certain electronic means.¹¹⁰

Authors have doubted the effectiveness of exercising jurisdiction on the basis of ‘temporary presence’ of the defendant (sometimes referred to as tag jurisdiction) arguing that ‘a judgment given in the action will be a *brutum fulmen* unless followed up by proceedings’ in the defendant's foreign court.¹¹¹

Notwithstanding their argument, and with regard to natural persons, the English Court of Appeal in *HRH Maharanee Seethadevi Gaekwar of Baroda v Wieldenste*,¹¹² held that English courts will have jurisdiction to entertain an action *in personam* against any defendant who can be found within the jurisdiction so that service upon him can be effected.¹¹³ In the case of a corporation, it was held, in *South India Shipping Corporation Ltd v Export-Import Bank of Korea*,¹¹⁴ that, it suffices ‘only to see whether the corporation is “here” the best test [being] ascertain[ing] whether [its] business is carried on here and at a defined place.’¹¹⁵ In this regard, a place of businesses denotes a fixed and definite place.¹¹⁶

(b) Submission of the Foreign Defendant to the Jurisdiction of the Court and Choice of Forum Clauses in E-Contracts

When discussing s 18 of the Civil Procedure Act of Tanzania, it was noted that a foreign defendant may submit to the court’s jurisdiction by agreeing to a choice of forum clause. In

¹⁰⁸See Dicey & Morris (n49) 291, 292-301; McClean & Beevers (n79) 115. See also Cheshire et al (n13) 354-355. The authors argue (in page 354) that ‘once the court has asserted its power by service of the process on the defendant it is not rendered incompetent by his subsequent departure from the country.’ See also *Colt industries v Sarlie* (No. 2) [1966] 3 All ER 85. See also the dicta by Lord Russell of Kilowen in support of this kind of exercise of jurisdiction in *Carrick v Hancock* (1895) 12 TLR 59, 60. As for a US decision on such a transient jurisdiction, see *Burnham v Superior Court of California* 110 S.Ct.2105 (1990).

¹⁰⁹See G C Cheshire & P M North *Cheshire's Private International Law* 8ed (1970) 76. See also Cheshire et al (n13) 354.

¹¹⁰See Rule 6.2 of CPR.

¹¹¹See Cheshire & North (n109) 78-79.

¹¹²[1972] 2QB 283.

¹¹³ See McClean & Beevers (n79) 115; Cheshire, North & Fawcett (n13) 355. It is stated, however, that if his presence was secured ‘fraudulently or improperly then service of the claim form may be set aside.’ See Cheshire et al (n13) 355.

¹¹⁴[1985] 1 WLR 585.

¹¹⁵Ibid at 590. See also Dicey & Morris (n49) 296-300; Fawcett (n100) 648; Cheshire et al (n13) 358-363. See also *La Bourgogne* [1899] AC 431, 433; *Newby v Van Oppen Co* (1872) LR 7 QBD 293.

¹¹⁶See Briggs (n67) 97. See also *Adams v Cape Industries plc* (n54) 433. If the corporation is one registered in England under the Company Act, 1985 it is considered present in that jurisdiction ‘even if it does not carry its business there, and for the purpose of service, a claim form can be left or posted to its registered office in England. See McClean & Beevers (n79) 116-117.

some instances, and indeed in many 'shrink-wrap' or 'click-wrap' agreements, there are clauses designed specifically to subject any dispute between the parties to a particular forum. Clauses of this sort are referred to as 'choice of forum clauses.'¹¹⁷

The value of such clauses in modern commerce has been commented on by a number of scholars.¹¹⁸ They have been called 'Janus-headed'¹¹⁹ because, on the one hand, they endorse submission to the jurisdiction of the contractual forum, while on the other exclude any other jurisdictions.¹²⁰ How courts treat such clauses in a discretion-based system like the common law is not uniform as it all depends on the nature of the clause itself.

It is argued that courts must uphold the clauses in order to achieve certainty and predictability of contracts, these being the basic needs of international commerce.¹²¹ Commercial interests would indeed require that the sanctity of an agreement be honoured by all, and the law should uphold the justified expectations of the parties to help them assess the risks of their venture.¹²² For his part, Taylor argues that a 'forum selection clause presents an opportunity to serve both private and judicial interests of economy and efficiency.'¹²³

Despite the above support, the validity of forum selection clauses poses certain problems, the solution of which has never been straightforward.¹²⁴ In most cases, the practice has been to rely on the law of the forum (the *lex fori*) to decide the question.¹²⁵ A quick

¹¹⁷They can, for instance, provide that parties agree to submit all disputes to the High Court of Tanzania (Commercial Division) in Dar-es-Salaam. See D H Taylor 'The Forum Selection Clause: A Tale of Two Concepts' (1993) 66 *Temple Law Review* 785. The clause can, for instance, provide that parties agree to submit all disputes to the High Court of Tanzania (Commercial Division) in Dar-es-Salaam.

¹¹⁸See, for instance, Taylor (n117). See also L Young 'Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts' (1997) 35 *Columbia Journal of Transnational Law* 663, R D Bishop & D B Lee 'Enforceability of Forum-Selection Clauses in International Commercial Contracts' (1995) 4 *Currents International Trade Law Journal* 20; R Oppong 'Choice Of Law And Forum Agreement Survives A Constitutional Challenge In The Kenya Court Of Appeal' available at http://eprints.lancs.ac.uk/30789/1/R-F-OPPONG-KENYA_COMMENT-CLB.pdf (as accessed on 30/1/2011).

¹¹⁹See Bishop & Lee (n118) 20.

¹²⁰*Ibid.*

¹²¹See P J Borchers 'The Internationalisation of Contract Choice of Law' (1995) 28 *Vanderbilt Journal of Transnational Law* 421, 422.

¹²²See Bishop & Lee (n118) 20. See also L Luttermann 'Jurisdiction clauses in trust instruments—creating certainty or muddying the waters?' (2011) 17 *Trusts & Trustees* 293.

¹²³See Taylor (n117) 785.

¹²⁴See Tang (n31) 135.

¹²⁵ *Ibid.*, stating that there are at least four other laws to which reference may be made: (i) the *lex fori* of the seized forum, (ii) the putative proper law that governs the contract in which the clause belongs, (iii) the default law applicable in absence of choice and, (iv) the law of the designated forum. See also Cheshire & North (n109) 231.

solution is necessary because, once the forum is decided it might just as well apply its own law to determine the validity of such choice of forum or law clauses.¹²⁶

Under the common law, a choice of forum is considered valid if consented to unless there are strong reasons to the contrary.¹²⁷ Establishing consent in e-contracts, however, depends on the mode of acceptance, and, as argued in Chapter two, in some web-based contracts, such as the so-called browse-wrap agreements, consent has been problematic. Such contracts are drawn up by e-companies, and their terms are designed to put the consumer in a take-it-or-leave-it position.¹²⁸

In conventional practice, consumers are used to signing contracts as evidence of their consent. Although this may seem to be a common practice, not all consumers are aware of different legal methods of signifying the signature. When it comes to e-contracts, for instance, a simple clicking or a mere browsing or even the act of downloading may be a sufficient indication of consent. To an ordinary consumer, however, given the lengthy nature of terms and conditions in most web-based contracts, clicking a button or downloading software may mean no more than an ordinary online process.¹²⁹ Nevertheless, these acts have far reaching legal implications because the consumer may find that he has already subjected himself to a jurisdictional clause.¹³⁰

Equally, e-contracting relies on the proper functioning of the technology used by the parties.¹³¹ That being the case, failure or a mistake occasioned by the system during transmission, or a virus in the computer programme can potentially affect the authenticity of the consent, and hence render a jurisdictional clause useless.¹³² The inability to localise or identify the nature of e-commerce transactions is also an issue that may affect a consumer's consent. A jurisdictional clause in an e-contract, for instance, may generally subject a dispute 'to the court of the place of business [or] the place where the contract was made' without

¹²⁶See Tang (n31) 135. See U Drobnig 'Substantive Validity' (1992) 40 *American Journal of Comparative Law* 635.

¹²⁷See *Aratra Potato Co Ltd v Egyptian Navigation Co ('The El Amria')* [1981] Lloyd's Rep 119, CA. See also Bishop & Lee (n118) 20. See also a recent Kenyan case of *Raython Aircraft Credit Corporation vs Air Al-Faraj Ltd* [2005] 2 KLR 47. In this case the Kenya Court of Appeal held that the courts will not disregard private international law on the status of law and exclusive jurisdiction clauses in international commercial agreements. See also T M Yeo 'The Effective Reach of Choice of Law Agreements' (2008) 20 *Singapore Academy of Law Journal* 723, 724.

¹²⁸See Tang (n31) 121.

¹²⁹See Tang (n31) 136.

¹³⁰*Ibid.*

¹³¹See Tang (n31) 137.

¹³²*Ibid.* See also *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] 2 SLR 594.

exactly specifying the locality of that place of business or the conclusion of the contract.¹³³ In the e-commerce scenario, these locations are not easy to establish, not only by an ordinary consumer but by even the courts themselves.¹³⁴ Consequently, in the absence of clarification, a consumer may argue that he did not properly consent to the choice of jurisdiction clause.

(c) Discretion to Service outside England and Presence of the Foreign Defendant

Service out of the jurisdiction is discretionary, and it is governed by the Civil Procedure Rules.¹³⁵ According to Part 6 of the United Kingdom's Civil Procedure Rules (CPR), Practice Direction 6B, an application to the court to sanction service to a defendant outside the jurisdiction of the court, with regard to claims based on contracts, must satisfy, *inter alia*¹³⁶ the following conditions:

(i) the claim is made in respect of a contract where the contract – (a) was made within the jurisdiction; (b) was made by or through an agent trading or residing within the jurisdiction; (c) is governed by English law;¹³⁷ or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.¹³⁸

(ii) A claim is made in respect of a breach of contract committed within the jurisdiction.¹³⁹

(iii) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).¹⁴⁰

It would seem therefore that, provided the applicant has shown an arguable case, the courts will exercise their discretion.¹⁴¹

¹³³See Tang (n31) 137.

¹³⁴Ibid.

¹³⁵ See Rule 6.20 of the Civil Procedure rules, previously Order 11, rule 1(1) of the Rules of Supreme Court.

¹³⁶Other grounds generally include showing that each pleaded claim falls within the letter and spirit of one or more paragraphs of rule 6.20 (see *Mercedes-Benz AG v Leiduck* [1996] 1 A C 284, 286 (PC); England being the proper place (see the CPR, rule 6.21 (2A), and there being reasonable prospects of success on merits (CPR, rule 6.21 (1)(b). All these need to be distinctly established.

¹³⁷See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] A C 50; *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Report 87; *Chevron International Oil Co v A/S Sea Team (The TS Havprins)* [1983] 2 Lloyd's Rep 356.

¹³⁸See Rule 6B para 3.1 (6) of the Civil Procedure Practice Direction 6B (England), available at http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part06b.htm#IDACDF1B (as accessed 20/7/2010).

¹³⁹See Rule 6 B para 3.1 (7).

¹⁴⁰See Rule 6 B para 3.1(8).

B2 The Appropriate Forum Tests

(a) Forum Conveniens and E-contracting

Notwithstanding this discretionary power, English courts will not in principle permit service outside unless convinced that England is the *forum conveniens*.¹⁴² Similarly, where the matter involves foreign immovable property, taxation, rights or liabilities arising under a foreign penal law or where the same case is pending in a foreign court (*lis alibi pendens*),¹⁴³ the court will refuse to serve summons outside its jurisdiction.¹⁴⁴

Lord Goff, in *Spiliada Maritime Co v Cansulex Ltd*,¹⁴⁵ summarised the factors to be observed when a court wants to ascertain whether it is an appropriate forum. These include convenience or expense (such as availability of witnesses), but also factors such as the governing law relevant to transactions and the places where the parties reside or carry out business.¹⁴⁶ Four issues need to be considered under the appropriate forum test: (i) the personal connections of the parties (for instance their habitual residence or domicile), (ii) the factual connections (as between the event and the particular court), (iii) the applicable law, and (iv) the choice of forum agreement (if any).¹⁴⁷

In practice, the appropriate forum test, viewed in the light of e-contracting between an ordinary consumer and an e-company, seems to favour e-companies rather than e-consumers,¹⁴⁸ because e-companies have the potential to ‘control the location of some factors.’¹⁴⁹ For instance, an e-company may selectively locate its website or its e-agents or servers in a location that is favourable to its interests.¹⁵⁰ It may also choose how the contract is

¹⁴¹See *E F Hutton & Co v Moffarij* [1989] 1 WLR 488. See also *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 WLR 1147; J G Collier ‘Service out of the Jurisdiction: What Is an Arguable Case?’ (1990) 49 *Cambridge Law Journal* 39.

¹⁴²See *Briggs* (n67) 99, 106. See CPR rule 6.20 (UK). See also *Tang* (n31) 77; *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* (n137); *Seaconsfar Far East Ltd v Bank Markhazi Jomhuri Islami Iran* [1994] 1 A C 438, 452.

¹⁴³See *The Abidin Daver* [1984] 1 WLR 196. See also J Fawcett ‘Lis Alibi Pendens and the Discretion to Stay’ (1984) 47 *The Modern Law Review* 481. However, unlike in England where the court may decline to hear a suit if the same is pending in a foreign court (*lis alibi pendens*) in Tanzania section 8 of the Civil Procedure Act, Cap 33 (Explanation) provides that a suit in a foreign court does not preclude the court ... from trying [it even if] founded on the same cause of action.

¹⁴⁴See *Cheshire & North* (n109) 477.

¹⁴⁵[1987] AC 460.

¹⁴⁶See *Spiliada Maritime Co v Cansulex Ltd* (n145) 478.

¹⁴⁷See *Tang* (n31) 97. See also *Cheshire et al* (n13) 426.

¹⁴⁸See *Tang* (n31) 103.

¹⁴⁹*Ibid.*

¹⁵⁰*Ibid.*

concluded, the manner of performance, and, of course, it may unilaterally insert a jurisdiction clause into such a contract with little regard to the convenience of the consumers.¹⁵¹ The effect of all these possibilities is that the e-company will enjoy a better chance of bringing proceedings in the most convenient jurisdiction.¹⁵²

The difficulty in an e-commerce context, and for the purpose of service of a summons, comes where an e-company, for instance, a Japanese car exporting company, is registered in Japan or China or elsewhere, but its website is accessible in the jurisdiction of another country, let us say in England or in Tanzania. Equally, the e-company, though not registered, let us say, in England or Tanzania, may have its servers hosted there. Dicey and Morris argue that a foreign corporation carrying on business in England but without having complied with the registration requirements of a person authorised to accept service may be served at its place of business within the jurisdiction.¹⁵³ This was the position at common law, and in *South India Shipping Corp Ltd v Export-Import Bank of Korea*,¹⁵⁴ the foreign bank was held to be duly served even if it did not conclude any banking transaction in England but had only some facilitating external and preliminary undertakings with other banks.

None of the above addresses the jurisdictional problem that a purely e-company may experience. One interesting question, for instance, is whether a web server accessed in a particular jurisdiction should be regarded as constituting a 'place of business' in that jurisdiction. If the e-company is not registered in England, but has its servers located there, should these servers be regarded as its place of business or its agent? Although this issue is vital it remains unclear whether an e-agent or a server should be regarded as a place of business, a branch, or other establishment.¹⁵⁵

Earlier suggestions indicated that, in the case where a foreign company physically sets up a web server in a country and directs its activities to customers in that particular country, its servers might constitute a 'place of business'.¹⁵⁶ Indeed, it has been suggested that servers should be considered as ancillary branches of a registered e-company, although their degree of

¹⁵¹Ibid.

¹⁵²Ibid.

¹⁵³See Dicey & Morris (n49) 296-297; 490-492.

¹⁵⁴See (n114) above.

¹⁵⁵See Z S Tang 'Private International Law in Consumer Contracts: A European Perspective' (2010) 6 *Journal of Private International Law* 225, 229.

¹⁵⁶See Chissick & Kelman (n78) 110.

permanency may be lower and the degree of control by the principal¹⁵⁷ weaker.¹⁵⁸ This position finds support from Catchpole, who considers servers to be equipment with physical location.¹⁵⁹ He argues that, if one combines the server with other websites' software, which contributes to the operation of the particular e-business, in theory, that may constitute a 'place of business'.¹⁶⁰

Whereas a server may fall within the definition of what constitutes a company's branch or an agency (which definition even so befits the physical world),¹⁶¹ Catchpole contends that, viewed on the user's computer, e-commerce websites cannot sufficiently create a virtual branch.¹⁶² He submits that an 'e-commerce operator may have neither premises nor staff within the jurisdiction and the user's computer is only used temporarily.'¹⁶³ Arguably, however, the fear has been that the 'web server as place of business rule' will create 'inconsistencies and, in some cases, might undermine the ability of the courts to exercise jurisdiction over companies [with] web servers elsewhere.'¹⁶⁴

Chissick and Kelman argue that, because e-companies 'place their web-servers all over the world ... the physical location of the web-servers has nothing to do with, and is 'completely irrelevant to the contract being formed.'¹⁶⁵ Taking the cue from this view, a website operator who permits his website to be accessed in a particular jurisdiction would be deemed to submit to the jurisdiction of the courts wherever the website is accessed. This is an arguable issue, although the authors consider that it is impractical to regulate web transactions in this way, and 'a State [should] not regulate web transactions based solely on the local accessibility of the website.'¹⁶⁶

¹⁵⁷See this requirement in *Adams v Cape* (n54) 530.

¹⁵⁸See Tang (n31) 80.

¹⁵⁹See J Catchpole 'The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment' (2001) 9 *International Journal of Law and Information Technology* 1, 10.

¹⁶⁰*Ibid.*

¹⁶¹See *Adams v Cape* (n54) 530. In this case the court was of the view that these concepts of 'business branch, agency or establishment' suggest a certain degree of permanency, for instance, the extension of a parent body, or presence of a management team that is equipped to negotiate business with third parties.

¹⁶²See Catchpole (n159) 7.

¹⁶³*Ibid.*

¹⁶⁴See Chissick & Kelman (n78) 111.

¹⁶⁵*Ibid.* As noted earlier above regarding the *EU Directive on E-commerce*, (recital 19) and Art 2(c) of the Directive clearly stipulates that as a matter of principle, 'the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity.'

¹⁶⁶See H Kobayashi & L E Ribstein 'A Recipe for Cookies: State Regulation of Consumer Marketing Information' at 22 (available at <http://www.federalismproject.org/masterpages/ecommerce/cookies.pdf> (as accessed on 31/3/2008)). See also Lanza (n19) 127.

From the above analysis of the common law approach it is clear that establishing a place of business of an e-company or the status of its server are difficult issues. Reliance on some previous court decisions, such as *Adams v Cape Industries*,¹⁶⁷ which lay emphasis on degree of permanence, does not help much since these decisions conflict.¹⁶⁸ For instance, some hold that 'establishing a place of business' is different from 'carrying on business',¹⁶⁹ the former meaning that 'place of business should be a local habitation.'¹⁷⁰ It is acknowledged that, according to the existing common law authorities, although a summons may be served to a defendant's place of business, what constitutes 'place of business' being a question of fact, there have been wide and flexible interpretations.¹⁷¹

As stated earlier in this chapter, establishing sufficient connections is important if a court is to exercise jurisdiction over a foreign defendant. Thus, considering the extraterritorial nature of the Internet, it has been contended that courts have to determine what types of Internet activity create sufficient contacts within a forum to justify 'asserting jurisdiction over a defendant.'¹⁷² Some authors have argued that a server can be a place of business of an e-merchant's website 'if it is rented by the website owner or it is relocated in a country only for a couple of months.'¹⁷³ Furthermore, if the server is held to constitute a place of business in line with the English requirements, the courts will be able to exercise jurisdiction based on the 'presence' of the defendant.¹⁷⁴

¹⁶⁷*Adams v Cape Industries* (n54). This pointed out four criteria to be observed if a corporation uses an agent: (i) whether there agent operations are on a fixed place acquired for him by the corporation for its sole business purposes; (ii) whether he is reimbursed by the corporation-for accommodation costs at that fixed place of its operations or cost of his staff, (iii) whether he is remunerated (receives commissions); the degree of control by the corporation over the running of the business, (iv) use of its name by the agent, (v) conclusion of contracts on behalf of the corporation, and whether the agent needs specific authority before binding the corporation in contract.

¹⁶⁸See, for instance, *Dunlop Pneumatic Tyre v AG Gudell* [1902] 1KB 715.

¹⁶⁹See *Reuben v Time* [2003] EWHC 1430 (QB); *Harrods v Dow Jones* [2003] EWHC 1162 (QB); *Re Oriel Ltd* [1986] 1 WLR 180; *South India Shipping* (n114); *Lord Advocate v Huron & Erie Loan & Savings Co* [1911] SC 612. See also Tang who argues that a place of business signifies a local habitation. (See Tang (n31) 80.

¹⁷⁰See Tang (n31) 80. See *Rakusens Limited (A Company) v Baser Ambalaj Plastik Sanayi Ticaret AS* [2001] EWCA Civ 1820 [para 33-34] where it was noted that a place of business seems to imply 'some degree of continuity and recognisability in the establishment.'

¹⁷¹See, for instance, *Dunlop Pneumatic Tyre v AG Cudell* (n168) 715 (where a 9 days presence was held to be sufficient to establish a place of business). See also *Saab Saudi American Bank* (n72) 1868; *Cleveland Museum of Art v Capricorn International SA* [1990] 2 Lloyd's Rep.166, 172.

¹⁷²See C Schulze 'Electronic Commerce and Civil Jurisdiction, with Special Reference to Consumer Contracts' (2006) 18 *South African Mercantile Law Journal* 31.

¹⁷³See Tang (n31) 80. See also Catchpole (n159) 10.

¹⁷⁴See Tang (n31) 80.

The analysis in *Adams v Cape Industries*,¹⁷⁵ however, does not clearly establish a solution for what ‘presence’ should mean with regards to websites because the Internet knows no boundary and how its servers should be treated is unsettled. It is also important to note that in England service of summons outside the jurisdiction is conditional. In a contracting scenario, it will depend on whether: the contract was made in the forum or by agent trading or residing there; it is governed by English law, or has a choice of law or jurisdiction clause choosing England;¹⁷⁶ or the breach of contract took place in England.¹⁷⁷ These grounds constitute key connecting factors between the contract and the forum, although establishing some of them (for instance, the place where a contract was made) may be problematic in e-commerce.

(b) Forum (non) Conveniens and Forum Shopping

Even if a court has jurisdiction, it may refuse to exercise it, and stay the proceedings upon an application by the defendant proving that the forum is inappropriate.¹⁷⁸ This is the *forum (non) conveniens* rule.

Forum shopping and *forum (non) conveniens* are related notions in conflict of laws. The former has been defined as a ‘lawyer’s act of seeking the forum that is most beneficial to his client’s interest.’¹⁷⁹ The act of forum shopping, however, is a debatable evil, especially during an era when commerce occurs in a ‘global village’ and parties aspire to greater freedom.¹⁸⁰ Those who support it feel that it should be upheld, unless there are ‘egregious circumstances,’ as where a suit is filed in a remote forum that lacks ‘connection to the issues involved in the law suit.’¹⁸¹ Opponents of this view argue that it is unfair to the defendant, as it gives more benefits to the plaintiff and creates uncertainty and increases litigation costs.¹⁸²

¹⁷⁵See *Adam v Cape* (n54). The factors considered relevant to establish that service to an agent could be proper according to this case are pointed out under (n167) above.

¹⁷⁶See, for instance, *Donohue v Armco Inc* [2000] 1 All ER (Comm) 641. In this case the agreement between the parties had an exclusive jurisdictional clause choosing English law and England as the forum to litigate all disputes between parties.

¹⁷⁷All these factors are in accordance with the English Civil Practice Rules.

¹⁷⁸See Briggs (n67) 99. See also *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625; *Lakah Group & Anor v Al Jazeera Satellite Channel & Anor* [2004] B.C.C. 703 (at para 21) stating that clear evidence is required if foreigners are to be held to be amenable to the jurisdiction of [the English] courts.’

¹⁷⁹See F Ferrari ‘Forum Shopping Despite International Uniform Contract Law Conventions’ (2002) 51 *International & Comparative Law Quarterly* 689.

¹⁸⁰See M Zhang ‘Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law’ (2006) 20 *Emory International Law Review* 511, 515.

¹⁸¹See M Algero ‘In Defense of Forum Shopping: A Realist Look’ (1999) 78 *Nebraska Law Review* 79, 81- 82. See also J Fawcett ‘Forum Shopping-Some Questions Answered’ (1984) 35 *Northern Ireland Legal Quarterly* 141,

While one may question the wisdom of allowing the plaintiff to enjoy the freedom to ‘shop for’ the best remedy,¹⁸³ the *forum (non) conveniens* doctrine acts as a shield in favour of the defendant. This doctrine is considered a defence against a forum that is available to the claimant, but which, in the specific circumstances of the case, is not appropriate.¹⁸⁴ It entitles a defendant to request the forum to refrain from hearing a matter because a distinctly more appropriate forum exists elsewhere.¹⁸⁵ Whether the forum will grant a stay of the proceedings or not depends on exercise of its own discretion.¹⁸⁶

Earlier, according to *St Pierre v South American Stores (Gath & Chaves) Ltd*,¹⁸⁷ the defendant had to prove that ‘continuance of the action would work an injustice because it would be oppressive or vexatious or would be an abuse of the process of the court in some other way.’¹⁸⁸ In addition, he was required to prove that a stay would not cause an injustice to the plaintiff.¹⁸⁹ These conditions were later modified in *The Atlantic Star v Bona Spes*,¹⁹⁰ where it was held that a stay would be granted if continuance of the proceedings would, ‘in a reasonable sense, be oppressive looking to all circumstances including the personal position of the defendant.’¹⁹¹

Application of *forum (non) conveniens* was well settled in Scottish law and in the US Courts before being accepted in the English law.¹⁹² Under the English law, although *The Atlantic Star v Bona Spes*¹⁹³ was the first case to consider the doctrine, it was given a firm and unequivocal acceptance in *Spiliada Maritime Corp v Canusulex Ltd*.¹⁹⁴ In this case, which

144, 152. In *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382, 398, Scott LJ stated that ‘the right of access to the King’s Court must not lightly be refused.’

¹⁸²See R Hayward *Conflict of Laws* 4ed (2006) 21. See also S E Cox ‘Interested Forum’ (1997) 48 *Mercer Law Review* 727, 742; G Rennet ‘Is Elimination of Forum Shopping by Means of International Uniform Law an ‘Impossible Mission?’ (2005) 2 *Macquarie Journal of Business Law* 119, 120; K A Moore & F Parisi ‘Rethinking Forum Shopping in Cyberspace’ (2001-2002) 77 *Chicago-Kent Law Review* 1325, 1330-1334.

¹⁸³See Zhang (n180) 515.

¹⁸⁴See Briggs (n67) 99. See also J P Verheul ‘The Forum (Non) Conveniens in English and Dutch Law and under Some International Conventions’ (1986) 35 *International and Comparative Law Quarterly* 413.

¹⁸⁵See Briggs (n67) 99.

¹⁸⁶See J H Weiler ‘Forum Non Conveniens: An English Doctrine?’ (1978) 41 *Modern Law Review* 739, 740.

¹⁸⁷See *St Pierre v South American Stores (Gath & Chaves) Ltd* (n181) 398.

¹⁸⁸*Ibid.*

¹⁸⁹*Ibid.*

¹⁹⁰[1974] 2 All ER 175.

¹⁹¹See *The Atlantic Star v Bona Spes* (n190) 181, *per* Lord Reid.

¹⁹²See Dicey & Morris (n49) 390-391, Briggs (n67) 99; Weiler (n186). In the US, for instance, *forum non conveniens* crystallised itself as a principle of law in *Gulf Oil Corp v Gilbert* 330 US at 501; *Koster v Lumbermen’s Mutual Casualty Co* 330 US 518. It was further refined and applied in an international context in *Piper Aircraft Co v Reyno* 454 US 235.

¹⁹³See *The Atlantic Star v Bona Spes* (n190).

¹⁹⁴See *Spiliada Maritime Corp v Canusulex Ltd* (n145). See also *The Abidin Daver* (n143).

stands as a leading authority,¹⁹⁵ Lord Goff held that, the defendant may apply to the court for a stay of the proceedings, and the court, on the basis of the doctrine of *forum non conveniens*, may exercise its discretion to stay such proceedings.¹⁹⁶ The court stated, however, that there must be ‘some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.’¹⁹⁷ The acceptance of this doctrine in England also opened doors for its application in other countries, which in one way or another follow the common law tradition.¹⁹⁸

In East Africa, for instance, its application can be observed in *American Express International Banking Corporation v Atul*.¹⁹⁹ This case involved a foreign company with most of its operations in Singapore. The respondent, a resident in Singapore, had guaranteed repayment of a loan advanced to a company. At the time of the suit, however, he was residing in Uganda. Due to a default in repayment of the loan, a suit was filed in Uganda against the respondent. The respondent challenged the action on the ground that the proper forum was not Uganda but Singapore. On appeal by the appellant, the court held, *inter alia*, that, for a defendant to succeed, he must satisfy the Court that there was another forum to whose jurisdiction he was amenable, and in which justice could be done between the parties at substantially less convenience or expense. Moreover, he had to show that the stay did not deprive the plaintiff of a legitimate, personal or jurisdictional advantage, which would be available to him if he invoked the jurisdiction of the Court in Uganda.

(c) The Ends of Justice Test

The appropriate forum test, however, is not the only one which a court can rely upon in finding whether a jurisdiction is the *forum conveniens*. Courts in England also consider the ends of justice, an approach which seems to be basically a test of public policy.²⁰⁰ Thus, in case of

¹⁹⁵See Briggs (n67) 99 citing *Connely v RTZ Corp plc* [1998] AC 854; *Lubbe v Cape plc* [2000] 1WLR 1545 (HL).

¹⁹⁶See *Spiliada Maritime Corp v Canusulex Ltd* (n145) 474.

¹⁹⁷*Ibid*, citing the Lord Kinneir in *Sim v Robinow* (1892) 19 R 665 at 668. The Court, in the *Gilbert case* (n192) listed several factors which may be regarded as grounds upon which to grant such a plea. These include matters of fairness or relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, problems of conflict of law and of applying a foreign law and the need to ensure that localised disputes are determined within the jurisdiction of a local court. For more discussion concerning *forum (non) conveniens* see Cheshire et al (n13) 428-442.

¹⁹⁸See (generally) C R Reetz & P J Martinez-Fraga ‘Forum Non conveniens and the Foreign Forum: A Defense Perspective’ (2003-2004) 35 *University of Miami Inter-American Law Review* 1.

¹⁹⁹[1990-1994] EA 10. See also *Valentine Investment Company Ltd v Federal Republic of Germany* [2006] eKLR.

²⁰⁰See A J E Jaffey ‘The Foundations of Choice of Law’ (1982) 2 *Oxford Journal of Legal Studies* 368, 377. See also Dicey & Morris (n49) 385, 386 stating that English courts have discretion to refuse to entertain an action if to

service outside the jurisdiction, the court may be persuaded to grant an order to serve the defendant if the judicial path of a foreign forum (which may be the appropriate forum) is not free from external interference or where the forum lacks competence to handle the dispute.²⁰¹

Similarly, where a plaintiff is likely to suffer prejudice due to lack of security²⁰² or discrimination, which will deny him a fair trial, the court may, on the basis of the justice test, decide to issue service of a writ outside, even if it is not itself an appropriate forum.²⁰³ It is however argued that this kind of approach may not fully guarantee the necessary protection to e-consumers, since what they ‘worry about is the possibility of access to justice, which would be hampered by their weaker financial power.’²⁰⁴

B3 Concluding Assessment of the English Law of Jurisdiction and Cross-border E-contracts

In conclusion, as regards jurisdiction under English law, one may state that certain rules forming the basis of the courts’ competence, such as the principle of presence, do not measure up to the current developments because they are territorial in conception. In *Carrick v Hancock*,²⁰⁵ it was stated that:

‘the jurisdiction of a court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts.’²⁰⁶

Be that as it may, as indicated earlier in this chapter, establishing the ‘presence’ of a web merchant is a difficult issue since websites are accessible in all jurisdictions at a time. In essence, the Internet defies jurisdictional or political boundaries, and hence it is difficult for states, for instance, to assert jurisdiction over a purely e-based company, merely because its website is accessible in their jurisdiction.

do so might work injustice. See also Tang (n31) 103; R Oppong ‘The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation’ (2006) 8 *Yearbook of Private International Law* 198, 199.

²⁰¹ See *Islamic Arab Insurance Co v Saudi Egyptian American Reinsurance Co* [1987] 1 Lloyd’s Rep 315, 319.

²⁰² See *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23, *Aaronson Brothers Ltd v Maderera del Tropicco/SA* [1957] 2 Lloyd’s Rep. 159.

²⁰³ See *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280.

²⁰⁴ See Tang (n31) 100.

²⁰⁵ (1895) 12 TLR 59.

²⁰⁶ Schmitthoff notes, however, that ‘the principle of presence is not based on allegiance as such but on allegiance asserted within the limits of territorial jurisdiction.’ See Schmitthoff (n96) 122.

Because of the nature of e-commerce and the difficulties it poses when locating the proper jurisdiction for a particular transaction, the common law approach (which includes the traditional appropriate forum test and the non-biased justice test) 'is insufficient to provide certainty and fairness to e-consumer contracts.'²⁰⁷ Similarly, the traditional close and substantial connection analysis is no longer effective.²⁰⁸ These approaches need to be updated by taking into account 'only factors that affect the substantial interests of the parties as well as the material efficiency of the proceedings.'²⁰⁹

It may also be argued that the appropriate forum test is inappropriate for e-commerce because e-commerce involves different and new techniques of transacting business.²¹⁰ Even if one should rely on the traditional rules, such as the postal rule, to determine grounds that will entitle a court to assert jurisdiction, in the e-commerce scenario, the exercise may be complicated, and separation between the postal rule and information rule leads to inconsistent and sometimes unpredictable results.²¹¹ This difficulty largely rests on the means of communication used by the parties.²¹²

It is also obvious that, since most e-commerce contracts are unilaterally drawn up, businesses have the opportunity to insert terms or conditions most favourable to their interests,²¹³ including a choice of the most favourable forum and its applicable law. The burden is then on the other party, the consumer, to prove that he did not consent to the choices.²¹⁴ Furthermore, regarding the validity of choice of forum clauses, the common law approach, which rests on consent of the parties in order to hold a choice of forum clause valid, is subject to criticism for being unrealistic in an e-commerce scenario. Given the lengthy nature of the terms and conditions in most e-contracts, it is common practice that consumers do not read everything before indicating acceptance.²¹⁵

The common law approach is also considered uncertain as it contains different methods to decide the enforceability of such clauses.²¹⁶ Consumers who participate in e-

²⁰⁷See Tang (n31) 106.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹See Tang (n31) 105.

²¹² Ibid.

²¹³ See E Peel *Treitel: The Law of Contract* 12ed (2009) 239.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶See Tang (n31) 147.

commerce need protection not only as weaker parties but also the assurance that they will not have to bear the financial burden of litigating in a foreign country.²¹⁷ Such assurance, however, is not clear with the common law approach.²¹⁸ It neither provides for 'specific concerns for consumer protection'²¹⁹ nor is it sufficient to ensure certainty and fairness to their e-contracts.²²⁰

C1 The US Approach to Jurisdiction *in Personam* and its Bases

The existence of many companies in the USA that rely on the Internet technology has perhaps made litigation involving the Internet more prevalent.²²¹ And, many US businesses have continued to widen their online presence worldwide, thus making them accessible anywhere around the globe. Whether or not such e-companies should be subjected to the jurisdiction of foreign courts, where their websites are accessed, has been a debatable issue in the US courts.

Since the early 1990s, American courts have been called upon to decide issues regarding the Internet and personal jurisdiction over foreign defendants.²²² A clear policy was not developed, although some of the judges who presided over Internet cases held that subjecting a foreign defendant to the jurisdiction of the court, because its website was accessed in the forum, was undesirable.²²³

As in many other countries, jurisdiction *in personam* in the USA 'rests on the doctrine of *actor sequitur forum rei*.'²²⁴ Several classical bases for *in personam* jurisdiction (recognised also by the common law) exist and continue in effect today.²²⁵ These include 'in-state service of individual defendant, voluntary appearance, and consent – as well as those based upon the

²¹⁷See Keller (n10) 2. See also J K Winn & B Wright *The Law of Electronic Commerce* 4ed (2008) 3.38-39.

²¹⁸See Tang (n31) 147.

²¹⁹*Ibid.*

²²⁰See Tang (n31) 106.

²²¹See F Wang 'Obstacles and Solutions to Internet Jurisdiction: A Comparative Analysis of the EU and US laws' (2008) 3 *Journal of International Commercial Law and Technology* 233, 238.

²²²See, for instance, *CompuServe Inc v Patterson* 89 F 3d 1267 (6th Cir 1996), *Inset Systems v Instruction Set*, 937 F Supp 161 (D Conn 1996); *State by Humphrey v Granite Gate Resorts* 1996 WL 767431 (Minn Dist Ct 1996); *Bunn-O-Matic v Bunn Coffee Service* 1998 US Dist Lexis 7819 (CD Ill 1998).

²²³See *IDS Life Ins Co v SunAmerica Inc* 958 F Supp 1258, 1268 (ND Ill 1997).

²²⁴See Tang (n31) 107. This means the plaintiff must sue in the court to which the defendant resides. See also Scoles et al (n31) 281, 296 (discussing the traditional categories which form the basis of jurisdiction). These include in-state service of defendant, voluntary appearance, consent and those based upon allegiance of the defendant, such as nationality, domicile and residence. All these still apply to date.

²²⁵See Scoles et al (n31) 296-297.

“allegiance” of the defendant to the forum state— such as nationality, domicile and residence.²²⁶

The contemporary law in the USA regarding the exercise of *in personam* jurisdiction over a foreign defendant, however, has its roots in *International Shoe Co v Washington*,²²⁷ which revised an earlier case of *Pennoyer v Neff*.²²⁸ The latter case held that ‘in-state service was a fundamental prerequisite to a state court’s jurisdiction over a non-resident defendant.’²²⁹ It was further suggested that ‘such was not only the product of the international public law limitations on state sovereignty but also a requirement of the Due Process Clause of the Fourteenth Amendment.’²³⁰ The Supreme Court in the former case, however, set ‘aside the “presence” test as a meaningful determinant of corporate jurisdiction’²³¹ in favour of an assessment ‘whether the exercise of jurisdiction was fair, given the nature and quality of the defendant's forum activities and their relationship to the dispute.’²³²

In view of the above developments in *International Shoe Co v Washington*,²³³ exercise of *in personam* jurisdiction over non-resident defendants is currently possible if two requirements are fulfilled: first, statutory satisfaction, notably, a long-arm statute, which refers to a law that allows a state to exercise jurisdiction over an out-of-state defendant, provided that the latter has sufficient ‘minimum contacts’ with the forum; and second, ensuring that the statutory assertion of jurisdiction accords with the constitutional due process requirement.²³⁴

While courts have continued to regard the due process clause as core to the exercise of *in personam* jurisdiction,²³⁵ clause requirements have been refined. Currently, the due process requirement is based on ‘purposive availment’ of the defendant, ie, the defendant has

²²⁶ See Scoles et al (n31) 297.

²²⁷ 326 US 310, 318 (1945).

²²⁸ 95 US 714 (1877).

²²⁹ See A B Spencer ‘Jurisdiction to Adjudicate: A Revised Analysis’ (2006)73 *The University of Chicago Law Review* 617, 620. See also Scoles et al (n31) 288.

²³⁰ See Spencer (n229) 620.

²³¹ See M Twitchell ‘The Myth of General Jurisdiction’ (1988) 101 *Harvard Law Review* 610, 623-624.

²³² *Ibid*, at 624.

²³³ (n227).

²³⁴ See H B Stravitz ‘Personal Jurisdiction in the Cyberspace: Something More is Required on the Electronic Stream of Commerce’ (1998) 49 *South Carolina Law Review* 925, 928. See *Bank Brussels Lambert v Fiddler Gonzales & Rodriguez* 171 F3d 779 (2Cir 1999). See also *International Shoe Co v Washington* (n227). For more about the Due Process and how it was linked to jurisdictional law see Scoles et al (n31) 285. Due process demands that, whenever a person’s life, liberty or property is to be taken, the state must act in fairness, meaning that the defendant must be able to defend his case. The US Constitutional Amendment XIV § 1 (the Fourteenth Amendment) prohibits states from ‘depriv[ing] any person of life, liberty or property without due process of law.’ See *Pennoyer v Neff* 95 US 714 (1877).

²³⁵ See Spencer (n229) 622.

deliberately established minimum contacts with the forum.²³⁶ In addition, exercise of *in personam* jurisdiction is required to be reasonable, meaning that it must not violate the ‘traditional notions of fair play and substantial justice.’²³⁷

Overall, exercise of *in personam* jurisdiction over a foreign defendant in the USA can be discussed as either ‘general’ or ‘specific’.

(a) General Jurisdiction

The concept of general jurisdiction refers to ‘assertions of territorial jurisdiction that do not depend upon the character of the dispute between the parties.’²³⁸ Like the ‘predominantly general’ common law bases of jurisdiction, this type of jurisdiction is also general ‘in the sense that it applies generally [and] independent of the nature of the dispute between the parties.’²³⁹ In other words, it permits the exercise of the court’s powers over a foreign defendant even if the cause of action has no connection to the forum.²⁴⁰ The only important thing is that the foreign defendant’s contacts with the forum are of such a pervasive and extensive nature that these contacts must have made him expect to be subject to suit in the forum, and without, however, causing him to suffer any inconvenience from defending the suit there.²⁴¹

To be able to establish the amount of the defendant’s activities needed to satisfy the substantial, systemic and continuous test in e-contracts, however, may be a too rigorous demand.²⁴² Indeed, Scoles et al consider the ‘continuous and systematic contacts’ test to be ‘[t]he most analytically difficult issue.’²⁴³ If analysed in terms of contact between an e-company and the state, contacts could be established either ‘through the servers or through

²³⁶ See *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 702–703 (1982) where it was stated that ‘[the Due Process] Clause is the only source of the personal jurisdiction requirement.’ See also Spencer (n229) 622.

²³⁷ See Spencer (n229) 622.

²³⁸ See Scoles et al (n31) 329. Since general jurisdiction overlooks the nature of the parties’ dispute, it has been considered to be ‘dispute blind’. See Twitchell (n231) 612. The genesis of the term ‘general jurisdiction’ is a law review article by A von Mehren & D Trautman ‘Jurisdiction to Adjudicate: A suggested Analysis’ (1966) *Harvard Law Review* 1121, 1135-1145.

²³⁹ See Scoles et al (n31) 300.

²⁴⁰ See *International Shoe Co v Washington* (n227) 318. See Twitchell (n231) 628. Tang (n31) 108. See also W Heiser ‘Towards Reasonable Limitations on the Exercise of General Jurisdiction’ (2004) 41 *San Diego Law Review* 1035, 1036; *Helicopteros Nacionales de Colombia SA v Hall* 466 US 408, 414 (1984).

²⁴¹ See Raut (n33) 38. See also Tang (n31) 108; *Naxos Resources Ltd v Southam Inc* No. CV96-2314 WJR, 1996 WL 662451 (SD Cal 1996). According to *International Shoe Co v Washington* (n227) 318-319, casual presence of a corporate agent or even his conduct of single or isolated activity in a state are insufficient to subject him to suit on causes of action unconnected with the activities there.

²⁴² See Tang (n31) 108.

²⁴³ See Scoles et al (n31) 348.

transactions.²⁴⁴ As discussed earlier in this chapter, however, e-companies pose a jurisdictional problem because they have no 'place of business' in the real sense, and rely on the Internet servers hosted in different countries. If an e-company simply chose to locate its website in a particular state, such act alone may not satisfy the substantial, systemic and continuous requirements of general jurisdiction.²⁴⁵ As such, 'a State [should] not regulate web transactions based solely on the local accessibility of the website.'²⁴⁶

Indeed, courts in the USA have held that mere access alone may not be a solid ground upon which to found general jurisdiction. In *Millennium Enterprises v Millennium Music*,²⁴⁷ the court refused to exercise general jurisdiction based on the mere access of an Internet website in the forum, holding that it was unaware of a case in which a courts ever did so. A similar approach was taken in *ESAB Group Inc v Centricut LLC*,²⁴⁸ where the court, in South Carolina, declined to exercise jurisdiction over a non-resident corporation merely because it had been maintaining a web page and sold products that infringed the plaintiff's patent. Even so, as it will be seen later, not all courts have taken such an approach and some have developed new tests.

In view of the above discussion, whether the 'systemic and continuous contact' requirements under general jurisdiction are to be satisfied or measured by a significant period of time through which a website is accessible in a forum, or through the number of people who access it, or whether the number of contracts concluded should be taken into account, are issues that may be difficult to answer.²⁴⁹ Overall, it is difficult to establish general jurisdiction over internet connections. For that reason, it has been argued that 'general jurisdiction cannot play an important role in e-commerce.'²⁵⁰

²⁴⁴ See Tang (n31) 108.

²⁴⁵ See Tang (n31) 108.

²⁴⁶ See Kobayashi & Ribstein (n166). See also Lanza (n19) 127.

²⁴⁷ See 33 F Supp 782 2d 907 (D Or 1999). See also *McDonough v Fallon McElligott Inc* 40 US PQ 2d 1826, 1828-29 (SD Cal 1996).

²⁴⁸ See 34F Supp 2d 323 (DSC 1999). See also F C Pelzer 'Annual Survey of South Carolina Law: Civil Procedure Unchartered Territory: Personal Jurisdiction in the Internet Age' (2000) 51 *South Carolina Law Review* 745.

²⁴⁹ See Tang (n31) 109.

²⁵⁰ See Tang (n31) 109.

(b) Specific Jurisdiction

Specific jurisdiction on the other hand, refers to the exercise of jurisdiction over a defendant's obligations arising 'out of or related to the defendant's contracts with the forum.'²⁵¹ This type of jurisdiction can be invoked when the foreign defendant's contacts within the forum state are the source of the dispute at hand. Such a source, for instance, may be a breach of contract or other 'single act, such as a tortious act committed by a foreign defendant in the forum state.'²⁵² In view of this, exercise of specific jurisdiction is dispute-specific because it is limited to the cause of action resulting from the defendant's contacts with the forum.²⁵³

Two factors determine whether specific jurisdiction exists or not, namely, 'whether the contacts are "related" to the dispute' and, if so, 'whether the contacts are "constitutionally sufficient".'²⁵⁴ What constitutes 'related' contacts, however, is a question that courts have never addressed.²⁵⁵

As regards whether the contacts are 'constitutionally sufficient', the matter turns on the understanding of the minimum contacts test, as demanded by *International Shoe v Washington* (discussed above). Courts in the US have consistently held that 'the *sine qua non* of specific jurisdiction is the defendant's "purposive availment" of the benefits and the protections of the forum.'²⁵⁶ In *World-wide Volkswagen Corp v Woodson*,²⁵⁷ for instance, it was stated that, where the claim in question arose from the defendant's contacts with the forum state, the court still has to evaluate the constitutionality of specific jurisdiction in two steps: (i) whether the foreign defendant acted in such a way that he purposefully availed himself of the privileges of conducting activities within the forum state,²⁵⁸ and (ii) whether jurisdiction over the defendant would be reasonable.²⁵⁹

²⁵¹ See *International Shoe Co v Washington* (n227) 319. See also Heiser (n240) 1036; Tang (46) 109.

²⁵² See Heiser (n240) 1036.

²⁵³ See Wang (n221) 238. See also Scoles et al (n31) 299, 329.

²⁵⁴ See Scoles et al (n31) 300-301.

²⁵⁵ See Scoles et al (n31) 301. Two tests have been developed, the 'but for' and 'proximate cause', but all these were discussed in relation tortious actions hence not necessary to delve on them in this discussion.

²⁵⁶ See Scoles et al (n31) 303; Tang (n31) 109 See also *Hanson v Denckla* 357 US 235(1958); *Asahi Metal Industries Co v Superior Court* 480 US 102 (1987).

²⁵⁷ 444 US 286,297, 100 S Ct 559, 62 LEd2d 490 (1980).

²⁵⁸ See C E Mayewski 'The Presence of a Web Site as a Constitutionally Permissible Basis for Jurisdiction' (1997) 73 *Indiana Law Journal* 297. See also Scoles et al (n31) 305-307.

²⁵⁹ *Ibid*, citing *Asahi Metal Industries Co v Superior Court* (n256); *Burger King Corp v Rudzewicz* 471 US 462 (1985) and *World-wide Volkswagen Corp v Woodson* (n257). See also Scoles et al (n31) 307-308.

In exercising specific jurisdiction over a foreign defendant, such defendant must, through his conduct with respect to the forum, anticipate the possibility of being sued in that forum. In other words, 'th[e] 'purposive availment' requires that the defendant has not only activities which target the forum, but also the intention or anticipation of targeting the forum.'²⁶⁰

When considered in light of the Internet development, it is clear that the US courts have not been in full agreement about specific *in personam* jurisdiction. Some have been unwilling to accept the mere accessibility of a website as a 'minimum contact' sufficient to establish specific *in personam* jurisdiction over a foreign defendant.²⁶¹ This approach is supported by authors who argue that 'it is unlikely that the existence of a defendant's website, alone, would be sufficient to establish personal jurisdiction for claims unrelated to the Web site.'²⁶²

Nevertheless, several cases have emerged, involving various claims ranging from torts and breach of contracts²⁶³ to intellectual property infringements,²⁶⁴ and, where they involve websites accessed in a forum state, specific *in personam* jurisdiction has been an intricate issue.²⁶⁵ Consequently, in contract cases, to be able to subject a defendant to the specific jurisdiction of the court, the entire course of the dealing, including 'prior negotiation and contemplated future consequences' which establish that the defendant had 'purposefully established minimum contacts with the forum', will need to be examined.²⁶⁶

²⁶⁰ See Tang (n31) 110.

²⁶¹ See Wang (n221) 238. But see, for instance, *Hasbro Inc v Clue Computing Inc* 994 F Supp 34 (D Mass 1997) (finding jurisdiction because the defendant availed itself of benefits in the forum state through purposefully directing its advertising at all states and did not avoid advertising in the forum state); *Maritz Inc v Cybergold Inc* 947 F Supp 1328 (ED Mo 1996) (finding jurisdiction because defendant transmitted advertising information to all Internet users, knowing the information would be distributed globally and because forum residents had accessed the Web site over 100 times); *Panavision Int'l v Toeppen* 938 F Supp 616 (CD Cal 1996) (finding jurisdiction because of the establishment of a Web site intended to interfere with plaintiff's business by an unauthorized use of plaintiff's trademark), affirmed, 141 F3d 1316 (9th Cir. 1998).'

²⁶² See Mayewski (n258) 301. See, also Stravitz (n234); *Compuserve Inc v Patterson* (n222).

²⁶³ See *The Ticketmaster Corp v Ticket.com Inc* 54USPQ2d (2000) USDist LEXIS 4553 (CD Cal March 27, 2000). See T Zynda 'Ticketmaster Corp v Tickets. Com Inc - Preserving Minimum Requirements of Contract on the Internet' (2004) 19 *Berkeley Technology Law Journal* 495.

²⁶⁴ See, for instance, *Beverly Hills Fan Co v Royal Sovereign Corp* 21 F3d 1558, 1569 (Fed Cir), cert. dismissed, 512 US 1273 (1994) (patents); *Keds Corp v Renee Int'l Trading Corp* 888 F2d 215, 218 (1st Cir 1989) (trademarks); *Arbitron Co v EW Scripps Inc* 559 F Supp 400, 404 (SDNY 1983) (copyrights).

²⁶⁵ See Mayewski (n258) 301.

²⁶⁶ See Wang (n221) 238. See also Scoles et al (n31) 303.

C2 Innovative Approaches to Establish 'Purposive Availment' in Specific *in Personam* Jurisdiction

Building on the existing principles and tests, courts in the USA have developed different approaches to wrestle with the problem of establishing specific *in personam* jurisdiction regarding online activities.²⁶⁷ Such innovative approaches represent not only the attempts to address the dilemma concerning 'what constitutes the 'purposive availment' of business through establishing a website' but also the efforts of courts to exercise discretion in order to bolster confidence in e-commerce.²⁶⁸ They include the (a) 'effects' test as applied in *Calder v Jones*,²⁶⁹ (b) the 'targeting test' as applied in *Bancroft & Masters Inc v Augusta Nat'l Inc*,²⁷⁰ and (c) the 'sliding scale approach' applied in *Zippo Manufacturing Company v Zippo Dot Com Inc*.²⁷¹

(a) The Effects Approach

The 'effects approach' adopts a theory of objective territoriality.²⁷² It applies in cases where an action takes place outside the territory of the forum state, but its primary effects are felt within the forum state.²⁷³ The test, therefore, determines the competence of a forum through an analysis of where the actual effects occurred. Three important things need to be established: (i) that the defendant's action was intentional, (ii) that the action was expressly aimed at the particular state, and (iii) that it caused harm in that state.²⁷⁴

The effects test in *Calder v Jones* (and the case in general) was not about an e-contract. The court said nothing as to whether the test applied to contracts. Indeed, some cases have ruled out the applicability of this test to contractual obligations arguing that it is better suited to tortious claims,²⁷⁵ although this has never been a rule of thumb.²⁷⁶ Tang, however, is

²⁶⁷See Wang (n221) 238.

²⁶⁸See Tang (n31)110.

²⁶⁹465 US 783 (1984).

²⁷⁰223 F 3d 1082, 1087 (9th Cir 2000). See also *CompuServe Inc v Patterson* (n222).

²⁷¹See 952 F Supp 1119 (WD Pa 1997) (available at

<http://cyber.law.harvard.edu/property00/jurisdiction/zipposum.html> (as accessed on 31/3/2008)).

²⁷²See M O Rahman, N Mohammad & M M Rahman 'Towards Understanding Personal Jurisdiction in Cyberspace: An Overview of American Try-out for Internet Cases' (2008) 50 *International Journal of Law and Management* 105.

²⁷³*Ibid.*

²⁷⁴See *Calder v Jones* (n269) 788-790.

²⁷⁵See Tang (n31) 117. See also: *Resolution Trust Corp v First of American Bank* 796 F Supp 1333, 1338 (CD Cal 1992); *McGlinchy v Shell Chem* 845 F 2d 802, 817 (9th Cir 1988); *Schwarzenegger v Fred* 374 F 3d 797, 802 (CA9 (Cal)(2004).

²⁷⁶See *Remick v Manfredy* 238 F 3d 248, 260 (CA 3 (Pa), 2001) concerning tortious interference of contract.

of the opinion that the test could apply also to contract, by asking whether the defendant's activities were intentional, expressly aimed at the particular forum state, and/or had effects in that state.²⁷⁷

(b) Subjective Availment (Target) Approach

The subjective availment approach is used when a foreign defendant deliberately targeted the forum in question. It focuses on the subjective purpose of the business rather than its 'objective purpose shown on the website.'²⁷⁸ For instance, if 'S' company (in State 'X') sells its product on auction on eBay, and 'B' buys them while in another state 'Y', 'S' cannot be said to have 'purposefully availed' itself of the privileges of doing business in 'B's forum state ('Y') because the aim of an auction was to fetch the highest bidder.²⁷⁹ In *Winfield Collection v MacCauley*²⁸⁰ it was held that the choice of the buyer is beyond the control of the seller.²⁸¹ Even if eBay was 'an active website,' the court has to evaluate whether the seller deliberately targeted the individual buyers in particular states.²⁸²

Similarly, it has been argued that, 'mere placement of a product into the stream of commerce, without doing anything more, is not an act of the "defendant purposefully directed"' towards the forum state.²⁸³ Certain acts, such as advertising or marketing in the forum state, may fulfil the deliberate availment requirement although one has to 'establish proof that the defendant inclined to serve the particular market.'²⁸⁴

(c) The Sliding Scale approach

Earlier, courts in the USA had established that in order to assert personal jurisdiction of the court, the physical presence of the defendant is not necessary; minimum contacts are sufficient.²⁸⁵

In the course of examining the traditional requirements for exercise of jurisdiction over the defendant, the court in *Zippo Manufacturing Company v Zippo Dot Com Inc*,²⁸⁶ stated

²⁷⁷See Tang (n31) 117.

²⁷⁸Ibid at 115.

²⁷⁹See a similar expression used by Tang (n31) 117.

²⁸⁰105 F Supp 2d 746 (ED Mich 2000).

²⁸¹Ibid.

²⁸²Ibid.

²⁸³See Rahman et al (n272) 109.

²⁸⁴Ibid, see *Burger King v Rudzewicz* (n259).

²⁸⁵See *International Shoe Co v Washington* (n227).

that, where the general rule of jurisdiction does not apply, a court may resort to the application of specific *in personam* jurisdiction over a foreign defendant.²⁸⁷ Such application, however, must be on activities related to the forum and the relationship between the defendant and the forum must be within the framework of 'minimum contacts' as established in *International Shoe Co v Washington*.²⁸⁸ In this regard, the court determined the exercise of jurisdiction in the Internet related cases on the basis of 'the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.'²⁸⁹ In so doing, it introduced a sliding scale approach which, it argued, 'is consistent with well developed personal jurisdiction principles.'²⁹⁰

Lanza has summed up eleven factors that frame the sliding scale analysis.²⁹¹ These are (a) whether the defendant makes sales in the jurisdiction; (b) whether the defendant maintains a toll-free telephone number that is advertised on the web site and is accessible from the jurisdiction; (c) whether the website includes a disclaimer as to the areas in which the defendant will sell merchandise; (d) the level of interactivity permitted by the website; (e) whether the website permits a visitor to the site to sign up for an interactive 'mailing list' with information about the defendant's products or services; (f) whether the website provides information about the defendant's specific commercial activities in the forum in which it is sought to be sued; (g) whether there have been interactions or sales through the website with residents of the forum in which the action is brought; (h) the likely market for the products or services being sold; (i) the market that the website itself explicitly or implicitly indicates it is targeting; (j) whether the website permits orders to be placed on-line; and (k) whether the defendant has otherwise marketed its services in the jurisdiction.

While emphasising the propriety of exercising personal jurisdiction over a defendant whose activities were interactive in the forum, the court stated further that, the exercise of personal jurisdiction may also be proper 'if the defendant enters into contracts with residents of

²⁸⁶See (n271).

²⁸⁷See *Zippo's case* (n271) 1122 where the court stated that general jurisdiction allows a court to exercise *in personam* jurisdiction over a foreign defendant 'for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state.'

²⁸⁸See *Zippo's case* (n271) 1122.

²⁸⁹*Ibid*, at 1124.

²⁹⁰*Ibid*.

²⁹¹See *Lanza* (n19) 128.

a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.²⁹²

By contrast, if the defendant has merely posted information on his Website accessible to users in other jurisdictions, such web service is passive and ‘does little more than make information available to those who are interested in it.’²⁹³ Consequently, its accessibility cannot be a ground for the exercise of *in personam* jurisdiction.²⁹⁴ The court noted, however, that *Zippo’s* case involved ‘doing business over the Internet.’²⁹⁵ For that reason, if a non-resident defendant consciously chooses to transact business with the residents of a forum state, it presupposes that he has clear notice that he is subject to suit there.²⁹⁶ In other words, the defendant voluntarily submits himself to the jurisdiction of the court.²⁹⁷

Although the sliding scale approach has been followed in a number of cases,²⁹⁸ it has not been universally accepted.²⁹⁹ In *Howard v Missouri Bone and Joint Centre Inc*,³⁰⁰ the test was rejected, and the court held that the defendant had done nothing more than advertise and solicit business in Illinois, conduct which, in and of itself, was insufficient to give rise to personal jurisdiction. It was stated further that the sliding scale approach in *Zippo’s* case was arbitrary and *Zippo’s* web page’s level of interactivity is irrelevant.³⁰¹ The court observed that there was no a striking difference between an interactive website and telephone or mail communications, and noted that a passive website was similar to advertising by radio or magazine.³⁰²

²⁹²Ibid.

²⁹³Ibid.

²⁹⁴Ibid.

²⁹⁵See *Zippo’s* case (n271) 1125.

²⁹⁶See *Zippo’s* case (n271) 1126-1127.

²⁹⁷It is also crucial to note that, even without *Zippo’s* sliding scale approach, courts may rely on other common law connecting factors, such the mere presence of the defendant within the forum state, voluntary submission to the forum to defend his case or the defendant's domicile. In the European Union assertion of jurisdiction over internet based commerce (as discussed below) is fully covered by the Council Regulation (EC) No. 44/2001(Brussels I Regulation).

²⁹⁸See *Larochelle v Allamian* 361 Ill App 3d 217, 225 (2005); *Publications International Ltd v Burke/Triolo Inc* 121 F Supp 2d 1178 (ND Ill 2000). See also R Bourque & K Konrad ‘Avoiding Jurisdiction Based on Internet Web Site’ (1996) *New York Law Journal* 1; Zembek (n8) 339.

²⁹⁹See *Winfield Collection v McCauley* (n280) 750.

³⁰⁰Case No. 05-476, — N.E.2d —2007 WL 1217855 (Ill App 5th Dist April 24, 2007) available online from <http://www.state.il.us/court/Opinions/AppellateCourt/2007/5thDistrict/April/5050476.pdf> (as accessed on 12/12/2009).

³⁰¹Ibid at 7-8.

³⁰²Ibid.

C3 'Purposive Availment' and E-commerce

Overall, the US approach on 'purposeful availment' and the various tests that have been developed to suit to e-commerce have not all been unreservedly accepted, although some, for instance, the target approach, have proved more popular.³⁰³ The courts have shown, however, varying degrees of preference.

A close examination of the existing tests reveals that, when they are applied to e-consumer contracts, they focus on the seller's purpose. None of them took into account the intention and expectations of the buyer.³⁰⁴ Consequently, the tests could only be used where a court wanted to decide whether an e-company's online activities with a consumer in another state 'purposefully availed it of the benefits of the consumer's home which gives the State personal jurisdiction over the business.'³⁰⁵ The same, however, cannot be used where an e-company wants to sue a consumer. This could perhaps be the reason why most US e-merchants trading with consumers 'routinely include an arbitration or a choice-of-forum term in their standard form contracts to limit their exposure to litigation in remote forums, class action lawsuits, and punitive damage awards.'³⁰⁶

C4 Concluding Comments on Jurisdiction *in Personam* regarding Foreign Defendants

In conclusion, it is clear that courts in the USA have had opportunity to tackle important issues regarding exercise of *in personam* jurisdiction over foreign defendants. While the traditional bases upon which a court may exercise jurisdiction *in personam* over a foreign defendant still apply,³⁰⁷ the more contemporary approach is based on the 'minimum contacts' test – a test based on the satisfaction of the Due Process Clause –, and the 'purposive availment' of the defendant. These tests are rooted in the *International Shoe* case.³⁰⁸ From this case two types of jurisdiction *in personam* –to which the minimum contacts and the purposive availment tests apply– have been developed: the general jurisdiction (which rely on systemic and continuous

³⁰³See Tang (n31) 118.

³⁰⁴Ibid.

³⁰⁵Ibid. See *Schwarzenegger v Fred Martin Motor Co* 374 F3d 797, 802 (9th Cir 2004).

³⁰⁶See J K Winn & M Webber 'The Impact of EU Unfair Contract Terms Law on US Business-to-Consumer Internet Merchants' (2006) 62 *The Business Lawyer* 1, 5.

³⁰⁷The common traditional bases of exercise of jurisdiction include in-state service of the defendant, domicile, resident or express consent and submission to the forum have do not continued to be relevant. See Scoles et al (n31) 296.

³⁰⁸See *International Shoe Co v Washington* (n227).

contacts of the foreign defendant with the forum) and specific jurisdiction (which rely on purposive availment of the foreign defendant).³⁰⁹

With the development of the Internet and e-commerce, a new, but challenging dimension has been added to the difficulties regarding the exercising of the powers of courts over a foreign defendant. In other words, the application of either general or specific jurisdiction to foreign defendants' e-transactions has never been easy. It is, for instance, too rigorous and difficult to establish the requirements of foreign defendants' substantial, continuous and systemic contacts with the forum as required under the general jurisdiction.³¹⁰ And, as a result, the role of this type of jurisdiction in e-commerce has been ruled out as being insignificant.³¹¹ Most courts in the USA, therefore, have declined to establish general jurisdiction over foreign defendants on the basis of internet connections.³¹²

In the course of determining whether a court can exercise specific jurisdiction over foreign defendants, however, courts, in the exercise of their discretion, have strived to expound what 'purposive availment' may amount to in cases involving the Internet. From such efforts, several innovative tests, some of which are discussed above, have evolved.

It is clear, however, that, although the innovative tests discussed are useful, they have not been exhaustive or completely effective.³¹³ Moreover, courts have been shifting from one test to another, either endorsing one, while rejecting the other. In such a balance-shifting approach, and from a perspective of conflict of laws, it becomes difficult to enhance certainty and predictability of electronic transactions. And, uncertainty and unpredictability of transactions, as stated before, is what ought to be avoided.³¹⁴

Overall, existing pole-shifting exercises in search of an appropriate test to be applied in determining jurisdiction *in personam* in cases involving e-commerce, is a further indication of the weaknesses that may exist in a discretionary approach.

³⁰⁹ See *Helicopteros Nacionales de Colom. SA v Hall* (n240). See also *Burger King Corp v Rudzewicz* (n259).

³¹⁰ See Tang (n31) 108.

³¹¹ See Tang (n31) 109.

³¹² See, for instance, *Millennium Enterprises v Millennium Music* (n247); *ESAB Group Inc v Centricut LLC* (n248); *McDonough v Fallon McElligott Inc* (n247). See also Tang (n31) 108.

³¹³ See Tang (n31) 118.

³¹⁴ See Calliess (n14) 1-2.

D1 Exercise of *in Personam* Jurisdiction in the European Union

The EU's approach to jurisdiction is also founded on the doctrine of *actor sequitur forum rei*, according to which the defendant must be sued at his place of domicile.³¹⁵ The ECJ held in *Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA*³¹⁶ that the rationale of this doctrine is that it makes it easier, in principle, for a defendant to defend himself.³¹⁷ The doctrine, which formed the basis of Art 2 of the Brussels Convention, 1968,³¹⁸ underlines the exercise of jurisdiction under Regulation (EC) No. 44/2001 (hereinafter 'Brussels I Regulation'), which replaced the Convention.³¹⁹ Recital 11 of this Regulation provides that 'rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations.'³²⁰

The scope of the Brussels I Regulation is set out in Art 1. This provision confines itself to 'civil and commercial matters', and excludes matters regarding revenue, customs, administration,³²¹ as well as cases of family, bankruptcy (insolvency), social security and arbitration.³²²

³¹⁵ See Article 2 of Brussels I Regulation. See also *General Insurance Co (UGIC) v Group Josi Reinsurance Co SA* (Case C-412/98) [2001] QB 68; Briggs (n67)59 and (generally) Ferrari (n179) 689; K Vasiljeva '1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online' (2004) 10 *European Law Journal* 123. See also M Weser 'Bases of Judicial Jurisdiction in the Common Market Countries' (1961) 10 *American Journal of Comparative Law* 323, 328-329.

³¹⁶ See *General Insurance Co (UGIC) v Group Josi Reinsurance Co SA* (n315).

³¹⁷ Ibid, para 35 (ECJ). See also C D Bougen 'Conflicting Approaches to Conflicts of Jurisdiction: The Brussels Convention and Forum Non Conveniens' (2002) 33 *Victoria University Wellington Law Review* 261, 263.

³¹⁸ Article 2 of the Brussels Convention, 1968 provided that '[s]ubject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.' This convention (now replaced) can be accessed at <http://curia.europa.eu/common/reldoc/convention/en/c-textes/brux-idx.htm> (as accessed on 3/9/2010).

³¹⁹ See Article 2 of the Brussels Regulation I and recital 11. Article 2(1) of the Regulation which confers general jurisdiction-meaning that the court is not limited by reference subject matter of the form of action. See Case C-103/05 *Reisch Montage* [2006] ECR I-6827, para 22; Case C-386/05 *Color Drack* [2007] ECR I-3699, paragraph 21.

³²⁰ Articles 59 and 60 explain further what is to be observed when considering the notion 'domicile.' Article 59 deals with determination of natural persons' domicile while Art 60 provides for the legal persons. There are three criteria of determining the domicile of legal persons: (i) statutory seat, or (ii) central administration, or (iii) principal place of business. Paragraph 2 of Art 60 states that '[f]or the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.'

³²¹ Article 1(1) of Brussels I Regulation. For analysis of this Article and how the ECJ interprets it see B Hess, T Pfeiffer & P Schlosser *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* (2008) 24.

³²² See Article 1(2) of Brussels I Regulation.

Article 2 of this Regulation sets out a fundamental principle of general application regarding exercise of jurisdiction *in personam*. It provides that:

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

The generality of the above provision suggests that ‘it is not limited by reference to its subject matter or the form of the action.’³²³

Article 5 of the Regulation, however, sets out specific cases regarding exercise of jurisdiction for contractual obligations, which are exceptions to the general principle set out in Art 2 of the Regulation. Article 5(1)(a) of the Regulation provides for ‘special jurisdiction’ in matters relating to a contract (generally).³²⁴ Accordingly, a plaintiff may sue, in the courts of the place of performance of the obligation in question,³²⁵ since it is presumed that such court will have a close link to the contract.³²⁶ The possibility of suing in the place of domicile, however, remains.

Under Art 5(1)(b) of the Regulation, unless agreed otherwise, in a contract of sale of goods, the place of performance for all claims is where the goods were delivered or should have been delivered. It further provides that, for contract of provision of services, the place of

³²³ Briggs (n67) 75.

³²⁴ Under the current arrangement, Art 5(1)(a) Brussels I Regulation has reiterated the earlier position in Art 5(1) of the Convention. See *Petra Enger v Janus Versand GmbH* (Judgment of 20th January 2005, C-27/02, ECR 2005 I-481 Ruling), where it was stated (paras 31ff) that Art 5(1) of the Brussels Convention (now replaced by Art 5 of the Regulation) relates to contractual matters in general whereas Art 13 thereof relate specific types of contract concluded by consumers, and a defendant may be sued in the place of performance of the obligation in question. As for a discussion on consumer contracts under the Rome Convention, see N Eksi ‘The Law Applicable to Consumer Contracts under the EU Rome Convention’ (2005) *Journal of South African Law* 299.

³²⁵ Art 5(1)(a) of the Regulation provides that ‘person domiciled in a Member State may, in another Member State be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question.’

³²⁶ See *Falco Privatstiftung and Rabitsch v Gisela Weller-Lindhorst* Case C-533/07, para 25 (available at <http://conflictoflaws.net/2009/ecj-judgments-on-brussels-i-regulation/> (as accessed on 31/8/2010)). Initially, under Art 5(1) of the Brussels Convention, jurisdiction depended on the nature of the claim (ie, the obligation to be performed) and relied on the plaintiff in the proceedings. See Case 14/76 C-*De Bloos v Bouyer* [1976] ECR 1497, Para 11 where the court stated that the word ‘obligation’ in the Article refers to the contractual obligation forming the basis of the legal proceedings’ and therefore not the characteristic one. Art 5(1) of the Brussels Convention provided that ‘[a] person domiciled in a Contracting State may, in another Contracting State, be sued: 1. In matters relating to a contract, in the courts for the place of performance of the obligation in question; (...)’ See North & Fawcett (n13) 204-205, who note, however, that the problem with the *De Bloos* approach is that the claimant could ‘make several claims involving different obligations to be performed in different states.’ See also C Witz ‘The Place of Performance of the Obligation to Pay the Price Art.57CISG’ (2005-2006) 25 *Journal of Commerce* 325, 326. And, according to *Industrie Tessili Italiana Como v Dunlop* [1976] ECR 1473, the place of performance had to be determined in accordance with the law selected by the choice of law rules of the forum. See also Case C-440/97 *Groupe Concorde* [1999] ECR I-6307 which also confirmed this approach.

performance is where the services were provided or should have been provided, yet again whatever the claim of the plaintiff. The place of performance, however, has been left to be determined by the rules of private International law.³²⁷

Article 5(1)(a) and (b) of Regulation was recently interpreted in *Falco Privatstiftung and Rabitsch v Gisela Weller-Lindhorst*.³²⁸ First, the court held that, in order to ensure uniformity, and in absence of reasons to the contrary, Art 5(1)(a) should be given a scope identical to that of the corresponding provision of the Brussels Convention.³²⁹ Secondly, that Art 5(1)(b) must be interpreted in light of the origin, objectives and scheme of that regulation.³³⁰ Overall, when considered in the light of e-commerce, Art 5 of the Brussels I Regulation caters for B2B contracts and B2C contracts involving ‘active consumers’ (as opposed to passive consumers).³³¹ The rules contained in this provision, however, provide general protection to consumers.

The Regulation contains other more specific rules intended to provide additional protection to consumers in contracts.³³² Article 15 of the Regulation sets out the scope of such protection and refers to a consumer as a person who concludes a contract for a purpose ‘which

³²⁷ See P R Beaumont ‘The Brussels Convention Becomes Regulation: Implications for Legal Basis, External Competence, and Contract Jurisdiction’ in J Fawcett (ed) *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (2002) 20. Under Art 5(1)(c) of the Regulation it is provided that in cases where Art 5(1)(b) does not apply, then subparagraph (a) of Art 5(1) (which refers to the place of performance) shall apply. According to Hess et al the place of performance, according to *Tessili case* will ‘be determined in accordance with the private law referred to by the choice of law rules of the forum.’ See Hess et al (n321) 54.

³²⁸ See *Falco Privatstiftung and Rabitsch v Gisela Weller-Lindhorst* (n326).

³²⁹ *Ibid*, para 51 citing, to that effect, Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 49.

³³⁰ *Ibid*, at para 20 citing, to that effect, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 29; Case C-283/05 *ASML* [2006] ECR I-12041, paragraphs 16 and 22; and Case C-386/05 *Color Drack* [2007] ECR I-3699, paragraph 18). Apart from noting that the concept of a ‘contract for the provision of services’ is not defined in the Regulation, the court declined to interpret Art 5(1)(b) of Regulation No 44/2001 in the light of its earlier approach regarding the freedom to provide services within the meaning of Article 50 EC. It stated that, whereas Art 50 EC demands a broad interpretation to accommodate as many economic activities as possible: ‘the broad logic and scheme of the rules governing jurisdiction laid down by Regulation No 44/2001 require, on the contrary, a narrow interpretation of the rules on special jurisdiction, including the rule contained, in matters relating to a contract, in Art 5(1) of that Regulation, which derogate from the general principle that jurisdiction is based on the defendant’s domicile.’ (See *Falco Privatstiftung and Rabitsch v Gisela Weller-Lindhorst* (n326) para 33-36).

³³¹ The European Consumer Law Group made a distinction between active and passive consumers in the Internet transactions. On one hand, an ‘active consumer’ refers to an individual who intentionally, while acting outside his or her commercial or professional activity, surf around shopping in the Union for goods or the provision of services. A ‘passive consumer’ on the other, was defined in the context of Art 13 of the Brussels Convention (now Art 15 of the Regulation), ie, the consumer who was made to enter into a contract by marketing activities or any other form of solicitation in his or her country of domicile/habitual residence. See also N Reich ‘European Consumer Law Group Jurisdiction and Applicable Law in Cross-Border Consumer Complaints. Socio-Legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Union’ (1998) 21 *Journal of Consumer Policy* 315, 319.

³³² These are contained in Arts 15, 16 and 17 of the Regulation.

can be regarded as being outside his trade or profession.³³³ It favours the ‘country of destination’ approach in cases involving consumer contracts.³³⁴ It defines ‘consumer contracts’ in three categories. The first involves ‘contract for the sale of goods on instalment credit terms.’³³⁵ The second involves ‘contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods’.³³⁶ The third involves all other contracts, falling outside Art 15(a) and (b) of the Regulation, and which are concluded with a person who pursues or directs commercial or professional activities in the Member State of the consumer's domicile.³³⁷

In order to ensure a balance between consumer protection and e-commerce development, the Brussels regime sets out limitations under which the protective jurisdictional approach can be exercised.³³⁸ Thus, apart from the additional protection offered to consumers as the weaker parties in contractual relations,³³⁹ the limitations set out under Art 15 of the Brussels I Regulation are important prerequisites for balancing the interests of the market and the consumer.

Article 15(1)(c) of the Regulation, provides that:

in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to

³³³ Article 15 provides that : ‘(1)[i]n matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if: (a) it is a contract for the sale of goods on instalment credit terms; or (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities. (2) Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State. (3) This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.’

³³⁴ See A Horvath & J Villafranco *Consumer Protection Law Development* American Bar Association, Section of Antitrust Law USA (2009) 755.

³³⁵ These are covered by Art 15(1)(a) of the Brussels I Regulation.

³³⁶ These are covered by Art 15(1)(b) of the Brussels I Regulation.

³³⁷ These are covered by Art 15(1)(c) of the Brussels I Regulation. Article 15(1)(a) and (b) follow the Brussels Convention precedent and deal with ‘contract for the sale of goods on instalment credit terms’ and ‘a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods.’

³³⁸ Unlike the United States, where the market oriented policies favour risks in consumer transactions to be borne by individual consumers, the EU policy is more protective. See Winn & Webber (n306) 5.

³³⁹ See Recital 13 ‘[i]n relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.’ See also Case C-89/91 *Shearson v TVB* [1993] ECR I-139 para 18.

several States including that Member State, and the contract falls within the scope of such activities.

This Article is regarded as a ‘catch all’ provision,³⁴⁰ and is more important in an e-commerce scenario.³⁴¹ It embodies the ‘targeting effect’, meaning that it is the seller who targets (and solicits or prompts) the consumer, through the interactive website accessed in the consumer’s domicile, to conclude a distance contract, which is then actually concluded. In effect, it introduces a new criterion, reframing the old one provided for under Art 13(3) of the Convention.³⁴² Firstly, it does not tie application of the protective rules to a specific classification of contracts, and secondly, it is centred on the activities of the business.³⁴³

Although Art 15(1)(c) applies to e-commerce activities, the requirements in this provision are fulfilled when a website is active, (that is to say, when the consumer concludes the contract directly online). Thus, it does not apply when a website merely provides information that leads to the conclusion of the contract in another context offline.³⁴⁴ According to the EU Commission, its integral concepts of ‘activities pursued in’ or ‘directed towards’ a member state are intended to make clear that Art 15(1)(c) ‘applies to consumer contracts concluded via an interactive website accessible in the State of the consumer’s domicile.’³⁴⁵ The Commission stated, however, that ‘[t]he fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction.’³⁴⁶ Thus, the distinction between ‘passive’ and ‘active’ website (which has featured in other jurisdictions, for instance,

³⁴⁰See Horvath & Villafranco (n334) 755.

³⁴¹See Keller (n10) 58-59. See also Tang (n31) 48. See also ‘Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in civil and commercial matters’ COM (99) 348 final, [1999] OJ C 376E/1, at 16. (Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0348:FIN:EN:PDF> (as accessed on 1/9/2010); P Stone *EU Private International Law: Harmonisation of Law* 2ed Edward Elgar European Publishing Inc Massachusetts USA (2010) 131-138. See also Horvath & Villafranco (n334) 755.

³⁴²Article 13 of the Brussels Convention 1968 was applied to consumer contracts if it was ‘(3) any other contract for the supply of goods or a contract for the supply of services, and (a) in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and (b) the consumer took in that State the steps necessary for the conclusion of the contract. Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.’

³⁴³See Commission Proposal (n341) 16.

³⁴⁴See Hess et al (n321) 84 para 299. See also Keller (n10) 59.

³⁴⁵See Commission Proposal (n341) 16.

³⁴⁶Ibid.

in the USA)³⁴⁷ is not maintained according to a later joint statement of the Council and Commission.³⁴⁸

Essentially, Art 15(1)(c) consists of two types of activities entitling a consumer to its benefits. The first governs commercial or professional activities of a business that are ‘pursued’ in the consumer’s domicile. It is uncertain, however, what exactly is meant by the activities ‘pursued’ in the consumer’s domicile. Some commentators have argued that it requires the business to physically carry out its commercial activity in the state at which it is aimed.³⁴⁹ However, since Art 15(1)(c) is intended for e-commerce transactions this argument may be erroneous because in an e-commerce environment physical presence in the strict sense is not necessary.

The second type of activity under Art 15(1)(c) refers to a situation where commercial or professional activities are ‘directed’ towards the consumer's domicile.³⁵⁰ Once either of the two limbs is established in a consumer contract, the consumer concerned is entitled to institute proceedings either in the courts of the member state in which the other party is domiciled, or in the courts of the state of the consumer’s domicile.³⁵¹ If the suit is against a consumer, however, as a rule, the action must be brought in the forum of his domicile.³⁵²

Hess et al note, however, that ‘some national courts have had difficulties in finding out whether under specific circumstances the activity of the other party was ‘directed’ to the country where the consumer had his residence.’³⁵³ In 2009, for instance, an Austrian court made a request to the ECJ regarding the correct interpretation of this Article.³⁵⁴ Specifically, the question laid before the ECJ was whether mere accessibility of a website, through which a consumer concluded a contract in his state of residence, can be sufficient to justify a finding that an activity is being ‘directed’ there, within the terms of Art 15(1)(c).

³⁴⁷ See *Zippo’s case* (n271).

³⁴⁸ See The Council and Commission, ‘Joint Statement on Articles 15 and 73’ (para 1) available at http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf, (accessed on 2/9/2010). See also Hess et al (n321) 84, para 299.

³⁴⁹ See J Øren ‘International Jurisdiction Over Consumer Contracts in e-Europe’ (2003) 52 *International Comparative Law Quarterly* 665, 676-667. See also Tang (n31) 49.

³⁵⁰ See Art 15(1)(c) of the Brussels I Regulation.

³⁵¹ See Art 16(1) of Brussels I Regulation.

³⁵² See Art 16(2) Brussels I Regulation.

³⁵³ See Hess et al (n321) 84, para 299.

³⁵⁴ See Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 24 April 2009 *Hotel Alpenhof GesmbH v Oliver Heller* (Case C–144/09) (2009/C 153/47) (reported in *Official Journal of the European Union* (4.7.2009) C 153/26. (Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:153:0026:0027:EN:PDF>) (as accessed on 31/8/2010).

In its ruling on the matter,³⁵⁵ the ECJ, while agreeing that ‘the mere accessibility of the trader’s or the intermediary’s website in the Member State in which the consumer is domiciled is insufficient’ to justify such a finding,³⁵⁶ held that:

[i]n order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be ‘directing’ its activity to the Member State of the consumer’s domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader’s overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer’s domicile, in the sense that it was minded to conclude a contract with them.³⁵⁷

The court provided a list of matters which, although not exhaustive, can be relied on to provide evidence from which an inference may be drawn to the effect that the particular trader’s activity is directed to the Member State of the consumer’s domicile. The relevant matters include:

the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.³⁵⁸

Another important aspect of the Brussels I Regulation is the provision on party autonomy in choice of forum. While Art 23 allows parties to designate the court or courts to determine their disputes,³⁵⁹ Art 17 sets out certain limitations in the case of consumer contracts. The latter provides:

³⁵⁵ See the ECJ ruling in (Joined Cases C-585/08 and C-144/09) *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* (C-585/08), and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), (available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79898792C19090144&doc=T&ouvert=T&seance=ARRET&where=%28%29> (as accessed on 5/3/2011)).

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ In this regard Art 23(3) provides that ‘[w]here a forum agreement clause has been validly entered by the parties, only the court chosen by them will exercise jurisdiction and any other court of the Member States will do so only when the chosen court has declined.’

[t]he provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen; or
- (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
- (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Article 23 also sets out requirements for testing the validity of choice of forum clauses. These are mainly concerned with consent and safeguards in relation to it.³⁶⁰ Thus, the choice of forum clause must either be in writing or evidenced in writing, or must be in regular usage between parties, or it must be in common usage in the particular trade or commerce.³⁶¹

In recognition of the functional equivalence between the traditional paper-based concept of writing and the use of electronic records and e-signatures, Art 23(2) provides that '[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.'

3 Concluding Analysis of E-contracts and Conflict of Laws – the Question of Jurisdiction

Deciding where to litigate has always been an important issue in cross-border transactions. The reason for this is that disputes involving cross-border transactions have foreign elements that attract the conflict of laws process. Conflict of laws rules, however, are not universal. Thus, in the absence of a clear agreement regarding where to litigate, parties in a cross-border transaction may find themselves in trouble since not all domestic rules always provide predictable results in dispute resolution. The common law rules on jurisdiction, for instance, provide room for exercise of discretion when a court seeks to establish whether it can assert jurisdiction over a foreign defendant. Moreover, the place where a case is litigated can potentially determine its result, regardless of the merits.

The development of the Internet as a medium through which commercial transactions can be undertaken and the increased economic globalisation oblige parties to cross-border transactions to carefully plan how their transactions should be carried out and how disputes

³⁶⁰ Cases held by ECJ have ensured that consent requirements are met. See ECJ, 12/14/1976C-24/96, *Estas Salotti v Rüwa* ECR 1976, 1831; ECJ 12/14/1976, *Serguorav v Bonakdarian* ECR 1976, 1851; see also ECJ 03/16/1999, C-159/97, *Trasporto Castelletti v Trumpy SpA* ECR 1999 I-1597.

³⁶¹ See Art 23 (1) of the Brussels I Regulation.

should be settled. From a business point of view, the importance of such prior planning is obvious. Primarily, it is not in the interest of parties that they should experience uncertainties and bear additional costs of litigating in a foreign land.

In an online environment, consumers, owing to their weak position, are at an even higher risk of being subjected to litigation in a foreign state than e-merchants. This chapter has considered rules from various jurisdictions regarding the exercise of *in personam* jurisdiction in e-commerce.

It should be noted, however, that problems regarding the exercise of jurisdiction in cross-border disputes were not created by the new technology. Instead, because of its disregard of territorial borders, the Internet and e-commerce have simply exacerbated already existing jurisdictional problems in cross-border transactions.

This chapter has examined the relevant rules as they apply in Tanzania, England, the United States, and in the European Union. From the discussion, it is clear that the absence of harmonised rules on jurisdiction *in personam* to regulate e-commerce is a critical legal problem that affects predictability – and will have a detrimental effect on the development of this form of business. The existing approaches to jurisdiction and the rules they support, especially in countries relying on common law, are inadequate.

It was also observed that, in both Tanzania and England, apart from a foreign defendant's presence in the forum state, service of the court process is a significant requirement for determining jurisdiction. This is also the case in the United States, although different concepts, such as 'minimum contacts' and 'purposive availment' are used. The gist of the matter is that the defendant must be served in order to ensure a fair hearing in accordance with the principles of natural justice.

For an individual who is a defendant, resident within the forum state, or a registered company within the jurisdiction of the forum, exercise of jurisdiction *in personam* may not create specific problems for e-commerce, since it will be easy to effect service personally (or if it is a registered company, service can be done at its place of business or to an appointed agent). This is the case in Tanzania under Order V rule 13 of the Civil Procedure Act, and ss 124-127 of the Companies Act, 2002.³⁶² A similar position may be observed in England, for

³⁶² Cap 212.

instance, under s 725(1) of the Companies Act 1985. The same rule is broadly applicable if a corporation is registered abroad but has its branch office or a place of business within the forum's jurisdiction. Again, effectiveness of service of summons may not be difficult. The jurisdictional problem, however, concerns e-companies that have no 'place of business' in the true sense of that term, and rely on the Internet servers hosted in different countries. There is still no settled answer to serving court process to such companies.

As observed in this chapter, where parties have not inserted a choice of forum clause in their contract, at least two different approaches have been adopted to ascertain jurisdiction. The first is discretion-based, while the second is rule-based. The former, which is applied under the English common law tradition, lacks specific rules for consumer protection. Consumers, as the weaker party in an online contract may find themselves being forced to litigate away from their home countries.

As the Internet continues to stimulate cross-border activities, parties to e-contracts should be encouraged to draft clauses choosing where to submit their disputes in order to ease jurisdictional problems. Although they should be at liberty to do so, courts should, especially in discretion-based systems like the common law, subject choice of forum clauses to careful scrutiny in order to protect consumers. It is submitted here that discretion-based clauses should be rejected for good reasons, for instance, lack of proper consent. This study, however, prefers adoption of clear rules that will offer protection to the weaker party, the rules in the EU Brussels Regulation being a good example.

In summary, the EU's efforts to harmonise jurisdictional rules within the region seems to be more effective in dealing with e-commerce transactions than the common law approach, which is purely discretionary. The merits of the rule-based EU system arise out of the fact that, apart from dealing with e-contracts generally, it contains specific protective provisions for consumers. Hence, in the EU, consumers engaging in online contracts within the region have to face fewer obstacles when they wish to litigate in a local forum. In view of this, the EU's approach should serve as a basis upon which further developments in Tanzania might be based. There are moves afoot in the East African Community to agree on harmonised rules to govern

jurisdiction in cross-border disputes³⁶³ and in SADC to develop a model law on e-commerce.³⁶⁴
The EU Brussels Regulation I offers good guidance for such processes.

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³⁶³ Currently the EAC member states have developed and adopted a framework for cyberlaws which will for a basis for harmonisation of cyberlaws in the region. See 'Draft EAC Legal Framework for Cyberlaws: Phase II February 2011' available at http://www.meaca.go.ug/index.php?option=com_docman&task=doc_download&gid=27&Itemid=6 (as accessed on 4/6/2011).

³⁶⁴ See SADC Model Law on Electronic Transactions and Data Protection, SADC Workshop on the harmonization of e-commerce laws, Nov 24th-25th, 2003 Johannesburg, South Africa. See also W Tadesse & T G Kidan 'e-Payment: Challenges and Opportunities in Ethiopia' United Nations Economic Commission for Africa (2005) (available at <http://www.uneca.org/itca/openafrica/resources/ePaymentStudyReportFinal2.pdf> (as accessed on 20/5/2011)).

CHAPTER FOUR: DETERMINING CHOICE OF LAW IN E- CONTRACTS

1. Introduction

This chapter examines choice of law issues. It assesses whether, and the extent to which traditional choice of law rules can effectively apply to e-contracts. Given the cross-border nature of many e-contracts, in any dispute arising, the court will need to determine the applicable law.¹ Ascertaining choice of law in e-contract is a complex issue due to the autonomy that parties enjoy and the diversity of connecting factors that may be involved.² These connecting factors are territorial in nature.

Moreover, conflict of laws is not an international set of rules, but is domestic in nature, ie, every state has its own rules. This chapter, therefore, argues in favour of harmonisation of conflict of laws rules as a way of enhancing certainty and predictability in e-commerce.³

The chapter is divided into five parts. Part one, as introduction, examines the choice of law problem through a hypothetical case study. Part two considers the choice of law rules applicable to contracts in Tanzania.⁴ Because Tanzania adheres to the common law legal system, its choice of law rules follow the 'traditional' common law approach. This approach applied in England up to 1991, after which English rules on choice of law in contract were, for

¹ See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50-73. In this case Lord Wilberforce held (at page 71) that a contract cannot be 'floating unattached to any system of law.'

² See P M North & J Fawcett *Cheshire and North's Private International Law* 13ed (1999) 533-534.

³For a discussion on harmonisation see P P Swire 'Elephants and Mice Revisited: Law and Choice of Law on the Internet' (2005) 153 *University of Pennsylvania Law Review* 1975, 1983-1999. See also J Wiener *Globalisation and the Harmonisation of Law* (1999) 134, as he argues that, transnational risks would be to be controlled effectively if all states adopt same laws.

⁴The Tanzanian Fair Competition Act, No 8 of 2003 provides, in section 26(1) and (2), that, '[w]here (a) the proper law of a contract for the supply by any person of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of the United Republic; or (b) a contract for the supply by any person of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of this Part. (2) This Part shall apply to any type of contract made or entered between parties under this Act.' As discussed in chapter two, this legislation does not cover consumer e-contracts. Notwithstanding this provision (ie, s 26 of Act 8 of 2003), English rules on choice of law will still apply as relevant source of law with regard to other contracts where a consumer is not involved.

the most part, supplanted by an EU Regulation.⁵ Part two of this chapter will therefore examine the choice of law rules from a traditional common law perspective.

Part three analyses the doctrine of party autonomy. It examines how this doctrine applies in the e-contracting scenario, existing debates on the doctrine and its limitations. In particular, part three addresses the question whether parties to an e-contract can avoid otherwise applicable mandatory laws. Part four examines developments regarding choice of law in the EU. It specifically examines the Rome I Regulation and the solutions it has created as part of efforts to remove uncertainty in cross-border commerce. Additionally, part four examines how this Regulation deals with consumer contracts. Part five concludes the discussion in this chapter.

2. Choice of Law and its Significance for E-contracts

‘The discipline of choice of law,’ writes von Mehren, ‘is concerned with the identification and systematic handling of situations in which the persons concerned and the interests and policies at stake have significant connections with more than one community.’⁶ As a cross-border activity, e-contracting touches persons, interests, and policies of more than one state. Consequently, understanding which law applies in an e-contract with foreign elements may lead to a difficult choice of law question. Compliance with the law is impossible ‘without an understanding of whose law (or laws) is (or are) applicable.’⁷ Once again, the overarching aspiration is for legal certainty regarding e-contracts, which in turn will build confidence in e-commerce.⁸

⁵See Dicey & Morris *The Conflict of Laws* 13ed (2000) 1195. See also A Briggs *The Conflict of Laws* 2ed (2008) 153; P North ‘Private International Law: Change or Decay?’ (2001) 50 *International and Comparative Law Quarterly* 477, 485. In 1990 the U K government enacted the Contract (Applicable Law) Act to incorporate the EU rules as laid down in the Rome Convention on the Laws Applicable to Contractual Obligations, of 19 June 1980, OJ 1980 L 266/1. (The Rome Convention has now been replaced by the Rome I Regulation which came to force in 2009), and the UK government signed up to the Regulation in 2008. See ‘UK signs up to Rome I rules on cross-border contract disputes’ OUT-LAW News, 11/08/2008 (available at <http://www.out-law.com/page-9337> (as accessed on 10/09/2010)).

⁶See A T von Mehren ‘Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology’ (1974) 88 *Harvard Law Review* 347, 349.

⁷See R Goode *The Hamlyn Lectures: Commercial Law in the Next Millennium* (1998) 81.

⁸See American Bar Association Jurisdiction in Cyberspace Project, ‘Achieving Legal and Business Order in Cyberspace: Jurisdictional Issues Created by the Internet’ (2000) 55 *Business Law* 1801. (The report will be hereafter referred to as ‘The ABA Report’). See also A Haines ‘The Impact of the Internet on the Judgments Projects: Thoughts for the Future’ Prel Doc No 17 of 2002 (available at http://www.hcch.net/upload/wop/gen_pd17e.pdf (as accessed on 23/5/2011)).

As the Internet pushes past the traditional barriers of commerce, on-line activities, including those in the nature of consumer contracts, have grown substantially.⁹ Once a computer is connected to the Internet it becomes easier for anyone to access a 'website and conclude an electronic contract.'¹⁰ Online consumer contracts therefore form a significant proportion of contracts concluded over the Internet.¹¹

Although the Internet may have introduced simplicity in contract making, which is an important breakthrough in commerce, it has complicated both transaction and litigation planning,¹² thereby creating more conflict of laws problems.¹³ This is so precisely because it has brought together people from different legal traditions,¹⁴ and, as one author asserts, 'wherever you find people you are bound to find disputes.'¹⁵ As indicated in chapter three, however, opinions vary about the right approach to solve cross-border internet issues.¹⁶ The complexity inherent in cross-border disputes may be due, partly, to parties' failure to choose an applicable law, and partly to the diversity of connecting factors¹⁷ (which imply the multiple geographic locations of an activity).¹⁸

⁹See L Gillies 'A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union' Commentary (2001) 1 *The Journal of Information, Law and Technology* (part 2.1) (available at <http://elj.warwick.ac.uk/jilt/01-1/gillies.html> (as accessed on 27/5/2010)).

¹⁰See A D Murray 'Entering Into Contracts Electronically: The Real W.W.W' (at page 15) (available at <http://www.100megsfree4.com/andrewmurray/Contracts.pdf> (as accessed on 3/6/2010).)

¹¹See R Schu 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?' (1997) 5 *International Journal of Law and Information Technology* 192, 193-194.

¹²See E A O'Hara & L E Ribstein 'Conflict of Laws' in B Bouckaert & G De Geest *Encyclopedia of Law & Economics Online* (1996-2000) 631-660 (available at <http://encyclo.findlaw.com/9600book.pdf> (as accessed on 2/4/2008)).

¹³See Murray (n10) 10-11, 15.

¹⁴In Africa alone the following major legal traditions exist: the common law or Roman-Dutch law. Others include Islamic law and customary law. (See R Oppong 'Private International Law and African Economic Community: A Plea for Greater Attention' (2006) 55 *International and Comparative Law Quarterly* 911, 915. See also M Ndulo 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101.

¹⁵See S Snail 'Electronic Contracts in South Africa – A Comparative Analysis' (2008) 2 *Journal of Information, Law & Technology (JILT)* 18 (available at http://go.warwick.ac.uk/jilt/2008_2/snail (accessed on 15/5/2010)).

¹⁶See Briggs (n5) 30. There are, at one extreme, those who consider it necessary to rethink the appropriateness of the existing choice of law rules, and, at the other, those who want to rely on the existing rules to address the challenges posed by the new information technologies.

¹⁷See North & Fawcett (n2) 533–534. See also G C Cheshire & P M North *Cheshire's Private International Law* 8ed (1970) 198.

¹⁸See H A Deveci 'Internet Jurisdiction-Personal jurisdiction: Where cyberspace meets the real world -Part 1' (2005) 21 *Computer Law & Security Report* 464, 465. As some authors contend, (though arguably) one may fail to properly locate a geographic location of an Internet activity depending on the circumstance of each case. See N Elkin-Koren & E M Salzberger 'Law and Economics in Cyberspace' (1999) 19 *International Review of Law and Economics* 553. See also G I Zekos 'State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction' (2005) 13 *International Journal of Law and Information Technology* 1, 2 who argues that, 'the key feature of the Internet is that the net is set up to operate logically rather than geographically.' However, Kampmark notes that given the current technological innovation it is possible to localise a particular internet-based activity or even blocking or

Tracing, identifying, or distinguishing an e-commerce transaction adds to the complexity due to its often anonymous nature.¹⁹ Its effect on the choice of law process is that ‘some of the traditional connecting factors... such as the place of contracting or performance can become fortuitous in an on-line environment.’²⁰

Consider the following scenario. A seller from country ‘A’, contracts to supply goods to a merchant in country ‘B’. The goods that are the subject of this contract are to be shipped from country ‘C’. Their contract is formed electronically via the Internet while the merchant from country ‘B’ is on vacation in country ‘D’. Payments for the goods are arranged and made by the merchant through his bank situated in country ‘E’. The goods are to be delivered to the merchant’s subsidiary company situated in country ‘F’, two weeks from the date of the contract. They are not delivered, hence a dispute arises.

The dispute in the above example has many foreign elements. To resolve it, the following factors will need to be considered: the place of business or domicile of parties,²¹ the place of contracting, the places of performance,²² the situation of the subject matter, the place of breach, and the place where the action relating to the contract is brought, ie, the forum.²³ Given the character of the Internet, however, continuing to rely on territorial connecting factors to select a law to be applied may be inappropriate.²⁴

3. Choice of Law Rules in English Common Law and Tanzania

Tanzania inherited the English common law approach to Choice of Law rules, and since nothing more specific to Tanzania can be added on the topic, the current discussion, will consider Choice of Law principles in relation to the English common law approach (for the moment leaving aside the UK's position under the Rome I Regulation).

filtering an activity from accessing or being accessed somewhere else. (See B Kampmark ‘*Macquarie Bank v Berg: A Private International Law Critique*’ in (September 2001) 8 (3) *E LAW | Murdoch University Electronic Journal of Law* (at Para 9) available at <http://www.murdoch.edu.au/elaw/issues/v8n3/kampmark83.txt> (as accessed on 24/3/2008).

¹⁹See Deveci (n18) 465.

²⁰See Schu (n11) 194.

²¹See A Mayss *Principles of Conflict of Laws* 3ed (1999) 1.

²²See Cheshire & North (n17) 198.

²³See R Hayward *Conflict of Laws* 4ed (2006) 107. See also B H Kobayashi & L E Ribstein ‘A Recipe for Cookies: State Regulation of Consumer Marketing Information’ at 22 (available at <http://www.federalismproject.org/masterpages/e-commerce/cookies.pdf> (as accessed on 31/3/2008)).

²⁴See Briggs (n5) 30.

The English common law approach is based on judge-made law. Given its slow development, its ability to effectively respond to the changes in the methods of international trade is questionable. This is especially the case in the light of the Internet and e-commerce. Conflict of laws rules with regard to e-consumer contracts, for instance, are not clearly developed.²⁵ Nevertheless, the traditional choice of law rules have never lost their relevance²⁶ (as some might argue).²⁷

Under the common law jurisdictions, where courts follow a hierarchy of rules, there are at least three basic choice of law principles. First is the principle of party autonomy, which gives parties freedom to choose the law governing their contract.²⁸ Second, and in the absence of parties' choice, is the legal system with which the contract is most closely connected,²⁹ called 'the proper law'. Notwithstanding the proper law, the application of 'the mandatory rules and public policy of the relevant states to ... protect the fundamental order of the forum or international society'³⁰ may also come into consideration.

It is perhaps best, however, to start by elaborating on the concept of Proper Law, that is, the law that will apply if the parties did not choose any law to govern their contract.

(a) The Concept of Proper Law under Common Law

Under the common law, the proper law governs most matters affecting a contract.³¹ This concept has received varied definitions. In *Mount Albert Borough Council v Australasian Temperature & General Mutual Life Assurance Society*,³² for instance, it was referred to as 'that law which the English court or other court is to apply in determining the obligations under

²⁵See Schu (n11) 194.

²⁶See Briggs (n5) 30.

²⁷See L Lessig 'The Zones of Cyberspace' (1996) 48 *Stanford Law Review* 1403, 1407, who argues that conflict of laws is 'dead -killed by realism intended to save.' Kohl has also argued that 'conflict of laws ... is on its deathbed' due to the fact that currently, 'the online phenomenon gradually undermines the viability of dividing events between States [to the extent that], we are reaching a point where such division is as nonsensical' (in Kohl 'Eggs, Jurisdiction, and the Internet' (2002) 51 *International and Comparative Law Quarterly* 555, 558).

²⁸See Z S Tang *Electronic Consumer Contracts in the Conflict of Laws Studies in Private International Law Vol.1* (2009) 169, (citing *Gienar v Mierer* (1796) 2 Hy Bl 603 which represents the common law recognition of this principle, and M Giuliano & P Lagarde *Report on the Convention on the Law Applicable to Contractual Obligations* (1980) OJ C282/1, 15-16, indicating the EU position (to be discussed later in this chapter). See also Article 3(1) of the Rome Convention (the convention has now been replaced by Rome Regulation I).

²⁹See Tang (n28). See *Bonython v Commonwealth of Australia* [1951] AC 201, 219 (followed in *Whitworth Street Estates (Manchester Ltd) v James Miller & Partners Ltd* [1969] 1WLR 337. As for EU position see Article 4 of the Rome Convention 1980.

³⁰See Tang (n28) (citing Rome Convention Article 3(3), 5(2), 6(1), 7(1) & (2), 9(2) and 16. As for public policy in English case law see *Foster v Driscoll* [1929] 1 KB 470; *Lemenda Ltd v African Middle East Co* [1988] QB 448.

³¹See Tang (n28) 197.

³²[1938] AC 224.

the contract.³³ It is also regarded as that system of law which the parties themselves intended should govern their contract³⁴ or a system of law 'with which the transaction [has] its closest and most real connection'.³⁵ In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*³⁶ it was regarded as the system of law which the court has attributed to the parties' contract. Such a system of law 'governs most matters affecting formation and substance' of the contract.³⁷

From its original settings, however, which can be traced back to Huber, and then introduced to English law, the concept of 'proper law' implied the law of the place with which a contract had its closest connection.³⁸ Thereafter, two theoretical views were developed in determining how to interpret the concept. The first was subjective, and was based on the intention of the parties, whether express or implied. The second, which was supported by authors such as Westlake, was objective, and was based on localisation of an agreement in a specific jurisdiction.³⁹ Localisation was to be evidenced by the grouping of a contract's elements as reflected in its formation and terms.⁴⁰ By doing so the country in which its elements are most densely grouped becomes its natural seat.⁴¹ The localisation theory, however, discouraged express selection of a governing law 'if it conflicts with the natural seat of the contract as disclosed by the grouping of its elements.'⁴²

The intention and the localisation approaches bore significant implications for the choice of law process. On the one hand, the subjective approach commences the process by ascertaining the parties' actual intention,⁴³ and, if necessary, allows them to choose the applicable law. If parties did not select a governing law, then the court has to impose the law

³³See *Mount Albert Borough Council v Australasian Temperature & General Mutual Life Assurance Society* (n32) at 240.

³⁴See Dicey & Morris (n5) 1196-1197. Mann refers to it as the parties' agreed system which regulates their legally enforceable rights and duties. See F A Mann 'The Proper Law of Contract' (1950) 3 *International Law Quarterly* 60. See also *Mackender and Others v Feldia A G and Others* [1967] 2 QB 590, 602.

³⁵See D McClean & K Beevers *Morris: The Conflict of Laws* 17ed (2009) 353.

³⁶See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* (n1) 61.

³⁷See Cheshire & North (n17) 198.

³⁸The proper law was introduced into English law by *Robinson v Bland* 97 Eng. Rep 717 (KB 1760). In *Robinson v Bland*, Lord Mansfield stated that 'the law of the place [of contract] can never be the rule where a transaction is entered into with an express view of the law of another country, as the rule by which it is to be governed.'

³⁹See Cheshire & North (n17) 199. According to this approach, the proper law should be 'the law of the country in which the contract may be regarded localised.'

⁴⁰See Cheshire & North (n17) 199.

⁴¹*Ibid.*

⁴²*Ibid.*

⁴³*Ibid.*

that, in the circumstances of the case, the parties would have selected as reasonable people.⁴⁴ The subjective approach, however, was considered ‘an unsustainable myth’⁴⁵ because the intent of man cannot be tried, not even by the Devil himself, for he cannot know it.⁴⁶

Given the unsuitability of the subjective and objective approaches, the English courts sought a middle ground. In that compromise a three-stage approach emerged. First, the court had to look at the terms of the contract in an attempt to discover whether the parties had expressly provided what law was to apply.⁴⁷ Where no clause indicated the chosen law, the second stage was for the court to investigate the parties’ conduct to see whether a proper law could be inferred.⁴⁸ In effect, ‘the courts read an implied term into contracts purporting to represent the [parties’] common intention.’⁴⁹ If this inquiry also failed, then the court would proceed to the third stage, which involved determination of ‘the system of law with which the transaction had its closest and most real connection.’⁵⁰

The second stage of inquiry, however, attracted criticism at three levels. First, the purpose of implying terms in a contract is to give a transaction business efficacy.⁵¹ Whereas a court may, with good reason, state that the parties intended their contract to be valid (on the basis of the maxim *ut res magis valeat quam pereat*), business efficacy might be indifferent to the implication of law ‘A’ rather than law ‘B’.⁵² Secondly, ‘it is a complete myth to regard the

⁴⁴Ibid. See *Mcclean & Beevers* (n35) 352-353 citing *Mackender and Others v Feldia A G and Others* (n34) 240.

⁴⁵See P E Nygh *Autonomy in International Contract* (1999) 106. See also the dilemma shown by Stephenson, LJ in *Coastlines Ltd v Hudig & Veder Chartering NV* [1972] 2QB 34, 50.

⁴⁶See also E Peel *Treitel: The Law of Contract* 12ed (2009) 24.

⁴⁷See Dicey & Morris (n5) 1197.

⁴⁸Ibid. See *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* (n29) 583, *The Komninos S* [1991] Lloyd's Rep.370 (CA).

⁴⁹See *Cheshire & North* (n17) 201.

⁵⁰See Dicey & Morris (n5) 1197. See Nygh (n45) 747-775; *Mcclean & Beevers* (n35) 353. See *Bonython v Commonwealth of Australia* (n29) 219 (followed in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* (n29); *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* (n1) 61. See also *Boissevai v Weil* [1949] 1 KB 482, 490, 491 (*per* Lord Denning); *Tomkinson v 1st Pennsylvania Banking & Trust Co* [1961] AC 1007; see S Coronas & S Christensen *Comparison of Generic Consumer Protection Legislation* (2007) 33-34 (available at http://www.pc.gov.au/__data/assets/pdf_file/0008/73691/consumerprotectionlegislation.pdf (accessed 23/6/10)).

⁵¹See *BP Refinery Western Port v Shire of Hastings* (1977) 180 CLR 266. The principle of ‘*officious bystander*’ applies in such a situation. In *The Moorcock* (1889) 14 PD 64 it was stated that if the ‘*officious bystander*’ were to propose a term and both the parties would be likely to reply with a testy ‘oh, of course’, the term is implied.

⁵²See, for instance, the discussion in *Cheshire & North* (n17) 201. See also D Wyatt ‘Choice of Law in Contract Matters. A Question of Policy’ (1974) 47 *Modern Law Review* 399, 408. The maxim *ut res magis valeat quam pereat* was recently applied in the USA in *Eli Lilly Do Brasil, Ltda v Federal Express Corp* No. 06-cv-0530 (2d Cir (2007)) where federal common law (and not Brazilian law was ‘applied to a contract for the shipment of goods, notwithstanding the fact that the contract was negotiated, executed, and performed in Brazil, by a Brazilian company and a corporation that regularly conducts business in Brazil, concerning goods that were at all times located in Brazil. Dispositive of the choice of law inquiry was the fact that federal common law would enforce the contract provisions, while Brazilian law would not.’ See C Kotuby ‘*Ut Res Magis Valeat Quam Pereat* as a

ultimate decision of the court as a fulfilment of the [parties'] common intention',⁵³ because, when parties appear before the court, each has his own view. Thirdly, the process of discovering an implicit intention is not only artificial and tortuous, but is also a duplication of the third phase.⁵⁴ These objections eventually induced the English courts to abandon the second stage of the inquiry.⁵⁵

In Tanzania, if parties have expressly chosen which law will govern their contract, courts honour their choice unless it contravenes the provisions of a mandatory law.⁵⁶

Karachi Gas Co Ltd v H Issaq,⁵⁷ though originating from Kenya, depicts the position in Tanzania, since the East African Court of Appeal (which decided the case) was by then serving all East African countries, including Tanzania. The case involved a contract of sale of pipes to a buyer in Karachi 'f.o.b Mombasa'. Payment was to be effected in Pakistani currency a month following delivery. Later, the appellant cancelled the order because it failed to obtain import clearance under Pakistani laws governing exchange restrictions. The respondent (plaintiff) successfully sued for breach of contract. The appellant appealed seeking the East Africa Court of Appeal's decision as to what should have been the proper law of the contract.

In the course of adjudicating the matter, it appeared to the court that the contract was split into two parts and was governed by two laws. Kenyan law was to govern shipment and delivery (as the place of delivery was at Mombasa, and, hence, the contract was formed there), and Pakistani law governed importation into Pakistan and payment of the purchase price. Consequently, it was clear that the Kenyan law was the proper law, since the goods were in Kenya, the plaintiff was residing in Kenya, and the delivery was to be made in Kenya.

“Dispositive” Choice of Law Factor: A Recent Decision from the Second Circuit’ (available at <http://conflictoflaws.net/2007/ut-res-magis-valeat-quam-pereat-as-a-dispositive-choice-of-law-factor-a-recent-decision-from-the-second-circuit/> (as accessed on 25/11/2010).

⁵³ See Cheshire & North (n17) 201.

⁵⁴ Dicey & Morris (n5) 1197 note, for instance, that in *Armadora Occidental SA v Horace Mann Insurance Co* [1977] 1 WLR 250, Kerr J decided the applicable law by reference to the second test, and was affirmed by Court of Appeal on the basis of the third test, and in *Amin Rasheed Shipping Corp v Kuwait* (n1) 50, 69 Lord Wilberforce reached the same result by the third test as the other members did by the second test.

⁵⁵ See Dicey & Morris (n5) 1197.

⁵⁶ See, for instance, s 26(1) of the Fair Competition Act, 2002 which provides that ‘where the proper law of a contract for the supply by any person of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of the United Republic.’

⁵⁷ [1965] EA 42.

(b) Discovering the Proper Law

Under the English law of contract, establishing whether a contract has really been formed is a mixed question of law and fact. It is a question of fact where, for instance, one wants to establish whether there was *consensus ad idem*, but the issue becomes a question of law if one is to establish the existence of a valid offer and its acceptance.⁵⁸ In a cross-border e-contract the legal issues will have to be determined by a single system of law.⁵⁹

Determination of an objective proper law requires reference, *inter alia*, to the places of performance (*locus solutionis*) and contracting (*locus contractus*), both of which may be difficult to identify in the case of e-contracts.⁶⁰ With regard to the former, although this has the advantage of always having substantial connection with the contract, this too has its problems, for instance, in the case of bilateral contracts where each party has to perform in a different country. To put it in other word: Callies states that, if a contract creates mutual or multiple obligations, adherence to the *lex loci solutionis* approach may lead to the application of different laws to the same contract.⁶¹ With regard to latter, as the interactions between merchants and buyers located in different countries increase, however, it becomes more difficult to identify the place of contracting.⁶² The answer is therefore dependent on which party happens to be the offeror and which the offeree; once this is determined, the place of contracting can be identified.⁶³

As comprehensively outlined in Chapter Two,⁶⁴ the divergent theories governing *communication of acceptance in contract* are a further potential ground for challenging e-contracts, and often the resolution of which law will apply to a contractual dispute is for courts

⁵⁸ See Cheshire & North (n17) 214.

⁵⁹ Ibid.

⁶⁰ See Dicey & Morris (n5) 1188.

⁶¹ See G Calliess (ed) *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (2011) 58. The author states that the preference for *lex loci solutionis* came about when it was *lex loci contractus* was found to be less convincing, due partly to industrialisation and communication revolutions which made local market place to lose its importance as parties increasingly contracted over a distance as they transact in the global markets. He notes that Savigny, who identified the place of performance as the decisive connecting factor was of the view that such a place is agreed upon by the parties and thus depended on their express or implied will.

⁶² See Dicey & Morris (n5) 1196. See also Calliess (n61) 58.

⁶³ See Dicey & Morris (n5) 1196.

⁶⁴ See the discussion in Chapter II part 3(d)(i) and (ii). See also Tang (n28) 83-84; R Ong 'Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong' (2004) 12 *International Journal of Law and Information Technology* 101, 105. See also V Watnick 'The Electronic Formation of Contracts and the Common Law Mailbox Rule' (2004) 56 *Baylor Law Review* 175.

to have recourse to ‘putative proper law, i.e. the law that would have been proper law’ had the contract been concluded.⁶⁵

Having ascertained the proper law, the possible areas of its application must now be considered. Murray asserts that ‘in a cross-border contract choice of law issues appear in three levels.’⁶⁶ These are the issue regarding formal validity, ie, examining whether ‘all necessary formal requirements have been complied with’,⁶⁷ the question of substantial (material) validity, ie, ‘whether the contract has actually been formed and is legally valid, according to the laws of the jurisdiction which apply to the contract’,⁶⁸ and, finally issues regarding capacity, interpretation, performance and the consequences of breach of contract.⁶⁹ Since most e-contracts are of an informal nature, formal validity is generally not a problem. Capacity may be referred to *lexi loci contractus* or *domicilii*.

As for performance of the contract, the traditional approach is that the law of the place where performance is to take place will take precedence. Cheshire and North argue that ‘[w]hen the proper law and the *lex loci solutionis* are not identical, performance being a matter of substance, will be governed by the proper law.’⁷⁰ The *lex loci solutionis*, however, will apply to ‘matters connected with the mode and manner of performance, as contrasted with those that affect the substance of the contract.’⁷¹

4. The Doctrine of Party Autonomy

Parties to international transactions usually state the system of law to govern their contract, and courts generally give effect to such an express choice provided it is clear and capable of easy reference.⁷² Clarity is important otherwise the court will decline to give effect to the choice. In *Compagnie d'Armement Maritime v Compagnie Tunisienne de Navigation*,⁷³ for instance, clause 13 of a contract for the shipment of crude oil from one Tunisian port to another provided

⁶⁵ See Cheshire & North (n17) 215. See *Mackender v Feldia AG* (n34) 602-603. See also *Re Bonacina* [1902] 2Ch 394.

⁶⁶ See Murray (n10) 15-16.

⁶⁷ See Murray (n10) 16. See also Dicey & Morris (n5) 1197-1198.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ See Cheshire & North (n17) 231. See *Jacobs v Crédit Lyonnais* (1884) 12 QBD 589, 603 and *Mount Albert BC v Australasian Temperance & General Mutual Life Assurance Society Ltd* (n32) 224.

⁷¹ See Cheshire & North (n17) 235. Such minor details may include the currency in which payments are to be made, the date of maturity of a bill of exchange or the exact time of delivery - all these being subject to *lexi loci solutionis*.

⁷² See McClean & Beevers (n35) 352-353. See also *R v International Trustee for the Protection of Bondholders Akt* [1937] AC 500 (recently applied in *Musawi v RE International (UK) Ltd* [2008] 1All ER (Comm) 607.

⁷³ [1971] AC 572 (HL).

that ‘this contract shall be governed by the laws of the flag of the vessel.’ The Court of Appeal declined to give effect to the clause and held that a number of different vessels, flying different flags, would be engaged in transporting the oil, making the proper law too variable.

Choice of law clauses are common in contracts concluded over the Internet, usually being made part of the standard form. Inclusion of such clauses is an aspect of freedom of contract, and courts in common law jurisdictions accept that parties are free to select the governing law.⁷⁴ (This freedom also extends, as we have seen, to the power to choose a forum where to litigate.)⁷⁵

(a) Academic Criticisms about Party Autonomy

Despite its special relevance to international contracts, the principle of party autonomy has been a subject of much academic debate and criticism.⁷⁶ Bauerfeld has, for instance, argued that it should be abandoned because it is inadequate when analysed from the perspective of traditional conflict of law values.⁷⁷ Other academic commentators have also had grave reservations. They argue that to give parties freedom to choose the applicable law allows them to escape the mandatory provisions of an otherwise applicable legal system. Thus, ‘Beale assailed it as “absolutely anomalous”, “theoretically indefensible”, and “absolutely impracticable.”’⁷⁸

In the USA, Beale's objection to party autonomy is that ‘in point of theory ... it involves permission to the parties to do a legislative act.’⁷⁹ Other scholars contend that ‘the validity of the choice of law clause must itself be tested by some legal system.’⁸⁰ The

⁷⁴ See North & Fawcett (n2) 560 who state that parties can do so by a choice of law clause.

⁷⁵ See M Zhang ‘Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law’ (2006) 20 *Emory International Law Review* 511. Indeed, party autonomy, as a doctrine introduced to challenge the statist notion that it is only the law of the place of contract (the *lex loci contractus*) which should govern a contract, is now a well-known doctrine in contract law. See D S L Kelly ‘International Contracts and Party Autonomy (*Based on Golden Acres Ltd v Queens Estate Pty Ltd*)’ (1970) 19 *The International and Comparative Law Quarterly* 701.

⁷⁶ Ibid. See also ‘Conflict of Laws: Party Autonomy in Contracts’ (1957) 57 *Columbia Law Review* 553.

⁷⁷ See R J Bauerfeld ‘Effectiveness of Choice-of-Law Clauses in Conflict of Law: Party Autonomy or Objective Determination?’ (1982) 82 *Columbia Law Review* 1659.

⁷⁸ See P J Borchers ‘Choice of Law in the American Courts in 1992: Observations and Reflections’ (1994) 42 *American Journal of Comparative Law* 125, 135.

⁷⁹ See P J Borchers ‘Contract and Tort: Categorical Exceptions to Party Autonomy in Private International Law’ (2008) 82 *Tulane Law Review* 1645, 1648, citing 2 Beale *Conflict of Laws* (1935) 1079.

⁸⁰ See C F Forsyth *Private International Law: The modern Roman-Dutch law including the jurisdiction of the Supreme Court* 3ed (1996) 296. See also M Wolff ‘The Choice of Laws by Parties in International Contracts’ (1939) 73 *United States Law Review* 203, 206.

argument here is that ‘the chosen law cannot perform this task, because, if the choice of law clause is invalid, there can be no chosen law.’⁸¹

As will be seen later, for instance, Art 10 of the Rome Regulation has disposed of a major criticism of party autonomy. It provides that the validity of an express choice of law is to be tested by the law chosen by the parties. For this specific purpose, the proper law is presumed to have been validly chosen (the ‘putative’ proper law). However, under Art 10(2) of the Rome Regulation, a party may rely on the law of his or her habitual residence to establish a lack of consent, if it appears from the circumstances that it would be unreasonable to determine the effect of his or her conduct by the putative proper law.

The doctrine of party autonomy, however, if examined from an e-commerce perspective, overcomes most– if not all– the difficulties that e-commerce causes in a traditional conflict of laws setting.⁸² The doctrine avoids the problem of localising and identifying places of contracting and performing.⁸³

Critics have nevertheless argued that party autonomy has the potential to work negatively on consumers' rights, unless specific consumer protection concerns are properly taken into account.⁸⁴ The worrying part is the inequality of bargaining power between online consumers and e-merchants.⁸⁵

In most ‘click-wrap’ or ‘browse-wrap’ agreements, for instance, the terms or conditions governing the contract are imposed unilaterally. A choice of law (or forum) clause is thus, in fact, a unilateral choice, and is imposed on the consumer. In view of this, the ‘clause could be one with the obvious intention to deprive the consumer of his legal rights, eg, a

⁸¹See Forsyth (n80) 296.

⁸²See Tang (n28)18.

⁸³Ibid, citing the Brussels Regulation I, Article 23 (2) and the Hague Choice of Court Convention, Articles 5 & 6 (all providing for special rules to validate electronic choice of courts agreements.) See also Rome I Regulation, Article 3 and UNCITRAL Model Law on E-commerce with Guide, para 44, supporting the doctrine. (This Model Law will be discussed in the next chapter).

⁸⁴See Tang (n28) 8, 18. Essentially, Tang argues (at 8) that ‘consumer contracts challenge the appropriateness of the doctrine of party autonomy’ The author notes, however, that the doctrine ‘can establish certainty, predictability and efficiency.’ See also M Gruson ‘Governing Law Clauses in Commercial Agreements-New York’s Approach, (1985) 18 *Columbia Journal of Transnational Law* 323. The author argues, (at pages 323-324) that, the desire of parties is to see their ‘rights and duties under an agreement be as well defined and predictable as possible [and for that case]... parties to commercial agreements, hoping to increase certainty, are anxious to incorporate an agreement on governing law.’ However, as a true indication that the doctrine of party is not absolute Ware argues that, sometimes ‘... many government-created rights and duties apply despite private agreements to substitute alternative rights and duties.’ (See S J Ware ‘Default Rules from Mandatory Rules: Privatizing Law Through Arbitration’ (1998-1999) 83 *Minnesota Law Review* 703, 705.

⁸⁵ See Tang (n28).

business chooses the law with the lowest standard of protection for consumers.⁸⁶ Businesses also tend to prefer their own forum law, due to familiarity or convenience, a fact which commentators find potentially prejudicial to foreigner consumers because it forces them to litigate abroad.⁸⁷ Consequently, states, conscious of the need to protect their consumers in an e-commerce environment, have sought to assert jurisdiction over e-transactions⁸⁸ or to limit the autonomy doctrine by ensuring that consumers, as weaker parties, are protected.⁸⁹

Despite the above criticisms, proponents of party autonomy maintain that, where the choice does not affect a third party or lead to market failures, it should be upheld, since it enhances predictability and promotes international commerce, especially in B2B settings.⁹⁰ In essence, where parties have inserted choice of law and choice of forum clauses in their contracts these reduce uncertainty.⁹¹ This means that, apart from simplifying the judicial task, party autonomy may often have the virtue of 'fulfilling the parties' reasonable expectations.'⁹²

(b) Party autonomy and Mandatory Rules

Generally, within the context of international contracts, the first objection to party autonomy, as discussed above, still remains a serious problem.⁹³ Can parties avoid an otherwise applicable law simply by selecting a law that better suits their purposes? In other words, are they free to evade mandatory rules of an otherwise applicable law?⁹⁴ This issue has attracted a vigorous debate.⁹⁵

Some scholars have, for instance, argued that, under the doctrine of party autonomy, parties enjoy not only the liberty to choose the applicable law but also the freedom to 'remove

⁸⁶Ibid.

⁸⁷Ibid at 9.

⁸⁸See C Pappas 'Comparative US & EU Approaches to E-commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation' (2002) 31 *Denver Journal of International Law & Policy* 325, 327.

⁸⁹See, for instance the EU approach as expressed by Rome I Regulation and in the Brussels I Regulation discusses above.

⁹⁰See North & Fawcett (n2) 553. See also R Giesela 'Party Autonomy in the Private International Law Contracts: Transatlantic Convergence and Economic Efficiency' CLPE Research Paper No.4/2007. See also F K Juenger 'Contract Choice of Law in Americas' (1997) 45 *The American Journal of Comparative Law* 195. See further T H Gary 'Minimum Contacts in Cyberspace: The Classic Jurisdiction Analysis in a new setting' (2002) 1 *Journal of High Technology Law* 85, 89-91.

⁹¹See A T Guzman 'Arbitrator Liability: Reconciling Arbitration and Mandatory rules' (2000) 49 *Duke Law Journal* 1279, 1294.

⁹²See Borchers (n78) 135.

⁹³ See G Sambugaro 'What Law to Choose in International Contract?' (2008) *The European Legal Forum* (E) 3-2008, 126-132 (available at <http://www.simons-law.com/library/pdf/e/887.pdf> (as accessed on 18/8/2010.))

⁹⁴See Zhang (n75) 511.

⁹⁵See E A O'Hara & L E Ribstein 'From Politics to Efficiency in Choice of Law' (2000) 67 *University of Chicago Law Review* 1151. See also Nygh (n45) 140-141.

the state organs almost completely from the process of adjudication.⁹⁶ The autonomy rule, therefore, requires courts to honour parties' choices without restriction.⁹⁷ With such a proposition, however, does it mean that mandatory rules play no role in determining the parties' rights and duties? Does it mean that their freedom is absolute? Before considering these questions it is pertinent to consider what mandatory rules are and how are they treated.

Mandatory rules can be defined as rules of the law of a particular country, which cannot be derogated from by contract.⁹⁸ They are considered 'immutable'⁹⁹ and are intended to protect certain disadvantaged groups or national security or a state's economy.¹⁰⁰ Although contracting parties are free to choose the applicable law, the general principle is that, if 'the contract has a sufficiently close connection to another country, mandatory rules of that country can be invoked to override the applicable law which remains applicable outside the scope of those mandatory rules.'¹⁰¹ The non-derogable nature of mandatory rules is justified where, for instance, a state wants to protect parties within the contract, or parties outside the contract.¹⁰²

In Tanzania, for instance, in case of a contract for supply of goods or services to a consumer, s 27(1)(d) of the Fair Competition Act¹⁰³ prevents suppliers from restricting, modifying, or excluding by way of a clause in their contracts of supply, a consumer's right to rescind such contracts.¹⁰⁴ This is an immutable rule that cannot be sidelined by the parties'

⁹⁶See A F Lowenfeld *International Litigation and the Quest for Reasonableness: Essay in Private International Law* (1996) 13. See also Nygh (n45) 13. For a contrary view see S E Cox 'Interested Forum' (1997) 48 *Mercer Law Review* 727, 730.

⁹⁷See Bauerfeld (n77) 1659.

⁹⁸See North & Fawcett (n2) 575-576. See also C R Drahozal 'Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards' (2003) 3 *Peppidine Dispute Resolution Law Journal* 419, 420.

⁹⁹See I Ayres & R Gertner 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *The Yale Law Journal* 87.

¹⁰⁰See Borchers (n79) 1651.

¹⁰¹See Schu (n11) 207.

¹⁰²See Borchers (n79) 1652 arguing that 'mandatory rules have significant externalities, [as] they exist to protect not just the parties to the transaction, but also other classes of persons.' See also H Mather 'Choice of Law for International Sales Issues Not Resolved by the CISG' (2001) 20 *Journal of Law and Commerce* 155, 203.

¹⁰³Act No 8 of 2003.

¹⁰⁴In the UK the Unfair Contract Terms Act 1977 contains provisions which restrict the parties' freedom to choose the applicable law. Section 27(2) of that Act states that the 'Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both) (a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or (b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.' (See North & Fawcett (n2) 576. According to Lipstein statutory provisions containing a general choice of law clause ... have assumed increasing importance where labour relations and consumer protection are concerned.' See K Lipstein 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 *International and Comparative Law Quarterly* 884.

agreement. Consequently, mandatory rules displace freedom of contract and seem to be a modern tool that creates a limitation on party autonomy.¹⁰⁵

(c) Avoidance of Mandatory Rules

As is well known, a contract is a legal conception that arises out of private arrangements. It is therefore a matter of private law with privately-created rights and obligations which, as Ware contends, may potentially replace ‘whatever government-created rights and duties would otherwise apply.’¹⁰⁶ This being the case, there is no reason why the parties may not choose to avoid application of a particular system of law to their contract. Where this choice amounts to evasion of mandatory rules of an apparently applicable legal system, however, such as the rules that protect consumers, courts will not enforce it since not all relationships are ‘privatisable.’¹⁰⁷

One of the very few English cases in which a discussion regarding potential evasion of mandatory rules arose was *Vita Food Products v Unus Shipping Co.*¹⁰⁸ English law was expressly chosen, although neither the parties nor the contract had any connection with this jurisdiction. On appeal to the Privy Council, it was held that the contract was valid, even though it failed to take account of mandatory rules of an otherwise applicable law. The decision on the express choice of proper law was the crux of the judgment. Lord Wright held that whatever intention was expressed in the contract would be conclusive.¹⁰⁹ He further stated that, although this principle might be considered too broad, ‘it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.’¹¹⁰

While English law had no apparent connection with the transaction, the Privy Council held that this was not a fatal defect, because there might nevertheless be certain associations with the chosen law. The venture might, for instance, have been financed or insured in England, and English law might have been chosen because its rules on maritime matters were more highly developed. According to the Privy Council, a contract valid by its proper law would be valid everywhere. In the *Vita Foods* case, the validity of the choice of proper law was tested by the *lex fori*. (An alternative approach, adopted in Art 8 of the Rome Convention

¹⁰⁵See Borchers (n79) 1651.

¹⁰⁶See Ware (n84) 705.

¹⁰⁷See Ware (n84) 706.

¹⁰⁸[1939] AC 277 (PC) at 289ff.

¹⁰⁹*Ibid.* See also *R v International Trustee* [1937] AC 500 (HL) at 529.

¹¹⁰See *Vita Food Products v Unus Shipping Co* (n108) 290. See also North & Fawcett (n2) 557; J J Fawcett ‘Evasion of Law and Mandatory Rules in Private International Law’ (1990) 49 *Cambridge Law Journal* 44, 48.

–now Article 10 of the Rome I Regulation– however, tests the choice by the putative proper law).

The court held, however, that even if English courts were to judge the contract valid, the forum was not obliged to hold likewise. In other words, it was assumed that a forum might be obliged to apply its own mandatory rules. As it happens, the English courts have given expression to their own mandatory rules under the rubric of public policy: application of a foreign law is refused if it runs counter to English ideas of policy, morality or *boni mores*.¹¹¹ Now, however, policy may intrude at another stage of the choice of law process.¹¹²

A major problem in this regard is how to determine whether a mandatory rule applies only to domestic relationships or to international relationships.¹¹³ In deciding this question courts refer to two criteria. The law in question may indicate whether it applies internationally: it may contain an express clause to that effect or one may be implied by a process of interpretation.¹¹⁴ Exchange control regulations are typical of mandatory laws intended to apply internationally.¹¹⁵

Alternatively, reference may be made to the substance of the statute, which involves distinguishing between public and private laws.¹¹⁶ The former are supposed to apply only within the territory of the enacting state, whereas the latter may apply internationally.¹¹⁷

¹¹¹Giving the public policy doctrine a positive function (ie, to apply the *lex fori*) rather than its usual negative function (which is simply to exclude a foreign law). For a more discussion regarding reasons why a court may apply a foreign law or decline to do so see G S Alexander ‘The Application and Avoidance of Foreign Law in the Law of Conflicts’ (1975) 70 *North Western University Law Review* 602. See also O Kahn-Freund ‘Reflections on Public Policy in the English Conflict of Laws’ (1953) 39 *Transactions of the Grotius Society, Problems of Public and Private International Law, Transactions for the Year 1953* 39.

¹¹² Article 9(2) of the Rome I Regulation gives the forum a broad discretion to apply its own mandatory rules. ‘Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.’

¹¹³ Certain treaties specify the scope of application of national legislation. (See, for example, Art 8(2)(b) of the IMF or Bretton Woods Agreement).

¹¹⁴ See North & Fawcett (n2) 579. See *Carver v Saudi Arabian Airlines* [1999] 3All ER 61 (CA). See also, for instance, *Ingmar GB Ltd v Eaton Leonard Technologies Inc* C-381/98; [2000] ECR I-9305 at para 24-25. See also M Pauknerová ‘Mandatory Rules and Public Policy in International Contract Law’ (2010) 11 *ERA-Forum Journal of Humanities, Social Sciences and Law* 29. For more on methods which court have employed to determine whether a statute apply internationally or not see S Dutson ‘The Conflict of Laws and Statutes: The International Operation of Legislation Dealing with Matters of Civil Law in the United Kingdom and Australia’ (1997) 60 *Modern Law Review* 668.

¹¹⁵ See *Boissevain v Weil* [1949] 1 KB 482; [1950] AC 327 (HL).

¹¹⁶ See Lipstein (n105) 886.

¹¹⁷ See Pauknerová (n114) 33 noting that ‘traditionally, courts decline to give effects to foreign public laws.’ Nevertheless, such laws may be taken into account as some cases show. In the *Nigerian Artefacts case*, BGH 22.6.1972, NJW 26, 1575 (1972), for instance, the German *Bundesgerichtshof* considered the validity of an insurance contract concerning the artefacts during their transport from Nigeria to Germany. The transaction was governed by German law but a Nigerian law, which was not the proper law of the contract, prohibited the

Because so many ostensibly public laws now serve private interests (and vice versa), however, this type of distinction is not always helpful.¹¹⁸ Generally speaking the forum should ask, first, whether the law in question demands application, and secondly, whether there was a close connection between the legal relationship and the enacting country, and thirdly, whether the latter was in a position to implement its law (which suggests that property or a *propositus* is situated within its jurisdiction).¹¹⁹ Finally, the foreign law should not offend the forum's *ordre public*,¹²⁰ a matter to be discussed below.

English courts also give effect to the mandatory rules of the *lex loci solutionis*. The leading case in this regard is *Ralli Bros v Compania Naviera Sotoy Aznar*.¹²¹ This case concerned an English company that had chartered a Spanish ship to carry a cargo of jute from Calcutta to Barcelona. Under English law, the proper law of the contract, freight was fixed at £50 per ton, one half to be paid by the owners in London when the vessel sailed and the other half to be paid at Barcelona on arrival. While the ship was under way, the Spanish government passed a law fixing the maximum freight on jute at 875 pesetas a ton and imposing penalties for breach of this limit. The forum, an English court, held that:

[w]here a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that state.¹²²

One interpretation of this judgment was to regard enforcement of Spain's legislation as a matter of fact, which could then be pleaded under the doctrine of frustration of contract. This line of argument is perfectly reasonable since foreign law is deemed to be fact by the

unlicensed export of artefacts. The German court held the contract to be unenforceable as immoral under German law. See also *Regazzoni v K C Sethia Ltd* [1958] AC 301, where the House of Lords held that 'English courts will not enforce a contract if its performance involves doing an act in a foreign and friendly state which violates the law of that state.'

¹¹⁸ For a more discussion on rules that are technically private but serve public law interests see E S Rashbat 'Foreign Exchange Restrictions and Public Policy In The Conflict Of Laws: Part II' (1943) 41 *Michigan Law Review* 1089.

¹¹⁹ See H van Houtte *The Law of Cross-border Securities Transactions* (1999) 87.

¹²⁰ Occasionally, when a foreign rule cannot be applied – for instance, because it offends the forum's idea of *boni mores* – it may be indirectly taken into account as a fact. Hence, if a party was exposed to heavy penalties for performance or, if property had been confiscated, the forum could treat the situation as fact.

¹²¹ *Ralli Bros v Compania Naviera Sotoy Aznar* [1920] 2 KB 287.

¹²² *Ibid*, at 304.

forum.¹²³ Thus, a performance illegal under the *lex loci solutionis* would be a fact that must be taken into account when the forum determines the parties' liability.

Ralli Bros received indirect support from *Kleinwort Son & Co v Ungarische Baumwolle Industrie*¹²⁴ and more recently in *Libyan Arab Foreign Bank v Bankers Trust Co.*¹²⁵ In this case the court held that performance of a contract is excused if it necessarily involves doing an act that is unlawful by the *lex loci solutionis*.¹²⁶ The principle was again reiterated in *Apple Corps Ltd v Apple Computer Inc (No Challenge: Preliminary Issue)*.¹²⁷

The Rome Convention went even further than the English common law to give the forum discretion to apply the mandatory rules of other applicable foreign laws. Article 7(1) provided that:

[w]hen applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract....¹²⁸

(d) Public Policy Limitations

Public policy is another ground upon which courts may limit the operation of an express choice of law.¹²⁹ When used in conflict of laws, public policy 'denotes a justification or excuse for not applying, or recognising the application of an otherwise applicable rule of law.'¹³⁰

¹²³ See *Grupo Torras SA and Torras Hostench London Ltd v Sheikh Fahad Mohammed Al-Shabah* [1996] 1 Lloyd's Rep 7, 18. See also R Fentiman 'Foreign Law in English Courts' (1992) 108 *Law Quarterly Review* 142, 149; R Fentiman *Foreign Law in English courts: Pleading, Proof and Choice of Law* (Oxford Private International Law Series) (1998) 60; R Hausmann 'Pleading and Proof of Foreign Law - a Comparative Analysis' *The European Legal Forum (E) 1-2008*, 1 – 14, at (available at <http://www.simons-law.com/library/pdf/e/878.pdf> (as accessed on 27/9/2010)).

¹²⁴ [1939] 3 All ER 38 (CA). See too *Rossano v Manufacturer's Life Insurance Co* [1963] 2 QB 352.

¹²⁴ [1989] QB 728; [1989] 3 All ER 252.

¹²⁵ [1989] QB 728; [1989] 3 All ER 252.

¹²⁶ Nevertheless, the court held that, contracts between banks and their customers are governed by the law of the place where the accounts are kept, and it is possible to have a contract governed by two different proper laws. In casu the rights and obligations in respect of the London account were governed by English law, therefore BT was obliged to render payments of the moneys standing to the L Bank's credit in this account.

¹²⁷ [1992] FSR 431, 443-444.

¹²⁸ Article 7(1) of the Rome Convention is now Art 9(3), Rome I Regulation.

¹²⁹ See M G Paulsen & M I Sovern 'Public Policy in the Conflict of Laws' (1956) 56 *Columbia Law Review* 969; See H F Goodrich 'Foreign Facts and Local Fancies' (1938) 25 *Virginia Law Review* 26; P B Carter 'The Role of Public Policy in English Private International law' (1993) 42 *International and Comparative Law Quarterly* 1. See also Cheshire & North (n17) 142. See also *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 292, 302; *Vervaeke v Smith* [1983] 1 AC 145,164.

¹³⁰ Paulsen & Sovern (n129) 1. See Goodrich (n129) 32 emphasizing on the need to distinguish between public policy where used in the internal sense and when used in conflict of laws.

Application of public policy in choice of law has inclusive and exclusive effects.¹³¹ The inclusive effects are shown when the forum accepts application of a foreign law either because the foreign law on the point is similar to that of the forum¹³² or where the court applies the foreign law as a matter of international comity.¹³³ The exclusive effects of public policy, however, occur when a court excludes the application of a foreign law.¹³⁴ This happens when it is clear that application of foreign law will lead to a violation of ‘some fundamental policy of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.’¹³⁵

Although conflict cases are subject to the doctrine of public policy, courts are generally reluctant to invoke it. In *Richardson v Mellish*,¹³⁶ Judge Burrough, nearly two centuries ago, referred to it as ‘a very unruly horse and once you get astride it, you never know where it will carry you.’¹³⁷ Lord Nicholls, in *Kuwait Airways v Iraqi Airways* (Nos 4 and 5),¹³⁸ stated that, only in certain exceptional and rare cases, will ‘a provision of foreign law be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court.’¹³⁹

Carter contends, however, that, unlike other areas of law, public policy has been more successfully invoked in the choice of law ‘relating to commercial contracts, an area in which English choice of law rules are more internationalist.’¹⁴⁰ For that reason, invoking it may result in the refusal to enforce contracts that involve restraint of trade,¹⁴¹ trading with the enemy,¹⁴² defrauding a foreign revenue authority¹⁴³ or breaking the laws of friendly foreign countries.¹⁴⁴

¹³¹See N Enonchong ‘Public policy in the Conflict of Laws: A Chinese Wall Around Little England?’ (1996) 45 *International & Comparative Law Quarterly* 633, 650.

¹³²See Goodrich (n129) 31-32.

¹³³See Enonchong (n131) 650.

¹³⁴*Ibid.*

¹³⁵See Paulsen & Sovern (n129) 969.

¹³⁶ See *Richardson* 130 Eng. Rep. 294 (Ex 1824).

¹³⁷This doctrine has been criticised from the time on as being vague, unpredictable, and uncertain in application. Like the Kiswahili adage that goes ‘*ukiona nyani mzee amekwepa mishale mingi*’, (literally meaning that ‘if you see an old monkey, it has escaped many arrows’), certainly, the doctrine of public policy, though it has seen extensive criticisms it has nevertheless survived to date. See M M Karayanni ‘The Public Policy Exception to the Enforcement of Forum Selection Clauses’ (1995-1996) 34 *Duquesne Law Review* 1009, 1013-1014.

¹³⁸[2002] 2 AC 883.

¹³⁹*Ibid.* According to Carter the existence of public policy, however, ‘denotes the shortcomings of choice of law rules’ and makes it to be used as ‘an escape route from the application of the relevant choice of law rules.’ See Carter (n129) 1.

¹⁴⁰*Ibid* at 3.

¹⁴¹See J G Collier *Conflict of Laws* 3ed (2001) 374. See also *Mason v The Provident Supply & Clothing Co* [1913] AC 724, *Roussillon v Roussillon* (1880) 14 Ch D 315.

5. The EU Choice of Law Regime: The Rome I Regulation

The EU approach to choice of law is not discretionary but rule-based. With the primary aim of harmonising conflict of law rules,¹⁴⁵ the EU enacted a major legal instrument to govern choice of law in contracts:¹⁴⁶ the Rome I Regulation.¹⁴⁷ According to Calliess, the Rome Regulation reflects the desire to create ‘uniform European rules of the conflict of laws with regard to contractual... obligations.’¹⁴⁸ The initiative to bring about such a unified system is further inspired by the already established goal of creating an environment in which freedom, security and justice play a significant role of strengthening and maintaining the proper functioning of the EU’s internal market.¹⁴⁹ It is also seen as a means to limit the effects of forum shopping.¹⁵⁰

Consequently, and, while paying attention to the need to protect proprietary rights and to facilitate private ordering and effective and low-cost contract enforcement as important pillars that support commerce,¹⁵¹ the Rome I Regulation has preserved the parties’ freedom to choose the law that will govern their contract.¹⁵² Article 3(1) of this regulation requires the

¹⁴²See *Dynamit AG v Rio Tinto Co* (n129) 260.

¹⁴³See *Re Emery's Investment Trusts* [1959] Ch.410.

¹⁴⁴See *Foster v Driscoll* (n30) 470.

¹⁴⁵See Recital 4 to Rome Regulation I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the Law Applicable to Contractual Obligations (Rome I) (*Official Journal OJ L* 177 of 4.7.2008).

¹⁴⁶See Z S Tang ‘The Interrelationship of European Jurisdiction and Choice of Law in Contract’ (2008) 4 *Journal of Private International Law* 35.

¹⁴⁷This Regulation, which came to force in 2009, replaced the Rome Convention, 1980. The replacement was necessitated by various factors, including the fact that the convention was unable to address or compliment the new emerging business techniques such as e-commerce. See ‘Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation’ COM (2002) 654 final, 14 January 2003 (at 29) (available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf (as accessed 25/8/2010)). See also North (n5) 503 concerning the inadequacies of the Rome Convention and why it was necessary to give it ‘a careful examination’.

¹⁴⁸See Calliess (n61) 1.

¹⁴⁹ Ibid. Recital 1 of the Regulation provides that ‘[t]he Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market’ See also Recital 6 which provides that ‘[t]he proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.’ See also Article 3 no.3 of the Treaty of European Union (as entered into force on 1 December 2009), OJ EU C 115/47 of 9 May 2008.

¹⁵⁰ See Calliess (n61) 5-6. See also Fentiman ‘Parallel Proceedings and Jurisdiction Agreements in Europe’ in P de Vareilles-Sommaires (ed) *Forum Shopping in the European Judicial Area* (2007) 27-45.

¹⁵¹ See Calliess (n61) 3. See also G K Hadfield ‘The Many Legal Institutions that Support Contractual Commitments’ in C Me ´nard & M M Shirley (eds) *Handbook of New Institutional Economics* (2005) 175–203, 175. See also D V Snyder ‘Private Law Making’ (2003) 64 *Ohio State Law Journal* 371.

¹⁵² See Article 3(1) of the Rome I Regulation. For a thorough discussion of Article 3 and its legislative history see Calliess (n61) 57-85. See also *Catterpillar Financial Services v SNC Passion* [2004] 2 Lloyd’s Rep 99.

choice to be expressly made or clearly demonstrated by the terms of the contract or the circumstances of the case. It provides that:

[a] contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.¹⁵³

Apart from giving preference to party autonomy, which is regarded as ‘one of the cornerstones of the system of conflict of law rules in the matters of contractual obligations’,¹⁵⁴ the Regulation also offers protection to consumers.¹⁵⁵ Extension of consumer protection to cross-border contracts was one of the contentious issues during the earlier discussions leading to the adoption of this Regulation. Safeguarding consumers’ interests, however, has been an important concern in Europe.¹⁵⁶

With the development of Internet and e-commerce it has been necessary for conflict of laws rules to address choice of law questions in online consumer contracts,¹⁵⁷ particularly to provide online consumers with the protection of being able to rely on their law of habitual residence to govern disputes with e-merchants. Moreover, given the inherent difficulties of determining an appropriate choice of law in online transactions, adopting the Rome I Regulation was an opportune moment ‘to precisely define an effective connecting factor [which entitles a court] to apply the law of the consumer’s domicile.’¹⁵⁸

The most important rules in the Rome I Regulation are the following.

(i) Parties are free to choose the law governing their contract.¹⁵⁹ This rule, however, is limited by either the operation of mandatory rules or other particular policy considerations.

¹⁵³ Art 3(1) of Rome I Regulation.

¹⁵⁴ See Recital 11 of the Regulation.

¹⁵⁵ Recital 23 provides that for ‘contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of- law rules that are more favourable to their interests than the general rules.’

¹⁵⁶ See L E Gillies *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (2008) 117-118. The author has also discussed the difficulties posed by the Internet. See also L Gillies ‘Choice of Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation’ (2007) *Journal of Private Law* 89; Z S Tang ‘Parties’ Choice of Law in E-Consumer Contracts’ (2007) 3 *Journal of Private International Law* 113; J Rothchild ‘Protecting the Digital Consumer: The Limits of Cyberspace Utopianism’ (1999) 44 *Indiana Law Journal* 893.

¹⁵⁷ *Ibid*, at 118.

¹⁵⁸ *Ibid*, at 118.

¹⁵⁹ See Article 3 generally of Rome I Regulation.

(ii) Where parties did not expressly chose an applicable law the applicable law must be determined in accordance with the rules provided for in Art 4 of the Regulation. Such determination is to be done objectively, and, in most cases, ‘the objective connecting factor is the habitual residence.’¹⁶⁰ Article 4(1)(a), (b), (d), (e) and (f), provide rules governing choice of law for the sale of goods, provision of services, franchises or distribution. In these cases, the applicable law will be determined according to the country of habitual residence of the party effecting characteristic performance.¹⁶¹

Article 4(1)(a), for instance, provides that in absence of a choice by the parties, ‘a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.’ Furthermore, if the contract involves provision of services, then Art4(1)(b) provides that such contract ‘shall be governed by the law of the country where the service provider has his habitual residence.’ As a residual rule Art 4(2) provides that a contract is governed by the law of ‘the country where the party required to effect the characteristic performance of the contract’ resides.

Generally, in order to stengthen legal certainty and predictability, the list of specified types of contracts in Art 4 of the Regulation does not grant courts much flexibility in the course of determining the applicable law.¹⁶² Nevertheless, Gebauer argues that the Regulation has brought simplicity of application to persons who are not specialised in conflict of laws.¹⁶³

(iii) Where a contract is more closely related to a country other than provided for by Art 4(1) and (2), the Regulation provides that the law of that country will be applied.¹⁶⁴ However, if the

¹⁶⁰ See M Gebauer ‘Article 4: Applicable Law in the Absence of Choice’ in Calliess (n61) 87.

¹⁶¹ See Art 4(1) (a), (b), (d), (e) and (f) of Rome I Regulation. According to Art 4(1)(c) of the Regulation Contracts concerning Immovable property are governed by *lex loci situs*.

¹⁶² See Gebauer (n160) 88.

¹⁶³ Ibid. See also See Cheshire, North & Fawcett *Private International Law* 14ed (2008) 723; O Lando & P A Nielsen ‘The Rome I Regulation’ (2008) 45 *Common Market Law Review* 1687, 1704.

¹⁶⁴ See Art 4(3) of Rome I Regulation. Art 4(1) and (2) provides as follows:

‘(1) [t]o the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence; (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated; (d) notwithstanding point (e), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; (f) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; (g) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence; (h) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be

law applicable cannot be determined in accordance with what Art 4(1) and (2) provides, then, the contract is governed by the law of the country with which it is most closely connected.¹⁶⁵

Treatment of consumer contracts under the Regulation is given special attention. As Art 6 of the Rome I Regulation indicates, the Regulation ensures that the applicable law is that of the consumer's country of habitual residence, provided that this is also the country where the supplier directed his professional or commercial activities.¹⁶⁶ Article 6 is considered to be 'a logical extension of the limitations on the freedom of contract which in domestic contract law are associated with consumer protection.'¹⁶⁷ Generally, it therefore reflects the requirement in Recital 23 of the Regulation, which reflects the general principle that weaker parties shall 'be protected by conflict of laws rules that are more favourable to their interests.' In view of this, Art 6(1) provides that, subject to certain conditions, where a contract is 'concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence.'

Article 6(1)(b) of the Rome I Regulation is more relevant to e-commerce transactions.

This Article provides as follows:

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the

determined; (i) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

(2) Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (i) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.'

¹⁶⁵See Art 4(4) of Rome I Regulation. See U Magnus 'Article 4 Rome I Regulation: The Applicable Law in Absence of Choice' in F Ferrari & S Leible (eds) *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (2009) 29, 33.

¹⁶⁶See Article 6(1)(a) and (b) of the Rome I Regulation which provides as follows:

'1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.'

(See also (generally) Arts 5-8 of the Regulation).

¹⁶⁷ See Calliess 'Article 6: Consumer Contracts' in Calliess (n61) 125.

professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

The above Art 6(1)(b) lays down one of the conditions that entitle consumers to rely on the laws of their own place of habitual residence if the e-merchant ‘by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.’ Parties are permitted, however, to enjoy freedom of choice and may agree to apply a law of another country, save that the law chosen should not provide lesser protection than the protection that the consumer should have enjoyed in his country of habitual residence.¹⁶⁸

Overall, apart from enhancing harmonisation, and hence promoting certainty and predictability of the choice of law rules in contracts, the protective mechanism adopted in Rome I Regulation in favour of the law of consumer’s habitual residence is a useful tool to regulate cross-border transaction. It is important to note that, although consumer protection is currently an issue of global concern and a policy to that effect has been put in place,¹⁶⁹ there has never been a global convention to protect their rights and approaches and the levels of protection differ in each country. In the area of conflict of laws, the harmonisation approach adopted in the EU is therefore beneficial as it guarantees that consumers will not have to bear the burden of litigating away from their place of habitual residence. This thesis submits thus that this approach should be adapted in a global context.

¹⁶⁸According to Art 6(3) of the Rome I Regulation ‘[i]f the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.’ Gillies (n156) argues (at 121) that, the earlier draft of the Rome I Regulation had suggested that the law of consumer’s habitual place of residence would apply in all contracts involving a consumer. This proposal was, however, unsuccessful since it was argued, and accepted as a rule, that parties to a consumer contract should also enjoy the right to choose a law to govern their contracts. Thus, Art 6(2) of the Regulation allows parties to a consumer contract freedom to select a law to govern their contract. Such a chosen law ‘may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable.’

¹⁶⁹ See the 1985 UN Guidelines for Consumer Protection, A/RES/39/248 16 April 1985 (as expanded in 1999) (available at http://www.un.org/esa/sustdev/publications/consumption_en.pdf (as accessed on 7/5/2011)). See also the OECD Guidelines for Consumer Protection in the Context of E-commerce (available at <http://www.oecd.org/dataoecd/18/13/34023235.pdf> (as accessed on 7/5/2008)). See Calliess (n61) 125, D Harland ‘The United Nations Guidelines for Consumer Protection’ (1987) 10 *Journal of Consumer Policy* 245.

6. Conclusion

As indicated in this chapter, every international contract must be governed by a particular system of law. This law may be expressed by parties or determined by court through the conflict of laws rules as the 'proper law'. Under the English – and hence Tanzania– conflict of laws, whenever parties determine the proper law to govern their contract, their choice will be respected unless it is not bona fide or legal, or it is contrary to public policy or contravenes the mandatory rules. The problem, however, arises when parties have not expressly chosen the governing law. If that happens to be the case, the court needs to determine the applicable law– a difficult exercise.

In an e-commerce scenario, the problem is even more complicated, because e-commerce transactions cannot be easily tied to a particular location. For instance, determining what amounts to an online advertisement or specific invitation to a consumer in a foreign state (the dematerialisation factor) is sometimes problematic. Similarly, it is also becoming difficult to determine the location and identity of the parties, a fact which complicates the application of special protection rules to be afforded to consumers.

Consequently, some of the traditional tests developed by courts to help determine the applicable law, especially in the common law countries, such as the place of contracting or performance are difficult to apply in an online environment given the diversity of connections which transactions may have. In the context of contract formation, for instance, while establishing when and where a contract was concluded is helpful in determining the applicable law, doing so is not easy as regards Internet-based contracts. Clarity on the applicable law is thus necessary, and, as will be observed in the subsequent chapter, the UNCITRAL approach on the time (when) and the place (where) an e-contract is said to be formed may be helpful.

With the cross-border character of e-commerce, it is also quite possible for online suppliers to deal with buyers from all over the world. In view of this, international trade is no longer a preserve of big companies (as it used to be), but has, as of late, embraced a significant number of consumer transactions. Involvement of consumers in such transactions, however, has made consideration of legal issues, such as the applicable law in case of a contractual dispute, the extent to which mandatory rules can be avoided by parties, the extent to which courts may rely on public policy, and the extent to which protection should be extended to consumers, more relevant.

As stated in this chapter, while the parties' freedom to choose the applicable law has been widely accepted, the extent of their freedom, especially in consumer contracts, is questionable. In particular, when consumers are involved in contracts one has to be more cautious, given the possible inequality of bargaining power. In most cases, if such contracts are upheld without taking into account the position which consumers occupy, there seems to be a high possibility to favour the merchants than consumers. In most consumer contracts with choice of law clauses, for instance, it is the merchants who (due to their stronger position) draw up such contracts and insert such clauses unilaterally. Hence, the merchants gain the advantage of deciding in which forum to litigate, and may exploit the consumer's weak bargaining power to choose the law with lowest standards of consumer protection.

The problem of protecting consumers is further exacerbated by the fact that, whereas there may be a requirement that a choice of law clause in a contract must be consented to, (this being part of the informed consent requirement) it is far from truth to state that online consumers do indeed make an informed consent when they transact online. This is because most e-contracts, such as click-wraps, will require a consumer to click the consent button to proceed with the transaction. Given that the choice of law clauses in such a contracts are always fused with others forming a long detailed list of terms and conditions (which not all consumers will read to the end) it is not correct to say that a consumer who clicks the 'I accept' button has sufficient knowledge or made an informed consent.

In order to protect consumers' interests, many jurisdictions therefore contain rules that are mandatory in nature, meaning that they cannot be avoided by contracting parties. Some such rules provide that a contract may not deprive the consumers of certain rights they are entitled to thereby limiting the parties' freedom by subjecting all contracts affecting consumer's rights under the law of the consumer.

In view of the potential for e-contracts to cause cross-border disputes, triggering a conflict of laws dispute, this chapter argues that, whereas parties are at liberty to design the terms of their contract and the law to be applied, conflict of laws rules relating to choice of law, and the effectiveness of the parties' chosen law *vis-à-vis* the avoidance of mandatory rules of an otherwise applicable law, remain issues of priority to e-commerce.

It has also emerged from the discussion in this chapter that there is a need for clear and harmonised rules that will satisfy the key demands in e-commerce, *viz*, predictability and

certainty of the existing legal environment, without compromising consumer's rights. In the absence of an express choice of law in a contract, the proper law may be determined either subjectively or objectively. While the subjective approach attempts to impute an intention of the parties by examining the terms of the contract or its surrounding circumstances, the objective approach ascertains the law through the closest connection test. In both approaches, however, the quest for certainty and predictability may be frustrated.

On the one hand, as regards the subjective test, no one can truly say with confidence what a party had in mind. On the other, although the objective approach, which attempts to localise the contract by determining the factors to which it has 'closest and most real connexion' would seem preferable, it too is not without difficulties. In the e-commerce scenario the traditional connecting factors, such as the place of contracting, the place of negotiation or performance are not easy to locate. Attempts to establish, for instance, the place of contracting in an electronic environment may be a daunting exercise. Reliance on some factual connecting factors, such as the location of the servers may be less helpful because such servers may be located in states that have no real connection with the contract.

There is yet another argument in favour of clarity of the choice of law rules in the light of current developments. It is evident that most of the rules relied upon in Tanzania are based on the traditional English common law approach. This approach is however problematic given its slow development, and this casts a shadow of doubts regarding its ability to effectively respond to the contemporary changes in the methods of international trade. In view of the developments in the EU this approach now seems to be outdated. First, the common law rules were designed to cater for face-to-face and paper based contracts. Second, cases relating to choice of law in contract in Tanzania are rare, which is an indication that the area has not seen much development. With e-commerce promising wider external engagements, it is necessary to consider adopting more flexible rules, including rules that take into account the need to promote consumer protection.

As indicated in this chapter, the EU approach to choice of law rules, as envisaged in the Rome I Regulation, presents a model which may further be advanced for global application. This option may be useful since it accommodates concerns of individual consumers without unduly hindering party autonomy or the continued application of new technologies. Because this approach is applied at regional level it can also be considered as an appropriate model for

harmonisation of choice of law rules in a global or regional economic community, such as the East African Community of which Tanzania is a member.

The next chapter examines the need for a more harmonised approach to trans-border commerce and the global initiatives that have existed generally to achieve that goal.

CHAPTER FIVE: GLOBAL INITIATIVES ON E-COMMERCE

REGULATORY FRAMEWORK

1. Introduction

This chapter examines efforts to create a global and harmonised regulatory environment for e-commerce. It argues that such an approach is the only viable solution to ensure the smooth development of e-commerce, to address the inadequacies in domestic legal frameworks (which hinder e-commerce growth) and to assist the developing countries in joining the digital economy.

The chapter has nine parts, including this introductory part. Part two examines the necessity for regulating e-commerce internationally. Part three analyses the debates regarding Internet regulation. Part four examines the ‘agreed’ regulatory approaches, while taking into account the role of harmonisation as a strategic platform for successful regulation.¹

Building on part four, parts five, six, seven and eight consider some of the global and regional e-commerce regulatory initiatives. These include efforts made by UNCITRAL (as a global example), the EU and USA initiatives (representing developed countries) and lastly African and East Asia initiatives (which represent the developing countries).² All these initiatives are useful because they help to facilitate international trade³ and enhance global and regional economic integration. Moreover, they provide mechanisms to address existing legal inadequacies hindering domestic e-commerce growth in most developing countries. Part nine concludes this chapter.

¹For more about harmonisation see M Boodman ‘The Myth of Harmonisation of Laws’ (1991) 39 *American Journal of Comparative Law* 699; J A Esterella-Faria ‘Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?’ (2009) *Unification Law Review* 1.

²The role played by UNCITRAL in the creation of uniform private law rules that promote functional equivalence between online and conventional modes of transacting business reveals its contribution in the promotion of international trade through e-commerce. More about UNCITRAL’s role will be considered in part 5 of this chapter, the key interest being the Model Law on e-commerce and the UN Convention on E-contracts. The Model Law and the Convention were developed under the auspices of this organisation.

³In the course of analysing the existing global efforts, it will be noted that, although governments play a notable role in e-commerce regulatory developments, the private sector’s role (together with that of international and non-governmental organisations), has been quite significant. For more on this see I J Lloyd *Information Technology Law* 6ed (2011).

2. Why Regulate E-commerce Internationally?

The international demand for e-commerce regulation arose from the need to address cross-border problems that affect e-commerce and the future development and use of the Internet technology.⁴ The cross-border nature of the Internet required sensible regulatory approaches that would create a balanced environment suitable for varied competing interests. These included: (i) a need to promote equivalence between online transactions and the traditional paper-based transactions, (ii) a need to protect contractual autonomy while ensuring consumer protection,⁵ and (iii) a need to promote technological advancement (by avoiding unnecessary restrictive regulation that would inhibit growth of the Internet and e-commerce).⁶

As discussed in chapter three, even though e-commerce may take place within the sovereign borders of a state, it is largely a cross-border phenomenon.⁷ Attempts to regulate it through individualised strategies may lead to inconsistencies, hence, hindering its development.⁸ Successful regulation, therefore, rests on international or trans-border solutions, an approach that requires measures to support harmonisation.⁹

In order to avoid inconsistent and isolated regulatory efforts, the current chapter supports UNCITRAL initiatives, as reflected in the Model Laws on Electronic Commerce and E-signature (adopted in 1996 and 2001 respectively) and the UN Convention on the Use of Electronic Communications in International Contracts, 2005 (to be referred hereafter as ‘the

⁴See H Farrell ‘Constructing the International Foundations of E-Commerce: The EU-US Safe Harbor Arrangement’ (2003) 57 *International Organization* 277, 278. The author points out the difficulties posed by the new communication technologies due to their ability to ‘cut across national contexts that were previously isolated from each other’ and the negative external effects which may result from an individual state’s efforts to regulate these technologies.

⁵ See, for instance, M R Albert ‘E-Buyer Beware: Why Online Auction Fraud Should be Regulated’ (2008) 39 *American Business Law Journal* 575. See also F Damanpour ‘E-business E-commerce Evolution: Perspective and Strategy’ (2001) *Managerial Finance* 16, 23.

⁶ See S K Thomas ‘The Protection and Promotion of E-Commerce: Should there be a Global Regulatory Scheme for Digital Signatures’ (1998-1999) 22 *Fordham International Law Journal* 1002. See also (generally) K Jamal, M Maier & S Sunder ‘Privacy in E-Commerce: Development of Reporting Standards, Disclosure, and Assurance Services in an Unregulated Market’ (2003) 41 *Journal of Accounting Research* 285.

⁷See J Cachpole ‘The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principle of Establishment’ (2001) 9 *International Journal of Law and Information Technology* 1.

⁸ Ibid at 4. See also H D Gabriel ‘The Fear of the Unknown: The need to Provide for Special Procedural Protections in the International Electronic Commerce’ (2004) 50 *Loyola Law Review* 307, 308.

⁹See J Huffmann *Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops* (Unpublished LLM Dissertation, University of Cape Town 2004) 10. See also D Satola, R Sreenivasan & L Pavlasova ‘Benchmarking Regional e-Commerce in Asia and the Pacific and Assessment of Related Regional Activities’ in *Harmonisation of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs* (2004). (Available at http://www.unescap.org/tid/publication/tipub2348_party1v.pdf (as accessed on 2/8/2007)).

UN Convention on E-contracts’). These instruments, however, were developed amid heated controversy regarding whether the Internet should be regulated, and if so, to which extent and in what manner.

3. Should the Internet be Regulated?

(a) The Regulatory Debates

Any discussion regarding regulation of the Internet, whether at international, regional or national levels, inevitably affects e-commerce. Generally, two important issues form the basis for debates concerning its regulation: whether it should be regulated and, if so, what regulatory form should be used.¹⁰ Some authors, a cyber-libertarian group, oppose using existing rules to regulate the Internet, arguing that such rules are unsuitable for the new environment. They contend that the Internet should be left to regulate itself.¹¹ Others, however, who hold a cyber-paternalist view, have argued that the Internet and its economy can and should be regulated.¹²

(i) Cyber-libertarians and the Distinct Place Theorists

The cyber-libertarians¹³ argue in favour of freedom from state regulation.¹⁴ Their earlier arguments were farfetched, to the extent that they declared certain laws, such as those regulating intellectual property, to be ‘dead’.¹⁵ While such early proponents of cyber-liberty advanced an anarchy-typology of cyberspace, latecomers to the group regarded cyberspace as a ‘distinct place’ that behoves a distinct regulatory approach, if indeed it needs to be regulated.¹⁶

Johnson and Post, for instance, argued in favour of the ‘distinct place’ approach, stating that cyberspace ‘radically undermines the relationship between legally significant

¹⁰See A D Murray *The Regulation of Cyberspace: Control in the Online Environment* (2007) x.

¹¹See T Kevan & P McGrath *E-mail, the Internet and the Law* (2001) 5. See A L Newman & D Bach ‘Self – Regulatory Trajectories in the Shadow of Public Power: Resolving Digital Dilemmas in Europe and the United States.’ (2004) 17 *Governance: An International Journal of Policy, Administration, and Institutions* 387.

¹²See G I Zekos ‘State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction’ (2005) 13 *International Journal of Law and Information Technology* 1, 2-4.

¹³The term ‘cyber-libertarians’ appears in M J Radin & R P Wagner ‘The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace’ (1998) 73 *Chicago-Kent Law Review* 1295, 1297. See also J Boyle ‘Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors’ (1997) 66 *University of Cincinnati Law Review* 177.

¹⁴The early contenders include John Perry Barlow and Mitch Kapor. (For more on this visit: <http://www.eff.org> (as accessed on 6/8/2007)). See also J P Barlow ‘A Declaration of Independence for Cyberspace.’ This declaration is also re-produced in M Geist *Internet Law in Canada* 3ed (2002) 15-17.

¹⁵See J P Barlow ‘Key note Address, Symposium on “Fundamental Rights on the Information Superhighway” at the New York School of Law 1994’ (1994) *Annual Survey of American Law* 335.

¹⁶See R P Johnson & D Post ‘Law and Borders-The Rise of Law in the Cyberspace’ (1996) 48 *Stanford Law Review* 1367.

(online) phenomena and physical location.’¹⁷ There was a denunciation of regulation founded upon state sovereignty, which they considered ineffective,¹⁸ because attempts by each nation to regulate would lead to regulatory inconsistency, resulting in chaos.¹⁹ Consequently, they suggested that the Internet must be freed from traditional regulation, or else rules, if any, should emanate only from the online community.²⁰

(ii) Against Cyber-Anarchy: The Cyber-Paternalist View

In efforts to counter the arguments regarding the impossibility of regulating the Internet, cyber-paternalists (or digital structuralists)²¹ argue that cyberspace is not an ‘unregulatable’ sphere, as is assumed.²² To the contrary, they say that rules be enacted to address certain cyberspace threats, such as children’s access to harmful materials, unauthorised collection of an individual’s private information without consent or infringement of intellectual property.²³

According to Lessig, regulation should not be conceived of only in governmental terms, because there are many other ways to regulate the Internet, including the norms imposed by the community or markets or through the use of technology architecture.²⁴ Consequently,

¹⁷See Johnson & Post (n16) 1369-1370.

¹⁸See Murray (n10) 7. See also M Klang ‘Controlling Online Information: Censorship & Cultural Protection’-A presentation given at ‘WSIS, Internet Governance and Human Rights’ Uppsala, 3rd October, 2005 (available at http://www.kus.uu.se/pdf/publications/ICT/klang_03_oct.pdf (as accessed on 7/8/2007)). See further E M Katsh ‘Rights, Camera, Action: Cyberspatial Settings and the First Amendment’ (1995) 104 *Yale Law Journal* 1681, 1713.

¹⁹See J L Goldsmith ‘The Internet and the Abiding Significance of Territorial Sovereignty’ (1997-1998) 5 *Indiana Journal of Global Legal Studies* 475, 477. See also J L Goldsmith ‘The Internet, Conflicts of Regulation, and International Harmonisation’ in E Mestmaecker & C Engel (eds) *Law and Economics of International Telecommunications* (2000) 197-207, 201.

²⁰See Johnson & Post (n16) 1369.

²¹See B L Smith ‘The Third Industrial Revolution: Policy-making for the Internet’ (2001) 3 *Columbia Science & Technology Law Review* 1, 11. For a discussion on the concept of technology paternalism see S Spiekermann & F Pallas ‘Technology Paternalism– Wider Implications of Ubiquitous Computing’ (2006) 4 *International Journal of Technology Assessment and Ethics Science* 6.

²²See, for instance, J Reidenberg ‘Governing Networks and Rule Making in Cyberspace’ (1996) 45 *Emory Law Journal* 911. See also L Lessig ‘The Zones of Cyberspace’ (1996) 48 *Stanford Law Review* 1403; Lessig ‘The Path of Cyber-law’ (1995) 104 *Yale Law Journal* 1743.

²³See ‘Developments in the law: The Law of Cyberspace’ (1998-1999) 112 *Harvard Law Review* 1680, 1635. See also F H Easterbrook ‘Cyberspace and the Law of Horse’ (1996) *University of Chicago Legal Forum* 207. It is important to note that, although the Internet reduces the relevance of national borders, the state’s power to influence rule-making by networks through, for instance, creation of network standards, has never been lost. See Reidenberg (n22) 929. Indeed, many states have enacted specific laws to regulate hate speech, pornography, spam and or hacking. See A Endeshaw ‘Regulating the Internet: clutching at a straw?’ (1998) 20 *Computer Communications* 1519; S Stalla-Bourdillon ‘Regulating the electronic marketplace through extraterritorial legislation: Google and eBay in the line of fire of French judges’ (2010) 24 *International Review of Law Computers & Technology* 39.

²⁴See L Lessig ‘The Law of Horse: What Cyber Law Might Teach’ (1999-2000) 113 *Harvard Law Review* 501, 507-510. See also L Lessig *Code v2.0* (2006); A D Murray ‘Free Expression and Censorship through Design Protocols: A Misapplication of the ICANN UDRP’- A conference paper *BILETA 17th Annual Conference April 5th*

the law, norms, markets, and architecture constitute four regulatory modalities able to operate together within real space and cyberspace.²⁵

A true regulatory concern (suggested by the earlier contenders against cyber regulation), however, is that, given the Internet's nature and possible accessibility in other jurisdictions, it may face opposing regulatory treatments, leading to confusion.²⁶ For instance, while some jurisdictions may authorise certain online conduct, such as online gambling, others may restrict it, thereby creating serious legal conflicts.²⁷

(iii) The Digital or Cyber-Pragmatist Arguments

Apart from the cyber-libertarian and paternalist views, there is a third category of scholars who posit a more pragmatic approach. This takes into account the fact that economic globalisation and market interactions have created interdependency among online operators, individuals and states. In view of this, cyber-pragmatists support technology-based and other market-driven mechanisms, arguing that such mechanisms can address internet problems more responsively and efficiently than the traditional regulatory intervention.²⁸

Viewed through an e-commerce lens, a pragmatist approach offers a suitable alternative to both digital libertarianism and digital structuralism.²⁹ Although it sees private arrangements, such as e-contracting, as useful in promoting commercial relations, it recognises that the same can only succeed against a background set of rules and policies supported by

to 6th 2002 Free University Amsterdam at 23 (available at <http://www.bileta.ac.uk/02papers/murray.html> (as accessed on 7/8/2007)).

²⁵See Lessig 'The Zones of Cyberspace' (n22).

²⁶In the case of *Digital Equip Corp v AltaVista Tech Inc* 960 F Supp 456, 462 (D Mass 1997) a federal judge was of the view that "as far as the Internet is concerned, not only is there perhaps 'no there there' the 'there' is everywhere where there is Internet access."

²⁷Morse, for instance, notes that 'Internet gambling operations circumvent domestic regulatory systems designed to accomplish various policy goals, including protecting minors, enforcing tax laws and preventing money laundering.' See E A Morse 'Extraterritorial Internet Gambling: Legal Challenges and Policy Options' (2007) 1 *International Journal of Inter-cultural Information Management* 33, 35-36. See also A C Jackson 'Gambling, Technology And Society: Social Issues' Paper presented at the conference on *Gambling, Technology and Society: Regulatory Challenges for the 21st Century*, convened by the Australian Institute of Criminology in conjunction with the Australian Institute for Gambling Research and held in Sydney, 7-8 May 1998. The paper is available at <http://www.aic.gov.au/events/aic%20upcoming%20events/1998/gambling.aspx> (as accessed on 26/7/2011).

²⁸See Smith (n21) 17. Essentially, the pragmatist approach does not object to government involvement in the cyberspace but welcomes it as a key partner. In this sense, the approach becomes not only relevant but also necessary in achieving a solution that best harnesses the benefits of public-private relationships for better economic ends while avoiding conflicting regulatory practices.

²⁹See Smith (n21) 17 who argues that '[d]igital pragmatism neither promises nor proposes specific solutions to discrete problems that arise online. Rather, it seeks to articulate a framework through which these problems are identified, defined and resolved.'

governments.³⁰ From this understanding, and, in order to arrive at an agreed cyber regulatory position, the suggestion has been to devise a well harmonised regulatory approach by involving all interested parties.³¹ Thus, the crucial issue in regulating cyberspace is not ‘if’ regulation is possible but ‘who’ regulates³² and how.³³

(b) From Who Regulates to How to Regulate

Three schools of thought have emerged regarding the form of regulation that should be adopted to regulate the Internet. The first two schools, though premised on a market-based approach, differ regarding the preferable regulatory modes and the extent to which such approaches should be used to control economic activities.³⁴

(i) The Self-regulation School

Self-regulation forms part of the digital pragmatist approach, which supports market based-mechanisms for regulating industries like the Internet. Market-based mechanisms, however, need not necessarily emanate from the Internet community, as cyber-libertarians claim.³⁵ Instead, proponents argue that whoever advocates intervention must justify it by showing that the market has failed to regulate itself.³⁶ They support self-regulation because they consider governmental intervention too monopolistic in nature, and any form of monopoly hinders

³⁰See Smith (n21) 17. Indeed, at times the private sector’s actions may fall short of its aims, necessitating government intervention.

³¹See Murray (n10) 250. The author supports an ‘effective symbiotic regulatory intervention [that applies] the principles of synchronicity [and] which suggest that harmony arises naturally and may be harnessed in a social regulatory environment.’

³²See C R Topping ‘The Surf is Up, But Who Owns the Beach?-Who should Regulate Commerce on the Internet?’ (1999) 13 *Notre Dame Journal of Law, Ethics & Public Policy* 179. The author proposes (at 236) that ‘states could have a direct role in shaping the future of the Internet by becoming market participants rather than regulators.’

³³See Klang (n18) 4-5.

³⁴See, for instance, C S Binamungu & G S Ngwilimi *Regulation of Banking Business in Tanzania* (2006) 11.

³⁵See Smith (n21) 18. The author states that ‘[t]he term ‘market-based’ as used here means mechanisms that exist within, are tied to, or in some sense mimic competitive markets and that display attributes often associated with such markets. These attributes include: (1) responsiveness to consumer demand; (2) plurality of choice; and (3) structural incentives towards efficiency.’

³⁶See, generally, Binamungu & Ngwilimi (n34) 12. See also S Breyer ‘Analysing Regulatory Failures: Mismatches, Less Restrictive Alternatives and Reforms’ (1979) 92 *Harvard Law Review* 552. (As for the necessity of governmental interventions in some key areas, such as banking, see M Mussa ‘Global Economic Prospects: Surviving a Mild Case of Stagflation.’ Paper presented at the *Fourteenth Semiannual Meeting on Global Economic Prospects* September 26, 2008 (available at <http://www.iie.com/publications/papers/mussa0908.pdf> (as accessed on 3/9/2010)).

development and frustrates the market structure.³⁷ Proponents also argue that market-based mechanisms are more responsive to changing business needs and practices than legal rules.³⁸

(ii) The Interventionist School

The interventionist school opposes self-regulation and supports state intervention in the interest of the public. It argues that, in many respects, ‘market systems [are] inherently full of deficiencies, inequities and classical market failures, which, as a matter of public interest, must be regulated.’³⁹ Indeed, the current global economic recession resulting from the failing self-regulatory controls and auditing mechanisms questions ‘the effectiveness of ... self-regulation and have led to increased calls for institutional controls.’⁴⁰ This means that the need to address institutional and regulatory frameworks by governmental intervention is inevitable, and interventionists call for such steps to be taken.⁴¹ One challenging issue, however, is the extent to which governmental intervention should be allowed.⁴² The answer does not lie in sole, direct government intervention (in its strictest sense) but in the so-called new minimalist regulatory approach.

(iii) The New Minimalist Regulatory Approach

The new minimalist regulatory approach is a combination of the two earlier schools. It supports selective public intervention to the exclusion of other aspects of regulation.⁴³ This hybrid model represents a significant strategy relevant to Internet regulation,⁴⁴ especially

³⁷See Smith (n21). See also J T Delacourt ‘The International Impact of Internet Regulation’ (1997) 38 *Harvard International Law Journal* 207, 234-235 (advocating self-regulation). However, see Reidenberg (n22) 911, 926 (advocating a collective approach that draws from government and private sectors).

³⁸See Smith (n21) 26.

³⁹See T Altenburg & C Von Drachenfel ‘The ‘New Minimalist Approach’ to Private Sector Development: T Critical Assessment’ (2006) 24 *Development Policy Review* 387.

⁴⁰See M Faure & A van der Walt (eds) *Globalisation and Private Law: The Way Forward* (2010) 2.

⁴¹See J H Jackson ‘International Economic Laws in Times that are Interesting’ (2000) 3 *Journal of International Economic Law* 3.

⁴²See Damanpour (n5) 23. See also P S Reichertz ‘Understanding Government Regulation of the Marketing and Advertising of Medical Devices, Drugs, and Biologics: The Challenge of the Internet’ (1997) *Food & Drug Law Journal* 303. See also P Sohmen ‘Taming the Dragon: China’s Efforts to Regulate the Internet’ (2001) 1 *Stanford Journal of East Asian Affairs* 17. The author argues (at page 26) that use of legislative mechanisms to shield governmental interests will ‘be a large obstacle for private Internet business, both domestic and foreign by creating uneven competition and an atmosphere of uncertainty.’

⁴³For that reason it is referred to as the new minimalist approach to regulation. For more on this see Altenburg & Drachenfel (n39) 387. See also T Beck & A Demirgüç-Kunt *Growth and Poverty: Public Policy for Private Sector*. Note No. 268 (2004) 1, where they argue that at best, ‘policy –makers should focus on creating a business environment that allows easy entry and exit for firms and assures entrepreneurs and financiers that property rights and contracts will be enforced.

⁴⁴See T D Casey & J Magenau ‘A Hybrid Model of Self-Regulation and Governmental Regulation of Electronic Commerce’ (2002) 19 *Santa Clara Computer & High Technology Law Journal* 1, 28-29.

because of its non-restrictiveness as opposed to the restrictive sense, which one may attach to the term 'regulate'.⁴⁵ The approach focuses on the government rather than the market and promotes the creation of a level playing field through deregulation and property rights guarantees. The central argument is that governmental interventions should only be facilitative, (that is to say, it should only be limited to the establishment of the necessary frameworks for harmonious operations of economic activities).

From an e-commerce perspective, the new minimalist regulatory approach creates a suitable environment for e-commerce development because it guarantees the autonomy of parties and seeks to ensure that they transact fairly. Moreover, the approach has the potential to enhance technological innovation and widen or advance technology use without unnecessary restraints. It provides room for further development and the adoption of harmonised rules to tackle some of the key Internet and e-commerce problems, by bringing together the competing private and government interests in the course of finding a common solution.

Even as governments strive to regulate Internet-based activities harmoniously, the development of this technology in the hands of the private sector should not be curtailed through state regulation, but should be given an opportunity to continue to develop. In order to ensure an appropriate balance, and while advancing the need for harmonious regulation of the Internet and activities conducted through this medium, some states, the USA for one,⁴⁶ favour self-regulation.

4. E-commerce and the Need for Harmonisation of Rules

Legal harmonisation is an age old ideal.⁴⁷ It implies an attempt to create a coherent framework within which domestic laws can be modified or updated in a uniform manner.⁴⁸ It is also useful in promoting legal cooperation between different countries. Historically, the ideal can be dated to as early as the ninth century AD, when a code of transnational mercantile law (the

⁴⁵According to the Black's Law Dictionary 'to regulate' means 'to control, govern, or direct by rule or regulation; to subject to guidance or restrictions' See *Black's Law Dictionary* 7ed (1999).

⁴⁶See White House *A Framework for Global Electronic Commerce* (July 1st, 1997) available at <http://www.ta.doc.gov/digeconomy/framework.htm> (as accessed on 20/5/ 2007).

⁴⁷See N Bourély 'The context for transactional legal harmonisation in the Americas: A background to the SLA/CIDA Project.' Available at <http://www.oas.org/legal/english/osla/bourelly.doc> (as accessed on 27/07/07).

See also L C Backer (ed) *Harmonising Law in an Era of Globalisation: Convergence, Divergence, and Resistance*, (2007) xiii. According to Boodman (n1) (at 700-701), '[o]ne attribute of harmonisation is that it presupposes and preserves the diversity of the objects harmonised.'

⁴⁸ See Bourély (n47).

lex mercatoria) developed in medieval Europe.⁴⁹ The *lex mercatoria* has been extraordinarily successful in promoting international trade. Instruments that embody this law draw indiscriminately from both civil and common law traditions.⁵⁰

Harmonisation of rules is, however, not always easy to achieve, given the different legal cultures and developments that cut across different jurisdictions.⁵¹ Nevertheless, as new relationships supported by Internet technology, such as e-commerce, continue to evolve at an unprecedented speed, harmonised rules become useful. E-commerce, as a cross-border phenomenon, raises various legal issues such as taxation, consumer protection, the form which e-contracts may take and the procedures involved in their creation, to mention but a few.⁵² Consequently, since e-commerce disputes are more likely to trigger a conflict of laws they are easier to address where countries apply a set of uniform rules rather than relying on domestic system of private international law.⁵³ Despite the challenges posed by disparities in legal traditions, harmonisation is the only suitable vehicle to advance commerce in a technology-driven market.⁵⁴

As such, various international initiatives have been directed towards creating a harmonised regulatory environment that will ensure not only easy enforcement of e-contracts but also the removal of all unnecessary restrictions.⁵⁵ Central to the existing international

⁴⁹Ibid. The Paris Convention for the Protection of Industrial Property (1883) for instance, is a 19th century example of a harmonisation process. The convention is available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as accessed on 20/8/2010).

⁵⁰See Bourély (n47). See also W Tetley (QC) 'Mixed Jurisdictions: Common Law v Civil Law (codified and uncodified)' Part II, (1999) 4 *Uniform Law Review* 591. See also Estrella-Faria (n1) 6.

⁵¹ See Estrella-Faria (n1) 5. See also J Wiener *Globalisation and the Harmonisation of Law* (1999) 134. The success of this process of harmonisation has always been criticised given the multiplicity of the harmonisation projects, and the fact that, 'at a global level, the truly successful binding instruments –measured in terms of actual ratification or domestic enactments- remain the minority.' See Estrella-Faria (n1) 8; S Hartkamp 'Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope', Acts of the Congress to celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law (UNIDROIT) (2003) *Unification Law Review* 81, 82.

⁵²See Z S Tang *Electronic Consumer Contracts in the Conflict of Laws* (2009) 17.

⁵³Ibid. As discussed in chapter three and four conflict of laws rules are not international but domestic in nature. Each country has its own rules.

⁵⁴See A B Overby 'UNCITRAL Model Law on E-commerce-Will Cyberlaw be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce' (1999) 7 *Tulane Journal of International & Comparative Law* 219, 219-220. See also Wiener (n51) 151 who considers harmonisation of national laws to be not only possible but is a fact. See further, W Twining *Law in Context: Globalisation and Legal Theory* (2000) 4-9; C T Marsden 'Information and Communication Technologies, Globalisation and Regulation' in C T Marsden (ed) *Regulating the Global Information Society* (2000) 6; R Honey 'An Introduction to the Symposium: Interrogating the Globalisation Project' (2002) 12 *Transnational Law & Contemporary Problems* 1; P P Polanski 'Towards a supranational Internet law' (2006) 1 *Journal of International Commercial Law and Technology* 1.

⁵⁵See T I Akomolede 'Contemporary Legal Issues in Electronic Commerce in Nigeria' (2008) 3 *Potchefstroom Electronic Law Journal* 1, 2-3. See also 'E-commerce: An International Effort' (2000) 5 *ejournalUSA: Economic Perspectives* (available at <http://usinfo.state.gov/journals/journals.htm> (as accessed on 12/2/ 2007)). As

regulatory efforts are the reforms determined to promote functional equivalence between transactions conducted via the modern technologies and the conventional methods.⁵⁶

5. Global Efforts Through UNCITRAL

For business and economies to flourish in the new inter-networked environment, and as called for by the New Minimalist Regulatory Approach, regulatory efforts must be drawn from different players.⁵⁷ Building on this understanding, UNCITRAL, as the main body of the United Nations responsible for the development of international trade law, has contributed a great deal towards establishing uniform international trade rules.⁵⁸ Its work on e-commerce started with the recognition that this new business venture would need an internationally agreed upon legal framework.⁵⁹

Initially, UNCITRAL had serious doubts about the effectiveness of the traditional state-based rule-making regimes, and the existing domestic laws dealing with issues arising from e-commerce.⁶⁰ One of the key issues to which UNCITRAL had to direct its mind was the existing legal requirement that documents needed to be signed or be in paper form.⁶¹

previously mentioned in chapter three and four, precedents have already been set from which one could mobilise support towards harmonised substantive e-commerce rules. The best example is the Brussels Regulation I (see Art 23(1) and (2) or the Rome I Regulation on Choice of law rules to contract. See also the Hague Choice of Court Convention, 2005, Art 3(c). For instance, the UNCITRAL Model Laws on E-commerce and e-signature as well as the United Nations Convention on the Use of Electronic Communications in International Contract (to be further considered later in this chapter) represent an important global avenue for the development of substantive harmonised (uniform) laws for e-commerce. See J A Estrella-Faria 'Legal Harmonisation through Model Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)' at 5, (available at http://www.justice.gov.za/alraesa/conferences/papers/s5_faria2.pdf (as accessed on 20/8/2010)).

⁵⁶See J K Winn 'Emerging Issues in Electronic Contracting, Technical Standards and Law Reform' (2002) 3 *Uniform Law Review* 699.

⁵⁷See a paper by members of the UNCITRAL Secretariat titled: *Electronic Commerce and International Legal Harmonisation: Time to go beyond Functional Equivalency?* ICT and E-business Strategies for Development, High Level Regional Conference for Transition Economies, Geneva, 20-21 October 2003, Organized by UNCTRAL and UNECE. The Article points out some factors for harmonisation being : (a) The trans-national nature of the Internet commerce, (b) Its disregard of jurisdictional borders; (c) Lack of effective domestic laws dealing with e-commerce and (d) Market shifts form geographical space to cyberspace.

⁵⁸See Chapter I of the Study Prepared by UNCTAD Secretariat in 1998 titled *Electronic commerce: legal considerations UNCTAD/SDTE/BFB/1* 15 May 1998.

⁵⁹ See a paper prepared for the Commonwealth Secretariat –Titled: *Legal Aspects of Electronic Commerce: Work by the United Nations Commission on International Trade Law (UNCITRAL) Meeting of Commonwealth Law Ministers and Senior Officials* Port of Spain, Trinidad and Tobago 3-7 May 1999 Memoranda Vol2 Commonwealth Secretariat Marlborough House London September (2001) 281. See also D Campbell (ed) *E-commerce Law and the Digital Signatures* (2005); R Nielsen 'Mega-trends in Electronic Commerce Law' *EU Electronic Commerce Law* 1ed (2004) 9-22 (available at http://uk.cbs.dk/forskning_viden/institutter_centre/institutter/law/menu/om_instituttet/it_retsgruppen/artikler (as accessed on 30/07/07)).

⁶⁰See the Commonwealth Secretariat Paper (n59) 281.

⁶¹See UNCITRAL Report *Legal value of computer records* (A/CN.9/265). See also UNCITRAL: *Recommendation on the Legal Value of Computer Records* (1985). Available at

Considering this requirement, and ‘noting that the use of automatic data processing (ADP)’ was becoming a firmly established global practice, UNCITRAL recommended a review of the existing legal requirements for handwritten signatures or ‘other paper-based method of authentication on trade related documents with a view to permitting, where appropriate, the use of electronic means of authentication.’⁶²

In the course of implementing this recommendation, it formed a Working Group on Electronic Commerce (referred hereinafter as ‘the WGEC’). This Working Group’s task was to prepare Model Laws, one on e-commerce (which was adopted in 1996), and another on e-signatures (which was adopted in 2001).⁶³ Later the WGEC prepared the UN Convention on E-contracts.⁶⁴ Together, these instruments, as will be discussed below, represent broadly accepted frameworks for international legal harmonisation in the area of e-commerce.⁶⁵

(a) The UNCITRAL Model Law on E-commerce

Although the Model Law on E-commerce is not a binding legal instrument, it provides national legislators with ‘a set of internationally acceptable rules which detail how a number of legal obstacles to the development of electronic commerce may be removed, and how a secure legal environment may be created for electronic commerce.’⁶⁶ Its objective is to facilitate e-commerce by ensuring equality of treatment between users of paper-based documents and of electronic forms of communication. In view of this objective, the Model Law addresses key issues affecting e-commerce, including notions such as ‘writing’, ‘signature’, and ‘original’, which were formerly perceived as obstacles to successful e-commerce.⁶⁷

http://elib.coj.go.th/Agreement/data/Ele_commerce1.3.pdf (as accessed on 20/10/2009). See also A Boss ‘Electronic Commerce: Globalisation of Domestic Law or Domestication of Globalised Law?’ (Available at <http://www.aals.org/2005midyear/commercial/AmyBossOutline.pdf> (as accessed on 1/8/2010)).

⁶²See recommendation 1(c) of the UNCITRAL Report (n61).

⁶³See U.N. GAOR, Comm. on Int’l Trade Law, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, G.A. Res. 51/162, U.N. Doc. A/51/628 (reprinted in 36 *ILM* 200 (1997)).

⁶⁴This Convention was adopted in 2005 by the General Assembly. It is available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (as accessed on 2/8/2010).

⁶⁵See D Campbell (n59) ix. A number of countries have taken steps to implement the UNCITRAL Model Law on E-commerce. For the current status as to the number of countries that have taken such initiatives visit: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (as accessed on 24/7/2007). See also Estrella-Faria (n55) 13-14.

⁶⁶The Commonwealth Secretariat Paper (n59) 282. See also J Coetzee ‘Incoterms, Electronic Data Interchange and the Electronic Communications and Transactions Act’ (2003) 15 *South African Mercantile Law Journal* 1.

⁶⁷See the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) (available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (as accessed on 23/07/2007)).

In the course of addressing such obstacles, the WGEC adopted a ‘model law approach’ rather than an international convention, although the latter option was not ruled out. This approach was preferred because the main concern was to encourage modernisation of existing legislation in the various systems of domestic law.⁶⁸ Owing to the diversity, nature and magnitude of the domestic obstacles to e-commerce, the approach seemed the most sensible,⁶⁹ since it was facilitative and not strictly regulatory.⁷⁰

As its first priority, the Model Law seeks to promote adaptation of existing national legal rules to the online environment. Since it is only a framework law, it does not take into account each and every aspect of e-commerce. Aside from serving as a model for international and national legislation, it assists parties to a contract to formulate their agreement.⁷¹

Article 1 defines its scope of application, providing that the Model Law shall apply to information in the form of a ‘data message’ used in the context of commercial activities. ‘Data message’ is defined as ‘information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.’⁷² Article 5 of the Model Law gives legal recognition to ‘data messages’ by providing that, where information is in data form it shall not be denied legal effect, validity or enforceability because of its form.⁷³

In 1998 Art 5 *bis* was added to the Model Law⁷⁴ to serve two purposes, namely: (i) to provide guidance as to how legislation aimed at facilitating the use of electronic commerce might deal with the situation where certain terms and conditions, although not stated in full but merely referred to in a data message, might need to be recognized as having the same degree of

⁶⁸See Campbell (n59) 2.

⁶⁹See Campbell (n59) 2.

⁷⁰ See Campbell (n59) 2. The Model Law approach was hence considered an appropriate vehicle for modernisation and unification of national laws. See Estrella-Faria (n55) 13.

⁷¹See-M Gabriela-Sarmiento ‘Basic E-Commerce Training for Pakistan Legislative Requirements for E-Transactions’ (a Seminar paper delivered during *International Telecommunication Union (ITU) Electronic Commerce for Developing Countries (ECDC)* 30th March-3-April, 2001 Islamabad, Pakistan, (at page 4) (available at <http://www.itu.int/ITU-D/e-strategy/ecdc/Seminars/pakistan/legalaspectsofe-commerce.pdf> (as accessed on 23/07/2007))).

⁷² See Art 2(a) of the Model Law on E-commerce.

⁷³Article 5 of the Model Law on E-commerce provides that ‘[i]nformation shall not be denied legal effect, validity or enforce- ability solely on the grounds that it is in the form of a data message.’

⁷⁴ Article 5 *bis* provides that ‘[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.’ Art 5 *bis* was added in recognition of the fact that ‘certain terms and conditions, although not stated in full but merely referred to in a data message, might need to be recognised as having the same degree of legal effectiveness as if they had been fully stated in the text of that data message’. See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (n67) para 46.

legal effectiveness as if they had been fully stated in the text of that data message;⁷⁵ (ii) to give recognition to ‘consumer protection or other national and other international mandatory rules (eg, rules protecting weaker parties in the context of contracts of adhesion) [which] should not be interfered with.’⁷⁶ In other words, states that adopt Art 5 *bis* may provide in their legislation that incorporation by reference in an electronic environment will be valid only ‘to the extent permitted by law or by listing the rules of law that remain unaffected by article 5 *bis*.’⁷⁷

The Model Law adopted three basic principles to support the application of modern technologies in business. These are functional equivalence, technology neutrality, and party autonomy.⁷⁸

(i) The Functional Equivalence Principle

The functional equivalence principle is based on an analysis of the purposes and functions of the traditional paper-based requirements and the extent to which they can be met electronically.⁷⁹ Its adoption resulted from thorough work on the best way to adapt paper-based legal transactions to an electronic world.⁸⁰ The principle, however, does not suggest that technical and factual differences would disappear merely by stating that paper and electronic-based communications are equivalent.⁸¹ Rather, it sets out requirements that should be fulfilled in an electronic environment to satisfy what a paper-based transaction would traditionally have fulfilled.⁸²

⁷⁵See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (n67) para 46-1.

⁷⁶Ibid, at para 46-7.

⁷⁷Ibid. The Guide to the Model Law provides, however, that Art 5 *bis* should not ‘be interpreted as creating a specific legal regime for incorporation by reference in an electronic environment.’ What Art 5 *bis* establishes is a non-discrimination principle, ‘to be construed as making the domestic rules applicable to incorporation by reference in a paper-based environment equally applicable to incorporation by reference for the purposes of electronic commerce.’

⁷⁸For a detailed discussion of the three principles see R Sorieul, J R Clift & J A Estrella-Faria ‘Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law (UNCITRAL)’ (2001) 35 *The International Lawyer* 107.

⁷⁹See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (n67) para. 16.

⁸⁰See the Commonwealth Secretariat Paper (n59) 283. See also Arts 5, 6, and 8 of the Model Law. Art 5 of the Model Law provides that ‘information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.’

⁸¹See F G Mazzotta ‘Notes on the United Nations Convention on the Use of Electronic Communications in the International Contracts and Its Effects on the United Nations Convention on the Contracts for the International Sale of Goods’ (2006-2007) 33 *Rutgers Computer & Technology Law Journal* 251, 257.

⁸²Ibid. Art 6, for instance, provides that ‘where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.’ Similarly, in Art 7(1) provides that that ‘[w]here the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was

For the principle of equivalence to apply under the Model Law certain conditions must be satisfied.⁸³ Satisfaction of a legal requirement that information must be ‘in writing’, for instance, will be achieved through use of a data message if the information contained therein is accessible so as to be usable for subsequent reference.⁸⁴ Thus, to establish whether a particular data message still retains its integrity, the Model Law requires such information to be verified to establish whether it has ‘remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display.’⁸⁵

(ii) The Technology Neutrality Principle

The technology neutrality principle promotes non-discrimination between types of technologies.⁸⁶ Important issues dealt with by this principle include the traditional requirements regarding the form of legal transactions, that is to say, requirements for ‘writing’, ‘signature’ and ‘original document’.⁸⁷ Since technology is changing fast, the neutral approach leaves room for new innovations without necessitating frequent changes in the legal framework. This allows technology developers to operate freely without being restricted to

appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.’ The principle of functional equivalence has also been recognised in other areas of law, for instance, in matters relating to consumer protection. For example, the Australian e-commerce policy framework adopted in 1999, being mindful of the challenges which consumers are confronted with as a result of technology developments, embraced five principles which include the principle of equivalency and that of technology neutrality. See Australian Treasury: *Review of building consumer sovereignty in electronic commerce: A best practice model for business* Discussion Paper November 2003 (available at http://www.ecommerce.treasury.gov.au/bpmreview/content/_download/BPM_Review.pdf (as accessed on 23/7/2007)).

⁸³ See Art 6 and 8 of the Model Law on E-commerce.

⁸⁴ See Art 6(1) which provides that [w]here the law requires information to be in writing, that requirement is met by a data message *if the information contained therein is accessible so as to be usable for subsequent reference.* (Italics added). Art 8(1)(a) and (b) further provides that such information must be presented or retained in its original form. According to Art 8 for such information to retain its originality: ‘(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.’

⁸⁵ See Art 8(3)(a) of the Model Law on E-commerce. The verification process is important since, as earlier stated in chapter two, the online environment is vulnerable to possible manipulation by hackers or impostors, who exploit the existing problems of anonymity. Problems which may be encountered from impostors have long been experienced even in the ordinary contracting process if one considers *Cundy v Lindsay* [1897] AC 456.

⁸⁶ Such an idea is contained in Arts 5, 6 and 8 of the Model Law on E-commerce.

⁸⁷ See J D Gregory ‘Technology Neutrality and the Canadian Uniform Acts’ 4th International Conference on law via the Internet, Montreal 2nd-4th October, 2002- available at <http://www.lexum.umontreal.ca/conf/conf2002/actes/gregory.html> (as accessed on 24/07/2007). The author argues that the principle allows users of the modern technologies ‘to decide what is appropriate to them, in expense, in deployment, in security and in reliability.’

narrow legal requirements,⁸⁸ thereby encouraging competition and innovation and improving the manner through which technology may be used to achieve specific legal requirements.⁸⁹

(iii) The Party Autonomy Principle

Party autonomy is an important principle contained in the Model Law on e-commerce.⁹⁰ This principle is well established in contract law as well as in private international law.⁹¹

Notwithstanding the debates considered in chapter four regarding party autonomy,⁹² it suffices to state here that, in the area of e-commerce, the Model Law favours its application. The Model Law does so by upholding the importance of the contracting parties' freedom to choose not only the mode of concluding their contract but also the technology to be relied upon to authenticate the contracting process. Consequently, the principle applies to chapter III of part 1 of the Model Law, which deals with formation and validity of contracts, recognition by parties of data messages, attribution of data messages, acknowledgement of receipts and time and place of dispatch and receipt of data messages.⁹³

(b) The UNCITRAL Model Law on E-signature

The development of e-commerce has created a concern over the reliability of the existing authentication mechanisms, such as the requirement for written signatures.⁹⁴ The values protected by such requirements (for instance, the need to prevent fraud) have not lost their importance even in an electronic environment.⁹⁵ In view of this, the WGEC was tasked to develop uniform rules on issues regarding authentication, attribution and non-repudiation of electronic transactions. In 2001 this task was accomplished following the adoption of a Model Law on e-signatures.⁹⁶ Its adoption resolves the questions regarding the legal effect of e-

⁸⁸Ibid.

⁸⁹Ibid.

⁹⁰See Art 4 of the UNCITRAL Model Law on E-commerce and Art 5 of the UNCITRAL Model Law on E-signatures. See also the Guide to the enactment (n67) paras 19-21.

⁹¹See D S L Kelly 'International Contracts and Party Autonomy (*Based on Golden Acres Ltd v Queens Estate Pty. Ltd*)' (1970) 19 *The International and Comparative Law Quarterly* 701. See also 'Conflict of Laws: Party Autonomy in Contracts' (1957) 57 *Columbia Law Review* 553.

⁹²See 'Conflict of Laws: Party Autonomy in Contracts' (n91).

⁹³Chapter III of part 1 of the Model Law covers issues relating to communication of data messages.

⁹⁴For a more discussion on this see part 6 of chapter two of this thesis concerning authentication.

⁹⁵In fact, the demand for secure transactions in an online environment is much higher than it may have been in the traditional face-to-face or paper-based environment. See P Latimer 'Signatures, Squiggles and Electronic Signatures' (available at <http://ssrn.com/abstract=1601169> (as accessed on 23/8/2010)).

⁹⁶See UNGA Res. A/RES/56/8 of 24/12/2001 (available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/490/26/PDF/N0149026.pdf?OpenElement> (as accessed on 23/8/2010)).

signatures and the necessary rules which ensure that parties involved in an e-transaction do not repudiate their communications.

The Model Law on e-signature seeks to build upon the fundamental principles behind Art 7 of the e-commerce Model Law.⁹⁷ Its framers were of the view that ‘the use of electronic signatures in a manner acceptable to states with different legal, social and economic systems could contribute to the development of harmonious international economic relations.’⁹⁸ Consequently, its scope of application to commercial transactions should not be narrowly interpreted.⁹⁹

The Model Law defines an ‘e-signature’ to include ‘data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message.’¹⁰⁰ The principles of functional equivalence and technology neutrality are also fundamental to this Model Law. Article 3 embodies these principles by prohibiting unnecessary exclusions, restrictions or deprivation of ‘legal effect of any method of creating an electronic signature that satisfies the requirements referred to in article 6, paragraph 1, or otherwise meets the requirements of applicable law.’¹⁰¹

Furthermore, Art 6(3) enshrines the concept of reliability for the purpose of satisfying any legal requirement of a signature.¹⁰² It is not advisable to confine e-signatures to a particular technology that keeps changing. Hence, the Model Law offers freedom to the parties to choose any authentication technology they consider appropriate, thereby affirming the

⁹⁷ As noted earlier in this chapter, Art 7 of the Model Law on E-commerce seeks to promote reliance on electronic signatures in an electronic environment by giving such reliance a functional equivalence to the handwritten signatures. See also Campbell (n59) 836, 843.

⁹⁸ See the preamble to the Model Law on E-signature (n96).

⁹⁹ Ibid, Art 1 of the Model Law.

¹⁰⁰ Ibid, Art 2 of the Model Law.

¹⁰¹ Ibid, see Art 3 of the Model Law on e-signature. Article 6(1) of this Model Law, to which reference is made under Art 3, provides that ‘[w]here the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.’

¹⁰² The Article provides (in sub-article 3) that for an e-signature to be reliable as required under sub-article 6(1) of the Model Law it must be shown that ‘(a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person; (b) the signature creation data were, at the time of signing, under the control of the signatory and of no other person; (c) any alteration to the electronic signature, made after the time of signing, is detectable; and (d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.’

principle of party autonomy which, together with other principles, defines the orientation of e-commerce rules.¹⁰³

(c) **The UN Convention on the Use of Electronic Communications in International Contracts**¹⁰⁴

(i) **Background and Purpose**

The work done by the WGEC did not end with the adoption of the Model Laws discussed above. The need to further harmonise the national laws on e-commerce necessitated the drafting of a more binding instrument in the form of an international convention.¹⁰⁵ Although the Model Laws were a significant development, they were no more than UNCITRAL recommendations to national law-makers.¹⁰⁶ Essentially, UNCITRAL did not envisage a formal adoption or notification process to be followed in case a particular state adopted them.¹⁰⁷ Nevertheless, since many domestic statutes have followed the kind of reforms envisaged by the two UNCITRAL Model Laws¹⁰⁸ the drafting of a binding convention reflects the positive effect of these Model Laws.¹⁰⁹

¹⁰³See J A Estrella-Faria 'e-Commerce and International Legal Harmonization: Time To Go Beyond Functional Equivalence?' (2004) 16 *South Africa Mercantile Law Journal* 529, 530–531.

¹⁰⁴The Convention was adopted in 2005 by the General Assembly. See G.A. Res. 60/21, UN Doc/ Res/60/21 (9th Dec. 2005) (available with its accompanying explanatory notes at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (as accessed on 3/6/2009)).

¹⁰⁵Several countries had expressed the need to have a binding instrument. See for example the United State proposed for an international convention on electronic commerce (contained in the General Assembly doc. A/CN.9/WG.IV/WP.77 (available at http://www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html (as accessed on 30/07/2007))). See also the proposal by France contained in UN Doc. A/CN.9/WG.IV/WP 93 (available from <http://daccess-ods.un.org/TMP/5064899.html> (as accessed on 30/7/07)); C Connolly & P Ravindra 'International e-commerce regulation: First UN Convention on e-commerce finalised' (2006) 22 *Computer Law & Security Report* 31.

¹⁰⁶See Connolly & Ravindra (n105) 31-32. These authors argue that the non-binding nature and flexibility to implement the Model Laws has resulted in 'reduced uniformity [and lessened] certainty and harmonisation of national e-commerce legislations.'

¹⁰⁷Ibid.

¹⁰⁸To ascertain the current number of countries that in one way or the other have implemented provisions of the Model Laws in their Legislation visit the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (as accessed on 30/07/2007).

¹⁰⁹See Connolly & Ravindra (n105) 31-32. As earlier stated in this chapter when the Model Laws were being formulated, e-commerce was still in its infancy stage, and UNCITRAL's soft law approach was appropriate to the times. However, they have proved to be a highly successful, in light of the many states that have adopted them. Consequently, the 'increased familiarity, use and acceptance of [their] legal provisions [to reflect] an increased desire in the international community for harmonisation and greater predictability in e-commerce.' (See Connolly & Ravindra (n105) 31).

The UN Convention on e-contracts is the first of its type to deal with e-commerce, especially B2B e-commerce.¹¹⁰ It seeks to ‘offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts.’¹¹¹ Drawing from the UN Convention on Contracts for the International Sale of Goods (1980)¹¹² (referred hereafter as the ‘CISG’) and the UNCITRAL Model Laws,¹¹³ it contains useful interpretive rules for the use of electronic communications in negotiating and forming contracts. Such rules promote legal certainty and commercial predictability of international electronic transactions.¹¹⁴

Additionally, the rules of the UN Convention on e-contracts complement those contained in the earlier conventions on international trade,¹¹⁵ notably the CISG.¹¹⁶ Its adoption was hence an important step in the development of e-commerce.¹¹⁷ It bridges a regulatory gap in the existing frameworks for international trade and provides an additional but new lifeline to international commerce.¹¹⁸

(ii) Structure and Scope

The UN Convention on e-contracts is framed in four chapters and consists of 25 articles. The most relevant part of the Convention to this discussion is its chapter III, which deals with the use of electronic communications.¹¹⁹ Like the Model Laws, the Convention embraces the principles of functional equivalence, technology neutrality, and party autonomy¹²⁰ (including freedom of form).¹²¹ The fifth paragraph to the preamble of this Convention states that ‘uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional

¹¹⁰See P P Polanski 'International electronic contracting in the newest UN Convention' (2007) 2 *Journal of International Commercial Law and Technology* 112.

¹¹¹See para 3 of the accompanying Explanatory Notes to the E-contracting Convention (n101).

¹¹²April 11, 1980 S Treaty Doc No.98-9, 1489 UNTS 3 (1984).

¹¹³See Mazzotta (n81) 251.

¹¹⁴See Connolly & Ravindra (n105) 31. See also part IV –chapter 1 of the Convention’s explanatory notes by UNCITRAL Secretariat, para.53 on substantive scope of application (available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (as accessed on 30/7/07)).

¹¹⁵See Art 20(1) of the e-contracting convention. See also Mazzotta (n81) 252.

¹¹⁶The earlier conventions were basically developed at a different period, ‘the era of faxes and telegrams’ and did not contemplate the Internet-based commerce. See Polanski (n110) 112.

¹¹⁷See Mazzotta (n81) 298.

¹¹⁸*Ibid.*

¹¹⁹See Arts 8-14 of the Convention (n104).

¹²⁰See for instance, Art 3 of the E-contracting Convention which provides that '[t]he parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.'

¹²¹See Art 9(1) which provides that '[n]othing in this Convention requires a communication or a contract to be made or evidenced in any particular form.'

equivalence.’ Paragraph 4 of the accompanying explanatory notes, however, states that the Convention establishes uniform rules for substantive contractual issues relating to the use of electronic communications only.

The Convention’s scope of application is limited to ‘the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.’¹²² It applies ‘when the law of a contracting state [is] the law applicable to the dealings between the parties.’¹²³ The explanatory note to the Convention provides that, if the parties have not validly chosen the applicable law, the rules of private international law of the forum state should be used to determine the applicable law.¹²⁴

Where a dispute involves a party from a contracting state to the Convention and another party from a non-contracting state (and the forum engaged is that of the latter), the Convention should be applied if that forum’s rules of private international law indicate that the law of a contracting state is applicable.¹²⁵ Similarly, if a ‘party seizes the court of a contracting state, the court would equally refer to its own rules of private international law and, if they designate the substantive law of that state or of any other state party to the convention, the convention would apply.’¹²⁶

Unfortunately, unlike the Model Law on E-commerce, the scope of the Convention does not cover e-consumer contracts.¹²⁷ Rather, it deals with the B2B e-contracts save for

¹²²See Arts 1 and 2 and para 5 the accompanying Explanatory Notes to the E-contracting Convention ((n104). See also P P Polanski 'Convention on E-Contracting: The Rise of International Law of Electronic Commerce?' A paper presented at the *19th Bled eConference eValues* Bled, Slovenia, June 5 - 7, 2006, at 3, (available at [http://domino.fov.uni-mb.si/proceedings.nsf/0/48ecfcae60f83bf6c12571800036bae9/\\$FILE/49_Polanski.pdf](http://domino.fov.uni-mb.si/proceedings.nsf/0/48ecfcae60f83bf6c12571800036bae9/$FILE/49_Polanski.pdf) (as accessed on 13/7/2010).

¹²³See para 65 of the accompanying Explanatory Notes to the E-contracting Convention (n104).

¹²⁴Ibid.

¹²⁵In that regard, the convention would apply as part of that foreign state’s legal system. In other words, ‘if a party seizes the court of a non-contracting state, the court would refer to the private international law rules of the State in which it is located, and if those rules designate the law of a contracting State to the Convention, the Convention would apply as part of the substantive law of that State, notwithstanding that the State of the court seized is not a party to the Convention.’ See para 65 the accompanying Explanatory Notes to the E-contracting Convention (n104).

¹²⁶Ibid. The explanatory notes to the convention provides, however, that at all times courts which may be seized by parties as in the above scenarios, must consider ‘any possible declarations made pursuant to article 19 or 20 by the contracting State whose law applies.’

¹²⁷ See Art 2(1)(a) of the Convention and para 72-74 of its explanatory note by the UNCITRAL secretariat. Although the Model Law does not expressly state that it applies to consumer contracts, Art 5*bis* of the Model Law was intended to give recognition to ‘consumer protection or other national and other international mandatory rules (such as rules protecting weaker parties in the context of contracts of adhesion) [which] should not be interfered with.’ See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (n67) para 46-47. In the course of deliberating on the adoption of a law on e-commerce in Brazil, the UNCITRAL Secretariat was of the view that while ‘[s]pecific rules on consumers’ protection ... [might] be considered ... caution should be used in

transactions involving ‘electronic financial services and international transferable documents such as bills of exchange.’¹²⁸ Its provisions, therefore, do not create any rights or obligations for online entrepreneurs with respect to consumers. A reason for this lacuna is said to be the existence of exclusive consumer protection in many modern legal systems, from which parties may not derogate by contract.¹²⁹

(iii) Its Essential Features

Despite its limitations, the UN Convention on E-contracts provides an important regulatory environment for B2B e-commerce.¹³⁰ It has addressed the important questions regarding ‘whether web-based contracts are valid, whether a website should be regarded as a binding offer or not and ... the consequences of input error.’¹³¹ Its other relevant features for cross-border e-contracting include rules that determine a party’s location or place of business when involved in a B2B contract.

As discussed in chapter 3 of this thesis, establishing a place of business in e-commerce is not only difficult but also a critical connecting factor in conflict of laws cases.¹³² The UN Convention has solved the matter by providing, in Art 6, which place should be regarded as the place of business of the parties.¹³³ In the absence of a clear indication by a party, the Convention adopts the closest connection approach.¹³⁴

order not to affect the predictability of the law of electronic commerce and its underpinning principles.’ It was reiterated that Art 14 of the Convention, regarding input errors made by human interacting with automated message systems might fulfil also a consumer protection function. See ‘Background Note: Contribution of the UNCITRAL texts to Brazilian legislation on Electronic Commerce’ para 8, (available at <http://forumdocomercioelectronico.files.worldpress.com/2010/03/uncitral-background-notebrazil.pdf> (as accessed on 25/8/2010)).

¹²⁸See Polanski (n110) 114. See also Art 2(1)(a) and (b) of the UN Convention on E-contracts.

¹²⁹See Polanski (n54) 4.

¹³⁰Certainly, as some commentator points out, the rules contained in the e-contracting convention will not only produce more predictability and certainty in the business world but also resolve important questions that arise in the context of electronic contracting. See Mazzotta (n81) 258.

¹³¹See Polanski (n122) 5. See Polanski (n110) 115.

¹³²See Tang (n52) 15, 79 who argues that ‘existing common law authorities suggest that the place of business may have a wide and inflexible meaning.’ See also J Catchpole ‘The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment’ (2001) 9 *International Journal of Law and Information Technology* 7, 10; Polanski (n54) 4.

¹³³ See Art 6(1) of the Convention which provides that ‘[f]or the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.’

¹³⁴Article 6(2) provides that ‘[i]f a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.’

Article 4 defines the place of business to mean ‘any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.’¹³⁵ The Convention rejects the determination of an e-merchant’s place of business by reference to the location ‘where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or where the information system may be accessed by other parties.’¹³⁶

Two basic principles can be deduced from Art 4(h) and Art 6(4) and (5).¹³⁷ Firstly, it is clear that issues regarding where servers are located and their status, or the domain name of a party’s Internet address are immaterial and do not apply in the course of establishing an e-contracting party’s place of business.¹³⁸ Secondly, the Convention ‘is primarily concerned with click-and-mortar companies that pursue both traditional and online outlets.’¹³⁹

Regarding the form of contracting, the UN Convention on E-contracts endorses the ‘freedom of form principle’.¹⁴⁰ (This important element is also a common feature in the CISG Convention).¹⁴¹

Article 8(1) of the UN Convention on E-contracts states that ‘[a] communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.’ The framing of Art 8(1) was inspired by Art 5 of the Model Law on E-commerce, with a view to promoting the functional equivalence approach.¹⁴² A non-

¹³⁵See Art 4(h) of the UN Convention on E-contracting. See also para 118 of the accompanying Explanatory Notes to the UN Convention on E-contracting (n104). It is important to note, however, that although the e-contracting convention defines what the ‘place of business’ means, its definition does not take into account the so-called ‘virtual companies’.

¹³⁶See Art 6(4) of the UN Convention on E-contracting.

¹³⁷ Article 4(h) was cited above. Article 6(4) and (5) provided as follows ‘[a] location is not a place of business merely because that is; (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.’ Thus, the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

¹³⁸See para 119-121 of the accompanying Explanatory Notes to the UN Convention on E-contracting (n104). According to Polanski, what is relevant is only the ‘actual physical location at which a business is run and which a party should have indicated.’ See Polanski (n54) 5. See the definition of business branch, agency or establishment given by the ECJ in Case 33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183 where the degree of permanency was contemplated. Tang has argued, however, that since ‘e-commerce was not developed at the time it is reasonable to presume that the ECJ did not intend to cover virtual appearance.’ (Tang (n52) 68

¹³⁹See Polanski (n54) 5.

¹⁴⁰See Mazzotta (n81).

¹⁴¹See Art 11 of the CISG Convention (n112) above.

¹⁴²See General Assembly Official Records 66th Session Supp. No.17 (A/60/17) para 52.

form requirement is also expressed in Art 9(1).¹⁴³ The two provisions, however, do not ‘override the form requirements [which may be] set out in national legal systems.’¹⁴⁴ Similarly, the provisions do not absolutely insulate e-contracts from possible invalidity ‘because there may be reasons that may render the electronic communication invalid.’¹⁴⁵ Article 9(2) is also a reflection of Art 6(1) of the Model Law on E-commerce, which sets out the ‘criteria to recognise the functional equivalence between data messages and paper documents.’¹⁴⁶

Unlike the Model Laws, treatment of electronic signatures under Art 9(3) of the UN Convention on E-contracts ‘underlines the intention rather than approval of the content.’¹⁴⁷ Article 9 provides the criteria for fulfilling the electronic equivalent of ‘writing’, ‘signature’ and ‘original’. Polanski notes that, although Art 9 of this Convention embraces a broad approach to the techniques of e-signature, its ‘signature reliability test (“as reliable as appropriate”) cannot be invoked to invalidate the entire contract, if the identity of the signer is unquestionable.’¹⁴⁸ In view of this, Art 9 may create uncertainty for merchants because the legal validity of an electronic signature is to be determined by the applicable national law and not by the Convention.¹⁴⁹

Other important features relevant to e-commerce are rules about formation of e-contracts, such as the treatment of offer and acceptance in an online environment, and the ascertainment of time and place of contracting. Unlike the Model Law on E-commerce,¹⁵⁰ the

¹⁴³ Article 9(1) states that ‘[n]othing in [the] Convention requires a communication or a contract to be made or evidenced in any particular form.’

¹⁴⁴ See Polanski (n110) 115.

¹⁴⁵ Ibid, citing Report of the Working Group on Electronic Commerce on the work of its forty-second session (Vienna, 17-21 November 2003) (A/CN.9/546, para 41) (available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/904/75/PDF/V0390475.pdf?OpenElement> (as accessed on 20/8/2010)).

¹⁴⁶ Ibid, para 56. Article 9(2) provides that ‘[w]here the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.’

¹⁴⁷ See Polanski (n110) 115.

¹⁴⁸ See Polanski (n110) 115, citing Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session 4-15 July 2005 (A/60/17, para. 65).

¹⁴⁹ See Polanski (n110) 115, citing para 28) of *Legal Aspects of Electronic Commerce: Explanatory Note on the Convention on the Use of Electronic Communications in International Contracts* ' Note by the Secretariat, United Nations Commission on International Trade Law Thirty-ninth session New York 19 June-7 July 2006, (A/CN.9/608/Add.2).

¹⁵⁰ See Article 11(1) of the UNCITRAL Model Law on e-commerce. It provides that in the course of forming e-contracts, ‘unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages.’ Since the Model Law recognises use of data messages as valid in contract formation (see Arts 5, 9 and 13), Art 11(1) restricts invalidation or non-enforceability of a contract on sole on the sole ground that a data message was used to create such a contract. It is crucial to point out that Art 11 of the UNCITRAL Model Law does not interfere with the traditional mode of contract formation but, as the Guide to

Convention has addressed these issues.¹⁵¹ Since various jurisdictions apply different rules to determine the time when acceptance of an offer becomes effective, the time factor was a difficult issue for the drafters of the Convention. According to the explanatory note '[t]he essential question before UNCITRAL was how to formulate rules on time of receipt and dispatch of electronic communications that adequately transpose to the context of the Electronic Communications Convention the existing rules for other means of communication.'¹⁵²

As discussed in chapter two of this thesis, a distinction between 'instantaneous' and 'non-instantaneous' communication of an offer and acceptance or between communications exchanged between parties present at the same place and time (*inter praesentes*) or communications exchanged at a distance (*inter absentes*) is maintained in various domestic rules.¹⁵³

Under the common law tradition, if parties rely on postal communication, the postal rule (also referred to as dispatch or mailbox rule, which falls under the 'expedition' theory) brings the contract into existence once a letter of acceptance is posted. The 'information theory', however, requires knowledge of the acceptance of an offer for a contract to be formed.¹⁵⁴ Consequently, and mindful of the different approaches adopted by the various legal systems, the drafters of the UN Convention on E-contracts avoided providing for 'a rule on the time of contract formation that might be at variance with the rules on contract formation of the law applicable to any given contract.'¹⁵⁵

Although Art 10 of this Convention deals with time and place of dispatch and receipt of electronic communications, it does not give a rule on time and place of the formation of a contract.¹⁵⁶ Rather, it provides only guidance with a view to allowing 'the application, in the context of electronic contracting, of the concepts traditionally used in international conventions

this Model Law points out, seeks to 'promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means.' The article has thus combined not only formation criterion but also the form which an offer and its acceptance may take. See para 76 of Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, (n67).

¹⁵¹ See Arts 10-14 of the E-contracting Convention (n104).

¹⁵² See para 171 of the accompanying Explanatory Notes to the E-contracting Convention (n104).

¹⁵³ See para 172 of the accompanying Explanatory Notes to the E-contracting Convention (n104).

¹⁵⁴ Ibid.

¹⁵⁵ See para 175 of the accompanying Explanatory Notes to E-contracting Convention (n104). See also A/CN.9/528, para 103; and A/CN.9/546, para 119.

¹⁵⁶ See Polanski (n110) 116.

and domestic law, such as “dispatch” and “receipt” of communications.’¹⁵⁷ Polanski has argued that the absence of a rule governing time and place of contract is still an outstanding problem, the solution of which will have to depend on the rules of private international law, that is, the law applied by a forum state.¹⁵⁸

According to Art 10, an electronic communication is said to be dispatched ‘when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator.’¹⁵⁹ Concerning the time of receipt, the UN Convention on E-contracts endorses ‘the time when [the communication] becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.’¹⁶⁰ Article 10(3) provides that the place from where an electronic communication is dispatched or received is ‘the place where the originator has its place of business and ... the place where the addressee has its place of business.’¹⁶¹

Article 11 of the Convention distinguishes an offer from an invitation to treat in an electronic environment.¹⁶² This distinction eliminates the contentious issue regarding the extent to which parties offering goods or services through an Internet website are bound by advertisements made in this way.¹⁶³ An unresolved problem, however, is whether unsolicited

¹⁵⁷See para 175 of the accompanying Explanatory Notes to E-contracting Convention (n104).

¹⁵⁸See Polanski (n110) 116. See also (A/CN.9/608/Add.2, para.48). The rules on time of dispatch and receipt of an e-communication, however, may be of some assistance.

¹⁵⁹See Art 10(1) of the E-contracting Convention.

¹⁶⁰See Art 10(2) of the E-contracting Convention. According to Polanski correctness of an ‘electronic address is important, because the time of receipt at another address is when the addressee becomes aware that a message has been sent and that it can be retrieved.’ See Polanski (n110) 116.

¹⁶¹Article 10 of the convention reflects what Art 15(1) and (2) the UNCITRAL Model Law on E-commerce provides. Art 15 states that (1) ‘[u]nless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator. (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs: (i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.’ According to the Guide to enactment of the Model Law, the rationale behind Article 15 is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt, and that that place can be readily ascertained by the originator.’ (For more discussion see Sorieul et al (n78) 114.) See also para 105 of the Guide to enactment of the Model Law on E-commerce.

¹⁶²Article 11 of the convention provides that a proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

¹⁶³See para 197 of the Explanatory Notes to the E-contracting Convention (n104). See also Report of the Working Group on Electronic Commerce on its thirty-ninth session (New York, 11-15 March 2002), A/CN.9/509, para 75-

marketing of goods and services directly addressed to an individual e-mail account should be considered an invitation rather than an offer. Nevertheless, the rule of thumb is that all e-merchants' statements should be regarded as amounting to invitation to enter into contractual arrangements.¹⁶⁴

For the above rule to apply, however, two conditions need to be fulfilled.¹⁶⁵ First, the web-merchants 'should not address electronic communications to one or more specific persons, and secondly, they should not clearly indicate the intention to be bound in case of acceptance.'¹⁶⁶

Dealing with mistakes occasioned in online transactions is another important feature addressed by the UN Convention on E-contracts. The Model Law on E-commerce did not sufficiently address the role of e-agents and the mistakes occasioned by them in the course of e-contracting.¹⁶⁷ It was considered necessary to address these issues in the Convention because several jurisdictions had enacted similar provisions in domestic legislation on electronic commerce.¹⁶⁸ Consequently, Art 12 of the Convention provides that all contracts 'formed by the interaction of an automated message system and a natural person or by the interaction of automated message systems' are valid and enforceable.¹⁶⁹ Moreover, 'the Convention regulates the question of who should bear the risk of input error in electronic communication [although] it only provides for consequences of input error.'¹⁷⁰

(iv) Criticisms of the UN Convention on E-contracts

The UN Convention on E-contracts is subject to criticisms. Firstly, its scope is too narrow, as it does not take into account B2C e-contracts. Secondly, Art 11 of the Convention (dealing with offer and invitations) failed to take into account the fact that many e-companies would require prior registrations, and, once that was done, communications are directed to specific

76 (available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V02/527/26/PDF/V0252726.pdf?OpenElement> (as accessed on 21/8/2010)).

¹⁶⁴See Art 11 of the Convention. See also Polanski (n110) 116.

¹⁶⁵See also Polanski (n110) 116.

¹⁶⁶Ibid.

¹⁶⁷What the Model Law dealt with in Art 13(2)(b) was to provide for a general rule on attribution. See para 209 and 226 of the accompanying Explanatory Notes to E-contracting Convention (n104).

¹⁶⁸See para 210 of the accompanying Explanatory Notes to the E-contracting Convention (n104). See also A/CN.9/546, para. 124-126. The issue of e-agents is covered under Art 12 of the Convention while that of mistakes in e-contracts fall under Art 14 of the Convention.

¹⁶⁹See Art 12 of the UN Convention on E-contracts.

¹⁷⁰Ibid.

persons.¹⁷¹ Maelik argues that since ‘diverse websites require a log-in or registration this could lead to the qualification as binding offers, as they would be addressed to a specific group of persons (who are registered or logged-in).’¹⁷²

A third criticism relates to Art 14 of the Convention. This Article provides for errors in electronic communications and provides 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.
2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

Clearly, this Article seems to be more appropriate to consumer e-contracts than B2B e-contracts, despite the fact that the scope of the convention is limited to B2B transactions.¹⁷³

Finally, Art 19 and 20(2) of the Convention, which allow parties to make declarations excluding certain matters to which the Convention would have otherwise applied, are also criticised¹⁷⁴ since they may be used by states to set up barriers ‘to the international harmonisation of legal rules surrounding e-commerce.’¹⁷⁵

¹⁷¹See Polanski (n110) 117. See also R J Maelik ‘Electronic Commerce in International Trade Law’ (Unpublished LLM -Course Work Paper, School for Advanced Legal Studies, University of Cape Town, 2007) 26.

¹⁷²See Maelik (n171).

¹⁷³See Polanski (n110) 117.

¹⁷⁴Article 19 provides that: ‘(1) [a]ny Contracting State may declare, in accordance with article 21, that it will apply this Convention only: (a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention; or (b) When the parties have agreed that it applies. (2) Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.’

¹⁷⁵See Connolly & Ravindra (n105) 33. See para 277 of the accompanying Explanatory Notes to the UN Convention on E-contracts (n104) which states that such declarations are not uncommon in private international law and commercial law conventions because their aim is to adjust the scope of application of a particular convention.

6. Efforts in the Developed World

(a) The EU Initiatives through EU Directives

In chapters three and four, this thesis dealt with the EU's efforts to harmonise jurisdiction and choice of law rules governing cross-border contracts (among other issues).¹⁷⁶ In order to benefit from the single market framework enjoyed in the EU the need to promote widespread adoption of e-commerce has been an important priority for that trading block.¹⁷⁷ E-commerce, in the European context, is widely described as 'a unique opportunity to create economic growth, a competitive European industry and new jobs.'¹⁷⁸ In view of the need to enhance consumers' trust and confidence in e-commerce, and in order to avoid inconsistencies in domestic regulation, the EU has adopted a series of Directives with direct effect on e-commerce development.¹⁷⁹

(i) The EC Directive on Consumer Distance Contracts

The Distance Selling Directive¹⁸⁰ applies only to B2C transactions. It covers consumer distance contracts, which include contracts concluded by traditional means of distance communication, such as telephone shopping, and the more modern ones, ie mobile phone commerce (m-commerce) and the Internet (e-commerce).¹⁸¹ The salient features of this Directive include its scope,¹⁸² the sellers' obligations towards consumers and the consumers'

¹⁷⁶The discussion was based on the Brussels I Regulation (See Council Regulation (EC) No 44/2001 of 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L 12, 16.1.2001)) and the Rome I Regulation (see Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF> (as accessed on 30/8/2010)).

¹⁷⁷ See *A European Initiative in Electronic Commerce* Communication to the Parliament, the Council, the Economic and Social Committee and the Committee of Regions COM (97)157, para.3 (hereafter the EU's Ecommerce Initiative) available at http://aei.Pitt.edu/5461/01/001338_1.pdf (as accessed on 30/8/2010).

¹⁷⁸ See Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market. (COM (98) 586 final) (OJ C30, (05.02.99)) at 3.

¹⁷⁹ Ibid. See also A F Salam, H R Rao & C C Pegels 'Consumer-Perceived Risk in E-commerce Transactions' (2003) 46 *Communications of ACM* 325 (available at <http://www.som.buffalo.edu/isinterface/papers/Consumer-Perceived%20Risk%20in%20E-Commerce.pdf> (as accessed on 26/7/2011)). On the aspect of trust, see also S L Jarvenpaa, N Tractinsky & L Saarinen 'Consumer Trust in an Internet Store' (2000) 1 *Information Technology and Management* 45.

¹⁸⁰ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (1997) O.J. (L 144) 19.

¹⁸¹ Article 2(d) of this Directive defines a 'consumer' as any natural person who, in contracts covered by this Directive, is acting for the purposes which are outside his trade, business or profession.

¹⁸² See Art 2(a) 'any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.'

contractual rights.¹⁸³ Because this Directive covers B2C transactions, it has a number of protections for the benefit of consumers.¹⁸⁴ In the recent past, however, the Internal Market and Protection Committee of the European Parliament (IMCO) adopted a proposal for a new Consumer Rights Directive, which seeks to establish a clear and harmonised set of rules on consumer rights, thereby increasing legal certainty for both consumers and traders.¹⁸⁵

(ii) The E-Commerce Directive

The E-commerce Directive 2000/31/EC¹⁸⁶ applies to service providers that operate ‘information society services’ within the EU.¹⁸⁷ It provides that the place of business for such operators is the place where a company, providing such services, pursues its economic activity and not the place where its servers are located or where its websites are accessed.¹⁸⁸

The European Commission had earlier indicated in one of its proposals that e-commerce cannot fully develop if e-contracting is hampered.¹⁸⁹ It pointed out three elements that are essential for a functioning e-commerce environment. These were the need to remove legal barriers to the use of electronic contracts, the need to embrace functional equivalency or a

¹⁸³ See Arts 3, 4, 5, 6 and 7 of the Distance Selling Directive.

¹⁸⁴ These include: a requirement on the part of suppliers to provide comprehensive information to consumers before purchase (see Art 3 and 4), communication of all contractual terms and confirmation of that information in written form (Art 5), the consumers’ right to cancel contracts (withdrawal right) within 14 days without giving reasons and without penalty (save for the associated costs of returning them to supplier) (Art 6(1), a right to refund where cancellation has been effected, delivery of goods or performance of services within 30 days from the day of contract (Art 7), protection from unsolicited goods/services (Arts 9-10) and fraudulent use of payment cards, and invalidation of any waiver of the rights and obligations provided under the directive by any of the parties (Art 12).

¹⁸⁵ See A Schwab Report A7-0038/2011 ‘Consumer rights (final vote) COM (2008)0614 – C6-0349/2008 – 2008/0196(COD) Proposal for Directive’ (available at <http://www.europarl.europa.eu/document/activities/cont/201106/20110616ATT21551/20110616ATT21551EN.pdf> (as accessed on 29/6/2011)). (See, for instance, Recital 8(a) and 9 of the proposed Directive). See also Department of Business Regulation and Enterprise Reform (BERR) ‘Consultation on EU Proposals for a Consumer Rights Directive’ November 2008 (available at <http://www.bis.gov.uk/files/file48791.pdf> (as accessed on 29/6/2011)).

¹⁸⁶ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 17/7/2000 L178/1. (Commonly referred to as the ‘E-commerce Directive’ See AR Lodder ‘Chapter 4: Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market’ at 67 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009945 (as accessed on 30/8/2010)).

¹⁸⁷ See Art 1(3) This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

¹⁸⁸ See Art 2(c) of the Directive. Recital 19 states that ‘[t]he place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity (...)’

¹⁸⁹ See (COM(98) 586 final) (n178) 4.

non-discriminatory (medium neutral) approach to e-contracts, and the need to create legal certainty in the laws governing e-contracts.¹⁹⁰

In view of the Commission's proposals, the E-commerce Directive creates a legal framework that takes into account certain aspects of electronic commerce in the internal market, such as e-contracts formation and liability of intermediaries (Internet Service Providers).¹⁹¹ Consequently it is also referred to as the Legal Framework Directive.¹⁹² It seeks to ensure legal certainty and to build consumer confidence and trust¹⁹³ and complements other directives which promote consumer protection.¹⁹⁴ Key features of this Directive include the principle of establishment and information requirements (which include exclusion of prior authorisation requirements for those who wish to take up or pursue an activity of the nature of an information service provider).¹⁹⁵

As regards the requirement of information, the E-commerce Directive obliges service providers to disclose certain information to recipients of their services in an easy, direct and permanently accessible way.¹⁹⁶ Article 6 of this Directive further provides that '[i]n addition to other information requirements established by Community law,' commercial communications must comply with conditions set out in the Directive.¹⁹⁷

Another important feature in this Directive is the treatment of contracts and the technical information requirements necessary to the formation of e-contracts.¹⁹⁸ While member states are required to promote e-contracting,¹⁹⁹ an information service provider is required to provide, clearly and unambiguously, the necessary steps to be followed to conclude

¹⁹⁰ Ibid, at 7, 8 and 11.

¹⁹¹ See Recital 7 which provides that '[i]n order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.'

¹⁹² Ibid, see recital 7-8. See also Art 1(1) which seeks 'to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.' Apart from this Directive on E-commerce the EU had earlier developed and adopted a Directive on E-signature. See Directive 1999/93/EC O.J (L 13) 12 of January 19, 2000.

¹⁹³ See Recital 11 and 55.

¹⁹⁴ Ibid, see recital 10-11. See Art 1(3).

¹⁹⁵ See Arts 4(1) and Art 5 of the E-commerce Directive.

¹⁹⁶ See Art 5 of the E-commerce Directive.

¹⁹⁷ See Arts 6 and 7 of the E-commerce Directive. Article 2(f) defines commercial communications to mean 'any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession ...'

¹⁹⁸ See Arts 9 and 10 of the E-commerce Directive.

¹⁹⁹ See Art 9(1) which requires members to ensure that their legal systems support e-contracting.

an e-contract, including, among others, the technical means of correcting all input errors.²⁰⁰

Overall, this Directive provides an important framework for e-commerce regulation within EU.

(iii) The EC Directive on Data Protection²⁰¹ and the EC Directive on Privacy and Electronic Communications²⁰²

The power with which technology can intrude into the private life of an individual in this information age is unprecedented. Given the nature of e-commerce, the need to protect personal data retained in the course of e-commerce transactions has become very important. In order to address this issue, the EU Directive on Data Protection seeks to protect, *inter alia*, ‘the fundamental rights and freedoms of natural persons, in particular the right to privacy with respect to processing of data.’²⁰³

In order to ensure that each EU member state takes responsible steps to protect individual data, the Directive requires them to prohibit transfer of personal data to non-member states, unless such other third country already ensures an adequate level of protection in this regard.²⁰⁴ Additionally, it contains a number of principles concerning data quality and regulates the circumstances in which processing of personal data is allowed (for instance, consent of the data subject).²⁰⁵

A complementary Directive, ie, Directive 2002/58/EC on Privacy of Communications (as amended by Directive 2006/24/EC of 15 March 2006), was also adopted to govern the processing of personal data related to electronic communication services that are available in open networks, like the Internet.²⁰⁶ In effect it translates the principles set out in Directive 95/46/EC into specific rules for the electronic communications sector.²⁰⁷ It lays down the rules applicable to processing, by network and service providers of traffic, and location data, generated by using electronic communications services. These rules cover issues such as

²⁰⁰ See Art 10 of the E-commerce Directive.

²⁰¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [*Official Journal* L 281/31 of 23.11.95]. This Directive is referred hereafter as ‘the EU Data Protection Directive’.

²⁰² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (*Official Journal of the European Communities* L 201/37 of 31.7.2002). (This Directive is referred hereafter as the Directive 2002/58 EC on Privacy of Communications).

²⁰³ See Art 1 of the EU Data Protection Directive.

²⁰⁴ See Art 25 of the EU Data Protection Directive.

²⁰⁵ See Arts 6 and 7 of the EU Data Protection Directive.

²⁰⁶ Directive 2006/24/EC applies on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications.

²⁰⁷ See Recital 2 of Directive 2006/24/EC.

network security,²⁰⁸ confidentiality of communications,²⁰⁹ traffic data,²¹⁰ location data²¹¹ and unsolicited communications.²¹²

(b) The US Initiatives to Regulate E-commerce

(i) The Framework Paper

In 1997, the US government issued a ‘Framework Paper for Global Electronic Commerce’ describing the revolutionary and economic potential of the Internet.²¹³ The then Vice President, Al Gore, noted that the world was on the verge of a revolution, and that soon electronic networks were going to ‘allow people to transcend the barriers of time and distance and take advantage of global markets and business opportunities not even imaginable today, opening up a new world of economic possibility and progress.’²¹⁴

The Framework Paper sets out five vital principles for global e-commerce development, namely: (1) allowing the private sector to take the lead in the industry, (2) avoiding undue government restriction on electronic commerce, (3) ensuring governmental involvement (but at minimal levels, that is to say, only with the view to ‘support, and enforce a predictable, minimalist, consistent and simple legal environment for commerce’), (4) ensuring full governmental recognition of the unique quality of the Internet, and (5) ensuring that e-commerce is facilitated on a global basis.²¹⁵

With these goals in its sights the US government took a major step forward to establishing a legal framework for e-commerce. This framework consists of the Uniform Computer Information Transactions Act (UCITA)²¹⁶ and the Uniform Electronic Transactions

²⁰⁸ See Art 4 of the Directive 2002/58/EC on Privacy of Communications.

²⁰⁹ See Art 5 of the Directive 2002/58/EC on Privacy of Communications.

²¹⁰ See Art 6 of the Directive 2002/58/EC on Privacy of Communications. Traffic data (or trails created when one makes a phone call, sends e-mail or SMS-messages) at times contain sensitive information and can tell much about a person’s habits, contacts, time of call, connection etc.

²¹¹ See Art 9 of the Directive 2002/58/EC on Privacy of Communications. Location data are defined under Article 2(c) of the Directive to mean data which are processed in an electronic communication network to indicate geographical position of terminal equipment of a user of a publicly electronic communications service.

²¹² See Art 13 of the Directive 2002/58/EC on Privacy of Communications. According to this Article, ‘[t]he use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

²¹³ See the White House ‘Framework for Global Electronic Commerce’ (n46).

²¹⁴ *Ibid.*, (statement by the then USA Vice President Al Gore.)

²¹⁵ *Ibid.*

²¹⁶ Uniform Computer Information Transactions Act (UCITA) (2002) (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010)).

Act (UETA).²¹⁷ These uniform statutes were prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide a set of standard rules to regulate electronic transactions,²¹⁸ demonstrating the need for uniformity of the law whilst not impeding e-commerce growth.

(ii) The UCITA

As a model contract law statute, ‘designed to deal with the new information economy’,²¹⁹ the UCITA applies to ‘contracts relating to software and other forms of computer information transactions.’²²⁰ It defines ‘computer information’ to mean ‘information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.’²²¹ It also defines a ‘computer information transaction’ to mean ‘an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information (...), [and] [t]he term does not include a transaction merely because the parties’ agreement provides that their communications about the transaction will be in the form of computer information.’²²² Presently, this Act has been adopted by two states only, namely, Virginia and Maryland.²²³

(iii) The UETA

The Uniform Electronic Transactions Act (UETA) came much earlier than the UCITA. Like the UCITA, the UETA was promulgated in response to the perceived need to support the new

²¹⁷ Uniform Electronic Transactions Act §7, 7A U.L.A. 211 (2002), (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010)).

²¹⁸ See P A Shah ‘The Uniform Computer Information Transaction Act’ (2000) 15 *Berkeley Technology Law Journal* 85. See also B P Fry ‘Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions’ (2000-2001) 37 *Idaho Law Review* 237; J Bell, R Gomez, P Hodge & V Mayer-Schönberger ‘Electronic Signature Regulation: An Early Scorecard - Comparing Electronic Signatures Legislation in the US and the European Union’ (2001) 17 *Computer Law & Security Report* 399.

²¹⁹ See the prefatory note to the UCITA at 2.

²²⁰ See The Uniform Computer Information Transaction Act, §103(a)(2002).

²²¹ See *ibid*, §102(a)(10).

²²² See *Ibid* §102(a)(11).

²²³ See Virginia adopted UCITA in 2000 VA Code Ann. §§ 59.1-501.1 to 59.1-509.2 (Michie 2001 & Supp. 2004) available at <http://leg1.state.va.us/cgi-bin/legp504.exe?001+SB372ER> (as accessed on 3/9/2010). Maryland did the same in 2003. See MD. Code Ann., Com. Law II §§ 22-101 to 22-816 (Supp. 2004); <http://mlis.state.md.us/2000rs/billfield/hb0019.htm> (as accessed on 3/9/2010).

economy.²²⁴ Unlike the UCITA, however, the UETA has been adopted in many states. It deals with electronic records and messages and builds a foundation for their use in e-transactions.²²⁵

In terms of its scope (set out in s 3) the UETA ‘applies to electronic records and electronic signatures relating to a transaction.’ Its scope is, however, limited to ‘transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commerce or government would not be subject to this Act.’²²⁶ Overall, the Act seeks to remove barriers to e-commerce, support legal neutrality with regard to mediums or technologies used to effect transactions, and it supports the principle of functional equivalence.²²⁷

7. Developing Countries’ Initiatives to Develop E-commerce

Initiatives to build e-commerce frameworks have also been underway in the developing world. This section assesses these initiatives, particularly in Africa and East Asia (the ASEAN Countries).²²⁸ As will be seen below, e-commerce has been a crucial development agenda in these regions.²²⁹

²²⁴ See, for instance, UETA (1999) prefatory note, at 1. See also the Electronic Signatures in Global and National Commerce Act (E-Signature Act) (Codified as 15 U.S.C. § 7001 (2001) *et seq.*). This Act was enacted by the Congress in June 2000 with a view to ‘facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered electronically.’ It carefully ‘preserve the underlying consumer protection laws governing consumer’ rights to receive certain information in writing by imposing special requirements on businesses that want to use electronic records or signatures in consumer contracts.’ See ‘Electronic Signature in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c) (1) (C) (ii).’ Federal Commission & Department of Commerce (2001) (Executive Summary). Available at http://www.ftc.gov/os/2001/06/esign7.htm#N_1_ (as accessed on 3/9/2010). See also J Bell et al (n218).

²²⁵ See UETA, §3. See also Fry (n218) 248.

²²⁶ See UETA, §3 (read together with para 1 of its legislative comments).

²²⁷ See UETA, §6 (read together with its legislative comments No.1 and 2 which reflect the policies behind the Act). Section 7 of UETA creates equivalency between paper-based records and handwritten signatures to those created electronically. It provides that a record, e-signature or e-contract shall not be denied legal validity because of its data form. (See UETA, §7(a)-(d), the source of which is the UNCITRAL Model Law on Electronic Commerce, Arts 5, 6, and 7).

²²⁸ The Association of Southeast Asian Nations (ASEAN) was created by the Bangkok Declaration on 8th August 1967 for the purpose of promoting a regional cooperation among its member states. Its current membership is composed of ten Southeast Asian countries, namely: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao People’s Democratic Republic and Myanmar. See S Siphana Overview of the ASEAN Agreements (available at http://www.moc.gov.kh/econo_intergration/asean/overview-asean_agre01.htm (as accessed on 4/8/2007)).

²²⁹ There are noticeable efforts in the ASEAN countries to grasp the opportunity which e-commerce offers. For more on this see *The Asia-Pacific Trade and Investment Review* (2005) 1. As for Africa, see the Tunis Declaration on E-commerce for Development, 2003 adopted during High-level Conference for Africa Electronic Commerce Strategies for Development. The Declaration is available at http://www.unctad.org/sections/wcmu/docs/site_ecn_ecom0008_en.pdf (as accessed on 13/8/2007).

(a) The ASEAN Countries' Initiatives

(i) The ASEAN Platforms for E-commerce Growth

In 1997, the ASEAN heads of state unveiled a development strategy, the 2020 vision. The vision accentuates the need to create an integrated ASEAN economy. Recognising the importance of ICT in economic growth, it underscores the need to establish a 'regional information technology network and centres of excellence for dissemination of and easy access to data and information.'²³⁰ Two initiatives were launched to achieve this purpose: the e-ASEAN Initiative and the Initiative for ASEAN Integration (IAI). The former seeks to 'develop a broad-based and comprehensive action plan, including physical, legal, logistical, social and economic infrastructure needed to promote ASEAN e-space as part of ASEAN positioning and branding strategy.'²³¹ The importance of this initiative to e-commerce development in this region is its focus on 'establish[ing] a regional-wide approach [for] comprehensive use of information and communication technology in business, society and government.'²³²

In 2000, through the e-ASEAN Initiative, the member states entered into a framework agreement to facilitate the setting up of the ASEAN Information Infrastructure (AII). This agreement supports efforts to 'adopt electronic commerce regulatory and legislative frameworks that create trust and confidence for consumers and facilitate the transformation of businesses [in the region].'²³³ It also encourages adoption of national laws and policies that promote e-commerce transactions on the basis of international norms, mutual recognition of digital signature frameworks, secure regional electronic transactions, and payments and settlements through mechanisms, such as electronic payment gateways.²³⁴

Since 2001, the ASEAN countries adopted a common reference framework for e-commerce legislation.²³⁵ This common framework aims at assisting member countries that

²³⁰See R Quimbo 'The ASEAN Legal Framework and Its Challenges' in UN Economic and Social Commission for Asia and the Pacific (UNESCAP), *Harmonised Development of Legal and Regulatory Systems for E-commerce in Asia and the Pacific: Current Challenges and Capacity-Building Needs. Studies in Trade and Investment No. 54 (ST/ESCAP/2348) (2004) 81* (available at http://www.unescap.org/tid/publication/tipub2348_party1v.pdf (as accessed on 2/8/2007)).

²³¹ See R Quimbo (n230) at 81.

²³²Ibid.

²³³Ibid at 83

²³⁴ See R Quimbo (n230).

²³⁵Ibid at 87. The laws that form the reference framework are- Electronic Transactions Act (ETA) of Singapore; The Digital Signature Act (DSA) of Malaysia; The Electronic Commerce Act (ECA) of Philippines; The

have not developed e-commerce laws to do so in harmony with international norms. In 2000, the 4th ASEAN Informal Summit held in Singapore endorsed the launching of the ASEAN Integration Initiative (IAI) in order to improve e-commerce and to ensure a harmonised economic growth in the region.²³⁶ Key programmes under this initiative include infrastructure, human resource development, information and communication technology and capacity-building for regional economic integration.²³⁷

(ii) The ASEAN Legal Harmonisation Strategy – Asian Member States Lead the Way

The role of law in Asian economic development has been well documented.²³⁸ Given its contribution to the economic life of the ASEAN states, these countries have taken steps to ‘overhaul or effect amendments to their existing laws to deal with the emerging legal issues that electronic commerce raises.’²³⁹ The different levels of economic growth and different legal systems of the Asian states, however, necessitated the adoption of a harmonised regulatory approach. Consequently, the UNCITRAL Model Laws on E-commerce and E-signature have become the heart of the harmonisation process and form part of the e-ASEAN Strategy.²⁴⁰

Electronic Transactions Order of Brunei Darussalam and Draft Electronic Transactions Bill (ETB) of Thailand. All these are said to have drawn heavily from the UNCITRAL’s Model Law on Electronic Commerce and Draft Model Law on Electronic Signatures, as well as the e-commerce and electronic signature laws used by some states in the United States (such as Utah and Illinois) and by some countries in Europe (such as Germany.) (See Quimbo (n230).

²³⁶ See D Hew ‘Towards ASEAN Economic Community by 2020: Vision or Reality?’ Institute of South East Asian Studies *VIEW POINTS* (2003) 1 (available at <http://www.iseas.edu.sg/viewpoint/dhjun03.pdf> (as accessed on 11/08/2007)).

²³⁷ Ibid.

²³⁸ See K Pistor & P Wellons (eds) *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (1999). An executive summary of this book is available from <http://www.asianlii.org/asia/other/ADBLPRes/1998/3.pdf> (as accessed on 12/8/2007).

²³⁹ See S Anil ‘Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues’ (2001) 9 *International Journal of Law and Information Technology* 93.

²⁴⁰ See Quimbo (n230) 88-89. See also R Quimbo ‘ESCAP: Trade and Investment’ No.54 ST/ESCAP/2348, at 82.

(b) E-commerce Development Initiatives in Africa

(i) The African Information Society Initiative (AISI)

Unlike the Asian region, Africa still lags behind in terms of ICT infrastructures development.²⁴¹ Even its basic infrastructures, which could support robust commercial activities, are underdeveloped, thus limiting the growth of trade and commerce in the region.²⁴² These problems are compounded by other factors, such as lack of harmonised policies and laws.²⁴³ Consequently, if e-commerce is to develop on the continent successfully, state laws must be harmonised with those of the major trading partners.²⁴⁴

In terms of individual country ICT developments, some African countries have made progress towards designing and adopting policies.²⁴⁵ Nonetheless, only a few have formulated electronic transaction legislation.²⁴⁶ Although there are difficulties to be encountered, assessment of Africa's e-commerce potential by the United Nations Economic Commission for Africa's reveals that the continent can potentially benefit from export-oriented services.²⁴⁷ It is argued, for instance, that the continent may consider: '[e]xport-oriented online teleservices, eg, call centres; [b]usiness-to-business offline e-businesses, eg, digitisation services, translation services; [d]iaspora-oriented e-businesses, eg, facilitating [d]iaspora communication with

²⁴¹ See A S Shemi & A P Magembe 'Challenges and Prospects of e-Commerce in Africa: The Need for Strategic Alliances and Collaboration.' (2003) 1 (3) *Chimera* USA-AFRICA Institute 26-30 (available at <http://www.usafrica.org/Chimera-Fall03.pdf> (as accessed on 13/8/ 2007)).

²⁴² See T James *An Information Policy Handbook for Southern Africa* IDRC-CDRI (2001) 131.

²⁴³ See K Chege 'AU: African ICT Policies Must Match Regional Needs' (available at <http://www.scidev.net/en/news/au-africa-ict-policies-must-match-regional-needs.html> (as accessed on 3/9/2010)). See also 'ICT Regulatory Harmonisation: a Comparative Study of Regional Initiatives' Support for Harmonisation of ICT Policies in Sub-Sahara Africa (HIPSSA), Activity G-1 of HIPSSA Project (2009) available at http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/docs/D_REGHIPSSA-2010_E.pdf (as accessed on 3/9/2010) (to be referred hereafter as HIPSSA Initiative).

²⁴⁴ See Chege (n243). This is, however, may be only a tip of an iceberg. Africa still has many other problems that hinder its economic growth, for instance, poor literacy, corruption, unfair trade with developed partners, to mention, but a few.

²⁴⁵ See A Vere 'Legal and Regulatory Frameworks for the Knowledge Economy: Concept Paper' *UNECA, First Session of the Committee on Development Information, Science and Technology (CODIST-I)* Addis Ababa, Ethiopia 28 April – 01 May 2009, para 9 (available at <http://www.uneca.org/codist/codist1/content/E-ECA-CODIST-1-15-EN.pdf> (as accessed on 13/8/2011)).

²⁴⁶ *Ibid* at para 12. Out of over fifty countries in Africa, only about eight countries have taken steps to enact appropriate legislation. These are Mauritius (2000), Tunisia (2000), South Africa (2002), Cape Verde (2003), Egypt (2004), Ghana (2008), Zambia (2009) and Rwanda (2010). This shows that there seems to be a problem of either not understanding the potential of e-commerce or, perhaps, underrating the fact that Africa can compete in the new global economy. See the current status of the UNCITRAL Model Law available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (as accessed on 22/2/2011).

²⁴⁷ See *The Pan African E-commerce Initiative Report ECA/DISD/CODI.2/30*. The ECA/IDRC Pan-African Initiative on e-Commerce Report (edited by the Economic Commission for Africa) at 5 (available at <http://www.uneca.org/codi/Documents/PDF/doc30en.pdf> (as accessed on 20/9/2010)).

family at home, and [g]overnment, [p]an-African institutional or regional e-procurement activity.²⁴⁸

The fact that Africa can potentially tap into new developments should be an added incentive to create an enabling environment that stimulates and develops niche markets. Questions therefore arise regarding the means which Africa should use to ensure the development and diffusion of ICT within its economic mainstream so as to reap the benefits of e-commerce.²⁴⁹ One clear fact is that Africa needs ‘good information and communications infrastructure, essentially, the Internet, [if it is] to participate in e-commerce.’²⁵⁰

Since 1995, initiatives meant to address the information and communication technology gap in Africa have been underway, especially after the African Information Society Initiative (AISI) was conceived.²⁵¹ In 1999, AISI facilitated the African Development Forum (hereafter ‘ADF’99’) Conference. The conference aimed at promoting an information technology development agenda in the context of globalisation and the so-called digital economy.²⁵² In order to address the problems identified by the ADF’99, and to facilitate Africa’s integration into the new knowledge-based economy, governments were urged to develop appropriate policy and legislative frameworks. Such policies ought to be able to

²⁴⁸ See James (n242) 140.

²⁴⁹ See Shemi & Magembe (n241) 26.

²⁵⁰ Ibid at 26. See also the Oliver Tambo Declaration (2009) (available at <http://www.uneca.org/aisi/>). In this Declaration African Ministers for communications expressed their commitment to promote ICT infrastructure, *inter alia*.

²⁵¹ AISI has been a platform for assisting countries to set up laws and ICT infrastructures and offers assistance in areas of skills development so that e-commerce can become widespread in Africa (see A Mensah, A Bahta & S Mhlanga ‘E-commerce challenges in Africa: issues, constraints, opportunities.’ Briefing Paper, World Summit on Information Society, Geneva 2003-Tunis (2005) 1 (available from <http://www.uneca.org/aisi/docs/PolicyBriefs/Ecommerce%20challenges%20in%20Africa.pdf> (as accessed on 12/8/2007)). For more about AISI- See: *African Information Society Initiative (AISI): An Action Framework to Build Africa's Information and Communication Infrastructure* UN Economic Commission for Africa (available from: <http://www.uneca.org/aisi/> (Accessed on 12/8/2007). See also UNECA, Resolution 795 (XXX) of 3 May 1995, entitled ‘*Building Africa's Information Highway*’ and Resolution 812 (XXXI): Implementation of the African Information Society Initiative (AISI) (Adopted by twenty-second meeting of Economic Commission for Africa (ECA) Conference of Ministers, May 1996).

²⁵² See AISI major Activities and achievements (see <http://www.uneca.org/aisi/>) (as accessed on 12/8/2007). The ADF’99 was organised under the auspices of the UNECA ‘to address the development of Information and Communications Technologies (ICTs) in Africa and their contribution to development.’ See The UNECA *Pan African E-commerce Initiative Report ECA/DISD/CODI.2/30*. The ECA/IDRC Pan-African Initiative on e-Commerce Report (edited by the Economic Commission for Africa) at 5 (available at <http://www.uneca.org/codi/Documents/PDF/doc30en.pdf> (as accessed on 20/9/2010).

address a range of issues relevant to e-commerce, for instance, enhanced connectivity, privacy and intellectual property protection.²⁵³

Overall, although e-commerce activities are emerging in most African countries, their growth has been slow due to the limited communication infrastructure, low levels of bandwidth connectivity (and entire Internet penetration), and the lack of awareness about the existing opportunities offered by e-commerce.²⁵⁴ Consequently, governments need to adopt new strategies and legal or regulatory frameworks that are conducive to e-commerce growth.²⁵⁵

The African Union's efforts through the NEPAD initiative to address some existing e-commerce development constraints are a highly commendable strategy.²⁵⁶ NEPAD promotes the need to embrace ICT for the growth of e-commerce so as to bridge the digital divide. In recognising the role played by ICT in socio-economic development and its ability to facilitate intra-regional trade, NEPAD established an e-Africa Commission in 2001. This was mandated to oversee the ICT development in Africa.²⁵⁷ In general, because the rapid growth of the Internet serves as the basis for global socio-economic transformation and the development of the knowledge-based economy, the requisite infrastructure for e-commerce has been a priority issue.²⁵⁸ In 2003, the Tunis E-commerce Conference emphasised the use of ICT, e-business and e-commerce as powerful tools for integrating African countries into the world economic system.²⁵⁹

(ii) Initiatives through Regional Economic Communities (RECs)

Regional economic communities, such as the East African Community (EAC) and the Southern African Development Community (SADC), have a critical role to play in bringing about

²⁵³See UNECA Resolution 812 (XXXI) para 47. Available from: <http://www.uneca.org/aisi/> (as accessed on 12/8/2007).

²⁵⁴See Mensah et al (n251).

²⁵⁵See UNECA *Pan African E-commerce Initiative Report* (n247).

²⁵⁶The New Partnership for Africa's Development (NEPAD) is a collaborative strategic framework that represents a commitment 'to place Africa on the path towards sustainable growth and to speed up its integration into the world economy.' See UNECA Report titled: *Attainment of the MDGS and Implementation of NEPAD in North African Countries: Progress Prospects ECA-NA/TNG/ICE/XX/4/REV.1*, March 2005, para. 89 (submitted at the 20th Meeting of the Intergovernmental Committee of Experts (ICE) of the ECA Sub-regional Office for North Africa, Tangier Morocco 13-15 April 2005).

²⁵⁷ See NEPAD *Annual Report 2003-2004* (2004) 25.

²⁵⁸This was strongly emphasised during the Tunis Regional High-level Conference for Africa's Electronic Commerce Strategies for Development held in Tunis –Tunisia on 19th –21st June 2003 and a declaration embodying this fact was adopted. The Declaration is available at http://www.unctad.org/sections/wcmu/docs/site_ecn_ecom0008_en.pdf (as accessed on 13/8/2007).

²⁵⁹See paragraph two of the preamble to the Tunis Declaration on E-commerce for Development, 2003 adopted during High-level Conference for Africa Electronic Commerce Strategies for Development.

integration and harmonisation of laws and policies that foster e-commerce. In view of this, African states should seize the available opportunities in these structures to develop their ICT infrastructure for e-commerce transactions.²⁶⁰

Within the East African Community, for instance, efforts to create an environment that is conducive to e-commerce have long existed.²⁶¹ Although no specific regional model law on e-commerce has been adopted, a Task Force, known as the East African Community (EAC) Task Force on Cyberlaws, was created to address cyber law issues.²⁶² The Task Force, in collaboration with UNCTAD, has managed to develop a Phase I Framework for Cyberlaws (“Framework”) which was adopted by the 2nd Extra-Ordinary Meeting of the EAC Sectoral Council on Transport, Communications and Meteorology in May 2010.²⁶³

Although the EAC Phase I Framework for Cyberlaws is not itself a model law it reflects the available international best practice envisaged in existing ‘model laws and other instruments of public international law’ with an overall objective of facilitating ‘the use of electronic means of communication to enter into and execute legal acts.’²⁶⁴ Because it is meant to create a basis for a harmonised legal regime for the effective functioning of e-commerce and an e-governance system in the region, the Framework envisages reform of national laws on five

²⁶⁰See Shemi & Maghembe (n241) 26-27. As noted earlier the Authors suggest that African business enterprises being of micro nature then a different e-commerce model should be developed for them. The models suggested here are business associations and cooperative models. See also the HIPSSA Initiative (n243).

²⁶¹ According to the ITU Report on East Africa ‘as early as 2001, when the 2nd EAC Development Strategy was developed, some of the pertaining issues (for instance, harmonisation of policies and regulations, improving cross-border connectivity, adoption of common frequency management strategies) were long recognised and prioritised for action, but unfortunately to date they remain on the to-do lists.’ See ITU *East Africa Regional Information Infrastructure Report– Volume I* ITU Geneva (2007) 9 –available at http://www.itu.int/dms_pub/itu-d/opb/ldc/D-LDC-ICTEARI-2007-PDF-E.pdf (as accessed on 3/3/2009). See also ‘Study on Programme for Infrastructure Development in Africa (PIDA) -Phase I Report,’ (available at <http://www.pidafrica.org/phase1/6ICT.pdf> (as accessed on 12/8/2011)).

²⁶² Apart from legal harmonisation there are still certain other issues that need to be addressed. One of them is the need to develop a strong ICT industry and reliable infrastructures at regional level. Since 2004, series of workshops have been carried out to address other issues relevant to e-commerce. These include Regional e-Government Framework Stakeholders Consultative meeting (28 - 29th June 2005); Workshop on Cyberlaws and e-Justice (on 25th–26th April 2006); Workshop on Information Security (27th–28th April 2006).

²⁶³See Draft EAC Legal Framework for Cyberlaws (Phase I) (November 2008) (available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&sqi=2&ved=0CBoQFjAA&url=http%3A%2F%2Fwww.eac.int%2Fadvisory-opinions%2Fdoc_download%2F632-eac-framework-for-cyberlaws.html&ei=0lfKTqqTDZKJhQfnzP30Dw&usq=AFQjCNHTXyPskvH41gKpnJRWI1gcErsDPQ (accessed on 21/11/2011)).

²⁶⁴ Ibid at 6.

key areas namely: electronic transactions, electronic signatures and certification services, data protection and privacy, consumer protection and computer crime.²⁶⁵

Under the Phase I Framework, the term ‘electronic transactions’ is regarded as not only including transactions of commercial value such as ‘agreements for the purchase goods, products or services’ but also ‘interactions with government and administrative bodies, in either a commercial or non-commercial context.’²⁶⁶ In order to ensure effective reform process within the region, the Task Force issued a total of 19 recommendations which need to be taken into account by the EAC member states when reforming their domestic legislation. These recommendations include the following:

- that, because governments, when adopting a measure on electronic transactions, have certain aims and objectives that should be achieved, eg, to ‘facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty’ or ‘to encourage the use of reliable forms of electronic commerce’, the preparation, adoption and interpretation of electronic transaction legislation must assume a purposive approach;²⁶⁷
- that, in order to avoid unintended consequences with regard to the application of an e-commerce legislation, it may be necessary to include provisions specifically detailing the areas in which the law is intended to apply. In view of this, it is recommended that ‘any electronic transaction law be generally applicable to all civil and administrative law matters’;²⁶⁸
- that, in order to maintain freedom of contract, private entities should be given the freedom ‘to depart from the provisions of the electronic transactions law by agreement, in specified circumstances’;²⁶⁹

²⁶⁵ A Phase II framework which addresses intellectual property, competition, and taxation and information security awaits further implementations by the EAC member states. See ‘Draft EAC Legal Framework for Cyberlaws: Phase II February 2011’ available at http://www.meaca.go.ug/index.php?option=com_docman&task=doc_download&gid=27&Itemid=6 (as accessed on 4/6/2011). See also Report of the EAC Meeting of The Task Force on Cyberlaws, Phase II 28-30 March 2011, Mombasa, Kenya (available at http://www.eac.int/advisory-opinions/doc_details/635-report-of-the-eac-meeting-of-the-task-force-on-cyberlaws-phase-ii-28-30-march-2011-mombasa-kenya.html (as accessed on 21/11/2011).

²⁶⁶ See EAC Legal Framework for Cyberlaws (Phase I) (n263) 6.

²⁶⁷ See EAC Legal Framework for Cyberlaws (Phase I) (n263) 6-7.

²⁶⁸ Ibid at 7.

²⁶⁹ Ibid.

- that, in order to ensure clarity and avoid uncertainty regarding the meaning of certain technology based terms, a comprehensive set of statutory definitions should be incorporated in the electronic transactions legislation;²⁷⁰
- that, '[p]rovisions should be drafted recognising the validity of electronic communications as meeting as requirement for a 'writing', 'signature' or 'original' and all areas where the law requires a person to file paper documents with public bodies including licensing, certification.' However, such validity may be subject to certain conditions being met and exemptions may be made for certain specified legal acts.'²⁷¹
In this regard, the Task Force recommended that the wording used in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) be adopted;²⁷²
- that, regarding validity of contracts formed by way of data messages or by using e-agents, the time and place where such contracts are deemed to be formed, and whether incorporating certain terms of such contract by way of hypertext links meets the legal requirements, are issues that need to be expressly addressed in the electronic transactions law and the wording used in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005), in particular Art. 8, 11-13 is recommended;²⁷³
- that, as regard evidential matters the electronic transaction law adopted by any member state should '[facilitate] electronic record-keeping and permits the admission of electronic records as evidence before a judicial, administrative or dispute resolution body, subject to certain conditions.'²⁷⁴

Overall, it is important to note that during the preparation of the EAC Framework for Cyberlaws (Phase I), the responsible Task Force adopted a comparative analysis of the Commonwealth Model Law on Electronic Transactions (2002), the UNCITRAL Model Laws

²⁷⁰ Ibid at 7.

²⁷¹ Ibid at 8.

²⁷² Ibid. The Task Force further recommended that the issue regarding when and where an electronic communication is sent and received should also be dealt with and the wording used in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) should be used.

²⁷³ Ibid, at 9.

²⁷⁴ Ibid at 11. The Task Force further recommended 'that regional standards be developed, reflecting international standards, to assist judicial, administrative or dispute resolution bodies to evaluate the evidential value of electronic records' (See Recommendation No.8).

on Electronic Commerce and Electronic Signatures (1998 and 2001 respectively) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).²⁷⁵ The Task Force's approach is commendable because it creates complementarity and avoids conflicting versions which may be adopted by EAC member states such as Tanzania. Its recommendations will thus offer a useful guidance to Tanzania's law reform process.

In the SADC region, similar initiatives to promote economic growth have been underway.²⁷⁶ In a bid to promote economic integration through trade and investment, development of e-commerce has been one of SADC's top priorities.²⁷⁷ In August 2001, for instance, SADC adopted an ICT Declaration that emphasised the need to remove e-commerce barriers within its member countries in order to exploit the opportunities and benefits of the technology.²⁷⁸ The ICT Declaration is a stepping stone towards further development and adaptation of new technologies that will enhance e-commerce capability, and thereby integrate the region into the global economy.²⁷⁹ It asserts SADC member states' commitment in five major areas, namely:

- the regulatory environment for Information and Communications Technology;²⁸⁰
- infrastructure for ICT development;²⁸¹
- community participation and governance in ICT development;²⁸²
- ICT in Business Development;²⁸³ and
- human resource capacity for ICT development.²⁸⁴

²⁷⁵ See EAC Legal Framework for Cyberlaws (n263) 4.

²⁷⁶ For instance the Community is spearheading the development of the ICTs through the Southern Africa Regional Information Infrastructure (SRII) initiative which involves also the Southern Africa Telecommunications Association (SATA). The initiative seeks to fast expand a broadband terrestrial network within and between the Southern States. (See ITU East Africa Report (n261) 26).

²⁷⁷ See The SADC Memorandum of Understanding on Co-operation in Taxation and Related matters (2003), Article III. para 3 (available at http://www.sadc.int/key_documents/memoranda/taxation.php (as accessed on 24/8/2007)).

²⁷⁸ See s 2(d) which states: 'WE SHALL UNDERTAKE to work together to remove barriers of electronic commerce in our SADC countries as a means to opening opportunities and benefits such as increased access to markets, opportunities to create economic value and cultural assets, reduced administrative costs, and improvement of public services. There is a need to adopt and adapt technologies that enable e-commerce capability to avoid increasing exclusion from the global economy.' (The Declaration is available at <http://www.tralac.org/scripts/content.php?id=440> (as accessed on 24/8/2007)).

²⁷⁹ Ibid.

²⁸⁰ See e-SADC Launch Meeting 05 – 06 October 2009, ECA/SA/E-SADC/2009/Info.1 (available at <http://www.uneca.org/sa/events/sadc200910/Aide%20Memoir.pdf> (as accessed on 21/11/2011)) at p1.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

Being fully aware of the existing paradigm shift to digitisation, SADC, in its 2004 strategic plan, reviewed and re-focused its development strategies. Emphasis has been laid on the need to utilise ICT aggressively, as a catalyst for socio-economic development and prosperity.²⁸⁵ In view of this, several projects have been underway, including the so-called dot-GOV Southern African ICT and Policy Reform Support (SIPRS) Project. This project, which was funded in partnership with the USAID, aimed at developing a harmonised legal framework for electronic commerce in the region.²⁸⁶ Through this project, a Draft SADC Model Law on E-commerce was tabled at a SADC Workshop on Harmonisation of E-commerce Laws held in Johannesburg, South Africa in November 2003.²⁸⁷ This Draft Model Law, follows the UNCITRAL approach,²⁸⁸ thus endorsing the principle of non-discrimination between media (or media neutrality), and functional equivalence as between paper documents and electronic messages.²⁸⁹ Other matters considered in the Model Law are electronic transactions, electronic signatures, cyber crimes, data protection and privacy.²⁹⁰

In February 2004 a revised version of this Model Law was submitted to the Telecommunications Regulators Association of Southern Africa (TRASA) and ‘a Legal and Policy Affairs Working Committee was formed at the 7th AGM, specifically to review the draft Model Law for ways to strengthen issues of data protection, electronic transactions (digital signatures) and convergence of technologies.’²⁹¹

Although the Draft SADC Model Law was expected to be finalised in 2004,²⁹² no further developments have been reported to date, and it is not clear whether there are any ongoing efforts to finalise it. The only probable conclusion is that the proposed SADC Model Law has remained a ‘draft model law’ that was never released to the public nor finalised. In

²⁸⁵See SADC-Regional Indicative Strategic development Plan, (RISDP) para. 3.7.1, at page 66 (available at http://www.sadc.int/content/english/key_documents/risdp/SADC_RISDP_English.pdf (as accessed on 24/8/07)).

²⁸⁶See James (n242) 132.

²⁸⁷ SADC Model Law on Electronic Transactions and Data Protection, SADC Workshop on the harmonization of e-commerce laws, Nov 24th-25th 2003 Johannesburg South Africa. See also See W Tadesse & T G Kidan ‘e-Payment: Challenges and Opportunities in Ethiopia’ United Nations Economic Commission for Africa (2005) 21, (available at <http://www.scribd.com/doc/49960139/25/SADC-Model-Law-on-Electronic-Transactions-and-Data-Protection> (as accessed on 29/3/2011)). See Vere (n245) para 38.

²⁸⁸ See Vere (n245) para 38.

²⁸⁹Ibid, para 14.

²⁹⁰See ‘Harmonisation of E-commerce Legal Framework for Southern Africa’ DOT-COMments News letter, March, 2007 vol19 (available at http://www.dot-com-alliance.org/newsletter/article.php?article_id=30 (as accessed on 23/8/2007)). See also Vere (n245) para 38.

²⁹¹ See ‘SIPRS Project Final Report August 2004’ (at p.9) (available at http://pdf.usaid.gov/pdf_docs/PDACA936.pdf (as accessed on 23/11/2011)).

²⁹² See SADC-Regional Indicative Strategic development Plan, (RISDP) (n285) 61.

view of this, it is clear that more efforts to harmonise e-commerce rules in the region, and indeed, the entire continent, should be considered a key priority in order to facilitate trade and enhance economic growth.

Other important developments in the region include the adoption of an e-SADC plan which was developed in collaboration with the United Nations Economic Commission for Africa (UNECA) in 2010.²⁹³ This plan, which was supported by UNECA, focuses ‘on the role of ICTs in transforming SADC into an information-based economy and aims to address all major aspects of e-applications including e-government, e-parliament, e-commerce, e-education, e-health and e-agriculture.’²⁹⁴

Since June 2011 SADC also adopted ICT Consumer Rights and Protection Regulatory Guidelines ‘meant to assist decision makers in the ICT Sector to ensure that consumer protection becomes an integral part of their developmental objectives in the SADC region.’²⁹⁵ These ‘Guidelines aim to:

- (i) encourage regional policy harmonization on consumer protection issues’;
- (ii) facilitate achievement or maintenance of adequate ICT consumer protection in SADC region;
- (iii) encourage high levels of flow of information to consumers to allow them to make informed choices;
- (iv) encourage high levels of ethical conduct by ICT service and product providers; and
- (v) encourage availability of effective consumer redress.’²⁹⁶

In addition, the Guidelines provide seven key principles on consumer protection which a service provider is required to observe. In particular the seven principles require service providers:

- ‘to act fairly, reasonably and responsibly in all their dealings with consumers’;²⁹⁷

²⁹³ See S Mhlanga, e-SADC Initiative Approved by ICT Ministers, 13 May 2010. Harnessing Information for Development – (available at <http://www.uneca.org/istd/news/istd-dna-2010051301-en.asp> (as accessed on 21/11/2011)).

²⁹⁴ See Study on Programme for Infrastructure Development in Africa (PIDA) -Phase I Report (n261) 21.

²⁹⁵ See SADC ICT Consumer Rights and Protection Regulatory Guidelines, June 2011 (available at <http://www.nbc.na/resources/Guidelines%20ICT%20Consumer%20Protection%20In%20Southern%20Africa.pdf> (as accessed on 21/11/2011)).

²⁹⁶ Ibid, at 7.

²⁹⁷ Ibid, at 10.

- ‘to make sure that all services and products meet the specifications as contained in their licenses and all the relevant regulations and code of service;’²⁹⁸
- ‘not to discriminate against consumers on the basis of race, gender, ethnic background, sexual orientation or special needs’; ²⁹⁹
- ‘to assist consumers when they need information and guidance with regard to their products’; ³⁰⁰
- ‘to keep consumers’ personal information confidential’; ³⁰¹
- ‘to handle consumer complaints promptly, correct mistakes and inform them how to take their complaints forward if they are still not satisfied; and’³⁰²
- ‘to train their staff to make sure that the procedure they follow reflect the requirements set out in these Guidelines.’³⁰³

As noted above,³⁰⁴ the SADC Draft Model Law was never finalised, and the EAC Framework (Phase I) is just a framework to guide the EAC member states in their efforts to enact e-commerce legislation. As such, although the current efforts in both regions are useful they are still not sufficient to guarantee harmonisation of e-commerce rules among their member states. Because e-commerce is a cross-border activity, and since some countries, for instance, Tanzania maintain membership in both regional entities, more efforts are needed to develop effective and complementary systems of harmonised binding rules to govern e-transactions in the two regional communities. Such rules, which constitute one of important attributes to a successful economic integration, must also include rules intended to resolve conflict of laws issues.

Overall, since the SADC Draft Model Law was never finalised, the paucity of efforts towards the harmonisation of e-commerce rules within the SADC region, and indeed, the entire continent, is lamentable in light of its role to facilitate trade and enhance economic growth. It has been noted, for instance, that there has been an increasing trade volume in services in many

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ See page 218.

countries within the SADC region.³⁰⁵ In 2007, for instance, ‘the services sector accounted for 59.3% of SACU’s Gross Domestic Product.’³⁰⁶ The table below reveals the trends and, in my view, suggests that enhanced regional economic integration through adoption of a harmonised e-commerce legal framework will further boost the growth of trade in services and other products.

Table 3: Total services exports and imports of the EU (27), US \$ million

	Exports (2006)	Imports (2006)
Africa	32 242	36 132
Botswana	115	56
Lesotho	NA	NA
Mozambique	171	207
Namibia	114	307
South Africa	6 655	5 466
Swaziland	59	38

Source: Cronje³⁰⁷

8. Conclusion

The rapid growth of ICT has not only been a central theme in economic development agenda, but also a legal issue for both developed and developing countries. Currently these technologies serve as the basis for global socio-economic transformation and development of the knowledge-based economy. To harness their potential, however, appropriate strategies, as well as effective legal frameworks are necessary. Law has an important facilitative role to play in meeting the increasing demands of a technology-driven society. Its importance hinges on the crucial role it plays as a regulatory infrastructure. A good legal framework helps to establish an environment that is conducive to economic growth. With this in mind, concerns have arisen regarding the need to ensure that global, regional, or domestic legal frameworks that regulate e-commerce are harmonised in order to avoid regulatory inconsistencies.

³⁰⁵See J B Cronjé ‘Trade in services and the regional integration process in southern Africa’ in C McCarthy, J B Cronjé, W Denner, T Fundira, W Mwanza & E Bursvik *Supporting Regional Integration in East and Southern Africa – Review of Select Issues* Trade Law Centre for Southern Africa (2010) 94-114.

³⁰⁶Ibid at 95. ‘SACU’ stands for Southern African Customs Union. For more on the statistics on total services exported and imported within the region visit <http://stats.oecd.org/Index.aspx?DataSetCode=LEVEL> (as accessed on 13/10/2010).

³⁰⁷See Cronjé (n307) 95.

As the Internet and e-commerce assume greater importance in global business, this chapter has analysed various global and regional efforts that aim at ensuring harmonised regulation of e-commerce, this being a suitable strategy to guarantee its continued growth. As noted in this chapter, such efforts include the adoption of the UNCITRAL Model Laws on e-commerce and e-signature and the UN Convention on E-contracts. These instruments have been useful to various countries because they provide rules that can be relied upon to address the existing inadequacies in most domestic laws. The Model Laws and the Convention, therefore, provide new avenues for further development of the domestic legal regimes and enhance the possibilities of harmonisation. In addition, the rules contained in these instruments are vital in promoting regional economic integration, facilitating international trade and creating the circumstances needed to help developing countries join the global market.

Owing to the facilitative role that the UNCITRAL Model Laws and the UN Convention on E-contracts play in creating a harmonised regulatory environment for e-commerce, this thesis supports them, notwithstanding their failure to address some key issues, such as rules regarding conflict of laws. Overall, these instruments can still be used to ease cross-border disputes because of their approach to enhance harmonisation of e-commerce rules. This study submits, therefore, that Tanzania and other developing countries should seek to embrace the existing regulatory developments, especially the UNCITRAL Model Laws and the UN Convention on E-contracts. For instance, most of the legal problems identified in chapter two of this thesis can satisfactorily be resolved by adopting the Model Laws and the E-contracting Convention.

While the discussion regarding the UNCITRAL's contribution to the development and regulation of e-commerce presents a global picture, this chapter has also examined other initiatives meant to regulate e-commerce regionally. Such initiatives include developments in the EU and in the US, as well as efforts in Africa and the ASEAN region.

The EU and the US initiatives represent the legal developments in the developed countries. E-commerce in these regions is in a more advanced stage. The discussion on these regions was essential because it reveals the steps which they have adopted to promote effective development and regulation of e-commerce. The EU's approach, however, presents a more suitable way of regulating e-commerce, because it has rules that are more elaborate on the need to enhance consumers' confidence and trust in the online environment. Consumer protection, for instance, is an important aspect in the EU's e-commerce initiative. The EU has adopted a

number of Directives some of which have the direct effect of protecting consumers when they transact online. The rules contained in the Directives may be useful to the developing countries, especially in areas where the UNCITRAL Model Laws and the UN Convention on E-contracts do not provide for effective remedy. The South African e-commerce legislation, for instance, represents a good example of how the EU rules may be useful to a developing country. As will be seen in the next chapter, apart from relying on the UNCITRAL Model Laws, South Africa also relied on the EU Directives in the course of developing its e-commerce legislation.

The Africa and ASEAN initiatives to develop and regulate e-commerce represent some of the efforts in the developing countries. The discussion regarding these regions reveals the existing barriers to e-commerce in developing countries and reflects on how the current international developments may be adopted to address these barriers. In particular, the efforts of the ASEAN region portray the usefulness of the UNCITRAL Model Laws on e-commerce and e-signature for developing countries, since these Model Laws have been pivotal to the legal harmonisation process in this region.

Compared to the developments that have taken place in the ASEAN region, Africa however, remains the least developed region as regards the regulation of e-commerce, and e-commerce is still in its formative stage in this region. This is partly due to poor infrastructure, including ICT infrastructure, and lack of effective legal frameworks that are conducive to e-commerce growth. As noted in this chapter, however, several efforts to address these problems are underway through important initiatives, such as the NEPAD and the existing Regional Economic Communities (RECs), such as the EAC, the ECOWAS and the SADC. The RECs provide not only a suitable avenue to address the barriers that prevent e-commerce development among member states, but they are also important vehicles in the overall process of integrating Africa into the global economy.

Overall, the discussion in this chapter provides one important lesson, that is, successful e-commerce and e-contracting developments demand a harmonised legal environment. This is clearly reflected in a number of ways, including the need to promote functional equivalence between transactions conducted via the Internet and those carried out through the conventional methods globally.

As indicated in this chapter, the existing global legal developments, such as the UNCITRAL Model Laws, the UN Convention on E-contracts, as well as the rest of developments in the EU and in the US, point towards the need to create an environment that is conducive for e-commerce development, not only internationally, but also domestically. The next chapter, therefore, examines the legal developments in South Africa in that context.

CHAPTER SIX: RESOLVING DOMESTIC E-COMMERCE PROBLEMS– A CASE STUDY OF SOUTH AFRICA

1. Introduction

This chapter examines country-based or domestic legal efforts aimed at resolving e-commerce problems. In a broader context, the previous chapter examined international efforts to regulate e-commerce. It analysed some of the leading international instruments, most notably the UNCITRAL Model Law on E-commerce (hereafter referred to as ‘the Model Law’) and the United Nations Convention on the Use of Electronic Communications in International Contracts, (hereafter referred to as ‘the UN Convention on E-contracts’).¹ The chapter established, *inter alia*, that many countries around the world have relied on the Model Law to enact legislation to regulate e-commerce domestically. South Africa is one such country.

This chapter examines the legislative developments in South Africa, a country selected because, firstly, although it is a Roman-Dutch legal system, its common law of contract shares some similarities with that of Tanzania because for historical reasons it has been considerably influenced by English law.² Another reason for selection is that, prior to the year 2002, like Tanzania, South Africa lacked rules to regulate e-commerce.³

A third reason is that, like Tanzania, South Africa is a developing country and a member of the Southern African Development Community (SADC). As an economic

¹The Model Law was adopted by the United Nations General Assembly in 1996 and amended in 1998. See UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, Part I, Resolution 51/162 adopted by 85th General Assembly at plenary meeting (December, 1996) (available at <http://www.uncitral.org/en-index.htm> (as accessed on 15/6/2008)). See also UNCITRAL Model Law on Electronic Signatures, Resolution 56/80 adopted by the 85th plenary meeting of the General assembly (December 12, 2001), (available at <http://www.uncitral.org/en-index.htm> (as accessed on 15/6/2008)). In 2005, the UNCITRAL adopted a Convention on the use of Electronic Communications in International Contracts. See Resolution 60/21 adopted by the General Assembly at 60th session (December, 2005) (available at <http://www.uncitral.org/en-index.htm> (as accessed on 20/10/2010)).

² See R H Christie *The Law of Contract in South Africa* 5ed (2007) 2. The author notes, however, that such influence ‘has fortunately not extended so far as to make a knowledge of English legal history necessary for a proper understanding of [South African] law.’ As pointed out in Chapter two of this thesis, the Tanzania contract law is based on the English common law. While there are some differences between these laws, for instance, the need for consideration as an essential element in contract formation under the Tanzanian law, (which is not the case in South African law), to a large extent the legal regime governing contract in both countries follows similar principles.

³ One of the applied principles in comparative law approach is that ‘[l]ike must be compared with like. Like is defined as countries in the same evolutionary stage’. (See H Xanthaki ‘Legal Transplants in Legislation: Defusing the Trap’ (2008) 57 *International and Comparative Law Quarterly* 659,661.

community, SADC seeks to harmonise its member states' laws, including laws regulating e-commerce.⁴

Fourthly, because South Africa is one of the first countries in Africa,⁵ and in the SADC region, to enact a law on e-commerce, analysis of its legislation can provide useful guidance to the legal reform of other SADC member states, like Tanzania.

As further discussed in this chapter, the new legislation in South Africa has introduced additional rules to govern electronic offers and acceptances and the time when and place where an electronic contract is formed. These features create some differences between the South African law and the Tanzanian law, since, by adopting additional rules to cater for the online transactions, the former has the advantage of promoting and regulating e-commerce. For comparative reasons, therefore, it is useful to examine its law in order to understand the path that Tanzania may wish to choose in reforming its law.⁶

Lastly, South Africa is one of the biggest economies in Africa, where e-commerce is thriving.⁷ Analysis of its regulatory efforts, therefore, helps to contextualise the prospects

⁴ See 'CyberLaw Development and Harmonisation within SADC: Report on the Seminar held in Mbabane, Swaziland, 5-8th April, 2005' CESPAM Executive Training Programme, available at <http://www.cespam.net/documents/events/swaziland2005/cyberlaw%20development%20&%20harmonisation.pdf> (accessed on 28/3/2011). See also A Vere 'Legal and Regulatory Frameworks for the Knowledge Economy-Concept Paper'E/ECA/CODIST/1/15 26 March 2009, para 38 (available at <http://www.uneca.org/codist/codist1/content/E-ECA-CODIST-1-15-EN.pdf> (as accessed on 22/2/2011)).

⁵ South Africa was the third country in Africa (as a continent) and 2nd in the Sub-Saharan African region to have enacted a law to regulate electronic transactions. Overall, other pioneer African states with legislation governing e-transactions include Mauritius (2000), Tunisia (2000), Cape Verde (2003), and Egypt (2004). See Vere (n4) para 10-11. Recently, Ghana (2008), Zambia (2009) and Rwanda (2010) have joined the list. (See the current status of the UNCITRAL Model Law available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (as accessed on 22/2/2011)).

⁶ The enactment of the law in South Africa marks a difference between its law of contract and the law in Tanzania because, as will be shown in this chapter, the new law has removed uncertainties concerning the use of data messages to form contracts. When considered in terms of the existing legal position in Tanzania, these differences are useful in analysing the latter's problems and possible solutions. As Xanthaki points out, 'contemporary comparatists support the view that ... differences enhance our understanding of law in a given society [E]mphasis can [therefore] be placed both on differences and on similarities.' (See Xanthaki (n3) 661.

⁷ See L Kasekende, K Mlambo, V Murinde & T Zhao 'Restructuring for Competitiveness: The Financial Services Sector in Africa's Four Largest Economies' in *The Africa Competitiveness Report 2009* World Economic Forum (2009) 49 (available at http://www.workinfo.com/Workforce/21821_africa_competitiveness.pdf (as accessed on 4/5/2011)). See also Y Daya & E Steenkamp 'Trade Potential Between South Africa and Nigeria' *Directorate International Trade: Trade Research Desk Department of Agriculture, Pretoria* (2005) (available at <http://www.daff.gov.za/docs/researchP/NigeriaStudy.pdf> (as accessed on 4/5/2011)). According to Maswera et al survey of literature about e-commerce in the Sub-Saharan Africa shows that this activity is concentrated in South Africa. See T Maswera, R Dawson & J Edwards 'E-commerce adoption of travel and tourism organisations in South Africa, Kenya, Zimbabwe and Uganda' (2007) 30 *Telematics and Informatics* 1, 13.

and challenges of developing and regulating e-commerce in the context of Sub-Saharan Africa.

As will be seen in this chapter, in the course of enacting its legislation, South Africa considered international developments, such as the UNCITRAL Model Laws on E-commerce and E-signature, and the developments of e-commerce and its regulation in the European Union.⁸ It is important to note, however, that, although the Model Law forms the basis of the South African law on e-commerce it was not adopted in its entirety, rather selectively.⁹ In particular, the drafters took a broader approach and considered developments in other regions, including domestic legislation that were already in place in countries like Canada, and which they thought had better provisions.¹⁰ Consequently, the analysis here assists to establish the extent to which the Model Law and developments in other regions, such as the European Union, and in countries such as Canada influenced the enactment of the law in South Africa.

In the course of analysis the chapter attempts to address the following questions: (a) what did South Africa do to develop or amend its laws? (b) did it adopt the Model Law in its entirety or was it selective? (c) are there any legislative shortfalls that need to be avoided? For comparative reasons, such analysis of the legal developments in South Africa will afford

⁸ See the Green Paper on Electronic Commerce for South Africa, Coordinated and compiled by the Department of Communications, Republic of South Africa, November (2000) at pages 76-81, referring to EU developments in consumer protection, for instance. (The Green Paper is available at http://www.capegateway.gov.za/Text/2004/6/green_paper_on_electronic_commerce.pdf (as accessed on 26/2/2008)).

⁹ For instance, while chapter I to III of the Model Law partly form the basis of the legal development in South Africa, issues regarding the effects of e-commerce on specific areas such as carriage of goods – and which appear in Arts 16 and 17 of the Model Law – were left out. This is perhaps due to the fact that these issues could be covered by other legislation such as the Sea Transport Document Act, 65 of 2000. As will be seen in the subsequent discussion in this chapter, some provisions in the South African law on e-commerce were borrowed from other foreign legislation. In the course of this research, I consulted Mr Wim Mostert – who was the chairperson of the drafting committee – on 12/5/2011, and asked him why the committee preferred a selective approach. He had the following to say: '[w]e took a selective approach using UNCITRAL as basis but amended as and when we thought other laws, including Canada, were superior.' Moreover, the UNCITRAL Model Law is considered a standard framework meant only to guide states but that does not mean that a country intending to develop its e-commerce law is bound to follow its provisions to the letter. (See para 1 and 2 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996)).

¹⁰ According to Mostert other countries from which information was obtained include the USA, the UK, Australia, Brazil, Hong Kong, Belgium, Germany, India, Ireland, the Netherlands, New Zealand, Mexico, Philippines, and Singapore. According to Mostert references were made to, for instance, the UK Electronic Communications Act (2000), and, s 6, that defines 'cryptography service', was adopted verbatim in the South African law. Likewise, in the course of defining 'advanced electronic signature' the reference to 'a process' as it appears in the South African law was derived in part from the wording of s 8 of the Singapore Electronic Transactions Act of 1998. The definition of an 'automated transaction' was also adopted verbatim from the US law – the Uniform Electronic Transactions Act (UETA), 1999.

an opportunity to evaluate the legislative shortcomings, and the lessons which Tanzania may learn from in spite of its different legal background.¹¹

The chapter is divided into ten parts. Part one consists of this introduction. Part two sets out the historical background to e-commerce development in South Africa. Since e-commerce is technology driven, this part examines the journey towards adopting the Internet technology in South Africa. It also examines subsequent efforts towards creating an enabling environment for e-commerce, which include the adoption of the Green Paper on e-commerce in 2000. Part three examines the purpose of the Electronic Communications and Transactions Act (hereinafter ‘the ECTA’) and the principles it has embraced. This part also considers the status of the UNCITRAL Model Law in the context of the ECTA and the South African Constitution.

Parts four to nine carry out an analysis of the problems that the ECTA addresses in order to facilitate e-transactions in South Africa. In particular, part four examines how the ECTA has dealt with matters pertaining to formation and validity of e-contracts. This includes the role of e-agents in e-transactions, the validity of certain web-based contracts, issues regarding offer and acceptance in online scenarios and the problem of determining the time and place of contracting. Part five examines matters regarding compliance with form requirements in an electronic environment.

Part six considers how the ECTA has addressed issues regarding proof of an e-contract (including establishing the identity of e-contracting parties, authentication and other evidential requirements). Part seven deals with online mistakes or input errors, while part eight addresses consumer protection rules in online transactions. This latter part examines the ECTA’s mandatory requirements for online suppliers when they contract with a consumer and how consumers’ personal data are protected online. Part nine examines questions regarding conflict of laws (particularly which court has jurisdiction and which law should be applied) and finally, part ten concludes this chapter.

¹¹ As noted in part 1 above, although South African common law of contract is based on Roman-Dutch legal system, it has also been influenced by the English common law.

2. The Historical Development of E-commerce in South Africa

(a) Building an Enabling Environment

Like many other developing countries, South Africa is experiencing profound socio-economic changes resulting from the application of ICT. Moving from the era of ‘telegraph wire’ to ‘broadcasting’ ICT is said to form the third pillar of communication media in this country.¹² During the apartheid era, however, ICT developments were limited as the country was far more isolated and its post and telecommunication sector was still a monopoly of the government of the day.¹³

According to some authors, the historical development of the Internet in South Africa commenced in 1987 through the work done by the Foundation for Research Development (FRD), especially when one of its leading members took an active interest in the formation of a computer network.¹⁴ Although a number of Universities in South Africa had, at that time, embarked on a study of networking needs, it was Rhodes University which, for the first time, drilled the hole from which the future of the Internet wells could bubble in South Africa.¹⁵ Rhodes University, according to Lawrie, was the first to be connected to the Internet in 1988.¹⁶

It is also important to note that in the 1980s and early 1990s South Africa had embarked on the use of EDI technology.¹⁷ At this time, since EDI was thought to be a potential technology to advance international trade, major EDI projects were being supported with a view to creating standardised formats for its global application.¹⁸ In South Africa,

¹² See D van der Merwe ‘Telecommunications Law’ in D van der Merwe, A Roos, T Pistorius & S Eiselen *Information and Communications Technology Law* (2008) 10. The author notes that in 1950s only one or two scientific institutions owned a mainframe computer model, and this could fill an entire room.

¹³ See ‘Negotiating the Net: The case for South Africa’ (available at http://www.cidcm.umd.edu/ntn/summary_files/v3_document.htm (as accessed on 22/9/2008)).

¹⁴ See N Zantsi & M Eloff ‘Guide to South African Law’ (available at <http://icsa.cs.up.ac.za/issa/2003/Publications/001.doc> (as accessed on 23/9/2008)). See also Van der Merwe (n12) 14. See also R Buys & J Rothmann ‘Internet: An Overview’ in R Buys (ed) *Cyberlaw@SA1ed* (2000) 35.

¹⁵ See Zantsi & Eloff (n14).

¹⁶ See M Lawrie ‘The History of the Internet in South Africa: How it began’ (1997) (available at <http://osdir.com/ml/operators.ioz/2006-06/msg00001.html> (as accessed on 23/9/2008)). See also D van der Merwe (n12) 14; Buys ‘South African Internet time line’ in R Buys (ed) *Cyberlaw@SA1ed* (2000) 1-9; Buys & Rothmann (n14) 35.

¹⁷ See S Eiselen ‘E-commerce’ in D van der Merwe *et al Information and Communications Technology Law* (2008) 142. For a discussion of EDI in the context of international trade see J Coetzee ‘Incoterms, Electronic Data Interchange, and the Electronic Communications and Transactions Act’ (2003) 15 *South African Mercantile Law Journal* 1.

¹⁸ See Eiselen (n17) 142.

such efforts were sponsored by the South African Foreign Trade Organisation (SAFTO) and later by the South African Bureau of Standards.¹⁹ As the Internet became commercialised from the 1990s and onwards,²⁰ its usefulness and transformative power made it essential to many in the business community to facilitate electronic transactions instead of relying on EDI technology.²¹

The 1990s were also marked by fundamental political and socio-economic transformations which finally lowered the apartheid curtain and gave way to a new constitutional and democratic order. In the light of these changes, development of ICT infrastructure in South Africa has become an important goal, since the country needs to fully participate in the new information economy.²² As van der Merwe and van Vuuren once cautioned, ‘countries that do not take time now to create appropriate infrastructures that support the Internet will find their economies plummeting in a matter of years’²³

Efforts to enhance ICT development and application have gone side by side with the need to create a more conducive environment that is competitive, along the lines of market economy requirements. According to the Internet Service Providers Association (ISPA) the current number of Internet Service Providers in South Africa, who are members of the association, is 179.²⁴ The 2009 South African Internet Usage and Marketing Report shows that Internet users in South Africa reached 5.3 million (amounting to a 10.8 percent of penetration rate among the population).²⁵

Law reforms in a number of areas that influence positive growth in the ICT industry have also been necessary.²⁶ These reforms have involved enactment of new legislation in the area of telecommunications in order to do away with the monopolistic attitude that characterised the industry.²⁷ In 1992, for instance, the telecommunication services were

¹⁹ See Eiselen (n17) 142.

²⁰ See Lawrie (n16).

²¹ See Eiselen (n17) 143.

²² See the Green Paper on E-commerce (n8). See also M van der Merwe & F J van Vuuren ‘Internet Contracts’ in R Buys (eds) *Cyberlaw@ SA* 1ed (2000) 155-192, 156.

²³ See Van der Merwe & Van Vuuren (n22) 155.

²⁴ See <http://www.ispa.org.za/membership/list-of-members> (as accessed on 10/8/2010).

²⁵ Source: Internet World stats: available at <http://www.internetworldstats.com/af/za.htm> (as accessed on 10/8/2010). For entire current Internet usage statistics in Africa by country visit <http://www.internetworldstats.com/stats1.htm> (as accessed on 10/8/2010).

²⁶ See Van der Merwe (n12) 9-33, discussing various reforms in the area of telecommunications law in South Africa including important legislation affecting this area.

²⁷ *Ibid.* These reforms include the Radio Act of 1952 which was repealed in 1996 by the Telecommunications Act 103 of 1996; the Broadcasting Act of 1976 which was repealed in 1999 by the Broadcasting Act 4 of 1999

‘corporatised’ under the state-owned company (Telkom SA Ltd), which was given an exclusive mandate to provide landline services, Internet services, data transfer services and wireless communication.²⁸ In order to liberalise the market, more reforms were needed and these came about when new telecommunications legislation was enacted in 1996.²⁹ This new law was a stepping stone for the converging technologies³⁰ and introduced a new regulatory authority –the South African Telecommunication Regulatory Authority (hereafter SATRA) which was later replaced by the Independent Communication Authority of South Africa (hereafter ICASA), following the enactment of the ICASA Act in the year 2000.³¹

These legal reforms in South Africa were necessary to stimulate wider participation in the telecommunications market and to meet the country’s commitments under the WTO fourth Protocol on Basic Telecommunications.³² Moreover, there was also a need ‘to accelerate the use of ICTs for service delivery in all governmental spheres; to facilitate growth and development of small and medium-sized enterprises (SMMEs) in ICT and other sectors.’³³

as well as the Post Office Act 44 of 1958. For more about the reforms in the telecommunication sector in South Africa, see also M Zlotnik ‘Telecommunications Monopoly in South Africa: Some Human Rights Aspects and Options for Future Regulation’ (1999) 43 *Journal of African Law* 214.

²⁸See G Makhaya & S Roberts ‘Telecommunications in developing countries: reflections from the South African experience’ (2003) 27 *Telecommunications Policy* 41, 46. See also M Ayogu & J Hodge ‘Understanding Telecom Sector Reforms in South Africa: A Political Economy Perspective’ (2002) 20 *Journal of Contemporary African Studies* 275. As a state owned company, Telkom was granted exclusivity in the sector by virtue of section 7(2) of the Post Office Act 44 of 1958 which provided that Telkom ‘shall ... have the exclusive power to conduct the telecommunication service ...’

²⁹See Telecommunications Act 103 of 1996. The Act repealed the Radio Act of 1952.

³⁰Section 2(r) provided that the Act intended to ‘promote and facilitate convergence of telecommunication, broadcasting and information technology.’ Technology convergence has been defined as ‘the merging of telephone, broadcasting and computing technologies, industries and cultures.’ See Van der Merwe (n12) 10. For more on this concept, see Suping et al ‘What is Convergence’ in L Thornton, C Ysmin, M Patric & R Pippa (eds) *Telecommunications Law in South Africa* (2006) 246. See also L Emery, A Gordon, G Krieshok & A Pompe *Information Policy Country Report: South Africa* Foundations of Information Policy Analysis and Design (2009) 2 (available at [http://deepblue.lib.umich.edu/bitstream/2027.42/64841/1/IPOL%20Country%20Report%20-%20South%20Africa%20\(2009\).pdf](http://deepblue.lib.umich.edu/bitstream/2027.42/64841/1/IPOL%20Country%20Report%20-%20South%20Africa%20(2009).pdf) (as accessed on 14/10/2010.))

³¹ Act 13 of 2000 (as amended by Act 3 of 2006). The new law dissolved the SATRA and the Independent Broadcasting Authority (IBA) which was earlier created by Independent Broadcasting Act, Act 153 of 1993.

³²See the WTO summary of country’s commitments at http://www.wto.org/english/news_e/pres97_e/bt-summ3.htm (as accessed on 16/3/2008).

³³See an Annual Report of the Department of Communications in terms of the Public Finance Management Act, 1999; submitted by the Director-General of the South Africa Department of Communication on 21st September, 2007, introducing the 2006-2009 Strategic plan of the department (at 6). The Report is available at http://www.doc.gov.za/index.php?option=com_docman&task=cat_view&gid=71&Itemid=431 (as accessed on 26/2/2008).

(b) The Green Paper on E-commerce

While these legislative reforms were necessary to ensure smooth ICT infrastructure development, a more comprehensive policy and regulatory framework to facilitate South Africa's entry into the new Internet economy was needed. With EDI, and later e-commerce, in place, consumers and the business community were anxious about the legal validity and consequences of relying on the increasing electronic technologies to conclude online transactions.³⁴ The adequacy of the existing law to provide for and regulate online contracts, for instance, was integral to their concern.³⁵ This anxiety, however, was not only felt in South Africa³⁶ but was also a global issue.³⁷

To resolve the problem, a due diligence report on e-commerce legal issues was prepared and a Discussion Paper on the subject was issued in July 1999.³⁸ The Discussion Paper sought views from the public on how best to develop e-commerce in South Africa.³⁹ One of the recommended options was that South Africa should refer to the Model Law on Electronic Commerce⁴⁰ as a basis for its legal developments in this area.⁴¹ Other instruments that were also recommended include the OECD Guidelines for Consumer Protection in the

³⁴ See Eiselen (n17) 143. See also T Pistorius 'The Legal Effects of Input Errors in Automated Transactions: South African Matrix' (2008) 2 *Journal of Information, Law & Technology (JILT)* at 3, available at http://www.go.warwick.ac.uk/jilt/2008_2/pistorius2 (as accessed on 13/10/10); Z N Jobodwana 'E-Commerce and Mobile Commerce in South Africa: Regulatory Challenges' (2009) 4 *Journal of International Commercial Law and Technology* 287, 288; J H Jansen 'A new era for e-commerce in South Africa' *De Rebus - SA Attorneys' Journal* (2002).

³⁵ See Eiselen (n17) 142-143. See also Pistorius (n34) 3; Jansen (n34).

³⁶ See Eiselen (n17) 143, 145. Concerns about consumer protection in online transactions were also held high by the European Union. For more on this see S van der Hof 'European Conflict Rules Concerning International Online Consumer Contracts' (2003) 2 *Information & Communication Technology Law* 165, 166. The author discusses the legitimate concerns in Africa including the fact that, since Africa imports more than exports goods and services from overseas markets, both its consumers and traders occupy a vulnerable position. (For a general discussion on consumer concerns see L A Reisch 'Potentials, Pitfalls, and Policy Implications of Electronic Consumption' (2003) 12 *Information & Communication Technology Law* 94).

³⁷ In its Guide to Enactment of the Model Law on E-commerce, UNICTRAL noted that '[t]he use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible. However, the communication of legally significant information in the form of paperless messages may be hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity' (See para 2 of the Guide to the enactment of the Model Law (n1)).

³⁸ See Pistorius (n34) 3. See also S L Gereda 'The Electronic Communications and Transactions Act' L Thornton et al (eds) *Telecommunications Law in South Africa* (2006) 262-294, 263.

³⁹ This Department of Communications *Discussion Paper on Electronic Commerce* (July 1999) (hereafter 'the Discussion Paper') is available at <http://www.azouk.com/163804/Discussion-Paper-on-e-commerce-South-Africa/> (as accessed on 12/8/2010).

⁴⁰ See (n1).

⁴¹ See Chapter III of the Green Paper (n8). See also T James (ed) *An Information Policy Handbook for Southern Africa — A Knowledge Base for Decision-Makers* IDRC (2001) 147.

Context of E-commerce (hereafter the OECD Guidelines)⁴² and the EU's Policy Directive on E-commerce.⁴³

While an analysis of these international documents was necessary to draw on, South Africa, being a country with 'strong First World and developing world components' needed to consider its own special position in the course of developing its e-commerce policy.⁴⁴ Issues considered unique to South Africa included understanding and resolving the needs of 'the so-called "unbanked society" whose economic wealth is referred to as "mattress money": not kept in saving accounts but rather under mattresses.'⁴⁵ Infrastructure development, access challenges and regional integrative issues were also important and had to be taken into account.⁴⁶ Eventually, in November 2000, the discussions and consultations led to the publication of a Green Paper on E-commerce, a precursor to the enactment of e-commerce legislation.⁴⁷

The Green Paper acknowledged that the on-going globalisation process and the new technology revolution through ICT have made e-commerce an integral component of the current information economy (also referred to as the 'new economy'). Consequently, to ensure that South Africa fully harnesses the advantages of e-commerce, the Green Paper addressed a number of pertinent e-commerce issues. These include taxation, security and privacy, protection of intellectual property, content development and regulation, electronic payment systems, standards and interoperability.⁴⁸

The Green Paper was based on a set of fundamental principles, which promise to be particularly helpful to other countries that seek to develop e-commerce policy frameworks. One of the guiding principles relevant to e-contracting is the need to ensure that any reform of the existing law is consistently aligned or is in harmony with existing international

⁴² See OECD 'Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce' available at http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.html (as accessed on 13/8/2010). It is also important to note that although South Africa is not a member of OECD it participates in its conferences and seminars as a non-member.

⁴³ For more on the EU's e-commerce policy development see C Kye 'EU's Ecommerce Development –E-commerce in the EU: Bridging Businesses and Consumers Abroad' (2001) 17 *Computer Law & Security Report* 25.

⁴⁴ See M Groenewald 'Towards an electronic commerce policy for South Africa' in R Buys (ed) *Cyberlaw@SA1ed* (2000) 98, 107.

⁴⁵ *Ibid*, at 108.

⁴⁶ *Ibid*, at 109.

⁴⁷ See the Green Paper (n8).

⁴⁸ *Ibid*, at chapter 1 para 1.3.

standards. Consequently, South Africa needed to develop its e-commerce regulatory framework in line with the existing international trends while taking cognisance of its own special requirements.⁴⁹

In view of the above requirement, chapter two of the Green Paper underscored several key areas within the existing legal framework which demanded prompt attention.⁵⁰ These may be summarised into eight major groups, namely:⁵¹

- issues relating to e-contract formation;
- time and place where an e-contract is concluded. (This includes information of material significance to confirm or enforce certain obligations to both dispatcher and recipient of goods or services, such as the time and place of dispatch and receipt of electronic information, verification of dispatch and acknowledgement of receipt);
- issues regarding formalities;
- questions about proof of an e-contract (ie, matters regarding authenticity and integrity of electronic communications, and admissibility of electronic evidence);
- online mistakes or input errors;
- protection of online consumers (including issues such as data protection or management and retention of records);
- jurisdictional question in online disputes; and
- choice of an applicable law to an online transaction.

A closer observation of the above problematic areas of the law identified in the Green Paper reveals a similar pattern of problems to those identified in chapter two (regarding the legal inadequacies in the Tanzanian legal framework). This suggests that African, or rather developing countries, share similar problems regarding e-commerce development despite their different legal systems.⁵²

⁴⁹Ibid, chapter 1 para 1.2.

⁵⁰Ibid, chapter 2 para 2.1.

⁵¹ See Eiselen (n17) 144. Although the author identified eight major areas these can be grouped in seven categories since the question regarding online mistakes or input errors was omitted.

⁵² However other developing countries may have more severe hindrances in many other areas compared to South Africa, in terms of levels of IT literacy, physical and financial infrastructures development, or economic might to mention but a few. For instance, South African economy is one of the largest in Africa south of Sahara. See Jobodwana (n34) 288 noting that 'South Africa's economic predominance is underlined by the fact

In view of the problematic areas noted in the Green Paper, South African legal framework needed prompt attention not only because of the need to promote e-commerce, but also the need to facilitate growth and development of SMMEs as well as improving their sustainability through the development of new applications.⁵³ Consequently, the ECTA had to be enacted.

3. The ECTA's General Objectives and Relationship with the UNCITRAL Model Law

(a) Its General Objectives

As a product of the earlier discussions initiated through the Green Paper, the ECTA was signed into law on the 31st of July 2002.⁵⁴ According to its preamble and s 2, it seeks, *inter alia*, to remove barriers to electronic communications and transactions in the Republic,⁵⁵ and to promote legal certainty and confidence in respect of electronic communications and transactions.⁵⁶ It also seeks to promote technology neutrality in the application of legislation to electronic communications and transactions, whilst ensuring that electronic transactions in the Republic conform to the highest international standards.⁵⁷

The Act also provides for the facilitation and regulation of electronic communications and transactions, and seeks to promote universal access to electronic

that it produces approximately 80 percent of Southern Africa's GDP.' See also C Alden & M Soko 'South Africa's Economic Relations with Africa: Hegemony and Its Discontents' (2005) 43 *Journal of Modern African Studies* 367; J J Hentz 'South Africa and the Political Economy of Regional Cooperation in Southern Africa' (2005) 43 *Journal of African Modern Studies* 21.

⁵³ See the Annual Report of the Department of Communications (n33).

⁵⁴ See the ECTA (Act 25 of 2002) Proclamation No. R 68 of 2002, Government Gazette No.7449 (SA).

According to Hofman the ECTA was the responsibility of the Department of Communication although the Department of Justice did contribute to its development. See J Hofman 'Electronic Evidence in South Africa' in S Mason (ed) *Electronic Evidence* 2ed (2010) 677. See also P De Wet 'Industry gets ECT Act breather (South Africa) (2002)' (available at <http://www.itweb.co.za/sections/internet/> (as accessed on 26/2/2008)); R Meiring 'Electronic Transactions' in R Buys & F Cronjé (eds) *Cyberlaw @ SA II: The Law of Internet in South Africa* (2004) 82-108; L Thornton 'South Africa' in *Telecommunication Laws and Regulations 2010: A practical insight to cross-border Telecommunication Laws and Regulations*, Published and reproduced with kind permission by Global Legal Group Ltd (www.ICLG.co.uk) London (2010) 240, (available at http://thornton.co.za/resources/TEL10_Chapter-35_South-Africa.pdf (as accessed on 10/8/2010)).

⁵⁵ See s 2(d) of the ECTA.

⁵⁶ See s 2(e) of the ECTA.

⁵⁷ See s 2(f) of the ECTA. As it was stated in chapter five, the UNCITRAL Model Laws were developed with a view to assist countries to develop rules which will facilitate e-commerce and other related electronic transactions.

communications and transactions and the use of electronic transactions by SMMEs.⁵⁸ Generally, all these functions are pertinent to the development of a digital economy.⁵⁹

(b) Its Relationship with the UNCITRAL Model Law on E-commerce

As indicated above,⁶⁰ the Green Paper on E-commerce recommended the adoption of the Model Law's approach for developing South Africa's legal framework on e-commerce.⁶¹ Doing so was advantageous since the Model Law on E-commerce had already simplified the legislative process. The only task was to acclimatise what was already available internationally to suit the local circumstances.⁶² The ECTA accordingly replicated some provisions of the Model Law verbatim and developed other provisions to suit the needs and peculiarities of South Africa.⁶³

Being influenced by the UNCITRAL Model Law, the ECTA embraced its basic principles, ie, functional equivalence, technology neutrality and party autonomy.⁶⁴ It is, however, important to note that, while the Model Law applies to data messages used in commercial matters,⁶⁵ the ECTA is broad and includes other essential issues, such as cyber-

⁵⁸See the preamble to the ECTA and ss 2(p) and 9. One way of facilitating such electronic communications and transactions is through recognition of contracts created electronically (see ss 11- 26). See also *Diners Club SA (Pty) Ltd v Singh & Another* 2004 (3) SA 630 (D), at 673.

⁵⁹ For instance, the ECTA provides for the appointment of cyber inspectors tasked with the function of investigating of activities of cryptography and authentication service providers and also inspection of websites this being part of enhancing cyber confidence on the part of participants in e-transactions.

⁶⁰See part 2(ii) of this chapter.

⁶¹ Although the UNCITRAL Model Law on E-commerce was developed to offer national legislators 'a set of internationally acceptable rules to replace their own legislation' and can be incorporated directly into the domestic law of any country willing to do so, globally, there have been three legislative responses to the implementation of this Model Law, namely: (i) 'prescriptive' approach (which involves enacting stringent guidelines pertaining to the use of specific technologies), (ii) a 'two-tiered' approach (which involves granting basic legal benefits to all electronic authentication techniques, and conferring additional legal benefits or presumptions upon documents authenticated by approved methods), and (iii) a 'minimalist' or 'enabling' approach (focusing only on the legal effect of electronic documents to enact specific standards for authentication techniques). (See Internet Law & Policy Forum (ILPF) 'Survey of International Electronic and Digital Signature Initiatives' (1999), available at <http://www.ilpf.org/digsig/survey.htm> (as accessed: 9 /6/2008). South Africa is one of the countries that adhere to the minimalist approach. See T Pistorius 'From snail mail to e-mail –a South African perspective on the web of contracting rules on the time of contracting' (2006) 39 *Comparative and International Law Journal of Southern Africa* (CILSA) 178, 183.

⁶² As it will be seen below, much as the Model Law was useful in enacting ECTA, there are some limitations in terms of extent to which the Model Law was followed. In other words South Africa did not adopt the Model Law without modifications where it was appropriate to do so.

⁶³ See Eiselen (n17) 146.

⁶⁴See s 2(d), (e), (f) and (h) of the ECTA. For more about the UNCITRAL Model Laws and the principles they advocate see the previous discussion in chapter five of this thesis. See also Hofman (n54) 679; W Jacobs 'The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts' (2004) 16 *South African Mercantile Law Journal* 556, 557.

⁶⁵ See Article 1 of the UNCITRAL Model Law (n1). See also J K Winn & B Wright *The Law of Electronic Commerce* 4ed (2008) 5-38.12.

crimes, domain name authority and administration, personal data protection, policy issues regarding e-government developments, and other issues regarding liability of service providers.

(c) The Status of the UNCITRAL Model Laws in the South African Legal Context

Although the Model Laws on E-commerce and E-signature have been influential as a blue print for e-commerce laws in many countries (including South Africa), they are not binding documents, and, hence, do not have the status of an international agreement.⁶⁶ Hofman suggests, however, that their incorporation in a number of statutes in different countries gives them the status of customary international law.⁶⁷ In view of this, he argues that courts in South Africa can rely on them for a reasonable interpretation of the provisions of the ECTA in terms of s 233 of the Constitution.⁶⁸

Hofman further suggests that, even if the Model Law on E-commerce is not an international agreement, because chapter 3 of the ECTA was based on it, one may argue 'that chapter 3 of the ECTA is ... a uniform statute' to be interpreted 'according to the Vienna Convention of the Law of Treaties.'⁶⁹ He thus concludes that the ECTA should be interpreted in conformity with the Model Laws.⁷⁰

Hofman's views have found support in cases that have discussed the application of the ECTA in contract law, such as *Jafta v Ezemvelo KZN Wildlife*.⁷¹ In this case the court stated that:

⁶⁶ See Eiselen (n17) 145. See also S Snail 'Electronic Contracts in South Africa- A Comparative Analysis' (2008) 2 *Journal of Information, Law & Technology* (available at http://go.warwick.ac.uk/jitl/2008_2/snail) (as accessed on 8/9/2010)) at 3.

⁶⁷ See Hofman (n54) 678, 680. However, see a contrary view from Eiselen (n17) 145. This author contends that since the UNCITRAL Model Laws are not conventions they do not find direct application in any legal system. However, they provide internationally acceptable solutions to e-commerce problems.

⁶⁸ See Hofman (n54) 678. Section 233 of the Constitution of the Republic of South Africa (1996) requires courts, interpreting a South African statute, to 'prefer any reasonable interpretation ... that is consistent with international law.'

⁶⁹ See Hofman (n54) 678 (citing F Mann 'The Interpretation of Uniform Statutes' (1946) *Law Quarterly Review* 278; 'Uniform Statutes in English Law' (1983) 99 *Law Quarterly Review* 376; F Sturley 'International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts Interpretation' (1986-1987) 27 *Virginia Journal of International Law* 729). See also F Diedrich 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 *Pace International Law Review* 303.

⁷⁰ See Hofman (n54) 680.

⁷¹ *Jafta v Ezemvelo KZN Wildlife* (2009) 30 ILJ 131 (LC). Other cases in which the provisions of the ECTA have been considered include *Ndlovu v The Minister of Correctional Services & another* [2006] 4 All SA 165 (W); *Sihlal v SA Broadcasting Corporation Ltd* (2010) 31 ILJ 1477 (LC). *Tsichlas v Touch Line Media (Pty) Ltd* 2004 (2) SA (W); *Mncube v Transnet* (2009) 30 ILJ 698 (CCMA); *Le Roux & Others v Viana No & Others*

[a]s many states also import the content of electronic communication law from the Model Law with little change, the unification of electronic communication law is both multilateral and complete. By adopting the Model Law, implementing states have thereby internationalised electronic communication law. The significance of the first lesson of the comparative enterprise ... is that South Africa has incurred international law obligations and ... court[s] must give effect to them.⁷²

4. Issues Regarding Contract Formation

One of the problems identified in chapter two of this thesis (with regard to the law of contract in Tanzania) related to validity of contract formation in an online environment. The crux of the matter was the requirement of *consensus ad idem*, this being an integral part of a valid contract.⁷³ The current discussion in this section examines issues similar to those of chapter two, but in the context of South African e-commerce law, the ECTA.

As regards e-contracts formation, the ECTA needed to address three important issues. The first was the question of validity, ie, whether a contract can be validly concluded between parties using the Internet or other modern electronic communications technologies. The second, and closely tied to the first, seeks to address issues pertaining to validity of online offers and acceptances. The third relates to the role of e-agents in e-contracting, and whether contracts formed by them are valid. All these issues will inevitably bring to the forefront *consensus ad idem*, which is a basis of contract making in South Africa.⁷⁴

(a) The Question Regarding Validity of Online Contracts

While it is acknowledged that the South African common law is flexible enough to address new situations, technologies or business methods, the rapidity with which e-commerce and the modern technologies evolve makes it an unsuitable vehicle for change.⁷⁵ Technology advancements have, in most cases, left common law lagging behind.⁷⁶ The unsuitability of

2008 (2) SA 173 (SCA); *Golden Fried Chicken (Pty) Ltd v Yum Restaurants International (Pty) Ltd* 2005 BIP 269 (T).

⁷² Ibid, at para 64-65.

⁷³ In chapter two it was pointed out that since it may be difficult to ascertain with all certainty the capacity and authenticity of the person whom a party is contracting with online the possibility of fraud in such transactions is high when compared to the physical or face-to-face contractual environment.

⁷⁴ See S van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 3ed (2007) 19. See also S Snail 'South African e-consumer law in the context of the ECT Act, Part.1' (2007) 15 *Juta Business Law* 40. The other basis for contract formation in South Africa is reasonable reliance. See also *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005(4) SA 345 (SCA). See also *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A).

⁷⁵ See Pistorius (n61) 182. See also Eiselen (n17) 143.

⁷⁶ See Pistorius (n61) 182.

common law development is exacerbated by the fact that such development is a slow process, reactive rather than proactive.⁷⁷

The evolution and use of electronic technologies, including use of data messages and encryption data technologies in business, have been rapid and are constantly changing from one form, method or device to another.⁷⁸ Currently, EDI, e-mails, sms, VOIP and the World Wide Web (www), are some of the techniques relied upon to conclude contracts. Their application in facilitating business transactions in South Africa, however, raised certain questions. One of these, as regards use of e-mails, was whether an e-mail, which is in the form of a data message, was adequate to express the necessary intent to be contractually bound.⁷⁹ Additionally, uncertainty existed whether a mere click of an icon on a vendor's website was sufficient to signify the consent legally required to consummate a contract.⁸⁰ All these issues were pertinent, since *consensus ad idem* forms one of the bases of contract in South Africa too,⁸¹ and, for true consensus to be established, a party's communication to another must be capable of adequately conveying the intent to be bound.⁸²

Prior to the enactment of the ECTA, South Africa did not have a specific law to address whether e-contracts were valid and enforceable or whether data messages could satisfy writing requirements or performance of certain juristic acts associated with commercial process, such as signature. Similarly, there were no authoritative cases upon which a party could confidently rely to shed light on the above issues.⁸³

With the advent of e-commerce as a business practice that takes place in a borderless environment, and which does not fall within the paper-based regulatory framework, there was

⁷⁷ See Eiselen (n17) 143.

⁷⁸ See the South African Law Reform Commission Issue Paper 27 (Project 126) 'Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues' (2010) 8, 10 (available at http://www.justice.gov.za/salrc/ipapers/ip27_pr126_2010.pdf (as accessed on 22/9/2010)). The paper will be referred hereafter as 'the SALRC Issue Paper No. 27.'

⁷⁹ See Snail (n66) 4.

⁸⁰ Ibid. See also T Pistorius 'Formation of Internet Contracts: Contractual and Security Issues' (1999) 11 *South African Mercantile Law Journal* 282, 293. See also T Pistorius 'Click-Wrap and Web-Wrap Agreements' (2004) 16 *South African Mercantile Law Journal* 568.

⁸¹ See C J Pretorius 'The Incorporation of Contractual Terms and Reliance' (2004) *Journal of South African Law* 416 (citing a number of authorities to that effect).

⁸² See Eiselen (n17) 147.

⁸³ See Snail (n66) 5. See Van der Merwe et al (n74) 73 who state that before the ECTA formation of contracts through computer-mediated communications had not been judicially considered in South Africa. However, *Balzan v O'Hara and others* 1964 (3) SA 1 (T) was a close case which could be considered, though it dealt with use of a telegram. Additionally, the court in *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (SCA) had intimated that an e-mail sent with an indication that the sender intended to resign from his employment was as valid as a letter of resignation.

a need to enact a statute to ensure its smooth development. Of particular importance was the need to create functional equivalence between transactions conducted in the cyberspace and those conducted in the physical world. The ECTA was therefore enacted to achieve this goal, and it resolved uncertainties regarding validity of electronic agreements by granting a legal recognition of 'data messages'. Specifically, Chapter III of the ECTA developed default rules to regulate the use of data messages.⁸⁴

Being based on the Model Law on E-commerce, Chapter III of the ECTA adopts the principle of equivalence. Computer-generated documents are placed on the same footing as traditional paper evidence.⁸⁵ Section 1 of the ECTA defines a 'data message' to mean data generated, sent, received or stored by electronic means, and this includes voices, where the voice is used in an automated transaction and a stored record.⁸⁶ This will therefore include any Internet content, e-mails or sms (to mention but a few). The section also defines 'data' to mean 'electronic representations of information in any form'. Thus the definition of a data message is broad enough to include even electronic records that are not intended for communication.⁸⁷

Section 11(1) of the ECTA provides that '[i]nformation is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.' This section, as read with s 22(1) of the ECTA, confirms the validity and enforceability of e-contracts. Consequently, the ECTA eliminates the former legal uncertainties.⁸⁸

Section 11(1) of the ECTA is a direct reflection of Art 5 of the Model Law on E-commerce.⁸⁹ Article 8(1) of the UN Convention on E-contracts also provides for a similar

⁸⁴See also s 4(2) of the ECTA.

⁸⁵See Hofman (n54) 677-680. See also H Zondo-Kabini 'Application of the Electronic Communications and Transactions Act to Online Merchants from Other Jurisdictions' (2003) 1 *Northwestern Journal of Technology and Intellectual Property* 78, 78.

⁸⁶See s 1 of the ECTA. The section has also defined the word 'data' to mean 'electronic representations of information in any form.' According to Mostert (see n9 and n10) this was borrowed from the Canadian Uniform Electronic Evidence Act (amended).

⁸⁷ See Pistorius (n34) 3.

⁸⁸ Section 22(1) stipulates that '[a]n agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.'

⁸⁹Article 5 of the Model Law provides that '[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.' However, para 46 of the Guide to the Model Law states that 'by stating that "information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message", article 5 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability.' It further states that 'article 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein.' See also s 7(b) of the United States' Uniform Electronic Transaction Act (UETA) of 1999

position, stating that '[a] communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.' Similarly, s 22(1) (as shown above) reflects what Art 11(1) of the Model Law partly provides. The Model Law stipulates that '[w]here a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.'⁹⁰

Two observations, however, need to be made in respect of the ECTA definition of a data message. In the first place, the Model Law on E-commerce defines a 'data message' to mean 'information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'.⁹¹ Article 4(c) of the UN Convention on E-contracts adopts a similar definition. It is important to note the inclusion of the words 'similar means' in the definitions of the Model Law and in the UN Convention, because 'similar means' stand as a 'catch-all' for futuristic techniques or approaches and takes into consideration the continuous evolution of new technology applications in e-commerce.

Unfortunately, however, the words 'similar means' do not feature in the ECTA's definition of a data message. The omission indicates a restrictive approach to the definition of a data message, one which is not suitable in a fast changing technological environment, and may be problematic in future. In this regard, and in view of Christie's caution, given the pace with which technological changes and innovations take place, the law may soon find itself rendered unrealistic.⁹² Nevertheless it may be argued, as Pistorius does, that the aim of defining a data message in the ECTA is to include all messages that are generated, stored or transmitted electronically.⁹³

The second observation, concerning the ECTA's definition of a data message, is that, although voice messages are considered part of the definition, it excludes 'real-time conversations such as telephone conversations, even where the message or record is stored as

and s 20(2) of the Canadian Uniform Electronic Transactions Act of 1999 (UECA) all with almost identical provisions like the ECTA. The Canadian Act (UECA) is a recommendation for enactment by the provinces and territories of Canada. To date it has been adopted by 10 provinces and territories of Canada. See J D Gregory 'The UETA and UECA – Canadian Reflections' (2001) 37 *Idaho Law Review* 441.

⁹⁰ See Art 11(1) of the Model Law.

⁹¹ See Art 2 of the UNCITRAL Model Law on E-commerce (n1). See also the "Guide to enactment of the Model Law para 30-32).

⁹² See Christie (n2) 78.

⁹³ See Pistorius (n34) 3.

voice message'.⁹⁴ The definition regards voice as a data message only where it is used in automated transactions.⁹⁵ It is unclear why the drafters of the Act adopted such a restrictive approach. Perhaps it may be due to the fact that the Act regards electronic communications as indirect forms of communication.⁹⁶ Consequently, the definition of a 'data message' is considered narrow⁹⁷ compared to the one adopted in the Model Law and the UN Convention on E-contracts. It is also important to note that, while the term 'electronic' is integral to both the meaning of 'data' and 'message', this term too is not defined under the ECTA.⁹⁸

(b) The Use of E-agents in E-contracting

The second question regarding e-contract formation is whether automated computer software (hereafter referred to as e-agents) can form valid online contracts. This issue is important because these new evolving technologies are complicating the conventional practices of negotiating and reaching *consensus ad idem*.⁹⁹

In Chapter II of this thesis, issues concerning the use of e-agents were discussed with regard to the law in Tanzania. It was stated that, because e-agents can perform intellectual activities, such as searches, certifications, transactions or communications, human characteristics, such as intelligence, autonomy or cognitive and cooperative abilities, are attributed to them. However, whereas business entities everywhere are relying more often on e-agents to form contracts, there are uncertainties regarding not only their capability to form the necessary consensus but also their status.¹⁰⁰

At least four questions arise regarding use of e-agents in a commercial landscape.¹⁰¹ The first is whether e-agents can form the necessary intent to be bound. In the event of a

⁹⁴ Ibid. See also Eiselen (n17) 148.

⁹⁵ See section 1 of ECTA defining a data message. According to it a 'data message' means 'data generated, sent, received or stored by electronic means and includes (a) voice, *where the voice is used in an automated transaction; and ...*' (Italics added).

⁹⁶ See Eiselen (n17) 150.

⁹⁷ See Pistorius (n34) 4.

⁹⁸ Ibid. The ECTA only defines 'electronic communication' to mean 'a communication by means of data messages.' (See section 1 of the Act). Pistorius notes that an earlier definition 'given in previous versions of the ECT Bill, namely digital or other intangible form' was rejected and deemed inadequate.

⁹⁹ See W Kilian 'Use of Automated Message Systems for Contract Formation' in A H Boss & W Kilian *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Source Book* (2008) 184-192, 184.

¹⁰⁰ Ibid, at 185-186. See also E Dahiyat 'Intelligent agents and contracts: Is a conceptual rethink imperative?' (2007) 15 *Journal of Artificial Intelligence Law* 375; F Andrade 'Intelligent Electronic Inter-Systemic Contracting - Issues on Contract Formation' in D Bourcier (ed) *Legal Knowledge and Information Systems Jurix 2003: The Sixteenth Annual Conference* (2003) 149-150, 149.

¹⁰¹ See Kilian (n99) 186.

negative response to this issue, the second is whether lack of intent at the time of executing communication affects the legal validity of their transactions. However, if the first issue is in the affirmative, then, the third is: in what capacity do the e-agents act and who takes responsibility? The final related issue is the legal effects of mistakes or input errors in e-contracting.

The concept of automated transaction is an important feature of the ECTA. As argued in chapter two, the increasing reliance on e-agents and the legal questions regarding the validity of their transactions, create a need for clarity concerning their recognition and regulation.¹⁰² Although the Model Law (which forms part of the ECTA) does not expressly address e-agents,¹⁰³ the UN Convention on E-contracts addresses contracting through e-agents.¹⁰⁴

For its part, the ECTA provides for not only a definition but also an elaborate specific provision on e-agents. Section 1 of the ECTA defines an ‘automated transaction’ to mean ‘an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment.’ In

¹⁰² In Canada, the Canadian Uniform Electronic Transactions Act of 1999 (UECA) specifically provides that e-agents can conclude contracts for and on behalf of their programmers. See V Gautrais ‘The Colour of Consent’ (2003-2004) 1 *University of Ottawa Law & Technology Journal* 189-212, 200. A similar development can be noted in the USA. Eg, s 14 of the Uniform Electronic Transactions Act (UETA) §7, 7A U.L.A. 211 (2002) (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010) which provides that ‘[i]n an automated transaction, the following rules apply:

- (1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents’ actions or the resulting terms and agreements.
- (2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual’s own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.
- (3) The terms of the contract are determined by the substantive law applicable to it.’

¹⁰³ See however, Art 2 of the Model Law which defines an ‘information system’ to mean ‘a system for generating, sending, receiving, storing or otherwise processing data messages.’ See also Art 13(2)(b) of the Model Law referring to ‘an information system programmed by, or on behalf of, the originator to operate automatically’, and Art 11 providing that an offer and the acceptance of an offer may be expressed by means of data messages. See also ‘The Guide to the UNCITRAL Model Law’ para 76. A definition of an e-agent may thus be inferred in this generalised definition.

¹⁰⁴ See Art 4(g) of the UN Convention on E-contracts which provides that “[a]utomated message system” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.’ See also Art 12 of the UN Convention on E-contracts which provides that ‘[a] contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.’

simple language, they are transactions conducted by software or e-agents. This encompasses software able to function independently by initiating an action or responding to data messages or performances in whole or in part, in an automated transaction.

ECTA has resolved the issues of the capacity of e-agents, ie, whether they can form intent to be bound in contract and whether their actions have legal effects. According to s 20(a) and (b) of the ECTA, e-agents are capable of forming legally binding agreements,¹⁰⁵ which come into existence if all parties or only one use e-agents.¹⁰⁶ This recognition adheres to the international principle of functional equivalence, meaning that electronic transactions and conventional transactions should be treated the same.¹⁰⁷

As regards the issue of who should take responsibility where an e-agent performs a particular transaction, the debate (observed in chapter two) revolved around the question of the agency-principal relationship.¹⁰⁸ As shown in chapter two, some authors have argued that e-agents should be considered agents of the parties.¹⁰⁹ Kilian, commenting on Art 12 of the UN Convention on E-contract, shares this view, arguing, however, that assignment of responsibility will depend on the organisational structure of the communication process.¹¹⁰ According to him 'the person or the organisation responsible for the coordination of the communication process for a given purpose is the actor or the principal.'¹¹¹ This being so, a principal who relies on an agent, whether human or electronic, should, in theory, bear the responsibilities and risks.¹¹² This will be the case whether such a principal knows the details

¹⁰⁵Section 20(a) and (b) state as follows: 'an agreement may be formed where an electronic agent performs an action required by law for agreement formation; (b) an agreement may be formed where all parties to a transaction or either one of them uses an electronic agent.'

¹⁰⁶ See s 20(a) and (b) (ibid).

¹⁰⁷The Model Law and the Convention of E-contracting fully subscribe to the functional equivalence approach.

¹⁰⁸ See E M Weitzenboeck 'Electronic Agents and Formation of Contracts' (2001) 9 *International Journal of Law and Information Technology* 204, 211.

¹⁰⁹See E S Tuma & R C Ward 'Contracting Over the Internet in Texas' (2000) 52 *Baylor Law Review* 381, 396. See also J P Fischer 'Computers as Agents: A Proposed Approach to Revised U. C. C. Article 2' (1997) 72 *Indiana Law Journal* 545; T Balke & T Eymann 'The Conclusion of Contracts by Software Agents in the Eyes of the Law' in L Padgham, D Parkes, J Müller & S Parsons (eds) *Proceedings of 7th International Joint Conference on Autonomous Agents and Multiagent Systems (AAMAS)* vol2 (2008) 771-778.

¹¹⁰ See Kilian (n99) 187. Article 12 of the UN Convention on E-contracts provides that '[a] contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.'

¹¹¹ See Kilian (n99) 187.

¹¹² Ibid.

of the e-agent's activities or not. He cannot be excused from responsibility since the choice to rely on an automated system was his.¹¹³

Section 20(c) of the ECTA has taken a similar position.¹¹⁴ It provides that a party, (for instance, an e-merchant) who relies on an e-agent to execute online contracts, will be bound by the terms of the agreement formed by the e-agent 'irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement.' This means that if an e-merchant uses an e-agent to form a contract, but has erroneously programmed its working environment in such a way that it assigns a lower price than the e-merchant intended, the latter should bear the outcome, ie, any contract concluded will be binding and the e-merchant must honour it. In view of this strict rule, all merchants who rely on e-agents will have to act diligently.

The strict rule under s 20(c) is, however, qualified by s 20(d). This provides that '[a] party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.' Thus a buyer who interacts with an e-agent must be able to fully review the terms constituting the agreement. It has, however, been argued that, since s 20(c) of the ECTA deals with the legal position of the person on whose behalf the e-agent operates, its reference to paragraph (d), which deals with a party interacting with an e-agent, is nugatory.¹¹⁵

Section 20(d) of the ECTA has also been criticised on the ground that its legal effects, in terms of the words 'not bound' as they appear in the section, is unclear. Whether it means that the contract is void or voidable is uncertain. Pistorius suggests that s 20(d) should be construed restrictively.¹¹⁶ According to this author, while the contract should remain valid, its standard terms and conditions should not be enforceable since the section dilutes the requirements of s 11(3) of the ECTA (regarding incorporation by reference).¹¹⁷ This dilution affects contracts with natural persons because such persons will be bound to the terms and

¹¹³ Ibid.

¹¹⁴ According to Pistorius (n34) 9 this position is similar to attribution under South African the common law. See also *S v Swanepoel* 1980 (1) SA 144 (NC).

¹¹⁵ See Pistorius (n34) 9.

¹¹⁶ See Pistorius (n34) 11.

¹¹⁷ Ibid.

conditions, if the terms were capable of being reviewed, even if such reference to them might have been unclear.¹¹⁸

(c) Issues Pertaining to Offers and Acceptances Made Electronically

Whether offers and acceptances can be validly made electronically is an important issue in the formation of contracts in an online environment, because the validity and effect of data messages in commercial communications lacks precedent.¹¹⁹ The current issue may be subdivided into two, namely, what constitutes an online offer, as opposed to an invitation to treat, and what constitutes a valid acceptance in certain web-based contracts, such as browse-wrap and shrink-wrap, and whether such agreements are enforceable.

(i) Is an Online Offering of Goods an ‘Offer’ or an ‘Invitation to Treat’?

Chapter two discussed the controversial question whether marketing on a website constitutes an offer or an invitation to treat.¹²⁰ Some merchants, who operate online businesses, can structure their websites in such a way that they ‘offer goods’ for sale to customers while others use their websites to invite or solicit offers from customers.¹²¹ While solicitation by the latter group is not different from a normal advertisement or shop display of goods (except for minor differences, such as the extent of its reach),¹²² it is, nevertheless, possible within the technology interface to fuse display and the actual sale on the website.¹²³ Consequently, this

¹¹⁸ Ibid.

¹¹⁹ See Pistorius (n80) 568.

¹²⁰ See P Polanski ‘International electronic contracting in the newest UN Convention’ (2007) 2 *Journal of International Commercial Law & Technology* 112, 116. See also C Glatt ‘Comparative Issues in the Formation of Electronic Contracts’ (1998) 6 *International Journal of Law and Information Technology* 34, 50.

¹²¹ See M Chissick & A Kelman *Electronic Commerce: Law and Practice* 2ed (2000). See also C Durtschi ‘William Hillison & C Pacini ‘Web-Based Contracts: You could be burned!’ (2002) 13 *Journal of Corporate Accounting & Finance* 12 (available at <http://www3.interscience.wiley.com> (as accessed on 28/8/2007)). See also P Polanski (ed) *Customary Law of the Internet: In Search for a Supranational Cyberspace Law* IT & Law Series (No 13) (2007) 26 where he submits that ‘an interactive website should be presumed to constitute an offer.’

¹²² See T I Akomolede ‘Legal Analysis of formation of consumer contracts in E-commerce: the Nigerian experience’ (2006) 2 *European Journal of Social Sciences* 135. See also *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at para 93 where the Singaporean High Court stated that, a ‘website advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical.’ For an extensive analysis of this case see A Phang ‘Contract Formation and Mistake in Cyberspace –the Singapore Experience’ (2005) 17 *Singapore Academic Law Journal* 361.

¹²³ See Pistorius (n80) 286. See also Meiring (n54) 103; Polanski (n121) 26; A Farooq ‘Electronic commerce: an Indian perspective’ (2001) 9 *International Journal of Law and Information Technology* 133, 138.

may lead to problems when deciding whether what was presented to customers was an offer or a mere invitation to treat.¹²⁴

A contract in South Africa, as in Tanzania, is concluded where two or more parties agree to be bound contractually.¹²⁵ The parties' consent is often constituted by an offer made by one party and its unqualified acceptance by the other.¹²⁶ For an offer to be valid, it must be made with intent to form a binding agreement if accepted, short of which it will be a mere invitation to treat.¹²⁷ Whether electronic communications should be regarded as offers or invitations to treat will entirely depend on the type of communications used and the wording so far used.¹²⁸

According to the South African law of contract, as elsewhere including Tanzania, an invitation to treat is not an offer but a mere advertisement, or a call to make an offer; it does not constitute an offer in the strict sense.¹²⁹ South African law also distinguishes an offer from a mere statement. One's statement may amount to an offer if it manifests a firm intention to contract (*animus contrahendi*) either expressly or impliedly.¹³⁰

Drawing the fine distinction between an offer and an invitation in an online environment may, however, be tricky. Thus online merchants ought to be cautious, since a purported advertisement on a website may be constructed as an offer which, if accepted, constitutes a binding contract.¹³¹

Restating the common law position is important because neither the ECTA nor the Model Law specifically address the distinction between an offer and an invitation to treat. However, the UN Convention on E-contracts does. Article 11 of the Convention states that:

¹²⁴See *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* (n122) at para 94.

¹²⁵See Pistorius (n80) 285.

¹²⁶See Van der Merwe et al (n74) 54. See also Pistorius (n80) 285.

¹²⁷See *Humphreys v Cassell* 1923 TPD 280.

¹²⁸See Pistorius (n80) 285-286. See also Eiselen (n17) 149. According to this author the communications may be regarded as direct or indirect. Indirect communications will include sms, e-mails, telefaxes, faxes, and interactions with the Internet websites. (See however, *Jamieson v Sabingo* 2002 (4) SA 49 where faxes and telex were regarded as direct communications relying on *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 (CA) 337). Direct communications will include voice communications (which are generally out of the scope of ECTA according to the definition of a "data message") and this will include Voice over Internet Protocol (VoIP).

¹²⁹See *Crawley v Rex* 1909 TS1105.

¹³⁰See Christie (n2) 29.

¹³¹See Pistorius (n80) 286. See also Meiring (n54) 103. See for instance, an incident which took place in the UK where Kodak wrongly displayed cameras worth £329 for just £100. (See T K Leng 'Electronic contracting: legal effects of input errors in e-Contracting' (2006) 22 *Computer law & Security Report* 157, 158).

[a] proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.¹³²

Both the ECTA and the Model Law, however, make it clear that an offer can be made electronically. In terms of the ECTA, s 24(a) (read together with 22(1) and s 1 of the ECTA) are clear to that effect.¹³³ Section 24(a) provides that an offer, being an expression of the offeror's intent to enter into a binding agreement with the offeree, may be expressed electronically.¹³⁴ This provision is based on Art 11(1) of the Model Law, which provides that '[i]n the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages.'

Section 24(a) of the ECTA prohibits denying an expression of intent or other statement legal effect simply because it is in a form of a data message. This section attempts to maintain the common law position: that an offer can be made orally and accepted electronically unless otherwise stipulated by the offeror.¹³⁵ What should be crucial is a firm intention (*animus contrahendi*) to create binding relations.¹³⁶

While these provisions in the ECTA clearly foresee that an offer can be made electronically, one should also be mindful of the difficulties which the distinction between an offer and a mere invitation to treat may pose in an electronic environment. The term 'offer' as used in s 43(1) of the ECTA (to be further discussed below) is, however, problematic because one may construe it to mean 'offer' in its strict sense.¹³⁷ In view of this, it is

¹³² This Article is based on Art 14 of the UN Convention on Contracts for the International Sale of Goods (CISG) April 11, 1980 S Treaty Doc No.98-9, 1489 UNTS 3 (1984). For comments about this Article see E Özsunay 'Invitation to Make Offers' in A H Boss & W Kilian *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Source Book* (2008) 177-182.

¹³³ Section 1 defines a 'data message'. Section 22(1) provides that '[a]n *agreement* is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.' (Italics added). Ordinarily a binding *agreement* constitutes an 'offer' and its valid 'acceptance'. An offer expressed in a data message is thus part of such an agreement and, in terms of s 24(a) it cannot be denied legal effect or validity.

¹³⁴ Section 24 provides that '[a]s between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that (a) it is in the form of a data message; or (b) ...' See also *Jafta v Ezemvelo KZN Wildlife* (n71) para 112 discussing the application of this section.

¹³⁵ See Pistorius (n80) 285.

¹³⁶ See Snail (n66) 7.

¹³⁷ Section 43(1) of the ECTA provides that '[a] supplier *offering* goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered: (...)' (italics added).

necessary, and in keeping with the spirit of ECTA (ie, ensuring predictability and certainty of global e-commerce transactions),¹³⁸ to consider amending ECTA in accordance with Art 11 of the Convention on E-contracts.

(ii) Can Acceptance of an Offer be Communicated Electronically (by an E-mail or Short Message Service)?

The following discussion will first consider acceptance of offers in contracts made by e-mail and/ or short message service (sms) and thereafter the enforceability of certain web-based contracts, such as browse-wrap and shrink-wraps.

▪ Communication of Acceptances Using E-mails and SMSs

An acceptance is an unequivocal indication that the offeree has consented to be bound to the contract, and his consent constitutes one of the main components of a valid contract.¹³⁹ In both Tanzania and under the South African common law, the general rule is that, for a communication to amount to a legally binding acceptance, it must be a clear, unequivocal and unambiguous conscious response to the offer.¹⁴⁰ In other words anybody should be able to infer that the offeree's message amounts to an acceptance and nothing else.¹⁴¹ It is also a requirement that an acceptance should correspond to the offer.¹⁴²

However, does an acceptance of an offer sent by email or sms result in a valid contract? The legal position in terms of s 24(a) and (b) of the ECTA (as discussed above) is that an otherwise valid acceptance of an offer expressed electronically is valid and can constitute a valid contract.¹⁴³ This was one of the key issues considered in *Jafta v Ezemvelo KZN Wildlife*,¹⁴⁴ and reference was made to both the ECTA and the South African common

¹³⁸ *Jafta v Ezemvelo KZN Wildlife* (n71) para 57-58.

¹³⁹ See Van der Merwe et al (n74) 61. See also Pistorius (n61) 184; Snail (n66) 7. See *Reid Bros v Fischer Bearings Ltd* 1943 AD 232, 241; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 429-430; *Lowe v Commissioner for Gender Equality* 2002 (1) SA 750 (W).

¹⁴⁰ See *Jafta v Ezemvelo KZN Wildlife* (n71) para 33. See also Van der Merwe et al (n74) 62.

¹⁴¹ See *Reid Bros v Fischer Bearings Ltd* 1943 AD 232 at 241; *Collen v Rietfontein Engineering Works* 1948 (1) S 413 (A) 429-430.

¹⁴² See *Jafta v Ezemvelo KZN Wildlife* (n71) para 41.

¹⁴³ Section 24 of ECTA provides that '[a]s between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that (a) it is in the form of a data message; or (b) it is not evidenced by an electronic signature but by other means from which such person's intent or other statement can be inferred.'

¹⁴⁴ *Jafta v Ezemvelo KZN Wildlife* (n71) para 31. See also *Sihlal v SA Broadcasting Corporation Ltd* (n71) 1485.

law of contract. The court held that acceptance can be inferred from the offeree's conduct and does not exclude electronic communications such as e-mail or sms.¹⁴⁵

But what if the offeror has prescribed the mode of acceptance? The general rule under the common law of contract is that, if the offeror has insisted on a mode of acceptance the offeree is bound to adopt such mode.¹⁴⁶ Section 21 of the ECTA has maintained this common law position. It provides that Part 2 of the ECTA (which deals with, among other things, communication of data messages) will apply only if the parties involved in a contract have not agreed otherwise how their transaction should be communicated. This means that, if parties have agreed to communicate acceptance in a different mode other than electronically, the rules under Part 2 of the ECTA will be inapplicable to their contract. Consequently, communicating acceptance by means other than electronically will be the only accepted means, and it must be unconditional or unequivocal, made by the person to whom the offer was addressed, and it must comply with any formality which may be required by statute.¹⁴⁷

▪ **Web-based Agreements: Their Enforceability and the Issue Regarding Consent**

The issue of acceptance is also pertinent to web-based agreements, such as shrink-wrap and browse-wrap agreements. Shrink-wrap agreements in the software industry have been around for quite a long time as a safeguard against software infringements.¹⁴⁸ Browse-wrap and click-wrap agreements, however, are more recent developments following the widespread use of the Internet for commercial purposes.¹⁴⁹

¹⁴⁵Ibid. See para 78 referring to Art 5 of Model Law; ss 22 and 24 of ECT Act; s 7 of USA Law; s 5110 of the Illinois Act Commerce Security Act (1998), and also para 113 of the same case. See further *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 (LC) at 391 b-c; D Collier 'e-Mail and SMS contracts: Lessons from the Labour Court' (2008) 16 *Juta's Business Law* 20.

¹⁴⁶In *Laws v Rutherford* 1924 AD 261 it was held that the offeror is entitled to specify the mode of acceptance of an offer. See also Van der Merwe et al (n74) 67. These authors have stated, however, that although no case has addressed the limits of which the offeror's capacity to prescribe the mode of acceptance, 'it is clear that the offeror cannot have an unlimited capacity to prescribe the mode of acceptance.'

¹⁴⁷See Van der Merwe et al (n74) 67. See also Snail (n66) 7, citing *Brand v Spies* 1960 (4) SA 14, where a contract of sale of land that failed to satisfy statutory requirements in terms of section 2(1) of Land Alienation Act was deemed invalid.

¹⁴⁸See T Pistorius 'The Enforceability of Shrink-wrap Agreements in South Africa' (1993) 5 *South Africa Mercantile Law Journal* 1.

¹⁴⁹See chapter one of this thesis for definition of these agreements.

As stated in chapter two, validity and enforceability of these agreements, especially browse-wrap agreements, have been controversial.¹⁵⁰ They have been considered invalid in some quarters because they do not strictly adhere to the ordinary principle that a contract should only bind a party who has specifically consented to it.¹⁵¹ Most browse-wraps, for instance, may contain a mere statement that: ‘by browsing this site you accept its terms and conditions.’ In view of such a statement, one may argue that it amounts to an attempt to impose a contract on those who browse the websites before they specifically consent to its terms. While uncertainty concerning their enforceability still exists in Tanzania, it only existed in South Africa prior to the enactment of the ECTA.¹⁵²

All web-based agreements are standard form or adhesion contracts. These are not new, and the common law of contract had evolved certain principles to govern the so-called ticket cases.¹⁵³ By their nature these contracts exclude the possibility of negotiating their governing terms or conditions.¹⁵⁴

It is common for web-based contracts to contain links or hypertext links (sometimes at the bottom of the web page and in small print) referring the other contracting party to terms or conditions that form part of the agreement. This method, known as incorporation by reference, is often encountered in standard form contracts and it is therefore not a new phenomenon in South Africa.¹⁵⁵

¹⁵⁰ See, for instance, M Robertson ‘Is Assent Still a Pre-requisite for Contract Formation in Today’s Economy?’ (2003) 78 *Washington Law Review* 265. See also D Clapperton & S Corones ‘Unfair Terms in Click-wrap and Other Electronic Contracts’ (2007) 35 *Australian Business Law Review* 152; M R H de Villiers *Consumer Protection Under the Electronic Communications and Transactions Act of 2002* (LLM Dissertation, University of Johannesburg (2004) 55) (available at <http://ujdigispace.uj.ac.za:8080/dspace/bitstream/10210/1848/1/MRHdeVilliers.pdf> (as accessed on 27/6/2011)).

¹⁵¹ See, for instance, *Register.com Inc v Verio Inc* 126 F Supp2d 238 (SDNY 2000) available at <http://www.spamseminar.com/materials/register-verio.html> (as accessed on 4/9/2007) and *Pollstar v Gigmania Ltd* 17F Supp 2d 974(ED Cal.2000). Available at <http://euro.ecom.cmu.edu/program/courses/tcr840/2003/pollstar.htm> (as accessed on 3/4/2009). See also Robertson (n150) 265-296.

¹⁵² See *Snail* (n66) 17. See also Pistorius (n80) 568). This uncertainty was not felt in South Africa only but also in other jurisdiction, for instance, in the United States. See, for instance, *Hotmail Corporation v Van Money Pie Inc* C 98-20064 (ND Cal April, 20 1998); *Ticket Masters Corporation v Tickets Inc* No Cv 99-7654, 2000 WL 525390 (CD Cal 27 March 2000); *Specht Netscape Communications Corporation* 150 F supp 2d 585 (SDNY 2001).

¹⁵³ See Van der Merwe et al (n74) 301. See also *Richardson Spence & Co v Rowntree* [1984] AC 217.

¹⁵⁴ See Pistorius (n80) 568. See also Van der Merwe et al (n74) 310; A Burgess ‘Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and Suggestion’ (1986) 15 *Anglo American Law Review* 255; T D Rakoff ‘Contracts of Adhesion: An Essay in Reconstruction’ (1983) 96 *Harvard Law Review* 1174.

¹⁵⁵ See Meiring (n54) 84. See also Eiselen (n17) 167. Incorporation by reference is a common feature in the so-called ‘ticket cases’, and hence fully dealt with in the South African common law of contract See Van der

Section 11(3) of ECTA governs incorporation by reference in electronic transactions. The section provides that:

[i]nformation incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is

- (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
- (b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

For incorporated terms within a shrink-wrap or browse-wrap to be valid they must therefore be referred to in such a way that they can be reasonably noticed by the other party, and such other party must be able to access, read or store or retrieve them electronically or as a computer printout. What will amount to sufficiently reasonable notice is, however, an elusive issue with no fixed answer. It is an issue subject to an objective assessment based on reasonableness.¹⁵⁶ Important factors to note in this regard include the accessibility and availability of the referred information, integrity of the particular data, and the extent to which those terms are subject to later amendment.¹⁵⁷ The conditions set out in s 11(3) create a higher threshold regarding incorporation in an online environment than what the common law usually requires in a paper-based environment.¹⁵⁸

Despite the above observations, it may be said that the ECTA did not sufficiently address the controversial question regarding a demonstrable act of consent, especially in browse-wrap agreements. These agreements bind a party who merely browses a particular website or downloads a particular software or document to his or her computer without asking him or her to indicate his or her consent. In other words, the act of mere browsing or download of software is regarded as sufficient consent.

Merwe et al (n74) 301-302; *Burger v Central South African Railways* 1903 TS 571; *Slabbert, Verster & Malherbe (Noord Vrystaat) (Edms) Bpk v Gellie Slaghuis (Edms) Bpk en 'n ander* 1984 1 SA 491 (O). See also *Richardson Spence & Co v Rowntree* (n153); *Kempstone Hire v Snyman* (1988) (4) SA 465 (T) (at 468 H); Pretorius (n81) 419-423. See G Gluck 'Standard Form Contracts: The Contract Theory Reconsidered' (1979) 28 *International and Comparative Law Quarterly* 72, 90. See also *Jaques v Lloyd D George A Partners Ltd* [1968] 1 WLR 625

¹⁵⁶ See Pistorius (n80) 574.

¹⁵⁷ Ibid. See *Durban's Water Wonderland (Pty) Ltd v Botha & another* 1999 (1) SA 982 (SCA).

¹⁵⁸ See Eiselen (n17) 168. The author considers this high standard as justified given that suppliers can make the terms easily and readily available. He notes that a similar requirement is contained in German law (citing: Schlechtriem and Schwenzler *Commentary on the UN Convention on the International Sale of Goods (CISG)* 199-202.)

As discussed in Chapter two, some cases in other jurisdictions, such as *Specht v Netscape Communications Corporation*,¹⁵⁹ held that a defendant who had downloaded software from a plaintiff's website without being asked, in the first place, to consent to the terms of the software licence agreement was not bound by such terms.¹⁶⁰ Lack of a positive act of consent to these agreements is what makes them subject to challenge.

Pistorius has, however, argued that, although such a positive requirement for consent is considered necessary in other jurisdictions such as in the USA, the law in South Africa is distinguishable since it has clearly made web-based agreements valid and enforceable provided they satisfy the requirements of s 11(2) and (3) of the ECTA.¹⁶¹ Certainly, the ECTA set out the conditions to be satisfied, such as conspicuousness of the incorporated terms or conditions, their accessibility, retrievability and readability. But the point is that in most of these agreements it is not always possible for a consumer whose interest is to download particular software to be mindful of the terms and conditions embedded in another hypertext link.

Under the common law, and also in Tanzania, one of the techniques discussed above is to see whether the supplier reasonably brought the incorporated terms to the customer's notice. This applies, for instance, in click-wrap agreements whereby customers cannot proceed with a particular transaction unless they declare that they have read and agreed to the terms. Such a requirement is quite reasonable, and adheres to the principle that a party should not be forced into a contract. At the very least the ECTA should have simply stated that a party to such contracts, apart from being notified of the existence of the incorporated information, must be required to indicate his or her consent to such information. This would have resolved the browse-wrap dilemma. Any party, who indicates consent by either a click of a button, as in click-wrap agreements, will still be bound despite not having read the terms. This will be equivalent to signing a document without reading it.

¹⁵⁹ *Specht v Netscape Communications Corporation* (n152).

¹⁶⁰ *Ibid*, at 595–596. See also *Ticketmaster Corporation v Tickets.com Inc* (n152); *Williams v America Online Inc* No 00-0962, 2001 WL 135825 (Mass Super Ct 8 February 2001), and *Pollstar v Gigamania Ltd* No CIV-F-00-5671 REC, 2000 WL 33266437 (ED Cal 17 October 2000). See also C L Kunz, H Thayer, M F Del Duca & J Debrow 'Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent' (2001) 57 *Business Lawyer* 401; C L C L Kunz, J Ottavian, E Ziff, J M Moringiello, K Porter & J Debrow 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form' (2003) 59 *Business Lawyer* 279.

¹⁶¹ See Pretorius (n81) 419-423. Although the ECTA does not specifically refer to these web-based agreements (ie, browse-wrap, click-wrap or shrink-wrap agreements) by their specific names, s 22(1) of the ECTA provides that no agreement should be denied legal force and effect merely because it was concluded electronically. Sections 22(1) and 24(a) (which allows electronic expression of intent to be bound) (as read with s 11(2) and (3) of the ECTA) confirms the enforceability of web-based contracts in principle. See Pistorius (n80) 571-573.

The importance of ensuring that a party to a web-based contract has indeed consented to its terms also lies in the fact that these agreements are often drafted to be beneficial to businesses at the expense of consumers, and often contain oppressive or unreasonable terms, which can easily escape the attention of unsuspecting contractants. Moreover, these agreements sometimes contain choice of jurisdiction and choice of law clauses referring disputes to a particular state and particular applicable law which, in most cases, favour the merchant.¹⁶²

Consequently, and as stated in chapter three of this thesis, consumers, as naturally weaker parties in typical e-commerce transactions, ‘need to be assured that they will not have to bear the (financial) burden of litigation in a distant forum if something goes wrong while they are shopping online.’¹⁶³ The possible abuse of a weaker party in most web-based agreements, as in many standard form contracts, is a matter of serious concern, and the law must make sure that one has indeed voluntarily agreed to be bound by the contract.

Currently, in order to protect weaker parties in consumer contracts, ss 48, 49 and 50 of the Consumer Protection Act (hereafter referred to as ‘the CPA’),¹⁶⁴ contain certain mandatory requirements regarding such contracts. According to s 48, suppliers are prohibited from contracting with consumers on terms that are unfair, unreasonable and unjust.¹⁶⁵ This means that consumers can challenge such terms.¹⁶⁶ Suppliers are also barred from requiring a consumer or a person to whom goods or services are supplied at the direction of the

¹⁶² See Van der Merwe et al (n74) 310-311. See also Sachs, J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 135, 138, 149 and 162. See also T Pistorius ‘The Rights of User of a Computer Programme and the Legality of ‘Shrink-wrap’ Licences’ (1991) 3 *South Africa Mercantile Law Journal* 52, 58.

¹⁶³ See M Keller ‘Lessons for The Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States’ (2004) 23 *John Marshall Journal of Computer & Information Law* 1, 2.

¹⁶⁴ Act 68 of 2008. This Act was signed by the President of the Republic of South Africa on 29 April 2009 and published in the *Government Gazette* on 29 April 2009. For a detailed discussion about consumers’ rights under this Act see W Jacobs, P N Stoop & R van Niekerk ‘Fundamental Consumer Rights under the *Consumer Protection Act* 68 of 2008: A Critical Overview and Analysis’ (2010) 13 *Potchefstroom Electronic Law Journal* 301; T Naudé ‘The consumer’s right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective’ (2009) 126 *South African Law Journal* 505; T Naudé ‘Enforcement Procedures in Respect of the Consumer’s Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective’ (2011) 127 *South African Law Journal* 515.

¹⁶⁵ See section 48(1)(a) and (b). In *Barkhuizen v Napier* (n162) para 36, the court held that in an instance in which a court has to decide whether the terms of a contract are contrary to public policy, the considerations of reasonableness and fairness must be considered. In para 56, the court held that there are two questions to ask in determining fairness: ‘[t]he first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the ... clause.’

¹⁶⁶ See also s 120(1)(d) which provides that the minister may ‘make regulations relating to unfair, unreasonable or unjust contract terms’. According to recently published Regulations, (see *Government Gazette*, No. 34180 of 1st April 2011 (available at http://www.dti.gov.za/ccrd/cpa_regulations.pdf (as accessed on 3/4/2011)), regulation 44 contains a list of contract terms presumed to be unfair and unreasonable.

consumer to waive any rights, assume any obligation, or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.¹⁶⁷

Section 49 of the CPA protects consumers against terms or conditions that affect their rights and which were not brought to their attention in a conspicuous manner and form. Subsection 1 of this section provides that:

any notice to consumers or provision of a consumer agreement that purports to

- (a) limit in any way the risk or liability of the supplier or any other person,
- (b) constitute an assumption of risk or liability by the consumer,
- (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause, or
- (d) be an acknowledgement of any fact by the consumer,

must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

It is also provided under s 49 that ‘if a provision or notice concerns any activity or facility that is subject to any risk of an unusual character or nature, or risks of which the consumer could not reasonably be expected to be aware of, or which could result in serious injury or death, the supplier has to specifically draw the fact, nature and potential effect of the risk to the attention of the consumer in the prescribed form and manner.’¹⁶⁸ In addition, the consumer must consent to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.¹⁶⁹

Section 49(3) requires all provisions, conditions or notices contemplated in subsection (1) or (2) to be written in plain language, as described in s 22.¹⁷⁰ Section 49(4)

¹⁶⁷ See s 48(1)(c). According to s 48(2) ‘a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and—(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.’

¹⁶⁸ See s 49(2)(a)-(c) of the CPA. The form and manner are prescribed in ss 49(3) and 49(5).

¹⁶⁹ See s 49(2) of the CPA.

¹⁷⁰ Section 22 of Consumer Protection Act provides that ‘(1) [t]he producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—

(a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or (b) in plain language, if no form has been prescribed for that notice, document or visual representation.

further places a duty on the suppliers to draw to the attention of the consumers, and in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, the fact, nature and effect of the provision or notice contemplated in subsection 1. Consumers are also entitled to adequate opportunity to receive and comprehend the provision or notice.¹⁷¹

Section 50 contains the plain language requirement that applies to all written contracts. Section 50(2)(b)(i) of the CPA provides that ‘[i]f a consumer agreement between a supplier and a consumer is in writing ... the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement’ in plain and understandable language.¹⁷² The plain language requirement is intended to enable ‘an ordinary consumer (for whom a notice, document or representation is intended), with average literacy skills and minimal experience as a consumer, to understand the contents without undue effort.’¹⁷³

Apart from the above prohibitions and requirements, the CPA contains a list of expressly prohibited transactions, agreements, terms and conditions.¹⁷⁴ This black list includes, but is not limited to, transactions, agreements, terms and conditions intended to defeat the purpose and policy of the Act, mislead or deceive consumers, or subject consumers to fraudulent conduct.¹⁷⁵ Any agreement that contravenes s 51 is void to the extent that it contravenes this section.¹⁷⁶ Additionally, s 120(1)(d) of the CPA empowers the responsible Minister to make regulations relating to unfair, unreasonable or unjust contract terms. On

(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—

(a) the context, comprehensiveness and consistency of the notice, document or visual representation; (b) the organisation, form and style of the notice, document or visual representation; (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and (d) the use of any illustrations, examples, headings or other aids to reading and understanding.

(3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).

(4) Guidelines published in terms of subsection (3) may be published for public comment.’

¹⁷¹ See s 49(5) of the CPA.

¹⁷² See s 22 of the CPA which sets out the requirement for plain language.

¹⁷³ See Jacobs et al (n164) 330.

¹⁷⁴ See s 51(1)(a)-(j) of the CPA.

¹⁷⁵ See s 51(1)(a)(i)-(iii) of the CPA.

¹⁷⁶ See s 51(3) of the CPA.

April 1st 2011, the government published the long awaited consumer protection regulations.¹⁷⁷ Regulation 44 contains a grey list of presumptively unfair and unreasonable clauses.

(d) Resolving the Problems Regarding Time and Place of Contracting

When and where does an e-contract take effect? Which theory should be followed to determine the time when and the place where an e-contract was concluded? These issues are important in the law of contract generally and in e-contracts in particular,¹⁷⁸ because they help to allocate risks between the parties and determine whether a contract can still be revoked.¹⁷⁹ The place of contracting is also significant because a contract may have to comply with certain requirements of that law (the *lex loci contractus*).¹⁸⁰ In addition, it may also be an important factor in determining the proper law and jurisdiction in case of a dispute between parties.¹⁸¹

At common law parties have the opportunity to settle any uncertainty regarding the time when and place where their contract comes into effect.¹⁸² If they did not do so, however, the time when and place where a contract took form is established by examining the rules governing offer and acceptance.¹⁸³ For instance, if the offeror prescribes that acceptance should be made through postal means, the contract will come into existence the moment the letter of contract, properly addressed, is handed to the post office.¹⁸⁴ The theory which applies here is the expedition theory (discussed earlier in chapter two).

¹⁷⁷ The Regulations are contained in the Government Notice 293 published in Government Gazette vol. 550 No. 34180 of 1st April 2011 (available at http://www.dti.gov.za/ccrd/cpa_regulations.pdf (as accessed on 3/4/2011)).

¹⁷⁸ See Pistorius (n61) 186, 196. See also the Guide to UNCITRAL Model Law, para 100. It is important to note that the Model Law does not deal with contract formation.

¹⁷⁹ See Eiselen (n17) 162. See also Pistorius (n61) 191, Christie (n2) 28-29.

¹⁸⁰ See C F Forsyth *Private International Law: The modern Roman-Dutch law including the jurisdiction of the Supreme Court* 4ed (2003) 318-325. See also Eiselen (n17) 161.

¹⁸¹ See Forsyth (n180) 10, 306-313. See also *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171; *Improvair (Cape) (Pty) Ltd v Etablissements* 1983 (2) SA 138 (C).

¹⁸² See Eiselen (n17) 162. See also Van der Merwe et al (n74) 68-70; Christie (n2) 64-65; *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A); *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T).

¹⁸³ See Van der Merwe et al (n74) 55. See also D Hutchinson 'Contract Formation' in R Zimmermann & D Vesser (eds) *Southern Cross: Civil Law & Common Law in South Africa* (1996) 165, 173-180; Pistorius (n80) 287. See also Pistorius (n61) 191. See *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34.

¹⁸⁴ See Van der Merwe et al (n74) 69. See also Pistorius (n80) 287. See also *Cape Explosives Works v Lever Brothers SA Ltd* 1921 CPD 244 which was approved in *Kergeulen Sealing and Whaling Co v Commissioner for Inland Revenue* 1939 AD 487.

In South Africa the expedition theory, which also applies in Tanzania, was considered in *Cape Explosives Works v Lever Bothers SA Ltd*.¹⁸⁵ This theory, however, has been considerably criticised.¹⁸⁶ Van der Merwe et al have noted that, in *Kaap Suiwelkoöperasie Bpk v Louw*,¹⁸⁷ the court simply disregarded it and stated that the agreement was concluded upon receipt of the letter of acceptance.¹⁸⁸ Nevertheless, this theory has never been overruled.

Another principle, which determines when acceptance takes place in both South Africa and Tanzania, is the information theory.¹⁸⁹ This principle applies irrespective of whether the parties entered into a contract *inter praesentes* or *inter absentes*.¹⁹⁰ In such a scenario the contract comes into effect when and where the offeror learns or is informed of the acceptance.¹⁹¹

Internet technology, however, has its own complexities which may make the determination of the exact time of conclusion of a particular e-contract technical. E-mails, for instance, rely on servers that may be located in different jurisdictions, and, if an e-mail is sent by the offeree's computer, it does not necessarily enter the offeror's server in the form it was originally sent because it is normally routed in small packets. For that reason, it may be a purely technical problem to establish when data messages are deemed dispatched (sent) or received.¹⁹²

Prior to the enactment of the ECTA, the legal position in South Africa, as regards determination of the time when and place where a contract is concluded, was dominated by either the information or expedition theory.¹⁹³ Given the technical difficulties which may be associated with electronic communications, it became necessary to adopt a different approach. In view of this, the ECTA introduced a third approach, namely the reception

¹⁸⁵ *Cape Explosives Works v Lever Bothers SA Ltd* (n184). See also *Kerguelen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* (n184).

¹⁸⁶ See Van der Merwe et al (n74) 69-72, 70. See also Anonymous 'Offers and Options' (1955) 72 *South African Law Journal* 306-312, 307; *Kaap Suiwelkoöperasie Bpk v Louw* 2001 (2) SA 80 (SCA) at 89-90;

¹⁸⁷ *Kaap Suiwelkoöperasie Bpk v Louw* (n186) 89-90. See also Anonymous (n186) 307.

¹⁸⁸ See Van der Merwe et al (n74) 69-72. See also *A to Z Baazars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A), 476 B.

¹⁸⁹ As for the application of this theory in Tanzania, s 4(2)(b) of the Law of Contract Act, Cap 345 [R.E.2002]. See the discussion in Chapter II, part 3 (iv) (b).

¹⁹⁰ See Van der Merwe et al (n74) 68.

¹⁹¹ See Van der Merwe et al (n74) 72. See also Eiselen (n17) 162; Pistorius (n80) 287-288; *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E).

¹⁹² See Pistorius (n61) 186-187.

¹⁹³ Currently, this is the legal position in Tanzania.

theory. Sections 22(2) read together with section 23 of the ECTA govern issues regarding time and place of communications, dispatch and receipt of data messages. Accordingly, a contract comes into effect when the acceptance reaches the offeror's address.

Section 22(2) of the ECTA provides that 'an agreement concluded by parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.'¹⁹⁴ The offeror under this section is regarded as the originator of the data message, while the offeree is the addressee of that message. Consequently, a contract comes to effect 'when and where the originator receives the addressee's message.'¹⁹⁵

Section 23 of the ECTA further elaborates where and when data messages may be regarded as having been dispatched or received. The section provides that:

[a] data message-

- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
- (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
- (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

Before going into the details of the section, it is necessary to state at the outset that there is a problem regarding its wording, especially the wording of sub-section (a), when compared to the rest of the sub-sections. It is clear that the phrase 'used in the conclusion or performance of an agreement', which appears in that sub-section, should have been part of the preamble, after the words 'data messages'. In its currently reading, the sub-section restricts the operation of the 'sending of a message' to form or execute a contract, but the same qualification does not apply to its opposite (receipt) in subsection (b) or to subsection (c). It is submitted that it would be appropriate to restrict all three subsections to instances where the parties to the communications are about to or have entered into an agreement, because s 21 of the ECTA requires rules contained in Chapter III Part 2 of this Act to be

¹⁹⁴ See Van der Merwe et al (n74) 75. See also UNCITRAL *Model Law on E-commerce with Guide to Enactment* (n1) Art 15(4) and para 55-56.

¹⁹⁵ See *Jafta v Ezemvelo KZN Wildlife* (n71) para 79. See also *Snail* (n74) 45. See Pistorius (n80) 290.

applied only if the parties involved in generating, sending, receiving, storing or otherwise processing data messages have not reached agreement on the issues provided for therein.

Section 23(a) of the ECTA is based on Art 15(1) of the Model Law, which provides that '[u]nless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.'¹⁹⁶

While the notion of 'entry' into an information system in both the Model Law and the ECTA is an important factor in determining when a data message is dispatched, s 23(a) of the ECTA, unlike Art 15(1) of the Model Law, goes further to address a situation where the sender and recipient share the same information system. In such a scenario s 23(a) provides that a data message will be deemed sent 'when it is capable of being retrieved by the addressee.'¹⁹⁷ Because the drafters of the ECTA referred to legislative developments in other countries including Canada, s 23(a) reflects a position similar to that of s 23(1) of the Canadian Uniform Electronic Commerce Act (UECA).¹⁹⁸ In contrast, the European Directive on E-commerce (discussed in chapter 5) adopts a neutral position on time of contracting, since it does not interfere directly with the general principles of national contract laws.¹⁹⁹

Concerning the time when a data message is regarded as having been received, s 23(b) of the ECTA provides that it is 'regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee, and is capable of being retrieved and processed by the

¹⁹⁶ Article 15 of the Model Law, however, uses the term 'dispatch', instead of 'send' to refer to the commencement of the electronic transmission of data. According to para 101 of the Guide to enactment of the Model Law, in case the term 'dispatch' has an established meaning in a particular jurisdiction, Art 15 will be supplementary to the national rules on dispatch, rather than displacing them. See Pistorius (n61) 180, 187; C Glatt 'Comparative Issues in the Formation of Electronic Contracts' (1998) 1 *International Journal of Law and Information Technology* 34, 57. Article 10 of the UN Convention on E-contracts also refers to the concept of dispatch.

¹⁹⁷ See s 23(a) of the ECTA.

¹⁹⁸ Section 23(1) of the Canadian UECA (also based on the Model Law) provides that '[u]nless the originator and the addressee agree otherwise, an electronic document is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, when it becomes capable of being retrieved and processed by the addressee.' See also *Jafta v Ezemvelo KZN Wildlife* (n71) paras 83-90 comparing the two provisions of these two statutes and Art 15 of the Model Law.

¹⁹⁹ See Pistorius (n61) 199. However, the early proposals for this directive had adopted definite rules for the time a contract should be deemed formed. See *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market -COM (1998) 586 final [1999] OJ C301/4*. See also A D Murray 'Entering into contracts electronically: the real W.W.W.' at 11 (footnote 57) (available at <http://www.100megsfree4.com/andrewmurray/Contracts.pdf> (as accessed on 16/10/2010)).

addressee.²⁰⁰ This provision is based on sub-article 2(a)(i) of Art 15 of the Model Law,²⁰¹ although there are some differences. For instance, s 23(b) of the ECTA, unlike Art 15 of the Model Law, does not provide for ‘receipt’ in a situation where the addressee has no information system designated or used for that purpose. What the section envisages is receipt into ‘an information system designated or used for that purpose by the addressee.’ This is a gap that needs to be addressed, as it creates uncertainty.²⁰²

In contrast, s 23(2)(b) of the Canadian UECA provides that ‘if the addressee has not designated or does not use an information system for the purpose of receiving documents of the type sent, [receipt occurs] when the addressee becomes aware of the electronic document in the addressee's information system and the electronic document is capable of being retrieved and processed by the addressee.’²⁰³

It is important to note, however, that the ECTA departs from the Canadian statute on the receipt of a data messages. The latter considers an electronic document as having been received when it enters an information system designated or used by the addressee for the purpose of receiving such a document and is capable of being retrieved and processed by the addressee.²⁰⁴ Whereas the Canadian position is that of a document being ‘capable of

²⁰⁰ See s 23(b) of ECTA. See also Pistorius (n80) 290.

²⁰¹ Article 15(2) of the UNCITRAL Model Law on E-commerce provides that ‘[u]nless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

- (i) at the time when the data message enters the designated information system; or
- (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.’

²⁰² See Pistorius (n61) 190. The author notes also a similar omission in the US law Uniform Electronic Transactions Act (UETA) §7, 7A U.L.A. 211 (2002) (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010)). As noted in this chapter, the drafters of the ECTA referred the legal developments in the US (among other countries) in the course of drafting process.

²⁰³ See also section 14(4) of the Australia, Electronic Transactions Act, 1999 (as amended by Act No. 21 of 2007). This section provides that ‘[f]or the purposes of a law of the Commonwealth, if the addressee of an electronic communication has not designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee of the electronic communication, the time of receipt of the electronic communication is the time when the electronic communication comes to the attention of the addressee.’ As noted in this chapter, the drafters of the ECTA referred the legal developments in Australia (among other countries) in the course of drafting process.

²⁰⁴ See s 23(2)(a) of the Canadian UECA. The section provides that ‘[a]n electronic document is presumed to be received by the addressee, (a) when it enters an information system designated or used by the addressee for the purpose of receiving documents of the type sent and it is capable of being retrieved and processed by the addressee.’ A similar approach is envisaged in the US law (UETA, s 15(b)(1)(B)(2)).

processing²⁰⁵ the ECTA requires the ‘completeness’ of data message in question for it to be ‘received’.²⁰⁶ This means that ‘unless the message is complete and intact, receipt of the data message cannot be said to have taken place.’²⁰⁷ This fact may, however, be problematic.

Commenting on the ECTA’s ‘completeness rule’, Pistorius says ‘[it] will create a disparity between electronic contracting and the general principles of contract law in a paper-based environment.’²⁰⁸ She argues that ‘in terms of the general principles, a message can be considered to have been received even if it is never received and it will be deemed to have been received even though it is not intelligible to the addressee or not intended to be intelligible to the addressee.’²⁰⁹ In that regard, she concludes that readability of a data message should be considered a separate issue from whether it was received.²¹⁰

Regarding the place of dispatch or receipt, the ECTA regards all data messages sent or received by the originator or addressee as ‘having been sent from the originator’s usual place of business or residence and as having been received at the addressee’s usual place of business or residence.’²¹¹ This is in line with the approach adopted in the Model Law which recognises the fact that parties to an e-contract may communicate without knowing the location of information systems through which communication is operated. Even if they do, the systems may change without either party being aware of the changes. Consequently, the Model Law regards the location of information systems irrelevant in determining the place where data messages are dispatched or received and sets forth a more objective criterion, namely, the place of business of the parties.²¹² A caveat is provided, however, to the effect

²⁰⁵ See s 23(2)(a) of UECA.

²⁰⁶ See s 23(b) of ECTA. In Australia, Electronic Transactions Act, 1999 (as amended by Act No. 21 of 2007) is liberal as it provides in section 14(3) that the time of receipt of the electronic communication is the time when the electronic communication enters that information system.’ This is therefore irrespective of whether it is capable of or available for processing.

²⁰⁷ See Pistorius (n61) 190.

²⁰⁸ See Pistorius (n61) 190. See also *Household Fire & Carriage Insurance Co v Grant* (1879) 4 ED 216. This case, quoted also in J T R Gibson & C J Visser (ed) *South African mercantile and company law* 8ed (2003) 42, held that once a letter of acceptance has been posted, the contract comes to effect even though the letter never reach the offeror, provided the requirements for the expedition theory are met.

²⁰⁹ See Pistorius (n61) 190, citing para 103 of the Guide to the enactment of the Model Law. See also *Household Fire & Carriage Insurance Co v Grant* (n208).

²¹⁰ See Pistorius (n61) 190.

²¹¹ See s 23(c). The ECTA, however, has not defined what does ‘place of business’ or ‘residence’ mean. This is important for those companies which are purely e-companies with no physical place of business (but rather virtual existence).

²¹² See Art 15(3) of the Model Law which provides that ‘[p]aragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).’ Para 4 of the Model Law provides that ‘[u]nless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its

that the criterion set out by the Model Law should not be construed as establishing a conflict of laws rule.²¹³

Controversy has also existed among scholars concerning whether e-mail messages should be regarded as instantaneous or non-instantaneous communications, this being an effort to determine which theory should govern such communications.²¹⁴ Sections 22, 23 and 26 of the ECTA, which reflect the reception theory, regard e-mail communications as non-real-time communication. Although certain forms of communications by data messages are sometimes in real time, (for instance, video conferencing or chat rooms), since the ECTA adopts the reception theory for all electronic communications, the ‘[d]ifferences between real-time communications which prefer the information theory, and the expedition theory, which applies to non-instantaneous communications, have now been set aside.’²¹⁵

In *Jafta v Ezemvelo KZN Wildlife*²¹⁶ the court stated that, with the application of the modern technology such as the Internet, the old postal rule (which states that contracts are concluded when a letter or telegram of acceptance is handed to the post office) is outmoded, and cannot apply to acceptance by emails or smss. Because the forms of communication under the modern technology differ substantially from the way post offices operate, it was clear to the court that, ‘the old common law presumptions about when an acceptance of an offer is sent and received have been supplanted by statute.’²¹⁷

In the course of justifying why the reception theory should be favoured in e-contracting in South Africa instead of the information theory, van der Merwe et al argue that the possibility that electronic declarations may be truncated, lost or delayed by

place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

- (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
- (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.’

²¹³ See the Guide to enactment of the Model Law (n1), para 100.

²¹⁴ See D L Kidd & W H Daughtrey ‘Adapting contract law to accommodate electronic contracts: overview and suggestions’ (2000) 26 *Rutgers Computer & Technology Law Journal* 215, 261-262. See also J Beatson *Anson’s law of contracts* 28ed (2002) 43; R Stone *The Modern Law of Contract* 8ed (2009) 81. See also Pistorius (n61) 201-205, discussing the common law position.

²¹⁵ See Meiring (n54) 98. See also *Jafta v Ezemvelo KZN Wildlife* (n71) para 80 where the court held that ‘section 23 supplants the general rule of the common law that an acceptance of an offer must come to the knowledge of the offeree for a contract to arise.’

²¹⁶ See *Jafta v Ezemvelo KZN Wildlife* (n71) para 79-80.

²¹⁷ *Ibid* at para 81.

intermediaries, or even by the failure of an addressee to retrieve an electronic message, do not favour retention of the information theory in the context of electronic communications.²¹⁸

Similarly, in *Jafta v Ezemvelo KZN Wildlife*²¹⁹ Justice Pillay gave elaborate reasons as to why the information theory is unworkable for e-contracts. The court stated that in a typical electronic contract, such as a click-wrap agreement, the contract comes to effect immediately ‘when an offeree clicks on “accept” or “I agree” on a website that offers goods for sale. The acceptance of the offer may not even come to the attention of the seller if the thing sold is packaged and delivered automatically or through a dispatch service.’²²⁰ The other reason identified by the court in favour of the reception theory to e-contracts is that the offeree should not be left at the mercy of the offeror by waiting until the offeror acknowledges receipt of the acceptance.²²¹ It was held that doing so would be putting the offeree at the mercy of a dishonest offeror if the offeror receives and destroys the acceptance, pretending not to have received it.²²²

5. Obstacles Raised by Formalities Requirements

Although the ECTA does not deal with each and every legal aspect arising from online transactions,²²³ it removes legal barriers to and enhances certainty.²²⁴ This breakthrough, however, is not without difficulties including those related to certain form requirements ordinarily associated with paper-based transactions. As discussed in Chapter II there are usually three formalities which may be imposed either by statute or the parties to a transaction, namely, ‘writing’, ‘signature’ and notarial execution.²²⁵ The reasons for such formal requirements in certain transactions may include ‘the legal certainty (provided by

²¹⁸ See Van der Merwe et al (n74) 74. See also Pistorius (n80) 288; L Davies ‘Contracts formation on the Internet: Shattering a few Myths’ in L Edward & C Waelde (eds) *Law and the Internet: Regulating Cyberspace* (1997) 97-120, 111. The reasons given by Van der Merwe et al (n74) 74 can also apply in Tanzanian situation.

²¹⁹ See *Jafta v Ezemvelo KZN Wildlife* (n71) para 81-92.

²²⁰ Ibid.

²²¹ Ibid at para 82.

²²² Ibid.

²²³ As regards electronic evidence, for instance, Professor Hofman asserts that the ECTA (section 15) ‘has not resolved all the problems with electronic evidence’ See Hofman (n54) 677. See also the SALRC Issue Paper No.27 (n78).

²²⁴ See ss 2(1)(d) and (e) and 12(a) and (b) of the ECTA.

²²⁵ See Eiselen (n17) 163. See also Eiselen ‘Electronic Commerce and the UN Convention on Contracts for International Sale of Goods (CISG) 1980’ (1999) 6 *EDI Law Review* 21, 35-36; Eiselen ‘Electronic Commerce and the CISG: Formation, Formalities and Validity’ (2002) *Vindobona Journal of International Commercial Law & Arbitration* 305, 311; Van der Merwe et al (n74) 152, 162-173; Christie (n2) 105-129.

writing), identification, attribution, assent and authentication.²²⁶ ‘In general, legislative formalities provide a party with an opportunity to reconsider (*locus poenitentiae*) before the execution of the agreement in writing.’²²⁷

Generally, and similar to the law of contract in Tanzania, the South African law does not require special formalities in the course of contract formation.²²⁸ Contracts can be formed either orally or by conduct.²²⁹ In *White v Pan Palladium SA (Pty) Ltd*²³⁰ the court was called upon to decide whether a written contract was required as a formality or whether it was merely required for the purposes of proof. Referring to *Goldblatt v Fremantle*,²³¹ the court held that, unless it is clear that the parties intended the writing to be a formality, it is only presumed to facilitate proof of the parties’ agreement and is not an essential requirement.²³² This general rule, however, is subject to certain exceptions, which include formalities prescribed by a statute²³³ or, as indicated in *Goldblatt v Fremantle*,²³⁴ those intended by the parties. As will be seen below, the ECTA has taken into account statutory

²²⁶ See Eiselen (n17) 163. See also Van der Merwe et al (n74) 164 stating that statutes which prescribe formalities may do so for various reasons, such as promoting certainty of certain transactions or discouraging fraud.

²²⁷ See Van der Merwe et al (n74) 165, citing *Davis v Executors Estate WP Prinsloo* (1899) 6 OR 64; *Jolly v Herman’s Executors* 1903 TS 515. The UNCITRAL Working Group points to eleven reasons for the writing requirement. (See para 48 of the Guide to the enactment of the Model Law on E-commerce (n1). These reasons are (i) the need to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves, (ii) the need to help the parties be aware of the consequences of their entering into a contract; (iii) the need to ensure that a document would be legible by all, (iv) the need to ensure that a document would remain unaltered over time and provide a permanent record of a transaction, (v) the need to allow for the reproduction of a document so that each party would hold a copy of the same data, (vi) the need to allow for the authentication of data by means of a signature, (vii) the need to provide that a document would be in a form acceptable to public authorities and courts, (viii) the need to finalise the intent of the author of the ‘writing’ and provide a record of that intent, (ix) to allow for the easy storage of data in a tangible form, (x) the need to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes, and (xi) to bring legal rights and obligations into existence in those cases where a ‘writing’ was required for validity purposes.

²²⁸ See Christie (n2) 105. See also Van der Merwe et al (n74) 152; Eiselen (n17) 163. The only important exception in the law of contract in Tanzania, which nevertheless is not connected to formality requirements, is the need for consideration as one of fundamental ingredients for a valid contract.

²²⁹ See Christie (n2) 105. See also Van der Merwe et al (n74) 152.

²³⁰ 2005 (6) SA 384 (LC).

²³¹ 1920 AD 123 at 128.

²³² See *White v Pan Palladium SA (Pty) Ltd* (n230) at 390C. See *Timoney & King v King* 1920 AD 133, 144. Where Innes CJ stated that even an acceptance of a contract ‘may be inferred from conduct.’ See also Meiring (n54) 103.

²³³ See, for instance, the Alienation of Land Act, Act 68 1981; the General Law Amendment Act, Act 50 of 1986 (requiring contracts of suretyship to be in writing and signed by the surety); the Matrimonial Property Act, Act 88 of 1984 (requiring authorisation of a person married in community of property for certain transactions to be in writing and attested by two witnesses); and the Mining Titles Registration Act, Act 16 of 1967 (which require certain mining rights and leases to be in writing).

²³⁴ See *Goldblatt v Fremantle* (n231) 128.

formalities.²³⁵ Concerning respect for the parties' intentions, principally this Act recognises their autonomy to decide how their transactions should be carried out.²³⁶

As stated earlier, the ECTA has adopted the Model Law's principles, including the principle of functional equivalence. According to this principle, formal requirements which were long considered a stumbling block to e-commerce, such as the legal requirements derived from statutes, for instance, those demanding that a document should be 'in writing', 'signed,' or be in the 'original' form, can, subject to certain statutory exceptions, be met electronically by data messages and e-signatures. Thus, in order to give documents created electronically a sense of functional equivalence to those in the traditional paper-based form, the ECTA addresses the problematic concepts, such as 'in writing', 'signed' or be in the 'original' form in ss 12, 13 and 14.

(a) Fulfilling Writing Requirement Electronically

According to s 12 of the ECTA a requirement in law that a document or information must be in writing can be fulfilled by data messages.²³⁷ Such a requirement, however, will only be satisfied if a data message is 'accessible in such a manner that it may be used for future reference.'²³⁸ Readability, accessibility, and/or retrievability of such information are important aspects which this section seeks to guarantee. According to Van der Merwe et al, if these qualities are guaranteed 'there is little warrant for exclusion from the ambit of the Act of transactions relating to the alienation of land.'²³⁹ Despite this view it is clear, however, that s 4(4) of the ECTA excludes such contracts from the scope of the ECTA.

It may be argued, nevertheless, that, although s 12 provides for a functional equivalence between conventional writing and data messages,²⁴⁰ the requirements associated

²³⁵ See s 4(3), (4) and (5) of the ECTA.

²³⁶ For instance, s 4(2) of the ECTA provides that its provisions should not be construed as compelling parties to a contract to use a particular mode of signature in the course of their transactions or create their contract in a particular way. These are matters that are within the parties' freedom. See also s 21 of the ECTA which provides that Part 2 of the ECTA (which deals with formation of e-contracts, among other issues) will apply only if contracting parties have not reached an agreement which would otherwise vary the application of the rules contained in this part.

²³⁷ See *Sihlal v SA Broadcasting Corporation Ltd* (n71) 1485 where the court, referring to section 12 of the ECTA stated that communication by sms is communication in writing. See also *Jafta v Ezemvelo KZN Wildlife* (n71). See also *Le Roux & Others v Viana No & Others* (n71) at 175 para 10; *Mncube v Transnet* (n71) 703.

²³⁸ Section 12(a) and (b) of the ECTA provides that '[a] requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message; and accessible in a manner usable for subsequent reference.'

²³⁹ See Van der Merwe et al (n74) 168.

²⁴⁰ See *S Snail* (n74) 44. See also the SALRC Issue Paper No.27 (n78) 40.

with the electronic version of 'writing' are stricter than those under common law, for instance, regarding incorporation by reference.²⁴¹ The approach adopted in s 12 of the ECTA corresponds to that envisaged in Art 6(1) of the Model Law on E-commerce.²⁴² (The same approach is envisaged in Art 9(1) and (2) of the UN Convention on E-contracts).²⁴³

As indicated in the foregoing discussion, the ECTA does not compel parties to perform transactions electronically. What it does is to avoid discriminatory treatments between paper-based documents and those created electronically. Section 4(3) of the ECTA, however, limits the application of ss 11, 12, (discussed above) and ss 13, 14, 15, 16, 18, 19 and 20 (to be discussed below) in certain transactions affecting certain laws. For instance, all these sections will not apply to transactions governed by the Wills Act.²⁴⁴ Similarly, ss 12 and 13 are excluded for contracts governed by the Alienation of Land Act²⁴⁵ or the Bills of Exchange Act.²⁴⁶ In addition, ss 11, 12 and 14 of the ECTA do not apply to transactions governed by the Stamp Duties Act.²⁴⁷

Consequently, s 4(4) denies validity of all electronic data or transactions that purport to (a) constitute agreements for alienation of immovable property as provided for in the Alienation of Land Act of 1981,²⁴⁸ (b) constitute an agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act,²⁴⁹ (c) evidence the execution, retention and presentation of a will or codicil as defined in the Wills Act²⁵⁰ and (d) amount to the execution of a bill of exchange as defined in the Bills of Exchange Act.²⁵¹ The exclusion of these transactions is based on public policy.

²⁴¹ See Eiselen (n17) 165.

²⁴² The Model Laws provide for internationally accepted standards which a data message should meet to satisfy the requirements of the law. According to Art 6(1) of the UNCITRAL Model Law on E-commerce, for instance, a legal requirement as to writing can be met electronically provided that the electronic information so rendered is 'accessible so as to be usable for subsequent reference.'

²⁴³ See Article 9(1) and (2) of the UN Convention on the use of Electronic Communications in International Contracts. These provide that '(1) [n]othing in this convention requires a communication or a contract to be made or evidenced in any particular form, and (2) [w]here the law requires that a communication or a contract should be in writing, or provides consequences for the absence of writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.'

²⁴⁴ Act 7 of 1953. See s 4(3) of the ECTA (as read with I schedule to the ECTA).

²⁴⁵ Act 68 of 1981. See s 4(4) of the ECTA (as read with the 1st schedule to the ECTA).

²⁴⁶ Act 34 of 1964. See s 4(3) of the ECTA (as read with the 1st schedule to the ECTA).

²⁴⁷ Act 77 of 1968. See s 4(3) of the ECTA (as read with the 1st schedule to the ECTA).

²⁴⁸ Act 68 of 1981. See s 4(4) of the ECTA (as read with item number 1 of the 2nd schedule to the ECTA).

²⁴⁹ Act 68 of 1981. See s 4(4) of the ECTA (as read with item number 2 of the 2nd schedule to the ECTA).

²⁵⁰ Act 7 of 1953. See s 4(4) of the ECTA (as read with item number 3 of the 2nd schedule to the ECTA).

Whether 'an electronic will' which sufficiently and unequivocally containing the wishes of the deceased should

Policy considerations were also a factor taken into account by the UNCITRAL Working Group when drafting the Model Laws. For instance, being mindful of the fact that certain legal requirements in certain transactions may require stricter rules governing ‘writing’, ‘signature’, or ‘original form’ as part of national public policy, Arts 6(3), 7(3), 8(4) and 11(2) of the Model Law on E-commerce provide for room to exclude certain transaction from application of electronic data messages permitted under those Articles.

According to paragraph 80 of the Guide to the Enactment of the Model Law, it was found that certain national laws have strict form requirements that reflect considerations of public policy, such as the need to protect certain parties or warn them against specific risks. Whereas the above functions may be met electronically, as already envisaged under the provisions of the ECTA, one may argue that these similar considerations, coupled with public policy reasons, underlie the basis for the stricter rules in s 4(3) and (4), which exclude transactions enumerated in the second schedule to the ECTA.

Whether the above restrictions are necessary or not is controversial. In matters regarding conveyancing agreements and other matters affecting real property, however, efforts are currently under way in South Africa to enable such transactions to be concluded electronically.²⁵² By doing so, South Africa will be joining other countries, such as England,

be admitted has been a debatable issue. See, for instance the views of Barclays Bank PLC (Singapore) on whether such wills should continue to be excluded in the Singaporean e-transaction law, available at http://www.ida.gov.sg/doc/policies%20and%20Regulation/Policies_and_Regulation_Level2/papers/ETA_Stage_2_BarclaysBank.pdf (as accessed on 8/8/2010). It is argued in this document that the strict requirements should be retained as they ensure freedom of the maker of the will a safeguard which could easily be removed if wills are to be made electronically. However, in *Rioux v Coulombe* (1996) 19 ETR (2d) 201 (Que. SC), the Canadian Supreme Court (Quebec province) held that depending on a case to case basis an electronically-recorded will may be admissible to probate. See BCLI Report, No 45-- Wills, Estates and Succession: A Modern Legal Framework.’ Prepared by members of the Succession Law Reform, British Columbia Law Institute (2006) 32. This Report is available at http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/404296/succession_report.pdf (as accessed on 9/8/2010).

²⁵¹ Act 34 of 1964.

²⁵²See H Mostert ‘Tenure Security Reform and Electronic Registration: Exploring Insights from English Law’ (2011) 14 *Potchefstroom Electronic Law Journal* 85 (available at <http://www.journals.co.za/WebZ/ej/AdvancedQuery?sessionid=01-52982-1704359156> (as accessed on 27/7/2011)). See also M B Shange *A system-based approach to land registration analysis and improvements. A case study of the KwaZulu-Natal Deeds Registration system* (Msc Dissertation, (Environment and Development), University of KwaZulu-Natal (2010) 47-52 (available at <http://dspace.ukzn.ac.za:8080/jspui/handle/10413/644> (as accessed on 25/5/2011)). See also Chief Registrar of Deeds and Law Society of South Africa, *Policy Document on the Electronic Deeds Registration System (E-Drs)* (Department of Rural Development and Land Reform Pretoria 2009) available at www.ruraldevelopment.gov.za/.../E_DRS/SADJ%20Artical%20on%20e-DRS%20POLICY%20DOCUMENT.doc (accessed on 10/7/2010) 1, 9. See further the Department of Rural Development and Land Reform’s *Annual Report 1April 2009-31 March 2010* (available at http://www.ruraldevelopment.gov.za/DLA-Internet//content/document_library/documents/Publications/Annual_Report/April2009-March2010.pdf (as

where conveyancing has moved from a paper-based system to one that is entirely electronic.²⁵³ It will also mean that even the other restrictions contained in s 4(4) of the ECTA, as read together with the second schedule to the Act, may need to be reviewed.

(b) Satisfying a Requirement for Signature

A requirement for signatures in an agreement may be statutory. For instance, s 2(1) of the Alienation of Land Act²⁵⁴ provides that '[n]o alienation of land ...shall...be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

Whereas previously signatures were manually written by parties, technology has made the use of electronic signatures possible. Consequently, as part of the effort to resolve formality problems that may hinder e-commerce, the Model Laws on E-commerce²⁵⁵ and E-signature²⁵⁶ and the UN Convention of E-contracts²⁵⁷ fully support the use of electronic signatures as the equivalent of manually created signatures. Thus, in certain instances, a

accessed on 28/10/2010) 33. According to the Department of Land Affairs Strategic Plan 2005-2010, titled: "*Sustainable Land and Agrarian Reform: A Contribution to Vision 2014*" March 2005, (see page 24) replacement of current paper-based processing of deeds and documents with fully electronic system (the e-Cadastre system) is expected to improve the property market substantially. The Strategic Plan is available at <http://www.info.gov.za/view/DownloadFileAction?id=127095> (as accessed on 27/10/2010).

²⁵³ See Law Commission/Land Registry Report: *Land Registration for the Twenty-first Century, a Conveyancing Revolution*, Her Majesty's Land Registry, Law Com No 271 (2001). This Report is available on the Internet at <http://www.lawcom.gov.uk/docs/lc271.pdf> (as accessed on 11/8/2010). See also the UK Land Registration Act 2002(c.9) which received Royal Assent on 26 February 2002. This Act which provides for e-conveyancing was based on the Law Commission's Report. The Act is available at http://www.opsi.gov.uk/acts/acts2002/en/ukpgaen_20020009_en_1.htm (as accessed on 11/8/2010). See also C S Wright 'Electronic Contracting in Insecure World' GIAC Legal Issue (GLEG) 2008) available at http://www.sans.org/reading_room/whitepapers/legal/electronic-contracting-insecure-world_2088 (as accessed on 28/10/2010) at 25.

²⁵⁴ Act 68 of 1981.

²⁵⁵ See Art 7(1) of the Model Law on E-commerce which provides that '(1) [w]here the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.'

²⁵⁶ The Model Law on E-signature which provides in Art 3 that '[n]othing in this Law ... shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6, paragraph 1, or otherwise meets the requirements of applicable law.' Article 6(1) states that '[w]here the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.'

²⁵⁷ See Art 9(3) of the UN Convention of E-contracts.

requirement of signature may be met electronically²⁵⁸ unless there is a legal restriction to the contrary.²⁵⁹

The ECTA provides for the legal recognition of electronic signatures. Section 1 defines two types of signatures. The first is an e-signature that constitutes data attached to, incorporated in or logically associated with other data and which is intended by the user to serve as a signature. This definition is wide enough to accommodate scanned signatures pasted to a document or even typing of the writer's name to associate the document with the sender provided that such typing or pasting was intended to serve as a signature.²⁶⁰ The second type of e-signature, referred to as an 'advanced electronic signature' is an authenticated signature. Section 1 of the ECTA defines an advanced electronic signature as one 'which results from a process which has been accredited by the Authority as provided for in section 37.'²⁶¹

According to s 13(1) of the ECTA, the formality of a signature 'required by law', as regards use of data messages, will be satisfied only by an advanced electronic signature. This signature, resulting from an accreditation process by the Accreditation Authority, is presumed to be valid and to have been properly applied until the contrary is proved.²⁶² The South African Accreditation Authority has already put in place the necessary regulations.²⁶³ Due to lack of a foreign recognition policy, however, it is uncertain whether s13(1) and (4) (read together) will apply to international signatures not accredited by the South African Accreditation Authority.²⁶⁴

Section 13(2) of the ECTA provides that 'an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.'²⁶⁵ The inference that

²⁵⁸ See Van der Merwe et al (n74) 169 noting that although a handwritten signature may be digitised and attached to an electronic document so as to fulfil a statutory requirement this procedure is open to abuse.

²⁵⁹ As noted in part 5(i) above s 4 of the ECTA contains a list of transactions which are excluded from the application of certain provisions of this Act. These include transactions involving real property. However, efforts are currently under way in South Africa to enable such transactions to be concluded electronically.

²⁶⁰ See s 13(3) of the ECTA.

²⁶¹ Section 37 of the ECTA deals with accreditation services provided by an accreditation authority.

²⁶² See s 13(4) of the ECTA. The criteria for accreditation of authentication products and services are provided under section 38 of the ECTA.

²⁶³ See Accreditation Regulations of 2007 (GG 29995 of June 2007 (Reg. Gaz.8701) (available at <http://www.info.gov.za/view/DownloadFileAction?id=72249> (as accessed on 19/10/2010)).

²⁶⁴ See the SALRC Issue Paper No 27 (n78) 39. More information about accreditation and the current status can be obtained from <http://www.saaa.gov.za/> (as accessed on 20/10/2010).

²⁶⁵ If compared to the provisions of the UNCITRAL Model Law on E-commerce, section 13 is similar to Art 7(1), (2) and (3) of that Model Law. For more about this Article of the Model Law see the previous discussion in

may be drawn from the wording of this subsection is that it does not preclude signatures that are not advanced e-signatures, if used by parties to an agreement.

Section 13(3) of the ECTA provides for situations where parties intend to rely on e-signatures but fail to agree which type of e-signature should be used. In such cases the requirement for e-signature will be met, in relation to a data message, if two things are satisfied, namely: (i) the parties have used a method that can identify them and which indicate their approval of the information communicated, and (ii), having regard to all the relevant circumstances at the time the method was used, the method used was reliable and appropriate for the purposes for which the information was communicated.²⁶⁶ What may further be deduced from s 13(3) of the ECTA is that where, for instance, a party to an e-contract, such as a click-wrap, clicks the consent button on the computer screen, such conduct, if all other circumstances are taken into account, suffices to establish that he intended to be bound.

One of the questions on which the South African Law Reform Commission (SALRC) has recently invited comments from the public is whether the distinction between electronic signature and advanced electronic signatures (as envisaged in ss 1 and 13 of the ECTA) should be abolished.²⁶⁷ This issue is debatable. It may, for instance, be argued that, in the light of s 13(2), there is no reason why the Act should maintain two distinct definitions, and doing so may lead to confusion. Indeed, the essence of enacting the ECTA was to clear doubts or uncertainties so as to facilitate electronic transactions, and that spirit should be maintained.

While such arguments are meritorious one should not, however, lose sight of the meaning of and rationale for an advanced signature. As the foregoing discussion reveals, 'in order to distinguish between signatures which a statute requires, where such signature is to be appended electronically, the [ECTA] created the concept of an "advanced" electronic

chapter five of this thesis. See also Art 9 (3) of the United Nations Convention on the use of Electronic Communications in International Contracts.

²⁶⁶ Section 13(3) provides as follows: '[w]here an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

²⁶⁷ See the SALRC Issue Paper No 27 (n78) 39.

signature.²⁶⁸ What the Act envisages in this regard is the inadequacy of ordinary e-signatures (for instance, scanning a handwritten signature and appending it to a document, which is provided for under s 13(2) of the ECTA) where a statute requires signature of the parties to an agreement. Consequently, the distinction between electronic signature and advanced electronic signature is necessary. In addition, the scope of what constitutes advanced electronic signatures should be extended to include use of biometrics (such as physiological features) for the purpose of consent and electronic identity.²⁶⁹

(c)Notarisation, Acknowledgement and Certification

Closely connected to the foregoing discussion is the question of notarisation, acknowledgement and certification. According to ss 17 and 18 of the ECTA, when the law demands these formalities they may be satisfied electronically by data message. This possibility, however, is subject to certain conditions.²⁷⁰ Section 17 reiterates the need to ensure integrity of the information produced, which includes assessing the reliability of how and when it was produced, sent, or stored.

The requirements of notarisation, certification or acknowledgement can be met by a data message with an attached advanced electronic signature of the person authorised to perform such acts.²⁷¹ Section 19 also provides that ‘a requirement in law for multiple copies

²⁶⁸ See L Michalson ‘Advanced Electronic Signatures 1.01’ (at 1) (available at <http://www.irmsa.org.za/library/iforest/Michalsons%20Infosheet%20-%20Advanced%20Electronic%20Signatures%201.01.pdf> (as accessed on 24/2/2011)).

²⁶⁹ However, see the ethical, social and legal issues associated with biometric technologies and the collection, use and storage of biometric information as discussed by the Irish Council for Bioethics in *Biometrics: Enhancing Security or Invading Privacy? Opinion* The Irish Council for Bioethics, Dublin (2009) (available at http://www.bioethics.ie/uploads/docs/Final_Biometrics_Doc_HighRes.pdf (as accessed on 21/10/2010)). See also D Brown & M Isakovic ‘Security and Privacy Laws: Striking The Balance’ Report on a Seminar Sponsored by the Commonwealth Centre For Electronic Governance and a Roundtable Lunch Hosted by the Public Policy Forum, October 20 & 21, 2003 – Ottawa, Ontario Canada (available at http://www.ppforum.ca/sites/default/files/sp_law_outcomes_report.pdf (as accessed on 21/10/2010)).

²⁷⁰ See s 17 of the ECTA (as read with s 28). Section 28 provides that ‘(1) [i]n any case... a public body ... may specify by notice in the *Gazette* (a) the manner and format in which the data messages must be filed, created, retained or issued;(b) in cases where the data message has to be signed, the type of electronic signature required;(c) the manner and format in which such electronic signature must be attached to, incorporated in or otherwise associated with the data message;(d) the identity of or criteria that must be met by any authentication service provider used by the person filing the data message or that such authentication service provider must be a preferred authentication service provider;(e) the appropriate control processes and procedures to ensure adequate integrity, security and confidentiality of data messages or payments; and (f) any other requirements for data messages or payments.’

²⁷¹ See s 18 of the ECTA.

of a document to be submitted to a single addressee at the same time is satisfied by the submission of a single data message that is capable of being reproduced by that addressee.²⁷²

6. Proof of an E-contract: Authentication, Attribution and Other Evidentiary Requirements

(a) Authentication and Message Attribution

As discussed in chapter two, a party's signature in a particular transaction may be sufficient proof that he or she approved the particular transaction to be carried out. As a method of authentication, a signature identifies a party with the transaction or serves to attribute it to him or her. One of the problems mentioned earlier,²⁷³ which the ECTA has fully addressed, is attribution of an electronic message to the person who purports to have sent it.²⁷⁴ In an electronic environment both consumers and businesses want to know whether they can rely on the fact that a message was actually sent by the purported sender and whether they can avoid liability in the event that a message allegedly sent by one party was actually sent by an impostor or a hacker.²⁷⁵

Attribution addresses the question whether a data message was really sent by the person who is indicated as being its originator.²⁷⁶ This is particularly important given the vulnerable nature of the online environment. For instance, a hacker may impersonate someone and conclude an online contract in the name of that person (to the latter's detriment).

²⁷² Section 19 further provides that:

'(3) [w]here a seal is required by law to be affixed to a document and such law does not prescribe the method or form by which such document may be sealed by electronic means, that requirement is met if the document indicates that it is required to be under seal and it includes the advanced electronic signature of the person by whom it is required to be sealed.

(4) Where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said Post Office and sent by that Post Office to the electronic address provided by the sender.'

²⁷³For more about this problem see C Pacini, C Andrews & W Hillison 'To agree or not to agree: Legal issues in online contracting.' *Business Horizons* (2002) 43.

²⁷⁴Section 25(c) provides that a data message is that of the originator if it was sent by an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming. This section echoes Art 13(2)(b) of the UNCITRAL Model Law on E-commerce which deals with attribution of data messages.

²⁷⁵See Pacini et al (n273) 47.

²⁷⁶ See T Pistorius 'Nobody Knows You're a Dog: Attribution of Data Messages' (2002) 14 *South African Mercantile Law Journal* 737, 739.

In order to solve this problem, Art 13 of the Model Law provides model rules.²⁷⁷ The ECTA followed this model, and s 25(a), (b) and (c) of the Act provides for the attribution of electronic communications.²⁷⁸ It presumes that a data message will be attributed to its originator if it was sent by the originator personally or by a person who had authority to act on behalf of the originator. It will, however, be a technical question of establishing that the denying party was indeed the originator of the data message. Section 25(b) will clearly support a finding that a party was the originator of a message if it was sent by another person on behalf of the originator. (Whether the sender was authorised or not is an issue outside the scope of s 25(b), and must be considered under the rules governing agency).

Attribution of online transactions as originating from a party to a contract also applies where an e-agent has been employed by a party. Problems relating to the use of e-agents were discussed earlier (and will further be discussed below in relation to mistakes or input errors during the contracting process). It suffices here to state that, regarding the use of e-agents, according to s 25(c) of the ECTA (which echoes Art 13(2)(b) of the Model Law on

²⁷⁷ Article 13 of the Model Law provides that:

‘(1) [a] data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

(a) by a person who had the authority to act on behalf of the originator in respect of that data message; or
(b) by an information system programmed by, or on behalf of, the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) does not apply:

(a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or
(b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.

(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.’

²⁷⁸ Section 25 provides that ‘[a] data message is that of the originator if it was sent by (a) the originator personally; (b) a person who had authority to act on behalf of the originator in respect of that data message; or (c) an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.’ For a detailed discussion on this section see Pistorius (n276) 746-747.

E-commerce) all transactions emanating from such e-agents will be attributed to their programmers.²⁷⁹

It is important to note that, although s 25 of the ECTA is based on Art 13 of the Model Law, the section did not adopt Art 13 in its entirety. Rather, the drafters of s 25 were selective and adopted three paragraphs only, ie, Art 13(1) and (2)(a) and (b) of the Model Law. Consequently, the scope within which an e-contracting party may attribute data messages to his counterpart under the ECTA is limited. For instance, Art 13(3) of the Model Law recognises that in certain instances parties may have agreed to adopt an attribution procedure to verify the person from whom an electronic message originates.²⁸⁰ This does not appear in the ECTA. Under such a rule if a technical analysis is made to that agreed attribution procedure, and if it is verified that the other party was indeed the author of the disputed data messages, it will be presumed to be so, and the disputed message will be attributable to him or her.²⁸¹ The presumption held under Art 13 of the Model Law (as it should also be under s 25 of the ECTA) is rebuttable. Overall, however, the Model Law's broad approach to attribution of data messages is more preferable than what the ECTA provides. The ECTA may therefore need to be reviewed to incorporate those parts of Art 13 of the Model Law that were excluded by the South African drafters.

(b) Other Evidentiary Requirements

(i) Satisfying the Requirement for 'Original' Document

The legal requirement that a document be in 'writing' (as discussed above) is also closely related to the requirement for 'signature' and an 'original' document. The ECTA has provided in s 14 how the requirement for an 'original' document can be satisfied electronically. The rule in South Africa is that evidence intended to prove the content of a document must be the original document itself.²⁸²

Section 14 of the ECTA, however, has made it possible, with certain provisos, for such a requirement to be met electronically. First the information must maintain its integrity

²⁷⁹ See Kilian (n99) 187.

²⁸⁰ Take, for instance, the use of encryption key technology such as public-key encryption.

²⁸¹ See para 86 of the Guide to UNCITRAL Model Law on E-commerce (n1).

²⁸² See *Barclays Western Bank Ltd v Creser* 1982 (2) SA 104 (T) AT 106. See also Hofman (n54) 683. A similar rule also applies in Tanzania according to s 64(1) of the Law of Evidence Act, originally Act No.6 of 1967 (Cap.6 [R.E 2002]).

throughout. In this regard it must pass an integrity test, which, according to s 14(2), involves assessment of whether such information has remained in its complete and unaltered form. This test includes establishing whether the information has retained the purpose for which it was generated, and whether, having regard to all other relevant circumstances, one could consider it creditable. Secondly, the requirement will be met electronically if ‘that information is capable of being displayed or produced to the person to whom it is to be presented.’²⁸³

Section 14 of the ECTA echoes what the Model Law provides in Art 8(1) and (3).²⁸⁴ The concept of ‘original’ was carefully considered during the drafting of the Law, and, since s 14 of the ECTA drew from it, the explanatory notes to the Model Law are of assistance when interpreting this section.²⁸⁵ The drafters of the Model Law felt that, if the concept of ‘original’ was to be defined to mean ‘a medium on which information was fixed for the first time’, it would be impossible to speak of ‘original’ data messages, because an addressee of a data message receives a copy thereof.²⁸⁶

The basic issues that need to be emphasised, however, include the importance of the integrity of the information for its originality and the criteria set out to verify such integrity ‘by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration.’²⁸⁷ Consequently, similar arguments may be made in respect of s 14 of the ECTA, ie, that the section links the concept of originality to a method of authentication, and that its focus is on the method of authentication to meet its requirements.

²⁸³ See s 14(1)(b) of the ECTA.

²⁸⁴ Article 8 of the Model Law provides as follows:

‘(1) [w]here the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

- (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and
- (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2)...

(3) For the purposes of subparagraph (a) of paragraph (1):

- (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and
- (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.’

²⁸⁵ See *Jafta v Ezemvelo KZN Wildlife* (n71) para 1. See also paragraphs 62-69 of the Guide to the enactment of the Model Law (n1).

²⁸⁶ See paras 62 and 64 of the Guide to the enactment of the Model Law (n1).

²⁸⁷ See para 65 of the Guide to the enactment of the Model Law (n1).

(ii) Admissibility of Data Messages

Before the enactment of the ECTA, admissibility of computer related evidence was governed by the Computer Evidence Act (now repealed),²⁸⁸ the Civil Proceedings Evidence Act²⁸⁹ and the Criminal Procedure Act.²⁹⁰ The enactment of the Computer Evidence Act was in response to the decision in *Norlis v South African Bank of Athens*²⁹¹ where a computerised bank statement was held inadmissible, in terms of s 34(2) and (4) of the Civil Proceedings Evidence Act, as it was not a 'statement made by a person in a document' according to s 34(1) of that Act.²⁹² In *Ex parte Rosche*,²⁹³ however, the court was of the view that the law did not require that everything retrieved from a computer should be used only after satisfying the requirements laid down by the Computer Evidence Act.²⁹⁴ In view of this case it was evident that there were still lacunae in the law that needed to be filled.²⁹⁵ The ECTA was therefore enacted to, *inter alia*, deal with this gap.²⁹⁶

²⁸⁸ See Act 57 of 1983, (repealed by section 92 of the ECTA).

²⁸⁹ Act 25 of 1965.

²⁹⁰ Act 51 of 1977.

²⁹¹ *Norlis v South African Bank of Athens* 1976 (2) SA 573 (A). See also See SALRC Paper No.27 (n78) 41; D van der Merwe 'The Law of ICT Evidence' in D van der Merwe et al *Information and Communications Technology Law* (2008) 107.

²⁹² The Computer Evidence Act, which was passed to rectify the mischief, was itself problematic for being encumbered with many technical requirements, and also for being limited in its scope to civil proceedings only. Section 3(1) of this Act provided that an 'authenticated computer-print-out [was] admissible on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible.' It also required that 'the deponent to the authenticating affidavit had to be a person qualified to depose thereto in two respects (s 2(3)). First, by reason of his knowledge and experience of computers and the particular system in question; and, second, in respect of his examination of all relevant records and facts concerning the operation of the computer and the data and instructions supplied to it. The records and facts had to be verified by him if he had control of or access to them in the ordinary course of his business, employment, duties or activities (s 2(4)(a)). If not, then a supplementary affidavit was required from a person who had control of or access to them (s 2(4)(b)). Records and facts were sufficiently verified if the deponent stated that, to the best of his knowledge and belief, they comprised all the relevant records and facts.' For more discussion see SALRC Paper No.27 (n78) 19, 41. See also SALRC Working Paper 60, Project 95 presented to the Minister of Justice in June 1982; P J Schwikkard 'Documentary Evidence' in P J Schwikkard & S E van der Merwe *Principles of Evidence* 3ed (2009) 412; Van der Merwe (n291) 107-108.

²⁹³ See *Ex parte Rosche* [1998] 1 All SA 319 (W).

²⁹⁴ *Ibid* at 328. In this case the requirements laid down by the Act were not met but the court admitted computer printouts generated automatically as real evidence, because their information did not result from human input. See also other cases regarding electronic evidence in criminal cases: *S v Harper* (1981) SA 88 (D) (in which the court hold that a print out was a 'document' in terms of section 221(5) of the Criminal Procedure Act, Act 51 of 1977) but declined to hold the definition also covers a computer; *S v De Villiers* 1993 (1) SACR 574 (Nm) concerning whether computer print-outs of bank statements were admissible under s.221 of the CPA, 1977. See also *S v Mashiyi & another* 2002 (2) SACR 387, (Tk) 390 where printouts 'obtained after sorting, re-arrangements, synthesis and calculation by a computer' were held inadmissible. *S v Howard* (Unreported case No. case no.41/258/02, Johannesburg regional magistrates' court); *S v Ndiki* [2007] 2All SA 185 (Ck); *Ndlovu v The Minister of Correctional Services & another* (n71) 165.

²⁹⁵ See *S v Mashiyi & another* (n294) at 392.

²⁹⁶ See P J Schwikkard (n292) 401.

Although the ECTA has moved beyond ‘computer printouts’ to embrace ‘data messages’²⁹⁷ has it succeeded in resolving the evidentiary problems?²⁹⁸ The key issue is whether its definition of a ‘data message’ includes ‘real’ evidence as well as ‘hearsay’ evidence.²⁹⁹

Section 15 of the ECTA (which is based on Art 9 of the Model Law) deals with the admissibility and evidential weight of data messages. According to s 15(1)(a) and (b) of the ECTA, unless other grounds permit, all data held in electronic form will be legally admissible in evidence and, in any judicial proceeding, such data should not be denied admissibility under any rule of evidence merely because of their form.³⁰⁰ This provision is important in both criminal and civil proceedings. For instance, where a dispute over unfair termination of an employee’s contract of employment by an employer occurs, and a need arises to bring into evidence archived e-mails to prove that there was victimisation or harassment of the employee by the employer, then such e-mails will be given the weight they deserve.

The admissibility rule under s 15 of the ECTA is also significant in the light of the traditional common law best evidence rule. Under this rule, the best evidence is the original document itself. So, if a party wished to rely on a document, he had to bring the document in its original form. This rule was seen as a stumbling block to e-commerce and needed to be re-evaluated to take into account modern exigencies. Under the current position, therefore, much as the best evidence rule will still apply to other conventional practices, its application in the electronic environment has to take into account the character of e-documents, ie, by accepting that they are in the form of data messages.³⁰¹

²⁹⁷ Ibid at 414.

²⁹⁸ See SALRC Paper No.27 (n78) 27.

²⁹⁹ Ibid.

³⁰⁰ See s 15(1)(a) and (b) of the ECTA. This section is based on Art 9 of the UNCITRAL Model Law. Section 15(4), however, does not have a counterpart in the Model Law. See Hofman (n54) 681-682, noting that s 15(1)(a) assumes that data message may be denied admissibility on other grounds. Reasons assigned to this include the fact that the ECTA was not meant to reform the law of evidence but to facilitate e-commerce by creating functional equivalence to paper based documents. Since not all paper-based documents are admissible the same should apply to data message where appropriate. See also the commentary on Art 5 of the Model Law in para 46 of the Guide to the UNCITRAL’s Model Law on E-commerce. See also *Ndlovu v The Minister of Correctional Services & another* (n71).

³⁰¹ See s 15(1)(a) and (b) provide that ‘[i]n any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence (a) on the mere grounds that it is constituted by a data message; or (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.’

The scope and meaning of s 15 of the ECTA, however, remains uncertain.³⁰² Consequently, questions have been raised as to ‘whether many of technology related evidentiary issues can be resolved or sufficiently dealt with under the existing rules and procedures.’³⁰³ This is further complicated by the fact that Art 9 of the Model Law, which forms the basis of s15 of the ECTA, was not intended for non-commercial matters.³⁰⁴ While chapter 3 of the ECTA does not have a statement to that effect, it has been argued that excluding non-commercial matters from its application will create lacunae in the South African law of evidence and will go against its objectives.³⁰⁵

Previously, scholars were divided as to whether the ECTA makes all data messages admissible (including that which would ordinarily be regarded as hearsay).³⁰⁶ The Act (and the Model Law) defines ‘data’ to mean ‘electronic representations of information in any form’ while a ‘data message means data generated, sent, received or stored by electronic means.’ Hofman argued that the definition relates to form and not content.³⁰⁷

³⁰² See SALRC Paper No.27 (n78) 41. See also Schwikkard (n292) 414.

³⁰³ See SALRC Paper No.27 (n78) 5.

³⁰⁴ See Hofman (n54) 680. Hofman has argued ‘that the problem with section 15 of ECTA is that it represents an approach to the law of evidence that does not fit well with South African law....’ See Hofman (n54) 677.

³⁰⁵ See Hofman (n54) 680. He thus suggests that court should strive to interpret the ECTA in a way that it conforms with the Model Law and the Guide, specifically ensuring that the law governing electronic evidence is functional equivalent to the law governing other forms of evidence.

³⁰⁶ For instance, an earlier edition of P J Schwikkard & S E van der Merwe had suggested that courts have little discretion when it comes to admissibility of data messages, and that they should merely exercise discretion on the weight to be attached to such evidence. It was argued, in that edition, that section 1 of the ECTA is wide enough to include hearsay evidence. (See P J Schwikkard & S E van der Merwe (eds) *Principles of Evidence* 2ed (2002) 385). In their next edition, however, P J Schwikkard & S E van der Merwe (See (n292) 414-415)) admit that although the previous argument was appealing it was unlikely that courts would follow it. (Indeed, in *Ndlovu v The Minister of Correctional Services & another* (n71) the court considered this to be a too stretched view. See also D P van der Merwe, B C Naudé, K Moodley, S S Terblanche *The Law of Evidence: Cases and Statutes* (2009) 233). Hofman had criticised the earlier position held by P J Schwikkard & S E van der Merwe considering it erroneous in view of the present South African law of evidence. He noted that arguing that way would, first contravene the functional equivalence principle (as not all documents are admissible); second, it would contravene the objectives of the ECTA, ie, seeking to regulate e-commerce and not reform the law of evidence; and third, ‘it would attribute to Parliament the intention to use detail buried in the ECT Act to bypass the wider debate concerning admissibility of documentary evidence.’ (See Hofman (n54) 681-682. See also Van der Merwe (n291) 124-125 in support of Hofman’s views.) Hofman maintains that in any case, arguing that the definition of data message in section 1 of the ECTA is wide enough to include all data messages (including even those which would constitute hearsay evidence) amounts to confusing form with content. (See Hofman (n54) 684. See also Van der Merwe (n291) 125).

³⁰⁷ See Hofman (n54) 684. For instance, Hofman states that the definition ‘does not refer to the content of the message which might, for example, be a contract, a defamatory statement or an assignment of copyright. The law exclude a document as hearsay because of doubts about the reliability of its content, not because of doubts about the reliability of the technology used to record that content.’ In *Sublime Technologies v Jonker and Another* 2010 (2) SA 522 (SCA) it was stated (para 14) that ‘[d]ata message’, as defined in s 1 of ECTA, means ‘data generated, sent, received or stored by electronic means and includes . . . a stored record’ [and] these provisions are wide enough to include copies of bank statements.’

Hofman had suggested that if a data message is used merely to establish that information was sent or received, it is not excluded in evidence.³⁰⁸ If such a data message is being used to show the truth of its content, however, unless a person responsible for it appears before the court for cross-examination, then it will remain hearsay (unless it falls under the exceptions to the hearsay rule).³⁰⁹ He thus concluded that ‘except where the ECT Act changes it, the ordinary South African law on admissibility of evidence applies to data message.’³¹⁰

Hofman’s suggestion has found support in *Ndlovu v The Minister of Correctional Services & another*.³¹¹ In this case, the court was of the view that, ‘there is no reason to suppose that s 15 seeks to override the normal rules applying to hearsay.’³¹² In this case the court (in an obiter dictum) identified two types of evidence: ‘real’ computer evidence and ‘hearsay’ computer evidence.³¹³ Similarly, in *S v Ndiki*³¹⁴ the court stated that:

computer evidence which falls within the definition of hearsay evidence in s 3 thereof may become admissible in terms of the provisions of that Act. Evidence, on the other hand, that depends solely on the reliability and accuracy of the computer itself and its operating systems or programs, constitutes real evidence. What s 15 of the Act does, is to treat a data message in the same way as real evidence at common law. It is admissible as evidence in terms of ss (2) and the court’s discretion simply relates to an assessment of the evidential weight to be given thereto (ss (3)). The ECT Act 25 of 2002 is therefore inclusionary as opposed to exclusionary.³¹⁵

These two decisions and the spirit of the Model Law on E-commerce convincingly establish that s 15 of the ECTA does not regard all data messages as admissible and, for that reason,

³⁰⁸ See Hofman (n54) 684.

³⁰⁹ Ibid.

³¹⁰ Ibid, at 682. This view has been supported in *D P van der Merwe et al* (n306) 234. See also *Van der Merwe* (n292) 125.

³¹¹ *Ndlovu v The Minister of Correctional Services & another* (n71).

³¹² Ibid at 173.

³¹³ Ibid. The court stated as follows: ‘[w]here the probative value of the information in a data message depends upon the credibility of a (natural) person other than the person giving evidence, there is no reason to suppose that section 15 seeks to override the normal rules applying to hearsay evidence. On the other hand, where the probative value of the evidence depends upon the “credibility” of the computer (because information was processed by the computer), section 3 of the Law of Evidence Amendment Act 45 of 1988 will not apply, and there is every reason *to suppose* that section 15(1), read with sections 15(2) and (3), intend for such “hearsay” to be admitted, and due evidential weight to be given thereto according to an assessment having regard to certain factors.’

³¹⁴ *S v Ndiki* (n294) 252.

³¹⁵ Ibid. The rule against hearsay evidence is also recognised in Tanzania. See s 62 and the exceptions to hearsay rule in s 34 of the Tanzanian Law of Evidence Act, originally Act No.6 of 1967, (Cap.6 [R.E 2002]).

they may be denied admissibility as hearsay evidence unless they fall under the exceptions to the hearsay rule.³¹⁶

In order to do away with the need to distinguish between what would amount to real evidence and what would constitute hearsay, as regards electronic records, the court in *S v Ndiki* suggested that the meaning of hearsay should be extended to include evidence that depends upon the accuracy of the machine.³¹⁷ Schwikkard considers, however, that doing so would be reverting 'to the exclusionary approach as *all* computer evidence would then be treated as hearsay.'³¹⁸

It is clear, however, that not all computer records or data messages constitute hearsay.³¹⁹ On the one hand, a computer record will constitute hearsay if it is computer-stored information based on human-generated content (for instance, an e-mail, word-processed document or spreadsheets) unless the person who generated the content testifies or unless it falls under the general exceptions to the hearsay rule.³²⁰ On the other hand, it will not constitute hearsay if such computer output was generated without human intervention.³²¹ If the probative value of a statement in the print-out is dependent upon the 'credibility' of the computer itself that is a different issue, for which the court will have to exercise its own discretion. Consequently, one should consider the facts of a particular case to categorise the particular type of evidence.³²² In view of that there is no need to amend the law as suggested in *S v Ndiki*.³²³

Overall, it is important to note that issues regarding admissibility of electronic evidence are becoming more complex and controversial since technology is not static but constantly changing.³²⁴ Because these rapid changes lead to new forms of electronic

³¹⁶ See Hofman (n54) 682, 683-684. See also Van der Merwe et al (n306) 234.

³¹⁷ See *S v Ndiki* (n294) para 33.

³¹⁸ See Schwikkard (n292) 416.

³¹⁹ See Hofman (n54) 684.

³²⁰ See M Watney 'Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position' (2009) 1 *Journal of Information, Law & Technology (JILT)* (available at http://go.warwick.ac.uk/jilt/2009_1/watney (as accessed on 21/10/2010)) 9, citing *S v Ndiki* (n294) 31.

³²¹ *Ibid.* Such a legal position can also be found in other jurisdictions such as the USA. See, for instance, H M Jarret & M W Bailie 'Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations' Computer Crime and Intellectual Property Section, Criminal Division, United States Department of Justice, at 192 (available at <http://www.cybercrime.gov/ssmanual/ssmanual2009.pdf> (as accessed on 24/2/2011)).

³²² See Watney (n320) 4.

³²³ (n294).

³²⁴ See S Mason & B Schafer 'The Characteristics of Electronic Evidence in Digital Format' in S Mason (ed) *Electronic Evidence* 2ed (2010) 21. See also the SALRC Paper No.27 (n78) 7.

evidence,³²⁵ there is a growing trend towards a shift from questions regarding admissibility and exclusion to more technical concerns about authenticity and the suitable weight to accord to such evidence.³²⁶ The current shift is justified, given that electronic evidence is intangible or transient in nature, easy to manipulate, fragile, and is highly susceptible to error, accidental alterations or fabrications in the course of its collection or compilation for judicial use.³²⁷ This means that there is a need for additional safeguards, including procedures governing the collection, storage and presentation of such evidence for purposes of judicial proceedings.³²⁸ It has been argued, however, that lack of such procedures in South Africa further compounds the current evidential problems, hence bringing to the forefront the questions regarding the accuracy or authenticity, and hence reliability, of such evidence.³²⁹

In its Issue Paper No.27, the SALRC raised some questions about assessing the evidential weight of a data message.³³⁰ One is whether it is necessary to review the principle of authentication, ‘in view of the nature and characteristics of electronic evidence that raise legitimate concerns about accuracy and authenticity’, and ‘given the fragmented nature of case law focusing on authentication of specific types of evidence.’³³¹ Additionally, ‘while section 15(3) provides guidelines for assessing the evidential weight of data messages, should courts apply a higher admissibility hurdle in the context of authentication (as an aspect of relevance) for electronic evidence than for other forms of tangible evidence?’³³²

As stated earlier in this chapter, the rule is that whoever wants to rely on a document in his favour must establish its authenticity.³³³ This rule applies to all documents in all forms. In order to avoid discriminating against forms of evidence, and in line with the principle of functional equivalence, there seems to be no reason why the rule on authentication should be

³²⁵ See the SALRC Paper No.27 (n78) 8, 10. The current changes make some technologies obsolete and data associated with them becomes unable to be read due to media incompatibility.

³²⁶ See Mason & Schafer (n324) 7. See also the SALRC Paper No.27 (n78) 7.

³²⁷ See The SALRC Paper No.27 (n78) 9. See also D Collier ‘Evidently Not So Simple’ (2005) 13 *JUTA’s Business Law* 6; P Sommer ‘Downloads, Logs and Captures: Evidence from Cyberspace’ (available at <http://www.pmsommer.com/dload01.pdf> (as accessed on 22/10/2010) (see page 5).

³²⁸ See, for instance, ‘*The Association of Chief Police Officers’ (ACPO) Good Practice Guide for Computer-Based Electronic Evidence*’ (available at http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf (as accessed on 4/6/2011). See also J Ashcroft *Electronic Crime Scene Investigation: A Guide for First Responders* U.S. Department of Justice Office of Justice Programs New York (2001) (available at <http://www.ncjrs.gov/pdffiles1/nij/187736.pdf> (as accessed on 23/4/2011).

³²⁹ See Watney (n320) 12.

³³⁰ See the SALRC Paper No.27 (n78) 44.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ See Hofman (n54) 683.

stricter in respect of electronic documents.³³⁴ If a court is satisfied that the document is authentic, it may only take judicial notice of the fact that it is an electronic document (which, as stated above, is ordinarily vulnerable to possible dangers of manipulations), and, with the help of expert opinion, proceed on the basis of s 15(3) of the ECTA to determine the weight to be attached to it. It must continuously be borne in mind that the essence of the ECTA is to facilitate e-commerce.

Concerning data messages produced ‘in the ordinary course of business,’ s 15(4) of the ECTA provides that such data message will be admissible in evidence.³³⁵ Hofman has stated, however, that despite s 15(4) it is clear that the ECTA does not contain a general exemption for data messages.³³⁶ This provision has been held to depart from the Model Law’s approach, as it goes against the functional equivalence principle.³³⁷ It has also been considered problematic given ‘the sheer scope of data messages made in the ordinary course of business that may now constitute rebuttable proof on mere production.’³³⁸ It is thus suggested that it should be given a restrictive interpretation.³³⁹ Indeed, in *Golden Fried Chicken (Pty) Ltd v Yum Restaurants International (Pty) Ltd*,³⁴⁰ it was held that unless a print out of a data message fulfils the requirements of s 15(4) its mere production as evidence is inadmissible and does not constitute *prima facie* evidence.³⁴¹

³³⁴ See Watney (n320) 11 stating that ‘no special rules of evidence should govern the admissibility of information in electronic format’ since doing so ‘will be discriminating against those transacting electronically or give them unfair advantage.’

³³⁵ See *Van Staden No & Another v Firstrand Ltd & Another* 2008 (3) SA 530 (T), at 532-533. In this case a witness’s testimony borne out by a certificate in terms of s 15(4) of the ECTA was accepted in court.

³³⁶ *Ibid.* There are other documents, such as public documents, which do not need to be authenticated. What they usually need is signature or an official seal. Even so, ss 18 and 19(3) of the ECTA provides for electronic notarisation, certification and sealing of data messages. Thus a data message which does not fall under these special provisions will need to be authenticated by a person responsible for it.

³³⁷ See Hofman (n54) at 688.

³³⁸ See The SALRC Paper No.27 (n78) 9. See also the judgment of the full bench of the South Gauteng High Court in *LA Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd* (Case NoA5014/08, 17 August 2009 (unreported) paragraphs 12–13.

³³⁹ See Hofman (n54) 689.

³⁴⁰ 2005 BIP 269 (T).

³⁴¹ *Ibid.*, at 272. See also *Sublime Technologies v Jonker and Another* (n307) 527-528 where attempts by a counsel for the appellant to circumvent s 30(1) of the Civil Proceedings Evidence Act 25 of 1965 which requires a ten days notice to adduce evidence of accounting records of a bank by relying on section 15(4) of the ECTA failed.

(iii) Electronic Data Retention

In many jurisdictions, including South Africa, there are legal requirements that certain information should be retained for a specific period of time before discarding it.³⁴² Record retention requirements of that sort may apply to both the public and private sector, and in some instances retained data may be called upon to support a party's allegation or denial in court proceedings. Whereas data retention is important for several business reasons, (for instance, for accounting or tax purposes), retention of business records may not only consume a company's resources, time of trying to retrieve such information when needed and storage space (where piles of paper files are to be kept and which space could have been utilised more productively) it can also be a hindrance to modern trading practices. With the current advancements in technology, however, retention cost, space and time to retrieve previous record when needed can be greatly reduced through electronic archiving of important business records that are legally required to be retained for a specified period of time.

Section 15 of the ECTA bears a relationship to s 16 of the Act regarding electronic data retention. In order to ensure that records retained in electronic data form are accorded legal recognition, validity and treatment in a similar way as those records retained or stored in the conventional way, s 16 of the ECTA recognises and validates electronically retained data. Whereas the law permits change of format of the stored information from the one in which it would have originally appeared, the law does not allow alterations which will distort the accuracy of the particular information. Thus, s 16(b) provides that data message must either be stored in a format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received.

It may however be problematic to satisfy the above requirement if data have been stored for a long time and if by the time they are needed, the technology used to keep them has become obsolete or incompatible with what might be available. As stated earlier, technology is constantly changing and older technologies, for instance, removable data storage media such as diskettes have been rendered obsolete. Business entities will thus have to ensure that data are properly kept and accurately transferred in a compatible format whenever the need to do so arises. Ensuring compatibility is important due to possible data migration problems. Section 16(c) adds a further requirement to the effect that retention of

³⁴²See for instance, section 50 of South Africa's Promotion of Access to Information Act, Act 2 of 2000.

information will be legally achieved if the origin and destination of such information, its date and the time when it was sent or received can be determined.

7. Online Mistakes or Errors Occasioned by E-agents

Online mistakes or input errors constitute one of the problems in online transactions including those associated with the use of e-agents. As discussed in chapter two, the general principles of contract formation also apply to online mistakes.³⁴³ Mistakes or input errors may be occasioned by either an e-agent or an online buyer (consumer). According to South African law, as discussed earlier, a party who relies on an e-agent to transact on his behalf will be bound by its actions.³⁴⁴

As discussed above,³⁴⁵ s 20(c) of the ECTA has made it clear that ‘a party using an electronic agent to form an agreement is ... presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement.’ The presumption created in s20(c) of the ECTA is, however, rebuttable.

According to s 20(c), when read together with s 25(c) of the ECTA, if the party relying on an e-agent successfully proves that the information system malfunctioned, then he or she will not be bound. Section 25(c) of the ECTA deals with attribution of data messages and provides that:

[a] data message is that of the originator if it was sent by an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.

It is clear that, whereas the common law places the burden of assuming risk caused by a malfunctioning e-agent on the party that installed it, s 25(c) has mitigated the rule.³⁴⁶

³⁴³ See Pistorius (n34) 12. The author notes that in a situation revealing an obvious mistake, courts in other jurisdictions have resorted to the application of the Common Law principles regarding voidable contracts (citing, for instance the Singaporean case of *Chwee Kin Keong v Digilandmall.com Pte Ltd* (n122) 594). She further notes that cases have existed in some other jurisdictions, however, where online merchants were held bound to auto-reply actions (citing, for instance, *Lim v The TV Corporation International* Cal.Ct.App.2002; Case No 9 S289/02, *Contra Corinthan Pharmaceutical System Inc v Lederie Laboratories* 724 F Supp 605 SD Ind (1989)).

³⁴⁴ See Pistorius (n34) 11.

³⁴⁵ See the discussion in part 4(ii) of this chapter.

³⁴⁶ See Pistorius (n34) 12.

Section 20(e) of the ECTA provides a basis upon which an agreement formed between a natural person and another person's e-agent should be evaluated in case of mistakes or errors.³⁴⁷ According to this provision, such agreements will be null and void if, in the course of interactions, the natural person makes a material error and is denied an opportunity to prevent or correct it.³⁴⁸ After having learnt about it, that particular natural person must also have notified the other party of such error as soon as practicable. Moreover, he or she must have taken reasonable steps to conform to the other party's instruction, including the return of any performance received. It has been stated, however, that the protection granted to a natural person who makes an error while interacting with an e-agent, as indicated in s 20(e) of the ECTA, conflicts with s 43(2) of the ECTA, concerning consumer protection. This issue will be further discussed below, since s 43(2) falls under Chapter VII of the ECTA, and supply of goods or services offered on a website under that chapter amounts to electronic transactions, which entitle a consumer the protections offered under that chapter.

The UNCITRAL Model Law and the UN Convention on E-contracts have also addressed the issue regarding errors or mistakes occasioned in an online transaction.³⁴⁹ However, unlike the Model Law, which deals only with errors in the content of the data messages arising from transmission problems,³⁵⁰ Art 14 of the UN Convention on E-contracts is more elaborate on the issues regarding mistakes or input errors occasioned by a natural person interacting with an e-agent.³⁵¹

³⁴⁷ Section 20(e) of the ECTA is based on the Canadian Uniform Electronic Transactions Act (UCITA).

³⁴⁸ The opportunity to 'prevent' an error and the requirement for 'prompt' notification are said to be mirrored on the UETA. See also Pistorius (n34) 13.

³⁴⁹ The Model Law has addressed this issue in Art 13(5). It provides in Art 13(5) that '[w]here a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.' See also paragraph 90 of the Guide to enactment of the Model Law which provides that Art 13(5) is additionally 'intended to deal with errors in the content of the message arising from errors in transmission.' See also Art 14 of the UN Convention on E-contracts.

³⁵⁰ See Art 13(5) of the Model Law (n1).

³⁵¹ Article 14 of the UN Convention on E-contracts provides that :

'(1) [w]here 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:

If s 20(e) of the ECTA is compared to Art 14 of the UN Convention on E-contracts (as discussed below) one will find that, unlike the Convention, the ECTA requires an e-merchant to avail a natural person interacting with an e-agent a mechanism to correct or prevent an error, in the absence of which the contract will be void. For its part, Art 14 of the Convention applies only to errors made on an 'interactive website' and permits withdrawal from the transaction only in respect of a portion of that e-communication (hence the contract is neither void nor voidable).³⁵² In my view, the ECTA provides a better approach.

8. Online Consumer Protection: An Analysis of Chapter VII of the ECTA

This section deals with online consumer protection in the context of the ECTA. It is important to note that a number of statutes dealing with consumer protection have been enacted in South Africa,³⁵³ the most recent one being the Consumer Protection Act.³⁵⁴ Since consumer protection is a wider subject, for the purposes of coherence with the objectives of this thesis, the current discussion is confined only to the rules contained in Chapter VII of the ECTA. Rules contained in this part of the Act are not based on the Model Law. The discussion in this section sets out the reasons for online consumer protection and proceeds to analyse and evaluate how the ECTA protects online consumers in South Africa.

(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.

(2) Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.' For an elaborate discussion of this Article see J D Gregory & J Remsu 'Error in Electronic Communication' in A H Boss & W Kilian *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Source Book* (2008) 198-211.

³⁵² See Pistorius (n34) 12-13. See also P P Polanski 'Convention on E-contracting: The Rise of International Law of Electronic Commerce?' 19 *Bled eConference eValues, Bled Slovenia* (2006) 12 (available at [http://ecom.fov.uni-mb.si/proceedings.nsf/0/48ecfcae60f83bf6c12571800036bae9/\\$FILE/49_Polanski.pdf](http://ecom.fov.uni-mb.si/proceedings.nsf/0/48ecfcae60f83bf6c12571800036bae9/$FILE/49_Polanski.pdf) (as accessed on 22/10/2010)). As noted in Chapter V of this study it is important to bear in mind that the UN Convention does not apply to consumer (B2C) contracts.

³⁵³ See, for instance, the National Credit Act, Act 34 of 2005; the Promotion of Access to Information Act, Act 2 of 2000; the Competition Act, Act 89 of 1998 and the ECTA, 25 of 2002.

³⁵⁴ Act 68 of 2008.

(a) Why is it Necessary to Protect Online Consumers?

In order to attain full realisation of the benefits of e-commerce to the economy, and to consumers generally, a high level of confidence in e-commerce transactions is required.³⁵⁵ Adequate disclosure, assured privacy and security are pivotal issues.³⁵⁶ These essential components in online transactions can be promoted through consumer protection. As indicated in chapters one and two of this thesis, e-commerce offers many benefits to consumers, such as increased ability to make different product choices, an easy access to various markets and convenience, as well as a wide spectrum of choices within which price comparisons can be made before placing orders.³⁵⁷

Despite the above rewards, this mode of conducting business has its dark side.³⁵⁸ First, globalisation, liberalisation of markets and the enhanced power of media through technology convergence has increased the danger of online supply of shoddy, defective and dangerous or substandard goods and services. Second, given that the global nature of internet commerce lacks jurisdictional boundaries and face-to-face interactions, consumers who engage in e-commerce run considerable additional risks. Moreover, it is impossible to expect poor, inexperienced and unsophisticated consumers to be able to fully protect their interests in on-line contracts.

Issues of particular concern range from questions regarding consumer's financial security, data protection, protection from unsolicited information, access to adequate information, and availability of effective and affordable redress mechanisms.³⁵⁹ All these

³⁵⁵ See 'A European Initiative in Electronic Commerce' Communication to the Parliament, the Council, the Economic and Social Committee and the Committee of Regions COM (97)157, para.3 (hereafter the EU's Ecommerce Initiative) available at http://aei.Pitt.edu/5461/01/001338_1.pdf (as accessed on 30/8/2010).

³⁵⁶ See OECD Background Report *Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy* DSTI/CP(2009)20/FINAL Washington DC 8-10 December 2009 (available at <http://www.oecd.org/dataoecd/44/13/44047583.pdf> (as accessed on 22/10/2010) at 6. See further De Villiers (n150) 6.

³⁵⁷ See De Villiers (n150) 7. See also A Horvath & J Villafranco *Consumer Protection Law Development* American Bar Association (ABA) Section of Antitrust Law ABA Publishing USA (2009) 69. Suppliers also have had the advantage of contracting electronically with consumers from different parts of the world.

³⁵⁸ See J Huffmann 'Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops' (Unpublished LLM Dissertation, University of Cape Town 2004) 4.

³⁵⁹ *Ibid.*, at 11-34. For measures taken in other countries see, for instance, The OECD *Policy Guidance on Online Identity Theft* OECD Paris (2008) available at www.oecd.org/dataoecd/49/39/40879136.pdf (as accessed on 20/10/2010); OECD *The economic impact of counterfeiting and piracy*, OECD, Paris, (2007) available at www.oecd.org/dataoecd/13/12/38707619.pdf (as accessed on 20/10/2010); OECD *Recommendation on Electronic Authentication* OECD Paris (2007) available at www.oecd.org/dataoecd/32/45/38921342.pdf (as accessed on 20/10/2010).

have created a need for special attention regarding online consumers hence making protective legal mechanisms, like those contained in the ECTA, necessary.

(b) Analysis of Chapter VII of the ECTA

(i) Who is a Consumer According to ECTA?

The ECTA defines a consumer as ‘any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier.’³⁶⁰ The Act, therefore, limits its definition to only natural persons.³⁶¹ It has been argued, however, that ‘in view of the large number of small businesses trading in the informal sector of South Africa’s economy, courts should not adopt a restrictive meaning when interpreting the word ‘consumer’ for the purpose of chapter VII.’³⁶² It has further been argued that it may also be difficult, on the part of a supplier, to know whether the other party in a consumer contract is indeed a natural person so as to enable the supplier to take necessary steps to comply with the requirements set out in Chapter VII of the ECTA.³⁶³ There is also a concern that ‘trusts’ will be excluded from the definition of a consumer.³⁶⁴

In view of the above definitional limitations, it is submitted that it may be better that courts should ignore the plain words ‘natural person’ as they appear in the Act.³⁶⁵

³⁶⁰See section 1 of the ECTA. The Consumer Protection Act, 2008 broadly defines the concept of a ‘consumer’ to mean ‘in respect of any particular goods or services—(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3); (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).’ In terms of section 5(2)(b), the Act does not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction equals or exceeds the threshold value determined by the Minister in terms of section 6. Currently a Government Notice has been published setting the monetary threshold applicable to the size of the juristic person for the purposes of the s 5(2)(b) to be R2 million. (See Government Notice 294 regarding the Consumer Protection Act (68/2008): Determination of threshold in terms of the Act, Government Gazette Vol. 550 No 34181 of 1/4/2011) available at http://www.dti.gov.za/ccrd/notice_threshold.pdf (as accessed on 3/4/2011). The Government Notice sets out a procedure on how this monetary threshold should be determined.

³⁶¹ See De Villiers (n150) 44-48, on requirements that qualify one as a consumer under the ECTA definition and pointing also to the fact that the Latin Maxim *inclusio unius est exclusio alterius* is the guiding principle in interpreting this section.

³⁶² See Huffmann (n358) 4.

³⁶³ See R Buys ‘Online Consumer Protection and Spam’ in R Buys & F Cronjé (eds) *Cyberlaw @ SA II: the Law of Internet in South Africa* (2004) 142.

³⁶⁴ Ibid. See also Eiselen (n17) 182 considering the position of trusts in the context of this definition of a consumer in the ECTA problematic. See further De Villiers (n150) 45.

³⁶⁵ See Huffmann (n358) 4.

Alternatively, the scope of the ECTA definition of a ‘consumer’ should be reviewed to include small, medium and micro enterprises (hereafter ‘SMMEs’).³⁶⁶ This is especially so considering that many of these enterprises are involved in online transactions with big multinational companies, and may also be purchasing goods as end users.³⁶⁷ Indeed, since one of the objectives of ECTA is to support SMMEs in the electronic environment,³⁶⁸ extending the protection provided under Chapter VII to them will boost their confidence to engage in e-commerce and thus contribute to their growth.

(ii) Scope of Application of Chapter VII of the ECTA

Because the ECTA was enacted, *inter alia*, to ‘promote legal certainty and confidence in respect of electronic transactions,’³⁶⁹ it seeks to develop a safe, secure and effective environment in which online transactions can be conducted while ‘affording better protection to the consumer.’³⁷⁰ Its consequences for online businesses, consumers and the entire future of electronic commerce in South Africa are thus far-reaching.³⁷¹ It has been stated that the European Directives 97/7/EC and 2000/31/EC (discussed in chapter five) ‘served the legislator as models [with] some of the European provisions have been taken over nearly without any changes.’³⁷²

³⁶⁶ Indeed, in some of the earlier ECTA drafts Bills, such as an annotated draft Bill dated 6th June 2001, it was suggested that ‘[i]n view of the unsophisticated nature of a large portion of the South African market, and especially the emergence of SMME’s it was judged that the net of protection in the case of SA needed to be cast a bit wider. It therefore makes provision for consumers to include smaller enterprises conducted in the person’s own name or close corporations where goods are acquired for own use and not for reselling.’ (I am greatly indebted to Mr Wim Mostert, who was the chairperson of the drafting committee, for availing me with a copy of the annotated draft Bill dated 6th June 2001).

³⁶⁷ A similar suggestion has been made by Eiselen (n17) 181. See also Buys (n363) 142. The definition adopted in ECTA seems to be in line to the one adopted by the EU’s Distance Selling Directive, (Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (discussed in chapter 5 of this thesis). The Directive defines a consumer as ‘any natural person acting for the purposes outside his trade, business, craft or profession.’

³⁶⁸ See s 2(1)(p) of ECTA. Section 1 of ECTA defines ‘SMMEs’ to mean Small, Medium and Micro Enterprises contemplated in the Schedules to the Small Business Development Act, 1996 (Act 102 of 1996). See also s 9 on the duties of the responsible minister in promoting SMMEs e-commerce capability. See also J Miller ‘Promoting Electronic Commerce in South Africa: Some Academic Perspectives’ (available at <http://www.trigrammic.com/downloads/Promoting%20Electronic%20Commerce%20in%20South%20Africa.pdf> (as accessed on 22/10/2010)).

³⁶⁹ See s 2(1)(e) of the ECTA.

³⁷⁰ See T Bortz ‘Electronic Communications and Transactions Act’ (2002) 8 *Tech Werks* 1.

³⁷¹ See ‘Data Privacy and Consumer Protection in South Africa E-commerce’ available from <http://www.commerce.uct.ac.za/informationssystemsstaff/PersonalPages/jvbelle/pubs/CAT104.doc> (as accessed on 25/9/08). See also Huffmann (n358) 55, noting that non-compliance with its mandatory requirement, ‘may have devastating consequences for any transaction concluded on the website as well as, in certain cases, the incurring of criminal liability and penalties.’

³⁷² See Huffmann (n358) 54.

Section 42(1) confines the application of chapter VII to electronic transactions only.³⁷³ For instance, if a consumer in Cape Town bought goods from a supplier in Durban, but arranged the deal by telephone, the transaction is outside the scope of Chapter VII of the ECTA.³⁷⁴ However, what if the transaction was partly concluded electronically and partly by other means? According to Buys,³⁷⁵ if a problem of this sort arises, one has to apply the provisions of Chapter VII of the ECTA only to those parts of the transaction concluded electronically.³⁷⁶

As will be discussed below, s 42(2) of ECTA also limits the scope of application of s 44, meaning the latter does not apply to all consumer transactions.³⁷⁷ The section provides that ‘section 44 does not apply to an electronic transaction:

- (a) for financial services, including but not limited to, investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities;
- (b) by way of an auction;
- (c) for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer;
- (d) for services which began with the consumer's consent before the end of the seven-day period referred to in section 44 (1);
- (e) where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which cannot be controlled by the supplier;
- (f) where the goods-
 - (i) are made to the consumer's specifications;
 - (ii) are clearly personalised;
 - (iii) by reason of their nature cannot be returned; or
 - (iv) are likely to deteriorate or expire rapidly;
- (g) where audio or video recordings or computer software were unsealed by the consumer;
- (h) for the sale of newspapers, periodicals, magazines and books;
- (i) for the provision of gaming and lottery services; or
- (j) for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.’

Furthermore, s 42(3) excludes the application of Chapter VII ‘to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions

³⁷³ See s 42(1) of the Act. Buys argues that in applying chapter VII of the Act, it is necessary to examine the terms ‘electronic transactions’ and ‘consumer’ and further that ‘[a]lthough Section 4(1) states that the ECT Act, as a whole, applies to all ‘data messages’ and ‘electronic transactions’, the use of the word ‘only’ in section 42(1) seem to exclude “data message” from application.’ (See also R Buys (n363) 142; Huffman (n358) 54).

³⁷⁴ See Eiselen (n17) 183; see also De Villiers (n150) 49.

³⁷⁵ See Buys (n363) 140. See also Eiselen (n17) 183 (supporting Buy’s views).

³⁷⁶ See Buys (n363) 141. See also Eiselen (n17) 183. However, De Villiers (n150) 41, considers that the definition of an ‘electronic transaction’ as suggested by Buys may be too broad.

³⁷⁷ See De Villiers (n150) 49. See further at (n435) below.

in respect of electronic transactions'.³⁷⁸ The ECTA is, by itself, a law that has created 'regulatory authorities' and 'prescribes for consumer protection in respect of electronic transactions.'

This being so, does it mean that even the regulatory authorities it has established are excluded from the application of Chapter VII?³⁷⁹ According to Eiselen, what the section 'probably intended to mean [is] that when an Act subjects electronic transactions to protective measures, transactions covered by that Act will not be subject to the provisions of the ECT Act.'³⁸⁰

There is yet another omission in the ECTA which may lead to problems. Although the term 'electronic transaction' is used throughout the Act, it is not defined.³⁸¹ Section 1 provides only a definition for the term 'transaction' which means 'a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services.' While this definition includes transactions of a commercial and non-commercial nature, the scope of the term 'electronic transaction' remains uncertain.³⁸²

Since a 'transaction' includes both commercial and non-commercial transactions, does every visit to a website amount to an electronic transaction?³⁸³ Buys is of the view that every visit by a consumer should not be covered by Chapter VII of the ECTA.³⁸⁴ He suggests rather that, for the purpose of Chapter VII, and in view of use of other terms, such as 'goods or services for sale, hire or exchange' in s 43(1), 'payments' in ss 43(1)(j) and 43(5), 'return policy' in s 43(1)(n) and 'commercial' in s 45(1), the term 'electronic transaction' should be limited to commercial transactions between a consumer and a merchant.³⁸⁵

³⁷⁸ This provision is subject to criticism for being unclear. See De Villiers (n150) 49.

³⁷⁹ See Eiselen (n17) 183 who states that 'this provision is poorly drafted and obscure [and it may] remain a dead letter in the Act'.

³⁸⁰ Ibid.

³⁸¹ In the USA the Uniform Electronic Transactions Act, (UETA) §7, 7A U.L.A. 211 (2002) (available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ueccta> (as accessed on 3/9/2010), defines the terms 'electronic transactions' and 'electronic' in two separate definitions. Section 2(5) defines the term electronic to mean 'relating to technology having electrical, digital magnetic, wireless, optical, electromagnetic, or similar capabilities.' On the other hand, s 2(16) defines the term 'transaction' to mean 'an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.'

³⁸² See Buys (n363) 140-141. Certain foreign legislation, however, have defined the term 'electronic transactions'. See the UETA's definition at (n381) above.

³⁸³ See Buys (n363) 141. Indeed this may be so despite that the website's terms or conditions of use are a non-commercial transaction.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

Other commentators, however, consider that the term should be given a wider interpretation.³⁸⁶ Thus, for the purpose of Chapter VII, ‘electronic transactions’ should be taken to include all data communications between web merchants and consumers whether they are of a contractual nature or not.³⁸⁷ This latter view seems to be correct since consumers may still be affected by non-contractual matters that are a result of their contractual undertakings, for instance, privacy infringements resulting from unsolicited communications of a commercial and non-commercial nature from a web-merchant.

(iii) Informational Duties of Online Suppliers

Chapter VII of the ECTA has set out very high protection standards for online consumers, which are not always offered to offline consumers.³⁸⁸ Such a high threshold, however, is necessary. As stated earlier, unlike traditional consumers, online consumers lack not only the ability to physically inspect goods they intend to purchase but also the opportunity for a face-to-face encounter with the provider of online services.³⁸⁹ Consequently, what is available to them is insufficient to satisfy or instil a sense of confidence in online retailers or a product or service providers.³⁹⁰ Furthermore, online transactions are subject to additional risks because, by reason of the technical aspects involved, the opportunities for fraud are greater in an online environment than they are in an offline transaction.³⁹¹

Section 43 of the ECTA provides for information requirements that every online merchant must adhere to, failing which consumers who contracted with the merchant will be entitled to cancel the contract within 14 days of receiving the goods or services.³⁹² Section 43(1) of the ECTA provides that:

³⁸⁶ See Eiselen (n17) 182.

³⁸⁷ Ibid. See also De Villiers (n150) 41.

³⁸⁸ See J Hofman *Consumer Protection and E-Law* (2002), available at <http://web.uct.ac.za/depts/itlaw> (as accessed on 24/9/2008). See also C Ncube (original text by D Collier-Reed) ‘Electronic Commerce’ in Collier-Reed & Lehmann *Basic Principles of Business Law* 2ed (2010) 517; De Villiers (n150) 9-10.

It has, however, been argued that although the ECTA has put in place strict mandatory requirements which online suppliers must adhere to when they transact with consumers, research has shown that these requirements are not often complied with. Consequently, non-compliance with the ECTA undermines ‘the tenets of the consumer protection which South African internet users should be enjoying.’ See ‘Data Privacy and Consumer Protection in South Africa E-commerce’ (n371).

³⁸⁹ See Buys (n363) 140.

³⁹⁰ Ibid.

³⁹¹ See De Villiers (n150) 10.

³⁹² See s 43(3) of the ECTA. See similar requirements in the OECD *Guidelines for Consumer Protection in the Context of Electronic Commerce* (1999) which applies to the OECD Countries. The Guidelines can be accessed at <http://www.oecd.org/dataoecd/18/13/34023235.pdf> (as accessed on 7/5/2008). See also OECD *Best Practice*

[a] supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the website where such goods or services are offered:...

The wording of this provision clearly shows that the elaborate list of requirements made under it cannot in any way be waived in a contract with a consumer. However, the phrase ‘offering goods or services for sale, for hire or for exchange by way of an electronic transaction,’ may be difficult to construe. Firstly, as indicated above, the term ‘electronic transaction,’ though relied upon throughout part VII of the Act, is not defined under the Act.³⁹³ Secondly, the term ‘offering’ or ‘offered,’ as used in the section, has dual meanings and may create problems because it can refer to either an offer in the strict sense or to an advertisement that entices consumers to make orders.³⁹⁴

As the earlier discussion indicated, in contract making, the effects of these two, ie, an offer and an advertisement, are quite different. An offer once accepted creates a binding contract while an advertisement does not. However, although an advertisement is just an invitation to enter into a bargain,³⁹⁵ in an online environment it may turn out to be an offer that sufficiently lead to an enforceable contract once accepted.³⁹⁶ For that reason, one should consider s 43(1) while taking into account the differences between a brochure website, which stands as an advertising board, and a functional e-commerce website, where orders can be effectively placed.

Nonetheless, the section restricts all disclosure requirements only to a website offering such goods or services.³⁹⁷ Section 1 of the ECTA defines the term ‘website’ to mean ‘any location on the Internet containing a home page or a web page’. Disclosure requirements can be contained in the supplier’s terms and conditions (also referred to as a user agreement) or in a hyperlink.³⁹⁸ Given the wording of s 43, it is clear that a supplier cannot rely on an e-mail containing the information that must be disclosed. This means that

Example under the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce DSTI/CP(2002)2/FINAL (2002).

³⁹³See The UETA (n381).

³⁹⁴See Jacobs (n64) 560. See also Huffmann (n358) 55). The author argues that ‘the term “offering” does not have a technical or legal meaning but a meaning of common language.’

³⁹⁵See Chissick & Kelman (n121).

³⁹⁶See Pistorius (n80) 282.

³⁹⁷See section 43(1) of the ECTA. See also Buys ‘How Will the Consumer Protection Provisions of the New the ECTA Affect Your Web Site?’ available at <http://www.buys.co.za> (as accessed on 6/8/2008).

³⁹⁸Even so, according to s 11(3) of the ECTA, use of hyperlinks should be reasonably noticeable to users.

suppliers have to tailor their websites in such a way that a consumer is able to gain access to the necessary information on the website of the supplier.

The information that suppliers must disclose to consumers in terms of s 43(1) of the ECTA includes the following:

- full name and legal status of a supplier, physical address and telephone number, the web address and e-mail address,³⁹⁹
- membership of any self-regulatory or accredited body to which the supplier belongs and contact details of the body,⁴⁰⁰
- any code of conduct to which that supplier subscribes and how to gain access to it electronically⁴⁰¹ - a hyperlink to such code may be sufficient,⁴⁰²
- the supplier's registration numbers, names of its office bearers and place of registration and the physical address where supplier will receive legal service of documents.⁴⁰³
- Suppliers are also required to provide clear description of the goods and services they supply to enable consumers to make informed decisions.⁴⁰⁴
- They must also indicate the full price of the goods or services, including transport, taxes, fees and/or other costs, the manner of payment, any terms, including any guarantees that will apply to the transaction, and how those terms may be accessed, stored and reproduced electronically by consumers, the time within which goods will be dispatched or delivered or within which service will be rendered, the manner and period within which consumers can access and maintain a full record of the transaction, the return, exchange and

³⁹⁹ See s 43(1)(a) of the ECTA.

⁴⁰⁰ See s 43(1)(b) of the ECTA.

⁴⁰¹ See s 43(1)(e) of the ECTA. The Code of conduct may, for instance, be the Advertising Code of Conduct and the Code of SMS Marketing. See Buys (n363)143.

⁴⁰² See Buys (n363) 143; De Villiers (n150) 50. Section 1 of the ECTA defines a hyperlink to mean 'a reference or link from some point in one data message directing a browser or other technology or functionality to another data message or point therein or to another place in the same data message.'

⁴⁰³ See s 43(1)(f) and (g) of the ECTA.

⁴⁰⁴ See s 43(1)(h) of the ECTA. A similar trend on the requirement for disclosure of certain facts is also provided for under the OECD *Guidelines for Consumer Protection in the Context of Electronic Commerce* (n392). See also De Villiers (n150) 58.

refund policy of the supplier as well as any information regarding dispute settlement mechanisms.⁴⁰⁵

- As regards dispute resolution, if a supplier has subscribed to an arbitration code, then such information needs to be disclosed and a consumer must be able to gain access to it. Most websites prefer arbitration of disputes and put notices of such a preference in their terms and conditions.⁴⁰⁶ In view of this, if there is any hyperlink to that effect, suppliers must conform to the requirements of s 11(3) of the ECTA.⁴⁰⁷

Furthermore, suppliers should:

- disclose their security procedures and privacy policy in respect of payment, payment information and personal information.⁴⁰⁸ In view of this requirement, the duty to ensure consumer safety when effecting payments to the supplier by way of credit cards is placed on the supplier. The law requires suppliers to guarantee a payment system that is ‘sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of the transaction concerned.’⁴⁰⁹

Buys suggests that safety and security of an e-commerce website with a payment gateway can be ensured if certain technologies are used, such as

[a] digital certificate to authenticate the web site (a small padlock appears at the bottom of the browser when visiting the authenticated web page), encryption technology that encrypts all communications between the consumer, the supplier and the banks in question (eg, secure sockets layer or SSL, indicated by https://), or use of username and password by the consumer to gain access to the transaction engine....⁴¹⁰

⁴⁰⁵ See s 43(1)(i), (j), (k), (l), (m) and (o) of the ECTA.

⁴⁰⁶ See De Villiers (n150) 52.

⁴⁰⁷ See the earlier discussion (above, and in chapter two) on browse-wrap agreements and their practical problems to consumers. See also De Villiers (n150) 53-56 discussing the similar issue concerning browse-wrap agreements.

⁴⁰⁸ See s 43(1)(p) of the ECTA.

⁴⁰⁹ Ibid, s 43(5).

⁴¹⁰ See Buys (n363) 146.

The ECTA is clear that a supplier is liable for any damage suffered by a consumer due to the supplier's failure to provide for a payment system that is sufficiently secured and up to the required standards.⁴¹¹

- The supplier is also required, where appropriate, to state the minimum duration of the agreement, in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently,⁴¹² and
- should state the rights of the consumer in terms of s 44 (dealing with the cooling off period).

(iv) Non-compliance with Section 43(1) of ECTA

In the course of conducting online transactions consumers must have an opportunity to review the entire transaction. Section 43(3) provides that if a supplier has failed to avail a consumer an opportunity to review their electronic transactions, correct any mistakes or withdraw from the transaction (as required by s 43(1) and (2)),⁴¹³ the consumer has a right to cancel the contract within a period of 14 days after receiving the goods or services. The ECTA, however, requires an online consumer, who opts to exercise the right, to return the goods received or to stop using the services performed. The supplier must then refund all payments made by the consumer (having deducted the 'direct cost' of returning the goods).⁴¹⁴

(v) Sections 20(e) and 42(2) of ECTA

The supply of goods or services offered on a website under Chapter VII of the ECTA amounts to electronic transactions giving consumers the protection offered under the ECTA. The same, however, will amount to automated transactions and the website will be deemed an e-agent. It is thus argued that the purchaser (also a natural person, hence a consumer) will fall under both ss 20(e)⁴¹⁵ and 43(2)⁴¹⁶ of the ECTA: first as a consumer interacting with a

⁴¹¹ See s 43(6) of the ECTA. It is important to note that protection of consumers' privacy is a right which they enjoy and if breached one can be entitled to damages under the law of tort.

⁴¹² See s 43(1)(q) of the ECTA.

⁴¹³ See part 8(ii)(c) above for a detailed account of the information that need to be revealed to consumers as required by s 43(1) and (2) of the ECTA.

⁴¹⁴ See Buys (n363) 146. See s 43(4)(a) and (b).

⁴¹⁵ Section 20(e) provides that '[i]n an automated transaction no agreement is formed where a natural person interacts directly with the electronic agent of another person and has made a material error during the creation of a data message and-

(i) the electronic agent did not provide that person with an opportunity to prevent or correct the error;

website, and second, as a natural person interacting with an e-agent.⁴¹⁷ Consequently, there is a potential conflict between the protection granted to a natural person who makes an error while interacting with an e-agent in terms of s 20(e) of the ECTA and that which s 43(2) of the ECTA provides.⁴¹⁸

The implications of the above conflict also reveal themselves with regard to other provisions under Chapter VII, such as s 44, which provides for cooling-off rights, as well as the nature of remedies available to a consumer.⁴¹⁹ Consequently, an online merchant 'faces the risk that the contract could be voidable due to insufficiency of the information or voidable or void as a result of keystroke errors.'⁴²⁰ To resolve the existing dilemma it will be necessary to amend s 43 of the ECTA by substituting the word 'website' with a general phrase, such as 'an information system' in order to give room for generic application of other emerging technologies, for instance m-commerce⁴²¹ or u-commerce.⁴²²

(ii) that person notifies the other person of the error as soon as practicable after that person has learned of it;

(iii) that person takes reasonable steps, including steps that conform to the other person's instructions to return any performance received, or, if instructed to do so, to destroy that performance; and,

(iv) that person has not used or received any material benefit or value from any performance received from the other person.

⁴¹⁶ Section 43(3) provides that '[t]he supplier must provide a consumer with an opportunity-

(a) to review the entire electronic transaction;

(b) to correct any mistakes; and

(c) to withdraw from the transaction, before finally placing any order.

⁴¹⁷ See Pistorius (n34) 14.

⁴¹⁸ See Pistorius (n34) 14. See also Eiselen (n17) 186-187 stating that in case a consumer is, for instance, denied the opportunity to review the transaction and correct mistakes therein, he or she may cancel the contract in 14 days in terms of s 43(2) or s 20 of the ECTA. In terms of section 20 of ECTA cancellation may have 'retrospective effect' and if 'the consumer successfully relies on section 20, he or she is under no duty to pay for "re-transporting" of the goods.' (See Eiselen (n17) 187.)

⁴¹⁹ (In terms of s 43(2) and a 'natural person' (in terms of section 20(e)).

⁴²⁰ Ibid, at 15.

⁴²¹ As for m-commerce see 'Mobile Commerce: opportunities and challenges' A GS1 Mobile Com White Paper (available at http://www.gs1.org/docs/mobile/GS1_Mobile_Com_Whitepaper.pdf (as accessed on 23/10/2010)). See also P B van der Merwe *Mobile Commerce over GSM: a Banking Perspective on Security* (Msc (Electronics) Dissertation, University of Pretoria, 2003). Available at <http://upetd.up.ac.za/thesis/available/etd-07202004-111814/unrestricted/00dissertation.pdf> (as accessed on 27/7/2011).

⁴²² Ibid, at 15. U-commerce refers to 'the use of ubiquitous networks to support personalized and uninterrupted communications and transactions between a firm and its various stakeholders to provide a level of value over, above, and beyond traditional commerce.' See also R Watson, L F Pitt, P Berthon & G M Zinkhan 'U-Commerce Expanding the universe of marketing' (2002) 30 *Journal of the Academy of Marketing Science* 329, 332 (available at <http://www.terry.uga.edu/~rwatson/Passau/u-comslides.pdf> or <http://www.cis.gsu.edu/~emonod/u-tour/watson-u-commerce-2002.pdf> (as accessed on 23/10/2010)). According to Watson *et al*, there are four Fundamental dimensions of u-commerce as described by Watson. These are (1) ubiquity, (2) uniqueness, (3) universality, and (4) unison. (See also T R Watson 'U-Commerce: The Ultimate' (available at http://www.acm.org/ubiquity/views/r_watson_1.html (as accessed on 23/10/2010)).

Online merchants may also escape being trapped by s 20 and 43(2) by ensuring that ‘the transaction process makes adequate provision for consumers to review the transaction, notice any mistakes and correct them, or withdraw from the transaction.’⁴²³ The conflicting sections have caused commentators to allege that the South African legislature seemed to act in an over-zealous manner with regard to consumer protection.⁴²⁴ Be that as it may, one may note the dangers of duplication in the course of drafting, since the drafters of the ECTA borrowed from other countries, especially the EU, Canada and the USA.⁴²⁵

(vi) Cooling-off Period

Section 44 of the ECTA provides for a cooling-off period, this mechanism being ‘a feature of most distance selling provisions and consumer protection measures.’⁴²⁶ In essence, this protective mechanism entitles a consumer to reflect on the consequences of the transaction or to inspect the goods ordered and decide whether to proceed with a transaction, ie, by finally accepting the goods.⁴²⁷ Section 44 is based on cooling-off provisions of the EC Distance Selling Directive (discussed in Chapter V).⁴²⁸

It has been argued, however, that because many consumers do not bother to read the standard terms and conditions governing their transactions, the benefits of this mechanism may take long to be realised.⁴²⁹ This suggests, therefore, that continuing consumer education is an important strategy for attaining the objectives of Chapter VII.

According to s 44, a consumer is entitled to cancel the contract without assigning any reason. This can only happen, however, within seven days after the date of the receipt of the goods or within seven days after the date of the conclusion of the agreement for the supply of services.⁴³⁰ If a consumer opts to exercise rights under the cooling-off provision he is entitled to a full refund of payments made under the contract within a period of 30 days of

⁴²³ See Eiselen (n17) 187.

⁴²⁴ See Pistorius (n34) 15. See also Snail (n66) 15.

⁴²⁵ See Pistorius (n34) 15. See also Snail (n66) 21 suggesting that the ECTA should be amended without having to copy international rules regulating cyberspace, provided, however, that the Act is aligned with international law instruments.

⁴²⁶ See Eiselen (8) 188.

⁴²⁷ See De Villiers (n150) 90. See also Eiselen (n17) 188.

⁴²⁸ See Directive (EC) 97/7 (n367), Art 6.

⁴²⁹ See Eiselen (n17) 188. At the time when the ECTA was still at the stage of a Bill, s 45 of the ECT Bill (now s 44 of the ECTA) was criticised as being superfluous and unnecessary. See Telkom Submission on the Electronic Communications and Transactions Bill 2001. Published in Notice 302 of 2002 (Government Gazette NO 23195 of 1 March 2002). See also De Villiers (n150) 93-94.

⁴³⁰ See s 44(1)(a) and (b) of the ECTA. This period is shorter compared to the time (under s 43(3)) within which a consumer may cancel a contract if the supplier failed to comply with s 43(1) and (2).

the date of such cancellation.⁴³¹ The only ‘direct costs’ that the supplier is entitled to levy on the consumer are charges associated with the return of goods.⁴³² It is important to note, however, that exercise of the rights provided by s 44 of the ECTA does not bar consumers from pursuing any other rights they are entitled to under any other law.⁴³³

One further matter may be noted concerning the exercise of rights under ss 43(3) and 44(1). Unlike s 46(2), which provides that cancellation under that section will be by way of ‘a written notice’, the former two sections do not state how a consumer should cancel. Under German legislation providing similar protections, for instance, cancellation must be made by means of a notice in ‘textual form’.⁴³⁴

As stated earlier, the application of s 44 of the ECTA is restricted in terms of s 42(2) which provides that certain transactions are excluded.⁴³⁵ One notable omission from the list of exclusions is transactions involving supply of digital goods that are directly downloadable to a consumer’s computer. Software, music, and e-books are examples.⁴³⁶ This omission is considered fatal, especially to software developers, music artists and e-book suppliers, and may encourage piracy and copyright infringement.⁴³⁷ Buys has noted the possibility that such ‘goods’ may be downloaded and used by a consumers for some time, and then returned within the seven days in exercise of their cooling-off right.⁴³⁸ In consequence, therefore, the market for digital goods in South African is crippled.⁴³⁹ In view of this lacuna there is a need to amend the ECTA.

⁴³¹ See s 44(3) of the ECTA.

⁴³² See s 44(2) of the ECTA. According to Huffmann, section 42(2) ‘leaves uncertainty relating to the question of what the rule is by law and what must be agreed on... The term ‘may levy’ in section 44(2) does not clarify if in general the supplier must pay the costs of returning, but may impose this obligation by agreement on the consumer ...’ (See Huffmann (n358) 59). Furthermore, the meaning of ‘direct costs of returning the goods’ is, nonetheless, not clearly described under the section.

⁴³³ See s 44(4) of the ECTA. See also s 3 of the ECTA which restricts interpretation that would exclude the application of any statutory law or the common law to, or from recognizing, or accommodating electronic transactions or data messages. Indeed, a consumer under this Act has different means of redress including the ones discussed above. He can also opt for criminal sanction against the supplier or lodge a complaint with the National Consumer Commission or even claim for damages in court.

⁴³⁴ See Huffmann (n358) 59.

⁴³⁵ According to section 42(2) of the Act, however, the cooling-off period does not apply to financial services, auctions, supply of consumables, shares, personalised goods or goods that expire rapidly, unsealed audio & video recordings or software or newspapers, magazines, books, gaming or lottery services, or for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, during the contracting time, to provide such services on a specified date or within a specific period.

⁴³⁶ See De Villiers (n150) 98-99.

⁴³⁷ See Buys (n363) 156.

⁴³⁸ Ibid.

⁴³⁹ See De Villiers (n150) 99.

(vii) Unsolicited Goods, Services or Communications

The problem of ‘spam’ (also referred to as unsolicited communications) is considered acute globally.⁴⁴⁰ Its economic side effects are colossal.⁴⁴¹ Consequently, the need to protect consumers from this plague through effective national legislative interventions is indispensable.⁴⁴² Whereas previously some states preferred self-regulation, this approach has proven to be less effective, and, increasingly, legislative mechanisms are being invoked.⁴⁴³ South Africa is one of the countries with legislation (the ECTA) which, although not exclusively enacted to regulate spam, sets out certain requirements.

Despite the economic side effects which spam generates,⁴⁴⁴ spam is not by itself illegal in South Africa. Basically, the approach adopted in the ECTA is that of regulation (an opt-out method, also referred to as ‘low-key approach’)⁴⁴⁵ rather than prohibition.⁴⁴⁶ The relevant provision in the ECTA is s 45, which provides that:

- (1) [a]ny person who sends unsolicited commercial communications to consumers, must provide the consumer-
 - (a) with the option to cancel his or her subscription to the mailing list of that person; and
 - (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.
- (2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.
- (3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).
- (4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

⁴⁴⁰ See P P Polanski ‘Spam, Spandexing and Regulation of Internet Advertising’ in S Kierkegaard (Ed) *International Law and Trade – Bridging the East-West Divide* (2007) 403. See also O S Sibanda ‘Anti-spam: a Comparative Appraisal of Canadian, European Union and South African Regulatory Regimes’ (2008) 2 *Journal of Information, Law & Technology (JILT)* at 2 (available at http://go.warwick.ac.uk/jilt/2008_2/Sibanda (as accessed on 15/10/2010)). See also Eiselen (n17) 190; Horvath & Villafranco (n357).

⁴⁴¹ According to Sibanda (n440) in South Africa the problem is reported to cost business between R7bn and 13bn annually in lost productivity. See also S Tladi ‘The Regulation of Unsolicited Commercial Communications (SPAM): Is the Opt-Out Mechanism Effective?’ (2008) *South Africa Law Journal* 178.

⁴⁴² See Sibanda (n440) 2.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ See Eiselen (n17) 190.

⁴⁴⁶ This approach has been criticised as unsatisfactory. For more discussion on this see Sibanda (n440) 4. See also Ncube (n388) 519.

As the section indicates, it only deals with spam as a problem partially and only with regard to ‘unsolicited commercial communications’, leaving out other non-commercial communications that may equally be objectionable.⁴⁴⁷ In the EU, the E-commerce Directive requires member states that allow unsolicited electronic communications to ensure that the service providers in their territory make it clear to the recipients of such communications that they are unsolicited commercial communications.⁴⁴⁸ By so doing consumers are put to early notice that the message is spam, and thus can be eliminated.⁴⁴⁹

As stated earlier, the ECTA has adopted a soft approach, which places the burden on consumers to decide whether to opt-out or opt-in when it comes to dealing with spam.⁴⁵⁰ This soft approach may have been adopted because, by the time the ECTA was being enacted, spam was not yet the plague it has become. It is submitted that the approach may be too costly on consumers.⁴⁵¹ Hence, it may be an opportune time to revisit the ECTA for stricter rules.

It is important to note that the Consumer Protection Act⁴⁵² contains anti-spam provisions. Although it still maintains the ‘low-key’ approach envisaged in the ECTA, the Act ‘presents the most comprehensive set of consumer rights relating to privacy.’⁴⁵³ Section 11 regulates direct marketing and provides a consumer with a right to restrict, refuse or accept the advances of direct marketing.⁴⁵⁴ Accordingly, ‘a person who has been approached for the purpose of direct marketing may demand, during or within a reasonable time after that

⁴⁴⁷ See Eiselen (n17) 190. The non-commercial communications may include opinions, newsletters, religious messages or appealing messages turning out to be harmful viruses to mention but a few.

⁴⁴⁸ See Directive 2000/31/EC, Article 7.

⁴⁴⁹ See Eiselen (n17) 191.

⁴⁵⁰ See s 45(1)(a) of the ECTA.

⁴⁵¹ See Sibanda (n440) 4.

⁴⁵² See Act 68 of 2008.

⁴⁵³ See N Kirby ‘The Privacy of the Consumer: Consumer law’ (2009) 9 *Without Prejudice* 28-29; 28. See also Jacobs et al (n164) 320.

⁴⁵⁴ Section 11(1) of the Consumer Protection Act provides that ‘[t]he right of every person to privacy includes the right to—

(a) refuse to accept;

(b) require another person to discontinue; or

(c) in the case of an approach other than in person, to pre-emptively block,

any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.’ Section 1 defines the concept of ‘direct marketing’ to mean an act of approaching approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of—

(a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or

(b) requesting the person to make a donation of any kind for any reason.’

communication, that the person responsible for initiating the communication desist from initiating any further communication.⁴⁵⁵

Consumers are also entitled to pre-emptively block any approach or communication, other than personal communication, that is primarily for the purpose of direct marketing.⁴⁵⁶ According to s 11(3) consumers may register such pre-emptive blocks with a registry recognised by the National Consumer Commission.⁴⁵⁷ Direct marketers are thus obliged to consult the Commission's registry, and if a consumer's name appears therein, then they may not direct or permit any person to direct or deliver any communication for the purpose of direct marketing to that registered consumer.⁴⁵⁸ Section 11 further provides that '[n]o person may charge a consumer a fee for making a demand in terms of subsection (2) or registering a pre-emptive block as contemplated in subsection (3).'⁴⁵⁹

Section 12 of this Act foresees that the Minister may by regulation restrict the time within which direct home marketing by a supplier may occur. Specifically s12(1) provides that '[a] supplier must not engage in any direct marketing directed to a consumer at home for any promotional purpose during a prohibited period prescribed in terms of this section, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.'⁴⁶⁰

More developments are also expected when the Protection of Personal Information Bill becomes law.⁴⁶¹ The intended law seeks 'to provide for the rights of persons regarding unsolicited electronic communications and automated decision making' among other things. Section 66(1) of the Bill provides that:

⁴⁵⁵ See s 11(2) of the CPA. Under s 16(3)(a)-(b) of this Act Consumers are entitled to terminate transactions resulting from direct marketing without reason or penalty.

⁴⁵⁶ See s 11(1)(c) of the CPA.

⁴⁵⁷ Section 11(3) provides that '[t]he Commission may establish, or recognise as authoritative, a registry in which any person may register a pre-emptive block, either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing.' The National Consumer Commission is established under s 85 of the Act.

⁴⁵⁸ See s 11(4) of the CPA.

⁴⁵⁹ See s 11(5) of the CPA.

⁴⁶⁰ See s 32(1) and (2) of the CPA. Section 32(1) provides that '[a] person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement, as set out in section 16.' Section 32(2) further states that '[i]f a person who has marketed any goods as contemplated in subsection (1) left any goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 21 applies.'

⁴⁶¹ The Bill was introduced in the National Assembly and published in Government Gazette No. 32495 of 14 August 2009. It is available at <http://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Protection-of-Personal-Information-Bill/Documents/Protection%20of%20Personal%20Information%20Bill.pdf> (as accessed on 25/2/2011).

[t]he processing of personal information of a data subject for the purpose of direct marketing by means of automatic calling machines, facsimile machines, SMSs or electronic mail is prohibited unless the data subject—

- (a) has given his, her or its consent to the processing; or
- (b) is, subject to subsection (2), a customer of the responsible party.⁴⁶²

(viii) Performance

In terms of performance, the law requires a supplier to effect performance within 30 days after receipt of the order placed by the consumer unless otherwise agreed.⁴⁶³ In case of a failure to do so a consumer is entitled, upon written notice to the supplier, to cancel the order within seven days.⁴⁶⁴ Section 46(3) of the ECTA provides, however, that a supplier who finds it impossible to perform the contract in accordance with the agreed terms with the consumer should inform the latter immediately. Any payment that might have been received under the contract must be refunded to the consumer in full within 30 days after the date of such notification. (It may be argued, however, that the period of 30 days in this subsection is too long and unrealistic given the modern type of electronic money transfers).

Furthermore, s 46(3) may be a Pandora's box for all sorts of evil against a consumer on the pretext that it is impossible to supply the goods. In view of this an unscrupulous supplier may hold a consumer's money for 28 days only to refund on the 29th or the 30th day. This will not be doing justice to the consumer, since the online merchant's right to terminate the contract lawfully creates 'a serious inroad into the rights of the consumers'.⁴⁶⁵ Commentators therefore propose that the term 'unavailable', as used in the provision, should be construed strictly, 'meaning that the goods must be objectively unavailable, not merely unavailable to the webtrader.'⁴⁶⁶ It is also unclear what should be done to an online merchant who fails to comply with this provision. As once said, 'while it is acknowledged that consumers should be afforded protection, that protection must be appropriate and enforceable.'⁴⁶⁷ There is, hence, a need to review this provision in order to stipulate a shorter time within which a consumer should be refunded.

⁴⁶² See s 16(2)-(3) of the Bill which lays down additional conditions in case personal data are to be processed.

⁴⁶³ See s 46(1) of the ECTA. In most cases, the period of 30 days may be varied by agreement. In some websites, the terms and conditions may even be 45 or 60 days. Since the time limits may not be appropriate for each and every contract, variation by agreement or on the basis of 'trade practices' may thus be employed to determine the appropriate time.

⁴⁶⁴ See s 46(2) of the ECTA.

⁴⁶⁵ See Eiselen (n17) 188.

⁴⁶⁶ See Eiselen (n17) 188. See also Buys (n363)157; De Villiers (n150) 127.

⁴⁶⁷ See Pistorius (n34) 4.

(ix) Complaints to the National Consumer Commission

Prior to 2008, dissatisfied consumers could refer their complaints to the Consumer Affairs Committee in respect of any non-compliance with Chapter VII.⁴⁶⁸ This body has now been replaced by the National Consumer Commission.⁴⁶⁹ According to Buys, reference to ‘any non-compliance’ indicates that, even if some provisions in Chapter VII give consumers redress mechanisms in the form of civil or criminal actions, consumers can still refer the complaint to the National Consumer Commission.⁴⁷⁰

(x) Protection of Personal Data

Data protection has been defined as ‘a set of measures aimed at safeguarding individuals (data subjects) from harm resulting from the computerised or manual processing of their information by data controllers.’⁴⁷¹ Measures to protect such data include a requirement for the application of certain principles on processing of personal data.⁴⁷² Loss of consumers’ confidence in e-commerce is partly due to fear of misuse of their personal data for other unauthorised purposes, some of which may pose a threat to their privacy. Data protection and protection of individual privacy in the information age has thus been critical issues.⁴⁷³

Although protection of personal data is indirectly dealt with in Chapter VII of the ECTA,⁴⁷⁴ it is addressed more directly in Chapter VIII. The scope of application of Chapter VIII is provided in s 50(1) of the ECTA. The section provides that the ‘Chapter only applies to personal information that has been obtained through electronic transactions.’

⁴⁶⁸ See s49 of the ECTA.

⁴⁶⁹ See 1st Schedule, item B(1) of Schedule 1 of the Consumer Protection Act, 68 of 2008.

⁴⁷⁰ See Buys (n363) 158.

⁴⁷¹ See A Roos ‘Data Protection’ in D P van der Merwe et al *Information and Communications Technology Law* LexisNexis Durban (2009) 313.

⁴⁷² Ibid. Such principles have been adopted in other jurisdictions and form the basic international standards for the protection of personal data. The EC Directive 95/46/EC, for instance contain seven of such principles. These are (a) Notice—meaning that data subjects should be given notice when their data is being collected; (b) Purpose, ie, data should only be used for the purpose stated and not for any other purposes; (c) Consent (ie, data should not be disclosed without the data subject’s consent);(d) Security—ie, collected data should be kept secure from any potential abuses; (e) Disclosure—ie, data subjects should be informed as to who is collecting their data;(f) Access—ie, data subjects should be allowed to access their data and make corrections to any inaccurate data; and (g) Accountability—ie, data subjects should have a method available to them to hold data collectors accountable for following the above principles.

⁴⁷³ For a lengthy discussion on the origin of data protection laws and other aims for such laws and instruments see Roos (n471) 313.

⁴⁷⁴ See s 43(1)(p), s 43(5) and (6) of the ECTA placing the burden of security on suppliers. See also s 45(1), (2), (3) and (4) of the ECTA concerning spam regulation and s 86(1) and (2) of ECTA.

Despite the sensitivity and the relevance of protecting personal data and other interests of online consumers, the provisions in Chapter VIII of the ECTA are not mandatory.⁴⁷⁵ The ECTA is therefore deficient as regards protection of a consumer's personal data because the mechanisms are voluntary. Section 50(2) provides that '[a] data controller may voluntarily subscribe to the principles outlined in section 51 by recording such fact in any agreement with a data subject.' Section 51 enumerates the principles that may be subscribed to when a data controller electronically collects personal data,⁴⁷⁶ and, when a data controller subscribes to such principles, s 50(3) requires that he should do so to all and not selectively. In case of breach of rights and obligations between the parties under any agreement reached in terms of s 50(2) the terms agreed upon will govern the matter.

Because adhering to the principles set out in s 51 depends on an agreement between the data controller and the subject, where a merchant violates Chapter VIII, such violation will be a matter of breach of contract between data subjects and data controllers, with no external supervisory body to investigate or implement criminal sanctions.⁴⁷⁷ Moreover, while the principles enumerated under s 51 are useful, should the data controller elect to be bound by them, certain important requirements are missing. These include 'a requirement that data must be accurate, kept up to date, relevant and not excessive in relation to the purpose for

⁴⁷⁵ Roos has stated that the ECTA 'does not treat sensitive personal data differently from the way it treats non-sensitive personal data and has no provision regarding automated individual decisions.' (See Roos (n471) 363; Ncube (n388) 520).

⁴⁷⁶ The section enumerates nine principles to be adhered to by data controllers once agreed by the parties.

(1) A data controller must have the express written permission of the data subject for the collection, collation, processing or disclosure of any personal information on that data subject unless he or she is permitted or required to do so by law.

(2) A data controller may not electronically request, collect, collate, process or store personal information on a data subject which is not necessary for the lawful purpose for which the personal information is required.

(3) The data controller must disclose in writing to the data subject the specific purpose for which any personal information is being requested, collected, collated, processed or stored.

(4) The data controller may not use the personal information for any other purpose than the disclosed purpose without the express written permission of the data subject, unless he or she is permitted or required to do so by law.

(5) The data controller must, for as long as the personal information is used and for a period of at least one year thereafter, keep a record of the personal information and the specific purpose for which the personal information was collected.

(6) A data controller may not disclose any of the personal information held by it to a third party, unless required or permitted by law or specifically authorised to do so in writing by the data subject.

(7) The data controller must, for as long as the personal information is used and for a period of at least one year thereafter, keep a record of any third party to whom the personal information was disclosed and of the date on which and the purpose for which it was disclosed.

(8) The data controller must delete or destroy all personal information which has become obsolete.

(9) A party controlling personal information may use that personal information to compile profiles for statistical purposes and may freely trade with such profiles and statistical data, as long as the profiles or statistical data cannot be linked to any specific data subject by a third party.

⁴⁷⁷ See Roos (n471) 361, 364.

which they are transferred or further processed.⁴⁷⁸ Similarly, there is no ‘obligation on data controllers to provide appropriate security measure for personal information, provision regarding access to or correction of personal information, the right of data subject to object to certain data-processing activities, and restrictions on onward transfers.’⁴⁷⁹

As stated above,⁴⁸⁰ the South African government has introduced a Bill – the Protection of Personal Information Bill⁴⁸¹ – for discussion and possible adoption into law. The Bill seeks, among other things, ‘to promote the protection of personal information processed by public and private bodies’.⁴⁸² If and when it comes into effect, it will remedy the existing deficiencies in the ECTA (as regards protection of personal data), since it gives effect to the constitutional right to privacy in a more appropriate manner than the ECTA.

9. The ECTA and Transborder Issues: Jurisdiction and Choice of Applicable Law

(a) The Challenging Cyber-Environment

As stated before, consumers and the business community in general need confidence in e-commerce transactions. This requires, among other things, accessible and effective means of redress should any problem arise.⁴⁸³ As discussed in Chapters one to four of this thesis, access to justice in a transborder e-commerce context is bedevilled with jurisdictional and choice of law problems.⁴⁸⁴ It was further noted that, although existing conflict of laws rules were relevant in paper-based commerce, their application in the Internet and e-commerce

⁴⁷⁸ See Roos (n471) 363.

⁴⁷⁹ Ibid.

⁴⁸⁰ See part 8(ii)(f) of this chapter.

⁴⁸¹ Published in Government Gazette No. 32495 of 14 August 2009. See also Ncube (n388) 520-521; South African Law Reform Commission (SALRC) Discussion Paper 109 (Project 124) on Privacy and Data Protection (2005) (available at <http://www.justice.gov.za/salrc/dpapers/dp109.pdf> (as accessed on 20/5/2011)).

⁴⁸² See the preamble to the Bill and section 2 (n481).

⁴⁸³ See K H Offermann (Ed) ‘Directorate-General for Research Working Paper: Abridged Multilingual Edition, *Legal Affairs Series JURI 105 AXX 03-2001*’ PE 303.747/AM, European Parliament L-2929 Luxembourg (2001) 18 (available at http://www.europarl.europa.eu/workingpapers/juri/pdf/105a_xx.pdf (as accessed on 23/10/2010)). See also L E Gillies *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (2008) 1.

⁴⁸⁴ See Eiselen (n17) 169. O S Sibanda ‘The Strict approach to party autonomy and choice of law in e-contracts in South Africa: Does the approach render South Africa an unacceptable jurisdiction? (2008) 2 *De Jure* 320, 321. See also Callies ‘The Making of Transnational Contract Law’ (2008) *Indiana Journal of Global Legal Studies* 1, 5; M Geist ‘Is there a there there? Toward a Greater Certainty for Internet Jurisdiction’ (2001) 16 *Berkeley Technology Law Journal* 1345, 1347-1348.

context is questionable, partly because of the nature of the Internet, and partly because such rules are primarily territorial in character.⁴⁸⁵

This problem is exacerbated by the fact that international trade is no longer the exclusive domain of a few multinationals. Increasingly ordinary consumers are becoming involved.⁴⁸⁶ This has created a polarised situation. On the one hand, consumer protection advocates seek to ensure that consumers are not forced to litigate away from their home,⁴⁸⁷ while, on the other hand, traders seek to protect their freedom to agree where to litigate and which law to apply. Traders also want to avoid potential exposure to suits in numerous countries because of their presence on the Internet.⁴⁸⁸ In short, the current complexities emanate from the fact that, although courts traditionally exercise powers on a territorial basis,⁴⁸⁹ participants in activities conducted in the current virtually borderless market place cannot be confined to a particular territory.⁴⁹⁰

(b) The South African Position under the ECTA

Before discussing jurisdiction and choice of law in South Africa it is important to state that, although the two are relevant to e-commerce transactions, they are not included in the UNCITRAL Model Law on which the ECTA is partly based.⁴⁹¹ Consequently, the Model Law does not have rules like those in ss 47 and 48 of the ECTA.⁴⁹²

⁴⁸⁵ See Eiselen (n17) 169. See also L A Bygrave & D Svantesson 'Jurisdictional Issues and Consumer Protection in Cyberspace: The View from "Down Under"' (available at http://folk.uio.no/lee/oldpage/articles/CLE_paper.pdf (as accessed on 23/10/2010)).

⁴⁸⁶ Ibid.

⁴⁸⁷ See Gillies (n483) 1.

⁴⁸⁸ See Offermann (n483) 18.

⁴⁸⁹ See Bygrave & Svantesson (n485).

⁴⁹⁰ See Eiselen (n17) 168-169. See also Z S Tang *Electronic Consumer Contracts in the Conflict of Laws Studies in Private International Law Vol 1* (2009) 12-13. See E F Scoles et al *Conflict of Laws* 3ed (2000) 281.

⁴⁹¹ Reference to conflict of laws in the UNCITRAL Model Law is only made in para 100 of the Guide to the enactment of the Model Law. This paragraph cautions that Art 15 of the Model Law should not be regarded as establishing a conflict-of-laws rule. Thus, issues regarding the applicable law in e-commerce transactions will still be governed by the existing choice of law rules.

⁴⁹² Section 47 of the ECTA provides that '[t]he protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question'. Section 48 provides that '[a]ny provision in an agreement which excludes any rights provided for in this Chapter is null and void.'

In chapter three of this thesis, the term ‘jurisdiction’ was defined to mean the power of a particular court to adjudicate a dispute.⁴⁹³ This power can be *in rem* or *in personam*.⁴⁹⁴ The earlier discussion, however, was not in the context of the ECTA.

As in Tanzania, exercise of personal jurisdiction over a defendant depends on whether the cause of action arose in the country⁴⁹⁵ or whether such defendant is resident in the country or has voluntarily submitted to the forum.⁴⁹⁶

Deciding which court should exercise jurisdiction over a dispute concerning an internet transaction or which law will govern such a transaction is not an easy task. This was explained in chapter four (although the discussion was not concerned with the practice in South Africa). Once the court is satisfied that it is competent to hear the matter, unless parties have chosen an applicable law, the next task is deciding which law should be applied to the dispute.⁴⁹⁷ These determinations are made on the basis of the conflict of laws rules of the forum (the *lex fori*).⁴⁹⁸

⁴⁹³ See the earlier discussion in Chapter three of this thesis. See Forsyth (n180) 158; S L Snail ‘An overview of South African e-consumer law in the context of the Electronic Communications and Transactions Act (part 2)’ 15 *Juta Business Law* 54, 58; Eiselen (n17) 171 citing *Ewing MacDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 256; *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 484. See also *Graaff-Reinet Municipality v Van Ryneveld’s Pass Irrigation Board* 1950 (2) SA 420 (A) 424; *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) 551.

⁴⁹⁴ For definition of *in rem* or *in personam* jurisdiction see chapter 3 of this thesis. See also Forsyth (n180) 158.

⁴⁹⁵ See, for instance, *Tsichlas v Touch Line Media (Pty) Ltd* (n71) concerning exercise of jurisdiction in relation to defamatory material published on the Internet. The court in this case held that when the relevant defamatory material is downloaded is the place of publication, and as such, that is the place where the cause of action arises. See also D Collier ‘Freedom of Expression in the Cyberspace: Real Limits in a Virtual Domain’ (2005) 1 *Stellenbosch Law Review* 21.

⁴⁹⁶ See Forsyth (n180) 202 who notes that ‘[i]n certain circumstances submission by the defendant may give a court jurisdiction which it might not otherwise have had.’ See, generally, E Spiro ‘Jurisdiction by Consent’ (1967) 84 *South Africa Law Journal* 295; South African Law Reform Commission, Project 121, *Consolidated Legislation Pertaining to International Judicial Co-Operation in Civil Matters* (Report) (2006) 55. See also *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W). In *Hugo v Wessels* 1987 (3) SA 837 (A) 849 it was stated that, whether a court has jurisdiction involves a two fold enquiry. The first issue is whether it can rightfully take notice of the subject matter (the answer being dependent upon the existence of one or more recognised grounds of jurisdiction. The first issue is whether it can rightfully take notice of the subject matter (the answer being dependent upon the existence of one or more recognised grounds of jurisdiction. The second issue is whether the defendant is subject to the court’s power, according to the doctrine of effectiveness. See Eiselen (n17) 171-174. For a discussion about the doctrine of effectiveness see Forsyth (n180) 159.

⁴⁹⁷ See Forsyth (n180) 307-313. In the case of *Improviar (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138(C), 145 it was stated that where parties make an express choice of law it lessens the problems of finding the proper law. See also P E Nygh *Autonomy in International Contracts* (1999) 13.

⁴⁹⁸ See E Spiro *The General Principles of the Conflict of Laws* (1982) 27-28. The author argues (at 27) that the ‘choice of the applicable law by parties ... still requires recognition through a conflict rule (of the *lex fori*, if not of the legal system governing the particular issue’. However he admits that [t]he choice of applicable law by the parties is now more and more recognised, at least on principle’ (ibid, at 28). See also Forsyth (n180) 295, 304; Eiselen (n17) 176.

The applicable law in contracts is referred to as ‘the proper law’ of contract, which is a single system of law, ie, it must be a law of a country and not just general principles of law.⁴⁹⁹ In this regard, a South African court will consider whether the parties have expressly stipulated a law in their contract.⁵⁰⁰ If there is no express or tacit choice, the court will impute a choice of law to the parties.⁵⁰¹

The rules regarding choice of law in South Africa are based on the doctrine of party autonomy.⁵⁰² The choice will be honoured by courts unless it is overridden by a mandatory rule, which applies regardless of the parties’.⁵⁰³ The ECTA is such a mandatory rule. It provides in s 47 that ‘[t]he protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.’⁵⁰⁴

Section 47 of the ECTA has therefore brought to the forefront the country of protection principle or the *lex loci protectionis*.⁵⁰⁵ This means that, in any case where the question of applicable law is in issue, and in which a consumer contract based on chapter VII of the ECTA is involved, the court will have to decide the dispute on the basis of Chapter VII. Section 48 of the Act bolsters this principle by providing that ‘any provision in an agreement which excludes any rights provided for in [the Act] is null and void.’ In effect, according to these two sections, non-South African websites and online suppliers are bound to the ECTA’s requirements under chapter VII when dealing with South African consumers.

⁴⁹⁹ See Forsyth (n180) 294-295. See also Pistorius (n80) 284; P M North & J J Fawcett *Cheshire and North’s Private International Law* 13ed (1999) 559-560. However, parties are free to choose a system of general principles such as the UNIDROIT Principles of International Commercial Contracts to apply to their contract. The doctrines of ‘proper law’ and ‘party autonomy’ are also part of the law in Tanzania. For more discussion on these concepts see chapter four of this thesis.

⁵⁰⁰ See Forsyth (n180) 295-304 for a discussion on the doctrine of party autonomy in South Africa.

⁵⁰¹ See Forsyth (n180) 307-313. See also *Mitchell, Cotts & Co v Commissioner of Railways* 1905 TS 349; *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171, 185.

⁵⁰² See Forsyth (n180) 295-302. See also Eiselen (n17) 176.

⁵⁰³ See Forsyth (n180) 295-302, 320-325; see also Eiselen (n17) 172; *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) 31; Pistorius (n80) 284-285.

⁵⁰⁴ The chapter referred to here is Chapter VII of the Act.

⁵⁰⁵ See Sibanda (n485) 324. The *lex loci protectionis* principle is well recognised in the intellectual property arena due to the territoriality of intellectual property rights. An infringement can only occur in a country if there is a local protection for this right. That being the case, for practical reasons the law of the protecting country (*lex loci protectionis*), ie, the law of the country in which protection is claimed seems to be the only reasonable choice of law in infringement cases. (See M van Eechoud ‘Alternatives to the *Lex Protectionis* as the Choice-of-Law Rule for Initial Ownership of Copyright’ in J Drexl & A Kur (eds) *Intellectual Property and Private International Law* IIC Studies Vol 24 (2005) 289-307.

Suppliers may not include a choice of law clause in their electronic agreements with South African consumers in disregard of the requirements of chapter VII of the ECTA.⁵⁰⁶

Since non-South African suppliers are also brought under the requirements of chapter VII of the ECTA, authors have expressed their concern that it may be difficult, if not impossible, to enforce Chapter VII against such suppliers.⁵⁰⁷ They even suggest that foreign suppliers may avoid doing business with South African consumers.⁵⁰⁸ Overall, critics argue that states must be ready to surrender some measure of sovereignty by way of legislative enactments encouraging e-commerce.⁵⁰⁹ In addition, in the light of the ECTA's restrictive approach and the cross-boundary nature of Internet-based transactions, some courts may be improper venues to exercise personal jurisdiction over a particular defendant.⁵¹⁰

Section 47 comes into play whenever a foreign supplier concludes an e-contract with a South African consumer. In order to ensure that the particular South African consumer is entitled to the rights, the section makes the law of the consumer's residence or domicile paramount over the contractual choice of law.⁵¹¹ The strictness of the ECTA in this regard and the fact that the parties' choice may not override the provisions of Chapter VII of the ECTA is considered an unnecessary infringement of party autonomy. Consequently, even if a supplier's law offers better protection, a court will have no option but to apply the South African law. As Sibanda says, in comparison with the developments in other jurisdictions, such as in the European Union, South African law adopts a more restrictive approach to party autonomy.⁵¹² Nevertheless, since consumers are the weaker parties, giving

⁵⁰⁶See Buys (n363) 158.

⁵⁰⁷Ibid. See also a report by the US trade department on 'Foreign Trade Barriers' where it is noted that although the ECTA 'was designed to facilitate electronic commerce [it] may increase regulatory burdens and introduce uncertainty into the future of electronic commerce in the country.' See http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file388_4796.pdf (as accessed on 8/5/2008).

⁵⁰⁸See Buys (n363) 158. See also Jacobs (n64); O S Sibanda 'Choice of Law, Jurisdiction, and Recognition and Enforcement of Judgements in "Click wrap" Transactions in South Africa' (available at <http://www.lspi.net/2008/2007/P-S.html#Sibanda> (as accessed on 23/10/2010)).

⁵⁰⁹See Burnstein 'A Global Network in a Compartmentalised Legal Environment' in K Boele-Woelkie & C Kessedjian (Eds) *Internet Law: Which Court Decides, Which Law Applies?* Kluwer Law International The Hague (1998).

⁵¹⁰See Sibanda (n484) 326; Sibanda (n508).

⁵¹¹See Sibanda (n484) 326. See also Jacobs (n64) 562.

⁵¹²See Sibanda (n484). For a discussion on EU choice of law rules, see chapter four of this thesis. See also L E Gillies 'Choice of Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation' (2007) *Journal of Private Law* 89, 97-98.

them priority to apply their own law is a more appropriate approach as it absolves them from the burden of having to litigate in a foreign state.⁵¹³

10. Conclusion

South Africa is one of a few Sub-Saharan African countries that have developed a clear policy and legislative framework to regulate and encourage e-commerce and e-contracting.⁵¹⁴ This chapter has analysed the developments that took place in South Africa leading to the adoption of a law to regulate e-commerce, namely the ECTA. The chapter has established that the development of the ECTA was influenced by existing international standards, especially the UNCITRAL Model Law on E-commerce adopted in 1996.

The analysis in this chapter has also revealed that, although the Model Law forms the basis of the ECTA, South Africa did not adopt it in its entirety but rather selectively. Because some countries had enacted laws or were in the course of enacting laws on e-commerce, the drafters of the ECTA had the opportunity to examine legislative developments in such countries in comparison with the Model Law. Such countries include the USA, Australia and Canada. Moreover, because the Model Law did not explicitly address issues regarding consumer protection, the drafters of the Act were influenced by developments in other regions, for instance, the European Union (EU) to address the gap.

The ECTA deals not only with e-contracts and consumer protection but also other important issues, such as cyber crimes, provision of e-government services, domain names registration, protection of personal information and critical data bases, and the liability of Internet Service Providers (ISPs). Whereas all these issues are relevant to the new economy, this chapter has confined its discussion to the validity and enforceability of e-contracts and requirements for effective online consumer protection.

One important lesson from this chapter is that, despite the continued application of the South Africa's common law of contract, it was considered necessary, in view of the ongoing changes brought by the Internet and other communication technologies, to enact a

⁵¹³ See A Halfmeier 'Waving Goodbye to Conflicts of Laws? Recent Developments in European Union Consumer Law' in C E F Rickett & T G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (2003) 386. The author notes that a jurisdictional rule that oblige a consumer to litigate in a foreign land, let say, in the supplier's jurisdiction, is not cost effective on the part of a consumer and discourages consumer-led litigations.

⁵¹⁴ As for other countries in Africa, see (n5) above.

law which will, among other things, promote legal certainty and confidence in respect of electronic communications and transactions. This particular lesson should inspire other countries, like Tanzania to reform their law of contract to accommodate current technological developments.

Secondly, the chapter has revealed how the existing international frameworks for e-commerce regulation can be relied upon to remedy deficiencies in a domestic regime, thereby enabling a country to embrace the digital economy. By relying on the UNCITRAL Model Laws, the EU Directives and other jurisdictions, such as Canada, the USA and Australia, South Africa was able to develop a legal framework that suits its own economic interests.

It is important to note, however, that, reliance on the existing standards and foreign legislative developments to develop a domestic legal framework requires a careful approach and flexibility in order to avoid narrow interpretations that may tend to discourage innovation or create inability to accommodate future developments.

As the current chapter noted, there are some deficiencies and conflicting provisions within the ECTA that need to be reviewed and amended for the sake of clarity. Of particular importance are the difficulties that s15 of the ECTA has created with regard to admissibility of electronic evidence and the rule concerning hearsay. The scope of this provision is uncertain considering that Art 9 of the Model Law, on which it is based, was not intended for application in non-commercial matters. Courts' decisions regarding the section, however, are to the effect that, since rules governing admissibility of evidence apply to data messages, s 15 of ECTA was not intended to displace the normal rules that apply to hearsay evidence. It may be necessary, nevertheless, to amend this section by inserting a subsection that reflects this position rather than leaving it open and subject to court interpretation.

It is also essential to note that, because the current rapid changes in technology lead to new forms of electronic evidence, there is a shift away from questions regarding admissibility and exclusion to more technical concerns about authenticity and the suitable weight to accord to such evidence. As noted in this chapter, this current shift is justified, because electronic evidence is intangible or transient in nature, easy to manipulate, fragile, and is highly susceptible to error, accidental alterations or fabrications in the course of its collection or compilation for judicial use. Thus, there is a need for additional safeguards including procedures governing the collection, storage and presentation of such evidence for

purposes of judicial proceedings. Such additional procedures or safeguards are currently lacking in South Africa.

This chapter also points out other unclear provisions within the ECTA that need to be re-examined.

- (a) The need to review the restrictions imposed by s 4 of the ECTA regarding use of data messages in certain transactions. With current advancements in technology, certain transactions, such as conveyancing are performed electronically. As noted in this chapter, processes are underway to legitimise e-conveyancing. These initiatives, however, should also explore other areas where the ECTA has imposed restrictions
- (b) The need to extend the definition of electronic signature. Section 1 of the ECTA has two distinct definitions of what amounts to an electronic signature: an advanced e-signature (which results from an accredited process) and an ordinary e-signature defined as ‘data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature.’

As noted in this chapter, the SALRC is concerned that having the two types of e-signature, while s 13(2) of the Act provides ‘[s]ubject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form’, may lead to confusion, thus disrupting the intention of the Act, ie, the need to facilitate electronic transactions. Subsection 1 of that section refers to the use of an ‘advanced electronic signature’ in all cases ‘[w]here the signature of a person is required by law and such law does not specify the type of signature’ to be used.

While the SALRC’s concerns are meritorious, in my view, the two distinctions need to be maintained, since what the ECTA envisages is the security inadequacies that an ordinary e-signature provides. What should be done is to expand the scope of what amounts to an advanced signature to include the use of biometrics.

It is also noted that, despite the frequent use of the term ‘electronic transaction’ in the ECTA, s 1 of this Act does not define it. The section has only defined the term ‘transaction’. This omission creates uncertainty regarding whether every visit to a website amounts to an electronic transaction, and also whether all data communications between merchants and consumers amounts to ‘electronic

transactions' even where they are of a non-contractual nature. In the USA, for instance, the UETA define both terminologies. It is suggested that the ECTA should adopted a similar approach.

(c) The need to expand the definition of who is a consumer for the purpose of part VII of the ECTA. As discussed in this chapter, the definition of a consumer for the purposes of the application of part VII of the ECTA is restricted to a 'natural person'. The ECTA excludes the SMMEs. Given that these entities are actively involved in e-commerce and buy items from larger manufacturing companies for purely internal use, they should be included in the definition and regulations may be made to categorise the size of an SMME that is eligible to enjoy the protections offered under part VII of the ECTA.

(d) As noted in this chapter, certain provisions within the ECTA are unclear and some create conflicting views. The following sections require particular attention:

- Section 20(d) of the ECTA

This section has been criticised on the ground that its legal effects, in terms of the words 'not bound' as they appear in the section, is unclear. Whether it means that a contract is void or voidable is uncertain. Other uncertain and conflicting provisions include s 20(e) of the ECTA, which conflicts with s 43(2) concerning protection of consumers.

- Section 23 of the ECTA

The wording of this section needs to be amended by removing the following phrase: 'used in the conclusion or performance of an agreement'. This phrase should be inserted in the preamble after the 'data message'.

- Section 44(2), as read together with section 42(2) of the ECTA

As discussed in part 8(ii) (e) of this chapter, the application of s 44 (concerning the exercise of the right to cooling-off) is restricted by s 42(2) as the latter provides for an exclusion list in certain transactions. The exclusion list, however, omits transactions involving the supply of digital goods, such as e-books, music files, or software, which are directly downloadable to a consumer's computer. The nature of

these products warrants their exclusion from the rights that a consumer is entitled to under s 44. This omission is fatal and may facilitate piracy and copyright infringements.

- Section 42(3) of the ECTA needs to be reviewed as well. This section excludes the application of Chapter VII 'to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions'. The argument here is that the ECTA is, by itself a law that creates certain regulatory authorities and prescribes for consumer protection in respect of e-transactions. The wording of this subsection, thus, needs to be reviewed for the sake of clarity.

- Section 43(1) of the ECTA also needs to be reviewed in order to clarify what the phrase 'offering goods or services for sale, for hire or for exchange by way of an electronic transaction' means. As discussed in this thesis, the term 'offering goods' or 'offered' may lead to confusion as it may be construed to mean an offer in the strict sense or an advertising of such goods. Since e-commerce operators need clear rules to guarantee the legal certainty of their transactions, the phrase needs to be reviewed for the sake of clarity. Similarly, the word 'website' as it appears in s 43(1) needs to be replaced by a much broader term - such as 'information system' - which has the ability to accommodate emerging technologies, such as u-commerce and m-commerce.

- Sections 43(3) and 44(1), which provide for certain rights to a consumer including the right to withdraw from a contract, needs reviewing. These sections are silent regarding the means which a consumer should use to cancel a transaction with a supplier. At best they should provide for such mechanism as s 46(2) provides. This section provides that a consumer who wants to cancel a contract with the supplier who fails to supply goods within 30 days can do so by way of a 'written notice'.

- Section 46(3) of the ECTA requires revision. This section provide for 30 days within which a refund should be made to a consumer by a supplier who fails to perform the contract due to unavailability of goods. The period of 30 days is too long and unrealistic given the modern electronic means of transferring money. In

addition, this provision may be a source of all sorts of injustices against consumers, since unscrupulous suppliers may refund consumers only on the last day of the period, having profited from the funds for the period held. In addition, the ECTA should provide sanctions for suppliers who fail to comply with this provision.

▪ Section 45, which relates to spam or unsolicited communications, needs attention too. As indicated in this chapter, spam has become a problem with huge financial implication to many businesses. Countries that had earlier adopted a soft approach to it, such as Canada, have since resorted to a much stricter means of curbing spam. In South Africa, although this problem has been recently addressed under the Consumer Protection Act, the opt-out or 'low-key' approach is still envisaged. Given the cost implications from spamming activities, in my view there is a need to adopt a prohibitive approach.

▪ Sections 50-51 of the ECTA, which deals with data protection, are also deficient. Currently there are efforts to address data protection under the Protection of Personal Information Bill, and one can but hope that this provides an opportunity to address the deficiencies in these sections of the ECTA.

(e) The chapter further notes that, although the ECTA is based on the Model Law, it has adopted a narrow definition of a data message compared to what the Model Law and the UN Convention on E-contracts envisaged. This approach is considered unsuitable in a fast changing technological environment, and may be problematic in future. The definition needs to be reviewed to reflect the broad approach envisaged in the Model Law and the UN Convention on E-contracts.

(f) Concerning the use of web-based agreements, such as browse-wrap agreements, it was noted in the above discussion that the ECTA has not been very articulate in resolving the problems generated by these agreements despite the conditions set out in s 11(3) of the Act. It is submitted that this section needs to be reviewed in order to establish a more positive requirement of consent in such agreements.

Generally, the discussion in this chapter has also examined transborder issues that bear relevance to e-commerce, namely, jurisdiction and choice of law. The chapter noted that as in Tanzania, the traditional conflict of laws rules remain the same in South Africa. The choice of law rules, for instance, gives autonomy to parties in a contract to choose a law that would govern their contract. As regards consumer contracts in the online environment,

however, unlike in Tanzania where no rules exist to protect online consumers in their contracts with foreign suppliers, the law in South Africa has created rules to protect South African consumers. In particular, exercise of party autonomy in consumer contracts in this country is restricted, since parties cannot derogate from chapter VII of the ECTA. This means that in case of a dispute the applicable law will be the South African law.

In conclusion, one may argue that the enactment of the ECTA has been a success, bearing in mind its application in resolving cases involving use of data messages, such as *Jafta v Ezemvelo KZN Wildlife*,⁵¹⁵ *Ndlovu v The Minister of Correctional Services & another*⁵¹⁶ and *Mncube v Transnet*,⁵¹⁷ to mention but a few, and the innovative protection that it offers to online consumers. As was discussed in this chapter, the ECTA has addressed all the major problems that create uncertainty in online transactions and this is an important step towards promoting e-commerce and enhancing consumers' confidence. Similarly, it is also important to note that although the Act is based on the Model Law, the drafters did not just adopt the Model Law but, in some instances, they went further than the Model Law in order to cater for the peculiar needs of South Africa.

Indeed, it is also significant to note that drafting of a law, which deals with an ever changing technology demands extra care and a broader understanding of characteristics of the particular technology in question. To be able to do so, drafters need to examine how other countries have responded to the current technology developments. According to Mostert, (who was by then the chairperson of the drafting committee) the drafting team considered legislative developments in the EU and other countries such as the UK, the USA, Canada, Australia, the Netherlands, Germany, India and Philipines to name but a few. The South African experience can thus enrich the future efforts of other African countries like Tanzania.

Whereas a similar approach can be adopted by other African countries such as Tanzania, there is a need to avoid mere copying of foreign legislation without sufficient analysis of the overall implications. Certainly, while legal transplantation is not a novel idea, especially in today's globalised world, thorough examination of scope, functionality and the extent of adoption of a legal transplant within the receiving domestic regime needs careful prior attention. Failure to adopt a cautious approach may lead to enactment of a statute that may fail to achieve the purposes for which the transplant was intended.

⁵¹⁵ See (n71).

⁵¹⁶ See (n71).

⁵¹⁷ See (n71).

CHAPTER SEVEN: CONCLUSION

1. Summary

Information and communication technology (ICT) is a ground-breaking tool. From a business viewpoint, it enables various players in commerce to gain access to accurate and relevant information easily and timeously, and hence helps them to make informed decisions. The Internet as an ICT tool and, flowing from it e-commerce, has greatly abridged the time within which transactions are concluded, thus reducing costs and increasing profit-making. Successful use of ICTs, however, depends on, *inter alia*, a legal framework to support electronic transactions. This study has examined the existing regulatory regime in Tanzania in light of the ICT revolution. It has analysed the current statutory and common law rules, specifically the Law of Contract Act, the Sale of Goods Act and the Fair Competition Act. Because e-commerce is a cross-border issue, the analysis extended to private international law.

The study sought to achieve three main objectives. First, it sought to analyse the existing legal framework governing contracts, with the view to identifying inappropriate rules that hinder the development of e-commerce and recommending measures which could be adopted to address them. It is hoped that such measures will in turn promote e-commerce activities, enhance free trade, strengthen the growing market-based policies and integrate the country into the global economy.

Secondly, in searching for a better law, the study sought to promote consumers' confidence by proposing reforms that include the enactment of rules which adequately and effectively protect consumers when they transact online. The development of e-commerce, and in general the widespread use of ICT, has seriously affected consumers' interests. The potential for invasion of privacy and other security risks, to which online consumers are exposed (in comparison to their offline counterparts), necessitates additional measures to secure confidence in online transactions.

Finally, the study sought to address cross-border problems affecting e-commerce transactions. This involved seeking the best strategy to enhance the coherence and harmonisation of rules, in order to reflect the borderless nature of e-commerce, and to ensure certainty and predictability in cross-border contracts.

The study commenced with identifying the key areas of e-commerce activity and policy (notably government policy). It then described problems in the Tanzanian law of contract that create legal uncertainty in e-contracting and lead to loss of consumer confidence and the undermining of the development of e-commerce. Two additional problems of a cross-border nature were analysed: jurisdiction and choice of law. When e-commerce is a cross-border issue, its successful regulation and development will no doubt rest on international solutions. Such an approach will not only minimise the difficulties of resolving disputes but also require a harmonised strategy.

Tanzanian law was compared with the law of e-commerce in South Africa. South Africa, like Tanzania, is a country in Sub-Saharan Africa (and a SADC member), and is one of the few African states to have enacted legislation to facilitate e-commerce. Hence, it was considered likely that Tanzania could thereby gain useful lessons for remedying its own laws.

The analysis of e-commerce and its legal developments in South Africa involved the examination of problems that the country had identified through its Green Paper on E-commerce, and the subsequent legislative framework. This required analysis of the Electronic Communications and Transactions Act ('the ECTA') in order to establish: (a) how, and to what extent the UNCITRAL Model Law on E-commerce and developments in other countries were relied upon in the course of enacting the ECTA, (b) how this legislation successfully or effectively addressed the legal barriers to e-commerce, and (c) whether there are inadequacies in the Act that still needed to be addressed.

Apart from adopting the case study strategy to deal with domestic problems hindering the development of e-commerce, the thesis analysed other legal initiatives aimed at creating an environment for promoting and regulating the development of e-commerce at global and regional levels. The analysis involved two perspectives, namely, a global outlook (representing efforts made by United Nations agencies, especially UNCITRAL) and a regional viewpoint, which was further sub-divided into the perspective of developed countries (the EU and the US) and developing regions (Africa and the ASEAN regions). From these perspectives, the study identified how the various global initiatives, such as the Model Laws, international conventions, Directives and frameworks, could be used to solve problems in domestic legal regimes.

The global perspective was further intended to identify rules that could facilitate trans-border transactions and establish a basis upon which domestic legal regimes could be harmonised to accommodate technological developments.

Overall, the study argued that if e-commerce is to flourish, states must strive to establish a global regulatory environment that provides certainty and predictability for e-contracts. In addition, they must seek to promote trust and confidence among the businesses and consumers who participate in e-commerce by harmonising the laws.

2. General Concluding Remarks

As a country endowed with unique traditional products, such as, coffee, spices, Makonde carvings, Tanzanite gemstone, national parks and other tourist attractions, Tanzania can benefit from the current technological revolution.¹ It is disturbing, however, that, despite the many natural resources and products available in Tanzania, there is limited information about them in the global market. Its unique products could be marketed electronically to the outside world and the country could be gaining considerably from e-commerce. In this way, Tanzanian firms could secure more access to international markets. In view of these observations, this study maintains that sustainable and concerted efforts to promote e-commerce activities in the country are needed. One such effort is the creation of a suitable legal framework that promotes electronic transactions.

The study submits that any country aspiring to promote an ICT-led economy must endeavour to create and adopt not only a strategy to develop e-commerce, but also rules that support innovation, technology and an entrepreneurial attitude. Therefore, developing countries, like Tanzania, must strive to reform their legal frameworks in order to strengthen the positive role that law plays in the modern economy. They must ensure that the law promotes and encourages use of the modern market-based approaches, for instance, e-commerce in order to enhance economic growth, enabling access to external markets and promoting business confidence.

As submitted in this study, in order to effectively support economic growth and to discharge its regulatory role, the law must create and support a competitive and a fair

¹ See (generally) A Utz 'Fostering Innovation, Productivity, and Technological Change: Tanzania in the Knowledge Economy' World Bank, Washington DC (2006) (available at http://info.worldbank.org/etools/docs/library/232302/Tanzania_in_the_Knowledge_Economy.pdf (as accessed on 28/6/2011)).

business environment if it is to provide room for further enterprise innovation and expansion.² In an e-commerce scenario, commercial legislation must be able to enhance transactional enforceability, ensure technology interoperability, and protect a highly vulnerable group, the consumers.

To some extent, Tanzania has taken positive steps to establish a policy and a regulatory environment that seeks to promote ICT-led growth.³ As stated in this study, however, there are serious deficiencies in the existing Tanzanian legal framework governing contracts.⁴ Such problems are not only evident in the law governing contracts but also in other areas, especially the legislation relevant to the enforcement of contracts, such as the Law of Evidence Act and the Civil Procedure Act.⁵ Because the law of contract is central to the economic life of the society, its reform is imperative in order to increase investors' confidence, build business networks and integrate Tanzanian economy into the global economic structure.

To initiate a successful reform process, and to the extent discussed in this study, it is submitted that Tanzania should embrace reforms similar to that of the South African law on e-commerce (the ECTA),⁶ the UNCITRAL Model Law and the UN Convention on E-contracts.⁷ The rules that the UNCTRAL Model Law established, and which forms the basis of the ECTA,⁸ and those established by the UN Convention provide solutions to e-commerce problems experienced in domestic legal regimes.⁹ They also offer an opportunity for a

² See Chapter one part 2(a) above.

³ See Chapter one part 4(d) and (e) above.

⁴ See the discussion in Chapter two above.

⁵ For instance, Order XVIII rules 4 and 5 of the Civil Procedure Code, 1966, provides as follows :

Rule 4. The evidence of the witness in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the Judge or Magistrate.

Rule 5. The evidence of each witness shall be taken down in writing in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge or Magistrates, not ordinarily in the form of question and answer but in that of a narrative and the Judge and Magistrate shall sign the same. These rules clearly reveal that the application of the modern technologies, which ought to be employed to facilitate quick services to litigants, and which fact is very crucial for e-commerce and the new economy in its entirety, have not been effectively and sufficiently been received within the legal regime. As regards receiving evidence in the court of law can the existing laws accommodate the new technologies such as video-teleconferencing? What about e-discovery procedures? Is the existing law on civil procedure able to handle these changes? Since such issues may arise in the courts where a litigant seeks redress in case of breach of contract, including e-contracts, the procedural laws need to take into account the technological developments too. In the area of law of evidence there are also a number of issues touching weight, reliability and validity of electronic records all these calling for serious scrutiny of the existing laws.

⁶ See the discussion in Chapter six above.

⁷ The Model law and the UN Convention on E-contracts were discussed in Chapter five above.

⁸ As discussed in Chapter six part 3 above.

⁹ See Chapter six concerning the legal developments in South Africa.

harmonised global regime and thereby contribute to ‘convergence of systems of municipal law among distinct sovereign states.’¹⁰

It is also important to note that Tanzania, as a member of the East African Community (EAC) and SADC, is also set to benefit from the current developments regarding e-commerce legal initiatives in these regional communities.¹¹ As discussed in chapter five,¹² although the EAC Framework on Cyber law is not a model law, Tanzania can still utilise it because it contains recommendations based on the existing international standards, such as the Commonwealth Model Law on Electronic Transactions (2002), the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures (1998 and 2001 respectively) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). In view of this, the Framework offers a useful guidance to the reform process in Tanzania and enhances complementarity of rules while avoiding the possibility of creating conflicting rules.

It also suffices to note that development of e-commerce demands an internationally and domestically harmonised and technology conscious regulatory regime.¹³ With such findings, a way forward must be found to cure the current inadequacies in the law and to integrate Tanzanian economy into the global market.¹⁴

3. Proposal of Regulatory Reforms Internationally and Domestically

(a)Regulatory Solution Internationally: The Need for an Effective Approach

One important finding drawn from international legal developments, and one which serves as a model for Tanzania, is that the existing international frameworks for e-commerce may be relied upon to remedy deficiencies in the domestic regime.¹⁵ Despite their usefulness, this study submits that there is a need to establish harmonised, yet flexible, mechanisms to

¹⁰ See J Wiener *Globalisation and the Harmonisation of Law* (1999) 184.

¹¹ As discussed in chapter 5 part 7(b)(ii) of this thesis, the EAC Task Force on Cyberlaws developed a series of recommendations which were adopted by the 2nd Extra-Ordinary Meeting of the EAC Sectoral Council on Transport, Communications and Meteorology in May 2010. Within the SADC region, a Draft Model Law on E-commerce developed in 2003 though the same has never been finalised. Moreover, in May 2010, SADC, in collaboration with the ECA, adopted an e-SADC Plan and in June 2011 adopted Guidelines on Consumer Protection and Privacy.

¹² See the discussion regarding Regional Economic Communities (RECs) in Chapter 5 part 7(b)(ii) of this thesis.

¹³ See the discussion in Chapter five part 4 above.

¹⁴ A way forward with regard to international cross-border disputes has been suggested in the preceding section above.

¹⁵ See the discussion in Chapter six which indicates how South Africa relied on such developments to reform its legal framework.

address cross-border disputes involving e-commerce in order to facilitate such transactions globally.

In particular, the analysis of the jurisdiction and choice of law approaches in both the EU and the US revealed that developments there may offer assistance in dealing with e-commerce disputes, while, also taking into account the need to protect consumers.¹⁶ The approach in the EU, for instance, is that of continuing reform of the existing jurisdiction and choice of law rules through enhanced harmonisation. The EU's position seems to have paid attention to the view that '[i]f the past is any guide to the future ... rules that have reached their shelf life [ought to] be superseded by more flexible ones.'¹⁷

Because harmonisation of substantive e-commerce rules is a vehicle through which e-commerce can be successfully developed and regulated, this study submits that states must avoid isolated efforts.¹⁸ A united approach will enhance global, regional, and domestic legal certainty in e-commerce, since more countries will have identical rules. With harmonised rules the danger of forum shopping by plaintiffs may be laid to rest, since wherever parties litigate the applicable laws will be the same. The approach is therefore a suitable and an effective means to respond to the transnational risks that frustrate cross-border e-commerce transactions.

Although the UNCITRAL Model Law and the UN Convention on E-contracts do not provide for global rules on conflict of laws, their effect in creating harmonised substantive rules for e-commerce suggests that this goal may also be achieved.¹⁹ Indeed, given the diversity of legal cultures and systems, the adoption of the UN Convention on E-contracts, and the fact that many countries have adopted the Model Laws, should be considered as sufficient incentives for Tanzania and other states to ratify, not only the UN Convention on E-contracts but also other global conventions, such as the Hague Convention of 30 June 2005 on Choice of Court Agreements.²⁰ It is important to note, as Spigelman does, that 'the global

¹⁶ See the discussion in Chapter three parts 2C1 and D1, and Chapter four, part 5 above.

¹⁷ See A Briggs *The Conflict of Laws* 2ed (2008) 30.

¹⁸ For more discussion on harmonisation see Chapter five, part 4 above.

¹⁹ For more discussion concerning the UNCITRAL Model law and the UN Convention see Chapter five, part 5(a)-(c), above.

²⁰ This convention is available at <http://www.hcch.net/upload/conventions/txt37en.pdf> (as accessed on 11/11/2010). For more about this convention see C Schulze 'The 2005 Hague Convention on Choice of Court Agreements' (2007) 19 *South African Mercantile Law Journal* 140. See also A I Pribetic 'Hague Convention on Choice of Court Agreements' (2005) 10 *The Globetrotter* 2 (available at http://www.smhilaw.com/Publications/intglaug05_extract.pdf (as accessed on 11/11/2010)).

patchwork quilt of rules ... , by reason of its limited scope, [has been] a significant barrier to world trade and investment.’²¹

The US (like the traditional English common law) has a more discretionary approach to jurisdiction and choice of law.²² If parties have included a choice of law or forum clause in their agreement, the general principle (which applies in most common law countries) is to give it effect unless it is illegal, contrary to public policy,²³ made in bad faith²⁴ or (as in the US) unconscionable.²⁵ As indicated in Chapters three and four, the common law leaves room to courts to develop the law, an approach that has unfortunately detracted from uniformity and consistency.

In the absence of a choice of jurisdiction or applicable law clause in the parties’ agreement, the most significant connection principle is relied upon.²⁶ This approach, as argued in this study, is problematic.²⁷ With advancements in Internet technology and the need to protect consumers, however, courts in the US have been grappling with the problem of exercise of personal jurisdiction over Internet-based contracts.²⁸ Owing to a lack of rules to provide for consistency, several tests have been adopted, for instance, a sliding scale test, a minimum contact test, an effects test and a targeting approach.²⁹

The targeting approach seems to be the most appropriate, as it can prevent fortuitous locations of connecting factors.³⁰ As such, it is suitable for further developments as a new connecting factor for electronic consumer contracts.³¹ This approach is followed when a

²¹ See ‘The Hague Choice of Court Convention And International Commercial Litigation.’ Address by the Honourable J J Spigelman AC Chief Justice of New South Wales Commonwealth Law Conference 2009, Hong Kong, 7 April 2009 (available at [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman070409.pdf/\\$file/spigelman070409.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman070409.pdf/$file/spigelman070409.pdf) (as accessed on 11/11/2010) at 1.

²² See the discussion in Chapter three, part 2C1, above.

²³ See *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 292; *Vervaeke v Smith* [1983] 1 AC 145,164; *Bush v National School Studios* 139 Wis 2d 635 (Wis1987), 642; *American Online v Superior Court* 90Cal App 4th 1 (Cal App 1 Dist 2001).

²⁴ See *Vita Food Products v Unus Shipping Co* [1939] AC 277 (PC).

²⁵ See *M/s Bremen v Zapata Off-Shore Co* (1972) 407 US 1.

²⁶ See S C Symeonides ‘Choice of Law in the American Courts in 2005: Nineteenth Annual Survey’ (2005) 53 *American Journal of Comparative Law* 559, 631; ‘Choice of Law in the American Courts in 2004: Eighteenth Annual Survey’ (2004) 52 *American Journal of Comparative Law* 919, 973.

²⁷ See the earlier discussion in Chapter three, part 2 B2(a).

²⁸ See the earlier discussion in Chapter three, part 2C1(a) and (b).

²⁹ See the earlier discussion in Chapter three, part 2C1(b).

³⁰ See L E Gillies *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (2008) 5. See also Z S Tang *Electronic Consumer Contracts in the Conflict of Laws Studies in Private International Law Vol 1* (2009) 19.

³¹ See Gillies (n30) 5.

foreign defendant deliberately targets the forum in question, and, out of such an intentional act, a contract is concluded. In cases where a business targets consumers in a particular country this approach is one of the protective mechanisms adopted in the EU in favour of consumers.³²

From the foregoing analysis it is clear that the EU's harmonised rule-based approach is more appropriate to e-commerce, because it takes into account the doctrine of party autonomy and the need to protect consumers targeted by online merchants. There is, therefore, a strong policy reason why this approach needs to be replicated in a global context for the sake of certainty and predictability of rules in the cyber environment. As Hay et al point out, '[i]n international trade, predictability can be achieved only if the courts of all countries strive to establish conflicts of law rules which ensure uniform results.'³³ Harmonisation of conflicts rules is thus the best way of attaining this goal. Consequently, this study submits that the strategy should be encouraged globally while taking into account the need to enhance material justice for consumers as weaker parties in trans-border e-contracts.

(b) Proposed Solutions to Domestic Problems: The case of Tanzania

In order to address the problems identified in this study, Tanzania needs to be guided by a set of recognised principles as was followed by other countries, such as South Africa.³⁴ Such principles include the following:

- the principle of conformity with international standards. Since e-commerce is a cross-border activity, Tanzania, like South Africa, should develop its e-commerce policy and legal framework on the basis of existing international trends and international treaties. In doing so, however, Tanzania will not be hindered from taking cognisance of its own socio-economic requirements. The purpose of adhering

³² When supplier targets consumers, then, consumers are entitled to litigate in their own country and courts are entitled to apply the national law of the consumer's country to govern the contract in question. See Art 15(1)(c) of the Brussels I Regulation and Art 16(1) of the Rome I Regulation.

³³ See P Hay, O Land & R D Rotunda 'Conflict of Laws as a Technique for Legal Integration' in M Cappelletti, M Seccombe & J Weiler (eds) *Integration Through Law* Vol.1 Book 2 (1986) 167.

³⁴ See para 1.2 of the Green Paper on Electronic Commerce for South Africa (2000) at pages 76-81, referring to EU developments in consumer protection, for instance. (The Green Paper is available at http://www.capegateway.gov.za/Text/2004/6/green_paper_on_electronic_commerce.pdf (as accessed on 26/2/2008).

to such international best practices is to promote and to ensure global consistency, alignment and harmonisation.³⁵

- The principle of functional equivalence.³⁶ The drafters of Tanzanian legislation on e-commerce must also be guided by this principle, which seeks to ensure equal recognition and treatment of commercial transactions conducted through the use of the paper medium and those arising from the use of data messages. Doing so helps to increase the overall efficiency of commercial transactions as it removes uncertainty.
- The principle of technological neutrality. Any proposed legislation to regulate e-commerce needs to be framed in a technologically neutral manner. This helps the law to keep pace with technological change. In addition, it allows users of the modern technologies 'to decide what is appropriate to them, in expense, in deployment, in security and in reliability.'³⁷
- the principle of party autonomy. This is an important principle because it promotes self-regulation. For instance, parties may choose the applicable law to govern their e-contract.³⁸
- Finally, the principle of public-private partnership. Since Tanzania considers the private sector as the engine of economic growth, and because e-commerce is an activity of interest to the private sector, including technology developers, it is wise to ensure that the process of developing a regulatory framework for e-commerce is all-embracing. Involvement of the private sector and the public at large is therefore necessary. This was the approach followed in South Africa.³⁹

³⁵ Ibid.

³⁶ See para 16 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) (available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (as accessed on 23/07/2007)).

³⁷ See J D Gregory 'Technology Neutrality and the Canadian Uniform Acts' 4th International Conference on law via the Internet, Montreal 2nd-4th October, 2002 (available at <http://www.lexum.umontreal.ca/conf/conf2002/actes/gregory.html> (as accessed on 24/07/2007)).

³⁸ For more about this principle see D S L Kelly 'International Contracts and Party Autonomy (*Based on Golden Acres Ltd v Queens Estate Pty. Ltd*)' (1970) 19 *The International and Comparative Law Quarterly* 7015. See also 'Conflict of Laws: Party Autonomy in Contracts' (1957) 57 *Columbia Law Review* 553. Article 4 of the UNCITRAL Model Law on E-commerce and Art 5 of the UNCITRAL Model Law on E-signatures supports its application in e-commerce. See also the Guide to the enactment (n34) paras 19 to 21.

³⁹ See Department of Communications *Discussion Paper on Electronic Commerce* (July 1999) (available at <http://www.azouk.com/163804/Discussion-Paper-on-e-commerce-South-Africa/> (as accessed on 12/8/ 2010)).

The study identified nine major problems in the existing legal framework in Tanzania. These concern e-contract formation and validity, including issues such as the requirement of *consensus ad idem* in transactions involving e-agents, marketing on websites, acceptance in certain online agreements, and the problem of establishing the time and place of contracting. The problems raised by formality requirements (such as 'writing' 'signature' or the need for 'original' documents), online mistakes, proof of contract, and the lack of rules on consumer protection were also analysed. Jurisdiction and choice of law were two additional problems. These, however, were considered separately because of their cross-border nature. This study offers solutions to these problems on the basis of the guiding principles set out above.

(i) Problems Regarding E-contract Formation

In order to form a valid contract the Tanzanian Law of Contract Act requires *consensus ad idem*. It may be problematic, however, to achieve such a requirement in online transactions unless the law is reformed to address ICT-related developments. In order to find an appropriate solution, which will ultimately ensure smooth development of e-commerce in Tanzania, there is a need for legislative interventions that address three important issues regarding contract formation. The relevant issues are: (a) the question of validity of e-contracts, (b) validity of online offers and acceptances, and (c) recognition and enforceability of e-contracts executed with the aid of e-agent technology.

In the course of addressing similar problems, South Africa developed specific rules applicable to the online environment.⁴⁰ Specifically, such rules validate all transactions executed electronically, including those in which e-agents were involved. It is important to note, however, that, in the course of developing rules intended to address this problem, South Africa did not restrict its inspiration to the UNCITRAL Model Law. In some cases regarding the use of e-agents, the Model Law does not provide adequate solutions.⁴¹ Consequently, although Chapter three of the ECTA contains provisions based on the Model Law, some provisions were based on legislation from the developed world, such as the US Uniform

See also S L Gereda 'The Electronic Communications and Transactions Act' in L Thornton, C Ysmin, M Patric & R Pippa (eds) *Telecommunications Law in South Africa* (2006) 262, 263.

⁴⁰ See Chapter six parts 4 to 8 above.

⁴¹ The Model Law, for instance, does not expressly define an e-agent but the ECTA defines them in section 1. While the Model law only refers to e-agents in Art 13(5) in relation to attribution of data messages, the ECTA has dealt with e-agents in two specific provisions (in ss 20 and 25).

Electronic Transactions Act ('UETA') and the Canadian Uniform Electronic Communications Act ('UECA').⁴² This thesis submits that these rules are important for e-contract formation and Tanzania should embrace them.

In view of the above discussion, and as earlier suggested in this research, Tanzania should refer to the UNCITRAL Model Law on e-commerce and the South African legislation, the ECTA, since the two provide a good reference point. The three issues mentioned above, namely: (a) the question of validity of e-contracts, (b) validity of online offers and acceptances, and (c) recognition and enforceability of e-contracts executed with the aid of e-agent technology should, therefore, be addressed as follows:

▪ **Validity of e-contracts**

Tanzanian law should embrace s 11(1) and 22 of the ECTA in order to address the issue of validity of online contracts and other transactions. Based on the provisions of the UNCITRAL Model law (specifically, Arts 2, 5 and 11), the two ECTA provisions resolved the existing uncertainty regarding the validity of e-contracts by providing rules that cater for the use of data messages.⁴³ Section 11(1) adopts the functional equivalence principle and place computer-generated information or data messages on an equal footing with paper-based documents. Section 22(1) further confirms the validity of agreements formed by use of data messages.

It is important to note, however, that the term 'data' as defined in s 1 of the ECTA is restrictive. Unlike the ECTA, the Model law and the UN Convention on E-contracts provide a broad definition by including any other information generated, sent, received or stored, by 'optical' or 'similar means'. The ECTA omitted this important 'catch-all' futuristic technique that enables the inclusion of any unforeseen technological developments. It also considers voice as a data message only where it is used in automated transactions. The

⁴² See, for instance, s 20(2) of the Canadian Uniform Electronic Commerce Act 1999 (UECA) (available at <http://www.law.ualberta.ca/alri/ulc/acts/eUECA.htm> (as accessed 12/8/ 2007)) which bears similarity with s 22(1) of the ECTA. See also s 20(1)(a) of the UECA and s 7(b) of the UETA which are to the effect that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. These provisions bear similarities with ss 22(1) and 24(1) of the ECTA. Chapter VII of the ECTA dealing with consumer protection was also influenced by various EC Directives since the UNCITRAL Model Law does not provide for consumer protection rules.

⁴³ They also reflect the subsequent developments which came in through the adoption of UN Convention on E-contracts (see specifically Art 4(c) (defining data message) and Art 8 (concerning recognition of data communications and e-contracts)).

approach adopted in ECTA is therefore narrow and it is not advisable that Tanzania should follow it.

▪ **Validity of Online Offers**

This study has demonstrated that there is a need to provide rules regarding the status of marketing through websites. The necessity for such rules lies in the fact that, in an online environment, it is not easy to state whether marketing on a website constitutes an offer or a mere invitation to treat. In Tanzania, the law is currently silent on this aspect. The UNCITRAL Model Law on E-commerce, which forms the basis of South African law ('the ECTA'), is also silent regarding the status of marketing on websites. It is stated in s 24 of the ECTA, however, that an offer may be made electronically.⁴⁴ Section 24 provides as follows:

[a]s between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that-

- (a) it is in the form of a data message; or
- (b) it is not evidenced by an electronic signature but by other means from which such person's intent or other statement can be inferred.

Although the above provision creates equivalence between offers expressed electronically and those expressed in other means, the issue of distinguishing between online advertisements as mere invitation to treat and those as offers has not been effectively resolved. The problem is further complicated by s 43(1) of the ECTA, which contains the phrase 'offering goods or services for sale, for hire or for exchange by way of an electronic transaction'. This phrase is ambiguous. It is not clear whether it refers to an 'offer' in its strict sense or in a sense that it should be regarded as inviting others to make offers. The ECTA, therefore, does not provide much help in resolving this problem.

Owing to the intricacies that may be involved in resolving whether marketing on websites constitutes an offer or an invitation to treat, the drafters of the UN Convention on E-contracts decided to include a provision that distinguishes between an online offer and an invitation to treat.⁴⁵ Article 11 provides that:

[a] proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the

⁴⁴ Section 24(a) of the ECTA (which was based on Art 11(1) of the Model Law) read together with s 22(1), clearly provides that an offer can be made electronically.

⁴⁵ See E Özsunay 'Invitation to Make Offers' in A H Boss & W Kilian *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Source Book* (2008) 177.

placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.⁴⁶

This provision removes uncertainty in e-contracting and aids both e-merchants and consumers who purchase items online. Consequently, apart from adopting s 24 of the ECTA, Tanzania should also adopt Art 11 of the UN Convention on E-contracts in order to resolve the existing inadequacy in its Law of Contract Act. Tanzania should also adopt s 21 of the ECTA, which provides for a situation where an offeror happens to prescribe the mode of acceptance of his offer. If, for instance, the prescribed mode relates to the use of paper-based or means other than data messages, then rules applicable to data messages will not apply. It is also submitted that, in order to bring clarity to the South African law, the ECTA should be amended by adopting provisions similar to that of Art 11 of the UN Convention on E-contracts.

▪ Issues Regarding the use of E-agents

As noted in the discussion regarding validity of e-contracts, the ECTA requires all agreements, regardless of how they were formed, to be given similar treatment in terms of their legal effects.⁴⁷ This includes agreements formed by e-agents. For better clarity, and in order to resolve other issues surrounding the use of e-agents in contract formation, s 1 of the ECTA provides a definition of e-agents while s 20(a), (b) and (c) deals with their capacity to form legally binding agreements and who should be responsible for the acts of an e-agent.⁴⁸ This legal position in South Africa has therefore resolved the objections raised in Chapter two of this thesis that were created by the use of e-agents in contract formation.⁴⁹

The UNCITRAL Model law, however, does not expressly provide for e-agents. Nevertheless, Arts 4(g) and 12 of the UN Convention on E-contracts provides for the use of e-agents in contract formation. Article 4(g) of the Convention defines an 'automated message system' (e-agent) as:

⁴⁶ This Article was based on Art 14 of the UN Convention on Contracts for the International Sale of Goods (CISG) April 11, 1980 S Treaty Doc No.98-9, 1489 UNTS 3 (1984).

⁴⁷ See s 22(1) of the ECTA.

⁴⁸ Section 20(a) and (b) state as follows: 'an agreement may be formed where an electronic agent performs an action required by law for agreement formation; (b) an agreement may be formed where all parties to a transaction or either one of them uses an electronic agent.' Paragraph (c) of this section provides that 'a party using an electronic agent to form an agreement is, subject to paragraph (d), presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement.'

⁴⁹ See Chapter two, part 3(a) above.

[a] computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.

Article 12 of the Convention further provides that:

[a] contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

Considering the above developments, it is submitted that the rules contained in both the ECTA (in ss 1 and 20), and those contained in the above-quoted provisions of the UN Convention, provide a useful reference to Tanzania in the course of developing its rules to regulate the use of e-agents in e-commerce. The UN Convention, however, is not as elaborate as s 20 of the ECTA. Article 12 of this Convention only reflects what s 20(a) and (b) of the ECTA provides.⁵⁰

It is also important to note, and thus for Tanzania to avoid and South Africa to review, the deficiency in s 20(d) of the ECTA, which states that:

[a] party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.

The phrase 'not bound' is unclear and makes it impossible to resolve whether the contract will be void or simply voidable.⁵¹ It is suggested that if Tanzania adopts this provision into its legislation, the law should clearly state that failure to provide a customer opportunity to review the transaction before entering into a binding agreement will render the contract 'voidable'.

(ii) Problems Relating to Web-based Agreements

Although the use of web-based agreements is prevalent in e-commerce transactions, these agreements also present challenges. First, as standardised agreements they result from a non-negotiated context (hence representing a 'take it or leave it' position). As a result, they

⁵⁰ The section, however, has other paragraphs (c), (d) and (e). Para (e) of the ECTA relates to mistakes or errors in online contracting. This issue also covered under Article 14 of the UN Convention on E-contracts.

⁵¹ See S Eiselen 'E-commerce' in D van der Merwe *et al Information and Communication Technology Law* (2008) 154-155.

harbour a multitude of problems of which an ordinary consumer may not be aware.⁵² Second, browse-wrap agreements, which are a category of web-based agreements, lack a mechanism to demonstrate a party's consent. Instead, these agreements typically provide that mere browsing of a particular website or an act of downloading a particular software or document governed by these agreements is considered sufficient to create a binding contract.⁵³

Because consent signifies that a party to a contract wishes to be bound to the terms or conditions governing a particular contract, its absence in browse-wrap agreements creates uncertainty regarding formalism and enforceability. Consequently, since the existing law in Tanzania does not address these issues there is a need to do so in order to reflect modern commercial exigencies.

In South Africa, web-based agreements are enforceable according to s 11(1), (2) and (3) of the ECTA, as read with ss 22(1) and 24(a) and (b).⁵⁴ Section 11(3) contains certain useful rules regarding incorporation by reference. The section requires incorporated information to be noticeable and accessible in a form in which it may be read, stored and retrieved by the other party. This section reflects the requirements of Article 5 *bis* of the Model law.⁵⁵ Thus, ss 11, 22 and 24 of this Act, together with Article 5 *bis* will prove useful in the course of developing the law in Tanzania.

As discussed in Chapter six, however, the South African law did not adequately address the controversial question concerning demonstrable acts of consent in browse-wrap agreements.⁵⁶ Hence, there is a need to amend its statute by inserting a provision which clearly states that a party to such contracts, apart from being notified of the existence of the incorporated information, must indicate his or her consent to such information. Since it is

⁵² See C Riefa & J Hörnle 'The Changing Face of Electronic Consumer Contracts in the Twenty-First Century: Fit for Purpose?' in L Edwards & C Waelde *Law and the Internet* (2009) 111.

⁵³ See M Robertson 'Is Assent Still a Prerequisite for Contract formation in Today's Economy?' (2003) 78 *Washington Law Review* 265, 296. See also *Specht Netscape Communications Corporation* 150 F sup 2d 585 (SDNY 2001) 11. See the discussion in Chapter two part 3(c) concerning this case.

⁵⁴ As discussed in Chapter six part 4(a) above.

⁵⁵ According to the UNCITRAL Guide to the Model law, in the course of assessing the accessibility of referenced text, the following factors need to be considered: 'availability (hours of operation of the repository and ease of access); cost of access; integrity (verification of content, authentication of sender, and mechanism for communication error correction); and the extent to which that term is subject to later amendment (notice of updates; notice of policy of amendment).' (See para 46-5 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996)).

⁵⁶ See Chapter six part 4(c)(ii) concerning 'Web-based Agreements: Their Enforceability and the Issue Regarding Consent.'

suggested that Tanzania should refer to the ECTA when developing its law, it is submitted that it should adopt a clear approach to browse-wrap agreements by requiring a demonstrable act of consent in such agreements.

Overall, there is a need to improve the modality of indicating acceptance in all web-based contracts. In most click-wrap agreements, for instances, customers are required to click a button that says 'I accept' as an indication of their consent to the terms and conditions governing the contract.⁵⁷ The simple click approach, however, does not provide sufficient evidence that the customer's conduct was intentional and not accidental. In other words, it may lead to unnecessary arguments in courts.

In order to avoid uncertainty which may surround the simple click approach, and to further improve the requirement for demonstrable acts of consent in web-based agreements, the law should require all online merchants to provide for clear and unequivocal mechanisms of demonstrating consent. Customers, should, for instance, be required to type the word 'I accept' or enter a particular word in correct order instead of a mere simple click of a button.⁵⁸ Such requirements help to signify the intentional behaviour of a particular customer in an unambiguous way, and thus, remove controversies surrounding web-based contracts.⁵⁹

(iii) Determining the Time and the Place where an E-contract was Concluded

The time when and the place where a contract was concluded are intricate issues in an online setting. As discussed in Chapter two, strict rules have been adopted in the conventional contract-making process to establish the time and place of making offers and acceptances. Such rules are important in resolving cross-border disputes and help to resolve such questions as when title passes from one party to another. Their determination in the online environment, however, is a highly technical problem, and the legal position in Tanzania in this regard is unsatisfactory.

New developments, however, have been made internationally to address when and where a data message is sent or received. Article 15 of the UNCITRAL Model Law and Art 10 of the UN Convention on E-contracts contain such developments. Relying on Art 15 of the Model law, South Africa developed its rules contained in ss 22(2) and 23(a), (b) and (c)

⁵⁷ See Uganda Law Reform Commission *A Study Report on Electronic Transactions Law* (2004) 2.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

of the ECTA.⁶⁰ These sections provide for the time and place of communications, dispatch, and receipt of data messages. They support the reception theory, which, compared to the postal or the information theory, is more appropriate to internet-based contracts.⁶¹ According to s 23, a contract comes into effect when the acceptance reaches the offeror's address.⁶²

While Tanzania should adopt the reception theory as envisioned in the above provisions, there are important observations which should be noted. First, it is important to note the differences between s 23(a) of the ECTA and Art 15(1) of the Model Law. As discussed in Chapter six, the notion of 'entry into an information system outside the control of an originator' is central to both s 23(a) of the ECTA and Art 15(1) of the Model Law, especially in determining time when a data message is dispatched.⁶³ Section 23(a) of the ECTA, unlike Art 15(1) of the Model Law, provides for an additional phrase in cases where both the sender and the recipient share an information system.⁶⁴

The second observation concerns the phrasing of sub-section (a) of s 23 of the ECTA. The entire section reads as follows:

A data message-

- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
- (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
- (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

⁶⁰ As discussed in Chapter six part 4(d) above.

⁶¹ As discussed in Chapter six part 4(d) above.

⁶² Section 23 of the ECTA provides that '[a] data message-(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee; (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

⁶³ See the discussion in Chapter six part 4(d) above.

⁶⁴ The additional phrase state that 'if the originator and addressee are in the same information system,' a data message will be regarded as sent 'when it is capable of being retrieved by the addressee.'

The problem lies in subsection (a), which contains a qualification not encountered in the rest of subsections, namely, the data message must be ‘used in the conclusion or performance of an agreement’. This phrase should be removed and re-inserted in the preamble to s 23 after the words ‘data message’. Indeed, it is unreasonable to restrict the operation of the sending of a message in subsection (a) to contract formation or execution, while the same qualification does not apply to its opposite (receipt) provided for in subsection (b), or to subsection (c). For that reason, it is submitted that all provisions must be restricted to occasions where the parties to the communications are about to or have entered into an agreement.

The third observation is centred on s 23(b) of the ECTA, which deals with the time when a data message is regarded as having been received. Here again, attention should be paid to the differences between this subsection and Art 15(2)(a)(i) of the Model Law on which it is based. Section 23(b) of the ECTA regards data messages as having been received ‘when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.’ Unlike Art 15(2)(ii) and (b), which further provides for ‘receipt’ in a situation where the address has no information system designated or used for that purpose, s 23(b) of the ECTA does not contemplate such a situation. It is submitted that Tanzania should avoid this gap by also adopting the provisions of Art 15(2)(ii) and (b) of the Model Law.

Overall, Art 15 of the Model Law, Art 10 of the UN Convention on E-contracts and ss 22 and 23 of the ECTA, prove to be useful to Tanzania because they support the reception theory, which is better applicable to online transaction than the postal or the information theories, the latter being the only theories currently applied to contract formation in Tanzania.

(iv) Problems Concerning Formalities

Understanding and responding to the nature of electronic communications is an important aspect of e-commerce. These communications are in data form. In certain circumstances, however, statutes may require that a contract be in ‘writing’. Given the current state of the law in Tanzania, whether such a requirement can be met electronically is questionable.⁶⁵ Unless the law clearly recognises the functional equivalence between paper and electronic data messages such a legal requirement will constitute a hindrance to e-commerce.

⁶⁵ As discussed in Chapter two part 4 above.

Hindrances to e-commerce that relate to formalities are not limited to writing. They also extend to all legal requirements of ‘wet ink signature’ and documents in their ‘original’ or ‘notarised’ form. The current legal environment in Tanzania does not address the use of electronic signatures or rules regarding e-notarisation and certification.⁶⁶ It is evident, therefore, that the current law needs to be reformed.

In South Africa, similar problems were identified and dealt with by drawing on the relevant rules from the UNCITRAL Model Law and developments in other countries. By adopting the principle of functional equivalence, technology or media neutrality and party autonomy, the drafters of the ECTA were able to adopt rules that do not discriminate between paper-based and electronic transactions.⁶⁷ This approach, which seems advisable for Tanzania, resolved the problems related to form requirements.

In view of the current inadequacies in the Tanzanian legal framework, this thesis submits that, in dealing with formalities, Tanzania should adopt the rules provided by s 12 of the ECTA. The section is based on Art 6 of the Model Law and also reflects what Art 9(1) and (2) of the UN Convention on E-contracts provides. It sets out the basic standards to be met if a data message is to satisfy a writing requirement. These include readability, accessibility or retrievability of data messages. Specifically it provides that:

[a] requirement in law that a document or information must be in writing is met if the document or information is-

- (a) in the form of a data message; and
- (b) accessible in a manner usable for subsequent reference.

The UNCITRAL Model law, however, foresaw that, as a matter of policy, states may limit the rules contained in Art 6 from applying to certain transactions.⁶⁸ Thus, s 4 of the ECTA adopts this approach and limits the application of s 12 (as well as ss 11, 13, and 14) in certain transaction.⁶⁹ All of these sections will not apply to transactions governed by the Wills Act.⁷⁰ Similarly, ss 12 and 13 of the ECTA are excluded from application in all contracts relating to transactions involving transfer of real property⁷¹ or the Bills of

⁶⁶ As discussed in Chapter two part 4 and 6 above.

⁶⁷ As discussed in Chapter six part 5(a)-(c) above.

⁶⁸ See the discussion in Chapter five, part 5(a), above.

⁶⁹ For a lengthy discussion about these exclusions see Chapter six, part 5(a), above.

⁷⁰ Act 7 of 1953. See s 4(3) of the ECTA (as read with I schedule to the ECTA).

⁷¹ These are governed by Act 68 of 1981. See s 4(4) of the ECTA (as read with the 1st schedule to the ECTA).

Exchange Act.⁷² In addition, ss 11, 12 and 14 of the ECTA do not apply to transactions governed by the South African Stamp Duties Act.⁷³

As discussed in Chapter six, however, there is a need to re-examine the rationale for these restrictions, since technology has advanced and proper and secure mechanisms may be put in place to permit these types of transactions to be performed electronically.⁷⁴ Consequently, while s12 of the ECTA and Arts 6 and 9 of the Model Law and the UN Convention, respectively, will prove useful in reforming the law in Tanzania, there is a need to constantly explore and monitor ongoing global developments that promise the possibility of allowing all transactions to be concluded electronically. In England, for instance, electronic conveyancing is legally supported.⁷⁵ Such developments need to be adopted in Tanzania instead of the kind of limitations contained in s 4 of the ECTA. It is thus necessary for South Africa to review the restrictions set out in s 4 of the ECTA.

The UNITRAL Model Law and the UN Convention on E-contract have dealt with form requirements regarding 'written signature' or 'wet signatures' in documents, as does the ECTA.⁷⁶ These provide for rules that seek to satisfy the legal requirement for signature in commercial or other transactions. First, they recognise that e-signatures are valid.⁷⁷ This is also an approach that should be followed in Tanzania. Second, they define what constitute e-signature and how a requirement for signature should be satisfied in an electronic environment.⁷⁸ Overall, reform of the law in Tanzania must ensure that the requirement in Art 6 of the Model law, that data messages must be 'accessible so as to be usable for subsequent reference' (and which also appears in s 12 of the ECTA) are adopted. Doing so will create an acceptable basis upon which the principle of functional equivalence will apply to all legal requirements for information to be in 'writing'.

⁷² Act 34 of 1964. See s 4(3) of the ECTA (as read with the 1st schedule to the ECTA). For a discussion on electronic Bills of Exchange see L Gamertsfelder 'Electronic Bills of Exchange: Will the Current Law Recognise Them?' (1998) 50 *University of New South Wales Law Journal* 566. See also AG review of the Bills of Exchange Act, July 2003, Commonwealth of Australia (2003)(available at <http://ncc.ncc.gov.au/docs/AG%20review%20of%20the%20Bills%20of%20Exchange%20Act,%20July%202003.pdf> (as accessed on 20/4/2011)).

⁷³ Act 77 of 1968. See s 4(3) of the ECTA (as read with the 1st schedule to the ECTA).

⁷⁴ See the discussion in Chapter six, part 5(a), above.

⁷⁵ Ibid.

⁷⁶ See Arts 6 and 7 of the Model law and Art 9 of the UN Convention on E-contracts.

⁷⁷ Ibid.

⁷⁸ Ibid.

(v) Problems Regarding Proof of Contract

▪ Authentication and Message Attribution

Parties to an e-contract must not only have confidence in the messages they receive from each other, but must also be able to rely on the available encryption technologies to protect their transactions. They must be able to attribute such communications to each other. The importance of being able to do so results from the anonymous nature of online transactions and the possibility that a party may repudiate a particular online communication pretending that he or she was not the author thereof. Having a mechanism in place to identify or verify that a particular transaction was initiated by a particular party, and not a hacker or an impostor, helps to promote trust in electronic transactions. Currently, however, Tanzania does not have appropriate rules regarding authentication and attribution of electronic transactions.⁷⁹ It also lacks rules on how a legal requirement for production of an original document may be satisfied electronically.⁸⁰

As discussed in Chapter two, although the Tanzanian Law of Evidence Act was amended in 2007 to address some aspects of electronic evidence, such as admissibility of electronic records, the amendments were limited to criminal proceedings.⁸¹ In respect of civil proceedings, the amendments do not effectively cater for the identity and integrity issues involving e-contracts.⁸² Given the potential threats inherent in an online environment, there is a need to create rules and mechanisms to ensure the security of online transactions and to provide for attribution and authenticity of the parties' conduct.

Articles 7 and 13 of the UNCITRAL Model Law provide for rules that address the issue of attribution and authentication, including the use of e-signatures. On the basis of the Model Law, South Africa adopted rules to deal with authentication and attribution of data messages, contained in ss 13 and 25 of the ECTA, including the use of encryption technologies in the course of signing e-contracts.

In the course of signing documents embodying contracts or other documents for which a signature is need, s 1, read together with s 13 of the ECTA, provides two definitions of e-signature: an ordinary 'e-signature' and an 'advanced electronic signature'. The former

⁷⁹ As discussed in Chapter two, part 6 above.

⁸⁰ Ibid.

⁸¹ See the discussion in Chapter two, part 6 above.

⁸² Ibid.

refers to ‘data attached to, incorporated in, or logically associated with other data and, which is intended by the user to serve as a signature’. The latter, ‘an advanced electronic signature’, results from a process of authentication based on a certification process by an accredited authority established under s 37 of the ECTA. While it is submitted that Tanzania should adopt s 13 of the ECTA, as discussed in Chapter six, there is a need to widen the scope of advanced electronic signatures to include other technological developments, such as the use of biometrics, for the purpose of establishing proof of identity and consent to a particular transaction.⁸³

Section 25 of the ECTA deals with attribution of data messages to the originator. It is important to point out, however, that the ECTA has adopted a narrow approach compared to what Art 13 of the Model Law provides. The drafters of the ECTA adopted only three paragraphs of Art 13, ie, Art 13(1), and (2)(a) and (b).⁸⁴ It is submitted that Tanzania should rather adopt the broad approach envisaged in the Model Law by adopting the whole of Art 13, since it gives other options. For instance, parties to a transaction may have their own preference regarding what constitutes a reliable attribution mechanism to be used in their transaction. In addition, the broad approach envisaged under Art 13 of the Model Law promotes the autonomy principle. As proposed in Chapter six, s 25 of the ECTA should also be revised to incorporate the other parts of Art 13 of the Model Law.⁸⁵

Sections 29 to 41 of the ECTA provides for the establishment of an accreditation authority ‘to accredit authentication products and services in support of advanced electronic signatures.’⁸⁶ Although these sections are useful to Tanzania, there is also a need to adopt a policy to guide the provision of domestic and international accreditation services.

▪ Fulfilling the Requirement for an ‘Original’ Document

Both the Model Law and the ECTA provide for rules specifying how a requirement that documents should be presented in their ‘original’ format can be satisfied electronically.

⁸³ See the discussion in Chapter six, part 5(b) above.

⁸⁴ See the discussion in Chapter six, part 6(a) and(b) above.

⁸⁵ See the discussion in Chapter six, part 6(i) above.

⁸⁶ See s 37(1) of ECTA. Such authorised persons are referred to in section 1 of the ECTA as ‘certification service providers’. Sections 29 to 41 of the ECTA deal with this issue. See also the discussion in Chapter six, part 5(b) above. Sections 29-32 of the ECTA deal with registration of cryptography providers and restrictions regarding information held in the register and consequences of failure to comply with the requirements under these sections. Sections 30-40 deal with authentication service providers, the relevant accreditation authority, accreditation criteria to be followed, grounds for revocation of an accreditation and accreditation of foreign products and services. Section 41 empowers the Minister to develop accreditation regulations.

Based on Art 8 of the Model Law, s 14 of the ECTA provides for the criteria to be relied upon if information in the form of data message should satisfy such a legal requirement.

Specifically, it provides that:

- (1) [w]here a law requires information to be presented or retained in its original form, that requirement is met by a data message if-
 - (a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and
 - (b) that information is capable of being displayed or produced to the person to whom it is to be presented.
- (2) For the purposes of subsection 1 (a), the integrity must be assessed-
 - (a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;
 - (b) in the light of the purpose for which the information was generated; and
 - (c) having regard to all other relevant circumstances.

Since there is a need to ensure the integrity of electronic data messages the criteria set out in the above section, which is based on Art 8 of the Model law, are useful and Tanzania should adopt them.

▪ Admissibility of Data Messages

The admissibility of data messages was discussed in Chapters two and six.⁸⁷ Both the Model Law (under Art 9) and the ECTA (under s 15) provide for rules concerning admissibility of messages in court. Section 15(a) and (b) of the ECTA are to the effect that, unless other grounds to the contrary exist, all data held in electronic form will be admissible and should not be denied admissibility merely because they are in that form. It seeks to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value.

Section 15 of the ECTA, however, has been controversial, and, in the recent past, the South African Law Reform Commission (SALRC) issued a Discussion Paper seeking public comments on this section. The Discussion Paper invited comments regarding the hearsay rule and some questions concerning assessment of the evidential weight of data messages. It is clear, however, that since rules governing admissibility of evidence apply to data messages, s 15 of ECTA was not intended to displace the normal rules that apply to hearsay evidence.

Nevertheless, it is important to note that, since the current rapid changes in technology lead to new forms of electronic evidence, there is a shift from questions regarding admissibility and exclusion to more technical concerns about authenticity and the suitable

⁸⁷ See Chapter two part 6 and Chapter six, part 6(b)(ii) above.

weight to accord to electronic evidence. This approach is indeed justified given that electronic evidence is intangible or transient in nature, easy to manipulate, fragile, and is highly susceptible to error, accidental alterations or fabrications in the course of its collection or compilation for judicial use.⁸⁸

Consequently, although the rules regarding hearsay remain intact, the controversy about the application of s 15, in general, is not so much a legal issue than an issue of clarity. In particular, clarity is needed regarding what should be done to ensure that courts are properly guided when interpreting this section. As noted in Chapter six, South Africa lacks procedures to guide the collection, storage and presentation of such electronic evidence for purposes of judicial proceedings.⁸⁹ This further compounds the current evidential problems, hence, bringing to the forefront questions regarding the accuracy or authenticity and hence reliability of such evidence. It is therefore submitted that there is a need to put additional safeguards in place which provide for such procedures.⁹⁰

Overall, Tanzania will find the rules provided in Art 9 of the Model Law and s 15 of the ECTA useful in the course of developing its rules to govern admissibility of electronic evidence. In particular, the country needs to take into account the following when developing its rules to govern admissibility of data messages:

- rules developed should provide clear guidelines on admissibility and weight of electronic records. This includes stating what should be taken into account;⁹¹
- rules developed must distinguish between computer records created with and without human intervention.⁹² Reforms should, however, be restricted to computer-generated evidence and should not extend to documentary evidence as a whole;⁹³

⁸⁸ See P Sommer 'Downloads, Logs and Captures: Evidence from Cyberspace' (available at <http://www.pmsommer.com/dload01.pdf> (as accessed on 22/10/2010) (see page 5). See also D Collier 'Evidently Not So Simple' (2005) 13 *JUTA's Business Law* 6.

⁸⁹ See Chapter six, part 6(b)(ii). See also M Watney 'Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position' (2009) 1 *Journal of Information, Law & Technology (JILT)* at 12 (available at http://go.warwick.ac.uk/jilt/2009_1/watney (as accessed on 21/10/2010)).

⁹⁰ See Chapter six, part 6(b)(ii).

⁹¹ See Uganda Law Reform Commission (n57) 34.

⁹² *Ibid.*

⁹³ *Ibid* at 35.

- such rules must provide an opportunity for courts to carefully assess the background, procedures and the process of data creation or storage and retrieval in order to ascertain the level of reliability of such computer generated evidence, this being a condition for their acceptability.⁹⁴ In any event, the onus to prove that the records are reliable should be on the person seeking to introduce such records.⁹⁵

Tanzania must also consider developing additional procedural safeguards, such as a code of conduct with rules concerning the collection, handling, storage and presentation of electronic evidence intended for judicial proceedings.⁹⁶

▪ **Electronic Retention of Data Records**

Record retention is a legal requirement in many countries for various reasons. In the past, volumes of paper-based records occupied huge spaces and consumed money and time to maintain or retrieve records when needed.⁹⁷ The new technology, however, has made record retention easier, hence saving both the space to keep the records and the time to retrieve them. In order to facilitate e-commerce, and to ensure that record retention requirements apply equally to information held in paper and electronic media, Art10 of the Model law provides that where the law requires certain documents, records or information to be retained, that requirement is met by retaining data messages.

Section 16 of the ECTA echoes what Art 10(1) and (2) of the Model Law provides.⁹⁸ It does not, however, include subparagraph (3), which addresses a situation where services of a third party are relied upon.⁹⁹ The Model Law provides that in cases in which the services of a third party are relied upon that third party must fulfil the requirements of subparagraphs (1) and (2) of Art 10. It therefore provides an additional opportunity to be used by a party who may not have the means to retain data records as required. In addition, Art 8 of the Model Law contains other supplementary rules on storage of data messages, namely, accessibility, integrity, and retention in a form that is presentable with the same accuracy when needed for future use. Given the importance of ensuring that retained data records are available, with

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ See above at page 335.

⁹⁷ See the discussion in Chapter six, part 6(b)(iii) above.

⁹⁸ Ibid.

⁹⁹ As for a discussion on trusted third party services in e-commerce see G Jones 'Trusted? Third? Parties' (2004) 2 *Hertfordshire Law Journal* 62.

accuracy and integral form, Tanzania must adopt these provisions— including subparagraph (3) of Art 16 of the Model Law. The ECTA should also be amended.

(vi) Dealing with Online Mistakes or Errors

Online mistakes may either be occasioned by e-merchants out of human error, programming of software (e-agents), errors resulting from failed data transmissions or by consumers who interact with an e-agent. As pointed out in Chapter two, the law in Tanzania is inadequate to deal with such errors.¹⁰⁰ Solution to such problems, however, can be found in Art 13(5) of the UNCITRAL Model Law, Art 14 of the UN Convention on E-contracts and ss 20 and 25 of the South African legislation, the ECTA.¹⁰¹

While it is recommended that Tanzania should develop its rules on the basis of these provisions, two observations need to be taken into account. First, Art 13(5) of the Model Law is limited only to errors in the content of data messages arising from transmission problems. This means that it is inadequate to rely solely on this provision. Second, Art 14 of the UN Convention is also limited to errors that occur in an interactive website and permits withdrawal from the transaction only in respect of the portion of the affected e-communications, hence making an e-contract neither void nor voidable.¹⁰² This makes it less preferable, if considered from the perspective of consumer protection.¹⁰³

As discussed in Chapter six if Art 14 of the UN Convention is to be compared with s 20(e) of the ECTA, the latter provides for a better position, although it also needs to be reconciled with s 43(2) of that Act for the better protection of consumers.¹⁰⁴ Overall, this thesis submits that Tanzania should adopt the ECTA approach, as it provides for a more favourable position for natural persons who interact with e-agents.

(vii) Consumer Protection in an Online Environment

As a cross-border phenomenon, e-commerce has serious implications for domestic consumers, and thus consumer protection deserves special attention. This is partly due to three reasons. First, the increasing globalisation and liberalisation of markets, coupled with

¹⁰⁰ See Chapter two, part 5 above.

¹⁰¹ See the discussion in Chapter six, part 7 above.

¹⁰² Ibid.

¹⁰³ However, as noted in Chapter five part 5(c)(ii) and (iii) above, the UN Convention on E-contracts applies only to B2B e-commerce.

¹⁰⁴ See the discussion in Chapter six, part 7 above.

the enhanced power of media through technology convergence, has created the possibility of online supply of shoddy, defective, dangerous or substandard goods and services.

Secondly, given that modern internet commerce assumes a global nature and lacks jurisdictional boundaries and face-to-face interactions, consumers who engage in e-commerce run considerable additional risks. For instance, online consumers are vulnerable to hacking and invasions of their privacy. And, because most online merchants gather personal data or information that consumers may not have consented to, the latter may not even know the purposes for which the information was collected, how it will be handled, stored, or accessed by others or generally protected against unauthorised use.

Finally, the rapid developments of the modern technology, and the continued sophistication and transformation of the ways through which suppliers and consumers interact contractually, make it impossible for inexperienced consumers to be able to protect their interests in online contracts.

Issues of particular concern are the online safety and welfare of consumers, financial security, data protection, protection from unsolicited information, possibilities of gaining access to adequate information, and availability of effective and affordable redress mechanisms. While to some extent these issues have been taken into account in countries such as South Africa, they have not been addressed in the existing rules in Tanzania.

As discussed in Chapter two, the laws on which Tanzanian consumers can rely for remedies, which include the Law of Contract Act,¹⁰⁵ the Sale of Goods Act¹⁰⁶ and the Fair Competition Act,¹⁰⁷ do not expressly take Internet-based transactions into account,¹⁰⁸ because some of these statutes were initially enacted between 50 and 80 years ago and are thus not suitable in the modern era of paper-less and faceless transactions. In addition, certain principles, which these statutes support, create dilemmas.¹⁰⁹ For instance, although the principle of privity to contract remains important, some aspects thereof are problematic.¹¹⁰

¹⁰⁵ Cap 345 [R.E. 2002].

¹⁰⁶ Cap 214 [R.E. 2002].

¹⁰⁷ Act No. 8 of 2003.

¹⁰⁸ See the discussion in Chapter two part 7.

¹⁰⁹ According to the principle of privity to contract a consumer who consumes goods purchased by another cannot sue in contract for remedy.

¹¹⁰ For more on this see the discussion in Chapter two part 7.

In spite of the urgent need for laws to regulate these deficiencies, no serious action has been taken in Tanzania. The Tanzanian Fair Competition Act is a good example. Although this Act was promulgated in 2003 it does not take into account online consumer transactions. This has remained the position even after a study by the Tanzanian Law Reform Commission, concerning the legal effects of this technology, recommended that the existing legal framework in Tanzania should be reviewed.¹¹¹ The Act is therefore entirely deficient, because it does not consider important rights for online consumers. Such rights include the right to withdraw from an e-contract, the right to prior consent, the right to privacy and protection of other information that online suppliers gather in the course of online transactions. The Act is also deficient regarding the duties that suppliers owe to consumers, for instance, the duty to disclose all relevant information concerning the products or services.¹¹²

South Africa, on the other hand, has made significant developments regarding online consumer protection.¹¹³ Although the Model Law on (which the ECTA was partly based) does not fully provide for consumer protection,¹¹⁴ South Africa developed its online consumer protection rules by drawing from other jurisdictions, especially the European Union.¹¹⁵ These rules (contained in Chapter VII of the ECTA) are mandatory, meaning that the parties cannot, by way of an agreement, derogate from them.

It is important to note, however, that Chapter VIII of the ECTA, which deals with privacy, does not sufficiently provide for the protection of personal data obtained in the course of transacting business online. Since data privacy in an online environment affects consumer confidence, and, in order to address this flaw efforts are underway in South Africa to address this. The government has already prepared the Protection of Personal Information Bill, which is intended to give effect to the constitutional right to privacy in a more

¹¹¹ See a position paper by the Law Reform Commission of Tanzania (available at <http://www.lrc-tz.org/Positionpaperone-COMMERCE.pdf> (as accessed on 21/07/2007)).

¹¹² For more on this see the discussion in Chapter two part 7.

¹¹³ For more on this see the discussion in Chapter six, part 8(b)(i)-(x) above.

¹¹⁴ See Article 5*bis* of the UNCITRAL Model Law on E-commerce.

¹¹⁵ For more discussion about the EU consumer protection regime see Chapter five, part 6(a)(i)-(iii) above. It is also important to note that more changes are expected in the EU following a proposal to adopt a new framework for consumer protection— to be called Consumer Rights Directive. See A Schwab ‘Consumer rights (final vote) COM (2008)0614 – C6-0349/2008 – 2008/0196(COD) Proposal for Directive’ (available at <http://www.europarl.europa.eu/document/activities/cont/201106/20110616ATT21551/20110616ATT21551EN.pdf> (as accessed on 29/6/2011)). (See, for instance, Recital 8(a) and 9 of the proposed Directive). See also Department of Business Regulation and Enterprise Reform (BERR) ‘Consultation on EU Proposals for a Consumer Rights Directive’ November 2008 (available at <http://www.bis.gov.uk/files/file48791.pdf> (as accessed on 29/6/2011)).

appropriate manner than the ECTA.¹¹⁶ These new developments will also be useful to Tanzania in the course of developing its rules concerning protection of personal information as a measure to ensure security of privacy of online transactions. Overall, despite the imperfections within the ECTA, the rules it contains in part VII are useful for safeguarding the interests of consumers as weaker and vulnerable parties in e-contracts. Tanzania will therefore find them useful in the course of addressing the inadequacies in its consumer protection regime.

In addition to the ECTA rules, Tanzania should also, in the course of developing its own e-commerce legislation, take into account the SADC ICT Consumer Rights and Protection Regulatory Guidelines which were adopted in June 2011.¹¹⁷ In particular, these guidelines require service providers to ensure, among other things, that online consumers' privacy is protected, including protection against unauthorised use of their personal information that might have been collected when they transact online. These guidelines, however, are not binding on SADC member states. They are only meant to lend assistance to decision makers in the ICT Sector to ensure that consumer protection becomes an integral part of their developmental objectives. Generally, more comprehensive rules regarding consumer protection will need to be formulated in separate legislation to deal with important issues envisaged in the SADC ICT Consumer Rights and Protection Guidelines, such as the requirements that service providers 'act fairly, reasonably and responsibly in all their dealings with consumers'. As noted in chapter six, South Africa has enacted a comprehensive law on consumer protection and such issues have been effectively addressed.¹¹⁸

(viii) Problems Relating to Court's Jurisdiction

Although the current rules on jurisdiction have not lost their relevance entirely, their application in internet-based transactions creates difficulties because they are essentially predicated on the concept of the territorial state. The Internet, however, is borderless in nature, and as a result as e-commerce does not require the physical presence of parties in a particular fixed place. With this in mind, the traditional principles of sovereignty,

¹¹⁶The Bill was published in Government Gazette No. 32495 of 14 August 2009. For more on this Bill see the discussion in Chapter six part 8(b)(x).

¹¹⁷ The 'SADC ICT Consumer Rights and Protection Regulatory Guidelines' are available online at <http://www.nbc.na/resources/Guidelines%20-%20ICT%20Consumer%20Protection%20In%20Southern%20Africa.pdf> (as accessed on 23/11/2011).

¹¹⁸ See Chapter 2 Part F and Part G of the South Africa's Consumer Protection Act, Act 68 of 2008.

territoriality and presence, which form the bases upon which a court may exercise jurisdiction over a particular foreign defendant, are inappropriate to the internet-based activities.

For instance, when it comes to e-contracts, there is no conclusive answer to questions that seek to identify the physical presence of a party or the place in which such an e-contract could be located, ie, where it was entered into or breached.¹¹⁹ As a result, although it is generally considered that '[w]here activities occur – or, more precisely, where we deem them to have occurred – answers the traditional question of jurisdiction ... under conventional private international law analysis',¹²⁰ such a proposition does not present the right approach for a private international law inquiry into law disputes emanating from e-contracts.¹²¹ However, while the localisation approach to determine jurisdiction often proves inappropriate for such disputes,¹²² website owners, e-commerce companies and consumers are desirous of clear rules on which they can rely in a cross-border dispute.

The involvement of consumers in cross-border transactions is an additional factor in the current jurisdictional conundrum. Nowadays, through e-commerce consumers are key players in the international trade arena.¹²³ Their involvement has complicated transaction and litigation planning¹²⁴ because, apart from increasing the possibility of multiple cross-border

¹¹⁹ See L A Bygrave & D Svantesson 'Jurisdictional Issues and Consumer Protection in Cyberspace: The View from "Down Under"' (available at http://folk.uio.no/lee/oldpage/articles/CLE_paper.pdf (as accessed on 23/10/2010)) para 3.1.

¹²⁰ See M Burnstein 'A Global Network in a Compartmentalised Legal Environment' in K Boele-Woelki & C Kessedjian (eds) *Internet: Which Court Decides? Which Law Applies?* (1998) 27.

¹²¹ Ibid. See also H Perritt 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675, 675-676.

¹²² See Perritt (n121) 675-676.

¹²³ See R Schu 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?' (1997) 5 *International Journal of Law and Information Technology* 192, 193-194. See also R Ong 'Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong' (2004) 12 *International Journal of Law and Information Technology* 101; C Reed & G Sutter 'E-commerce' in C Reed & J Angels (eds) *Computer Law: the Law and Regulation of Information Technology* 6ed (2007) 220-227; C Ramberg 'The E-commerce Directive and Formation of Contract in a Comparative Perspective' (2001) 26 *Entertainment Law Review* 429. See also L Gillies 'A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union' Commentary (2001) 1 *The Journal of Information, Law and Technology* (part 2.1) (available at <http://elj.warwick.ac.uk/jilt/01-1/gillies.html> (as accessed on 27/5/2010)).

¹²⁴ See E A O'Hara & L E Ribstein 'Conflict of Laws' in B Bouckaert & G De Geest *Encyclopedia of Law & Economics Online* Edward Elgar & the University of Ghent (1996-2000) 631-660 (available at <http://encyclo.findlaw.com/9600book.pdf> (as accessed on 2/4/2008)).

internet disputes,¹²⁵ there has been a necessity to extend consumer protection concerns to the area of conflict of laws.¹²⁶

As noted in Chapter three, the need to extend consumer protection rules in the regime of conflict of laws has never been smooth. On the one hand, most consumer protection advocates focus on the need to ensure that consumers who transact with foreign merchants electronically should not bear the financial burden of litigating away from their place of domicile.¹²⁷ Thus, in all cases, consumers should at least enjoy the level of protection provided by their own laws.¹²⁸ Online merchants, on the other hand, argue in favour of party autonomy. In view of these polarised positions, and taking into account the cross-boundary character of the Internet, it becomes difficult to determine the appropriate legal protections to which consumers may be entitled in online transactions. There is, therefore, a need to resolve the current tension through clear rules that take into account the interests of both the consumers and the e-merchants.

In Tanzania, before a court adjudicates any dispute it must have jurisdiction over the parties. Courts are entitled to exercise jurisdiction over a foreign defendant on three grounds:

- (i) the presence of the defendant in Tanzania (either as a resident or if he is domiciled in Tanzania or is carrying on business in the country. His presence may also arise from his submission to the court).
- (ii) If the cause of action arose in Tanzania, or, in the case of a contract, if it was made in the country or has a jurisdictional clause choosing Tanzania, and
- (iii) the defendant being properly served with the writ or the claim forms.¹²⁹

Viewing the above jurisdictional rules from the perspective of the current technological developments, these rules are inadequate. Reforms are thus necessary in order to not only make these rules responsive to the modern commercial exigencies but also to

¹²⁵See A D Murray 'Entering Into Contracts Electronically: The Real W.W.W' (at page 15) (available from <http://www.100megsfree4.com/andrewmurray/Contracts.pdf> (as accessed on 3/6/2010)). See also J Hörnle 'The Jurisdictional Challenges of the Internet' in L Edwards & C Waelde *Law and the Internet* 3ed (2009) 121.

¹²⁶ See Gillies (n30) 9-21.

¹²⁷ See M Keller 'Lessons for The Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States' (2004) 23 *John Marshall Journal of Computer & Information Law* 2. See also J K Winn & B Wright *The Law of Electronic Commerce* 4ed (2008) 38-39.

¹²⁸See Gillies (n30).

¹²⁹ For more discussion see Chapter three part 2A1 (a) and (b) above.

ensure that they are in line with international developments that take into account the need to protect consumers who transact with online merchants.¹³⁰ Consequently, the following reforms are necessary:

- jurisdictional rules governing service of writ and other documents within or outside the courts' jurisdiction need to be reviewed to allow service by electronic means. As discussed in Chapter three, the UK Civil Procedure rules contemplate such kind of service of writs.¹³¹ Tanzania should therefore adopt a similar approach.
- While courts should continue to uphold choice of jurisdiction clauses (party autonomy) there is a need to create in-built mechanism to protect consumers.¹³² In particular, rules must be in place requiring such clauses to be clear and conspicuous in order to bring them to the attention of consumers who are usually considered the weakest party.¹³³ Where such clauses are incorporated by reference, then they must be subjected to the rules that govern incorporation (as discussed earlier), and this includes a requirement that there must be an appropriate mechanism to ensure that consumers actually consented to such terms and conditions (including such a jurisdictional clause).¹³⁴ Such mechanisms may include a requirement to insert a given security word or number in a particular designated space, instead of a mere requirement to click the 'I agree' button.
- To offer additional protection to consumers. In order to do so rules that signify the 'targeting effect' should be developed.¹³⁵ Thus, interactive websites that target (and solicit or prompt) consumers domiciled in Tanzania to conclude a distance contract should be required to litigate their disputes in Tanzania whenever such contracts are concluded.

¹³⁰ Harmonisation of domestic rules and adoption of rules that protect consumers has been a strategy which the EU has adopted through various Directives (see chapters 3, 4 and 5 of this thesis). Such rules may still be adopted in any other country as they represent acceptable and appropriate standards that enhance certainty and predictability in e-commerce globally and domestically.

¹³¹ See Chapter three part 2B1 above.

¹³² For more discussion on party autonomy see Chapter four part 4 above.

¹³³ More discussion was made in Chapter three part 2 B2(a) concerning jurisdictional clauses.

¹³⁴ See the discussion in part 3(b)(ii) of this Chapter. See also Chapter six part 4(c)(ii) above.

¹³⁵ See the discussion in Chapter three part 2 C1 and D1 above.

(ix) Problems Concerning Choice of Law

Choice of law in consumer contracts is also a thorny matter.¹³⁶ Problems arise because of the need to protect freedom of contract, on the one hand, and the need to protect consumers from the risks associated with online contracting, on the other. In a situation where a domestic legal regime contains weak or inadequate consumer protection rules, consumers are more at risk. This is especially so because, although a domestic statute may contain rules that purport to override the parties' chosen law, if such rules are weak, consumers will not be given the better protection they deserve.

As discussed in Chapter four, Tanzanian choice of law rules in contracts are based on the traditional English common law rules.¹³⁷ Under the traditional English common law rules, courts give preference to party autonomy.¹³⁸ Thus, if parties have inserted a clause choosing the applicable law, courts will uphold such a choice.¹³⁹ While this practice needs to be guaranteed even in online transactions, a choice of law clause ought to be clearly and conspicuously brought to the attention of the consumer. As with jurisdictional clauses, there must be additional requirements, especially when terms, embodying a choice of law clause, are incorporated in the agreement.¹⁴⁰ Thus, similar rules as those suggested earlier to govern jurisdictional clauses, should be adopted to ensure that a particular consumer, who is a party to an online contract, in fact consented to the choice of law clause.¹⁴¹

In case parties to a contract failed to expressly choose an applicable law to govern their contract, the usual practice is that courts must determine 'the proper law' to be applied. Important connecting factors, such as residence, place of contracting and performance have been relied upon. The contemporary method of determining the proper law has been to identify and adopt the system of law with which the contract is most closely connected. Because these criteria were developed before e-commerce existed they are not wholly satisfactory, since locating various connecting factors in an online environment can be complicated. Article 15 of the UNCITRAL Model law, which this thesis proposes Tanzania

¹³⁶ See Chapter four for more discussion on this problem.

¹³⁷ See Chapter four part 3.

¹³⁸ See Chapter four part 3 and 4. See also Tang (n30) 169.

¹³⁹ See D McClean & K Beevers *Morris: The Conflict of Laws* 17ed (2009) 353. See also *R v International Trustee for the Protection of Bondholders Akt* [1937] AC 500 (recently applied in *Musawi v RE International (UK) Ltd* [2008] 1All ER (Comm) 607.

¹⁴⁰ See the discussion in part 3(b)(ii) of this Chapter. See also Chapter six part 4(c)(ii) above.

¹⁴¹ See part 3(b)viii (above). See also the discussion in part 3(b)(ii) of this Chapter and Chapter six part 4(c)(ii).

should adopt,¹⁴² however, offers assistance in determining the place where a contract was formed, and for that reason, it offers assistance in the course of determining choice of law if parties did not expressly do so. The South African legislation on e-commerce, the ECTA, has adopted it.¹⁴³

Two more provisions in the ECTA need to be adopted. These are ss 47 and 48. Section 47 is meant to ensure that all mandatory rules contained in the Act (specifically the requirements intended to protect consumer, which are provided in Chapter VII of the Act) are not derogated from by way of agreement or limitation of any sort by the parties. Consequently, the section provides that '[t]he protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.' For its part, s48 makes the further provision, stating that '[a]ny provision in an agreement which excludes any rights provided for in this Chapter is null and void.'

While ss 47 and 48 of the ECTA are useful and should be adopted in Tanzania, they are not satisfactory as a guarantee of a balanced and flexible regulatory regime. In view of this, and, in order to strengthen legal certainty and predictability of online transactions, this study submits that there is a need to develop a more flexible choice of law regime. Specifically, it is submitted that, since most existing legislation on contract do not provide for conflict of laws, legislation governing e-commerce transactions demand conflict rules that take into account the plight of consumers. It is therefore necessary that Tanzania should establish flexible rules that meet such a requirement.

In particular, Tanzania needs to adopt the protective mechanisms, such as those envisaged in the EU's Rome I Regulation.¹⁴⁴ Apart from guaranteeing party autonomy,¹⁴⁵ the Regulation contains rules that protect consumers in cases where their contracts with suppliers do not expressly provide for choice of law. Determining the applicable law under the Regulation is done objectively, and, 'the objective connecting factor is the habitual residence.'¹⁴⁶ The rules contained in Art 4(1) (a), (b), (d) and (f) of the said Regulation are

¹⁴² See the discussion in part 3(b)(iii) of this Chapter.

¹⁴³ As discussed in Chapter six part 4(d) above. See also part 3(b)(iii) of this Chapter.

¹⁴⁴ See Rome Regulation I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the Law Applicable to Contractual Obligations (Rome I) (Official Journal OJ L 177 of 4.7.2008).

¹⁴⁵ See Art 3 generally of Rome I Regulation. For more discussion see Chapter four part 5 above.

¹⁴⁶ See M Gebauer 'Article 4: Applicable Law in the Absence of Choice' in G Callies (ed) *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (2011) 87, 95.

relevant in this case. Article 4(1)(a), (b), (d), and (f) provide rules governing choice of law for the sale of goods, provision of services, franchises or distribution.

Article 4(1)(a) provides that, in the absence of a choice by the parties, ‘a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.’ Contracts involving provision of services are governed by Art 4(1)(b), which provides that such contract ‘shall be governed by the law of the country where the service provider has his habitual residence.’

As a residual rule, Art 4(2) provides that where a contract cannot be categorised as one of the types covered under the rules provided by Art 4(1), or its elements fall within more than one of the specified types, then such a contract will have to be governed by the law of ‘the country where the party required to effect the characteristic performance of the contract’ resides. The weakness, however, lies in the fact that, mostly, the party giving characteristic performance will be the supplier. In other words, the principle of characteristic performance does not favour the weaker party. Nevertheless, the rule is subsidiary to what Art 4(1) provides. Overall, the Regulation has brought simplicity of application to persons who are not specialised in conflict of laws,¹⁴⁷ and, in order to strengthen legal certainty and predictability, the list of specified types of contracts in Art 4 of the Regulation does not grant courts a wide flexibility in the course of determining the applicable law.¹⁴⁸

Although reliance on the ‘closest and most real connection’ principle to establish the proper law in an e-contract may be inappropriate, given the difficulties of establishing connecting factors in an online environment,¹⁴⁹ Art 4(3) of the Regulation has retained this rule (although it is a ‘mere subsidiary rule’).¹⁵⁰ It applies to cases that show, from all their surrounding circumstances, that a particular contract in question is manifestly more closely connected with a country other than that indicated in Art 4(1) and (2).¹⁵¹

Overall, it is important to note, as Chapter four revealed, that to a large extent, the choice of law rules in England have been supplanted by the new developments.¹⁵² Thus,

¹⁴⁷ Ibid. See also See Cheshire, North & Fawcett *Private International Law* 14ed (2008) 723; O Lando & P A Nielsen ‘The Rome I Regulation’ (2008) 45 *Common Market Law Review* 1687, 1704.

¹⁴⁸ See Gebauer (n146) 88.

¹⁴⁹ See A Briggs (n15) 20.

¹⁵⁰ See Gebauer (n146) 89.

¹⁵¹ Ibid.

¹⁵² For more discussion see Chapter IV part 1 above. See also Dicey & Morris *The Conflict of Laws* 13ed (2000) 264, 291; Briggs (n15) 153.

Tanzanian rules, which are essentially common law based, are in need of reform. It is proposed that, regarding protective mechanisms, the EU approach should be adopted. This will effectively and adequately protect both the interests of consumers who take part in e-commerce and the suppliers who wish to organise their transactions in a more predictable manner.

(c) Final Recommendations

Tanzania may address issues identified in this thesis in three ways. First, they may be left to be resolved by the courts as and when they occur.¹⁵³ Secondly, they may be left to the parties to be resolved through contractual terms in their agreements, or finally, they may be resolved by way of enacting a new statute.¹⁵⁴ This thesis supports the third approach, ie, enacting new legislation to govern e-commerce issues. The reasons in support of this option are set out below.

(i) Leaving the problem to be resolved by courts to deal with them as and when they occur

As observed in this thesis, there have been views that most of the existing rules can be adapted to new situations arising from the utilisation of the Internet technology,¹⁵⁵ and that, the courts have always been able to find ways of addressing the challenges of new technologies.¹⁵⁶ Despite such arguments, it is clear from the perspective of the current technological revolution that, there are limits on the adaptability of the law.¹⁵⁷ Such limitations result from the nature and extent of the contemporary technological revolution.

As argued in this study, technological changes are continuous and rapid. The Internet, for instance, has made some of the existing rules 'farfetched, artificial, and irrelevant.'¹⁵⁸ As a result, they either 'need to be supplemented, replaced, or abolished.'¹⁵⁹

¹⁵³ See Uganda Law Reform Commission (n57) 12.

¹⁵⁴ Ibid.

¹⁵⁵ See G M Kalow 'From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications' (1997) 65 *Fordham Law Review* 2241, 2242. See also Pistorius 'Formation of Internet Contracts: Contractual and Security Issues' (1999) 11 *South African Mercantile Law Journal* 282, 283.

¹⁵⁶ See H B Stravitz 'Personal Jurisdiction in the Cyberspace: Something More is required on the Electronic Stream of Commerce' (1998) 49 *South Carolina Law Review* 925, 926. See also R S Zembek 'Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace' (1996) 6 *Albany Law Journal of Science & Technology* 339, 346.

¹⁵⁷ S Anil 'Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues' (2001) 9 *International Journal of Law and Information Technology* 93, 95.

¹⁵⁸ See Z S Tang 'Private International Law in Consumer Contracts: A European Perspective' (2010) 6 *Journal of Private International Law* 225, 229.

Reform of such rules, through judge-made law, will exacerbate matters because it is often too slow and uncertain. In addition, its development is reactive rather than proactive. Courts have to wait for parties to bring disputes before them for resolution. If nothing is submitted to the court then the *status quo* remains. For these reasons, relying on the courts solely to develop the law can neither meet the goals of enhancing certainty and predictability in e-contracting nor can it ensure consumer protection in a fast changing business environment.¹⁶⁰ (And, we cannot always rely on the bench to construe the law in favour of the weaker party, because courts are very reluctant to interfere with the freedom of the parties). In short, courts are cautious lest they find themselves legislating. It is clear, therefore, that leaving the problems identified in this study to be addressed by the courts as and when they arise is not an appropriate and reasonable option that should be suggested as a way forward.

(ii) Encouraging parties to resolve the identified problems through contractual terms in their agreements

In most cases contractual clauses that specify how contracting parties will carry out their obligation have been part of the private mechanisms used to regulate commercial transactions.¹⁶¹ Indeed, as argued in this study, self-regulation is considered a useful and flexible approach able to march with the dynamic and international character of e-commerce.¹⁶² While the above reasoning is well founded, given the level of uncertainty and risks involved in online transaction, it is clear that relying on parties alone may not be the best option through which e-commerce is to be developed.

Consequently, a combined mechanism of private-public involvement, also referred in this work as the new minimalist regulatory approach, is necessary.¹⁶³ This approach supports governmental interventions that are facilitative in nature, ie, interventions meant to lay down the necessary frameworks for secure, fair and competitive operation of the markets. This kind of intervention, however, is achieved through no means other than establishment of

¹⁵⁹ See N L Georgakopoulos 'Predictability and Legal Evolution' (1997) 17 *International Review of Law and Economics* 475, 478.

¹⁶⁰ See Uganda Law Reform Commission (n57) 13.

¹⁶¹ Ibid.

¹⁶² See B L Smith 'The Third Industrial Revolution: Policy-making for the Internet' (2001) 3 *Columbia Science & Technology Law Review* 1, 26.

¹⁶³ See T Altenburg & C Von Drachenfel 'The 'New Minimalist Approach' to Private Sector Development: T Critical Assessment' (2006) 24 *Development Policy Review* 387. See also T D Casey & J Magenau 'A Hybrid Model of Self-Regulation and Governmental Regulation of Electronic Commerce' (2002) 19 *Santa Clara Computer & High Technology Law Journal* 1, 28-29; M Faure & A van der Walt (eds) *Globalisation and Private Law: The Way Forward* (2010) 2.

laws and procedures that regulate the market or the industry in question. This reasoning, therefore, points to the third option, which is supported by this thesis.

(iii) Enacting new legislation to supplement the existing legal framework and remove barriers to e-commerce development.

In order to effectively address the problems discussed in this thesis, and with the intention of promoting certainty through functional equivalence of rules applicable to online and off-line transactions, it is recommended that Tanzania should enact specific e-commerce legislation. This will simplify business transactions, as businesses and consumers will know with certainty which rules apply. Certainty and predictability of the law promotes the confidence of the parties involved in e-commerce.¹⁶⁴

It is important to note, however, that whereas a new law on e-commerce is necessary, the role played by the existing laws, such as the Law of Contract Act, will not be displaced. A new law on e-commerce, apart from regulating e-transactions, will generally supplement and correct what is missing or inadequate in the existing laws. It will therefore play a facilitative role.

Overall, such legislation will take into account issues of significance, such as validity of e-contracts, use of electronic agents in executing contracts, use of data messages and e-signatures, online consumer protection, authentication and certification processes, to mention only a few issues. The proposed Act may also take into account other issues, such as cyber crimes (although this area may stand on its own since it is also becoming more sophisticated as technology innovations continue to evolve).

In order to embrace successful and meaningful legal reforms in the area of electronic commerce, this study recommends that Tanzania should adopt the best practices, such as the UNICTRAL Model Laws (on e-commerce and e-signature) as well as the UN Convention on E-contracts. As discussed in this study, the legal developments in South Africa should be a further basis for reform of the law in Tanzania. In particular, it is recommended that Tanzania should adopt the mixed approach used by the drafters of the South African law on e-commerce (the ECTA). The value here is that the ECTA represents a law from a developing African country. Moreover, because South Africa and Tanzania are members of SADC, and because there are efforts within the SADC to harmonise the legal frameworks within its members, taking account of the South African e-commerce law –save for its

¹⁶⁴ See Uganda Law Reform Commission (n57) 13.

inadequacies as pointed out in this thesis – will be a motivation towards realising the regional harmonisation process.

Finally, four things need to be emphasised. First, while legal transplanted is not a novel idea in today's globalised world, this study has taken the necessary caution in its proposal that Tanzania should borrow provisions from foreign legislation, such as the ECTA, to develop its domestic legal framework. In particular, it has taken into account that it is unwise to embark on such a process without thoroughly examining the scope, functionality and the extent of adoption of a transplant within a receiving state, in this case Tanzania. For that reason, the study has made it clear that while similar foreign legislation may provide useful information, each country develops its own laws in particular areas taking into account its own policies and circumstances. In other words, the study recognises that legal reforms in Tanzania must be pursued in the context of its own prevailing socio-economic and political context. Even in the course of drafting the UNCITRAL Model Law, the Working Group on E-commerce, which was responsible for its preparation, recognised this, and the Model Law gives an opportunity for states, intending to adopt it, to consider relevant home grown issues.

In view of the above observations, and in order to avoid a 'copy and paste' approach, the analysis in this study included pointing out the weaknesses in the proposed legal transplants, whenever it was necessary to do so.

The second issue to emphasise is that the reforms proposed in this thesis are merely the very basic ones. They are only concerned with a small area essential to facilitate the development of e-commerce in Tanzania. Because the list of other reforms that Tanzania needs to embark on may therefore be long, and since e-commerce is a broad area of study, more research remains to be done. In particular, research is needed in key areas, such as e-banking and e-financing, e-taxation, e-governance, cybercrime, e-procurement and e-tourism, to mention but a few.

Thirdly, it is important to emphasise that the government, in partnership with the private sector, should take the lead in promoting the new economy. Doing so, however, goes hand in hand with the necessary speed required to embark on modern ways of delivering services to government departments, the business community and the entire citizenry. Adoption and implementation of an e-government strategy is therefore one of the best ways of achieving this aim. With an effective e-government strategy, the country's economy will be better integrated into the current global digital economy and the benefits of ICT will be realised. Such a strategy will ease some of the bureaucratic obstacles experienced by

prospective investors and new entrants in the e-business. Also, it will be a positive contribution to the growth of businesses in Tanzania. With an expanded business base, there will be a further contribution to e-commerce and e-contracting development, either through B2B, B2C, or B2G transactions.

The fourth and final issue is that, while some of these proposals are extra-legal in nature, they are nevertheless pertinent to the growth of e-commerce. Indeed, its development cannot be considered in isolation from other factors, such as the need to create a pool of ICT skilled manpower or providing innovative skills to SMEs to participate in e-commerce. Having resources that are not utilised or a pool of labour that is redundant is uneconomical for any country that aspires to develop. On the contrary, having the requisite knowledge, information and skills makes it possible to transform what is available (in terms of resources or labour force) for further wealth creation. This is, indeed, what the new knowledge-based economy is all about.

BIBLIOGRAPHY

(i) Books & Chapters in Books

- Anton A E & Beaumont P R *Private International Law* 2ed (1990) W Green, Edinburg.
- Atiyah P S *The rise and fall of freedom of contract* (1979) Oxford University Press, Oxford.
- Atiyah P S *The Sale of Goods* 3ed (1966) Pitman, London.
- Aubert V *Continuity and Development in Law and Society* (1989) Norwegian University Press, Oslo.
- Ayadi F (ed) *African Business and Development: Strategies for Economic Growth and Poverty Alleviation* (2005) International Academy of African Business Development, USA.
- Backer L C (ed) *Harmonising Law in an Era of Globalisation: Convergence, Divergence, and Resistance* (2007) Carolina Academic Press, Durham, North Carolina.
- Beale H *Chitty on Contracts: General Principles* 30ed (2008) Sweet & Maxwell, London.
- Beatson J *Anson's Law of Contract* 28ed (2002) Oxford University Press, Oxford.
- Bell D *The coming of post-industrial society* (1976) Basic Books, New York.
- Binamungu C S & Ngwilimi G S *Regulation of Banking Business in Tanzania* (2006) Mzumbe Book Project, Mzumbe University, Morogoro.
- Black's Law Dictionary 7ed (1999) West Group St Paul, Minn.
- Boele-Woelkie K & Kessedjian C (eds) *Internet Law: Which Court Decides, Which Law Applies?* (1998) Kluwer Law International, The Hague.
- Boss A H & Kilian W *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Source Book* (2008) Kluwer Law International BV, The Netherlands.
- Botha J, Bothma C & Geldenhuys P (eds) *Managing E-commerce* (2004) JUTA & Co Ltd, Lansdowne, Cape Town.
- Bourcier D (ed) *Legal Knowledge and Information Systems Jurix 2003: The Sixteenth Annual Conference Amsterdam* (2003) IOS Press, The Netherlands.
- Briggs A *The Conflict of Laws* 2ed (2008) Oxford University Press, Oxford.
- Brinson D J, Dara-Adams B, Dara-Adams D, Masek J, McDunn R & White B *Analysing E-commerce and Internet Law* 1ed (2001) Prentice Hall PRT, Upper Saddle River, NJ.
- Brownsword R *Contract Law: Themes for the Twenty-First Century* (2000) Butterwoths, London.

Buys R & Cronjé F (eds) *Cyber law @SA: The Law of Internet in South Africa* 2ed (2004) Van Schaik Publishers, Pretoria.

Buys R (ed) *Cyber law @SA* 1ed (2000) Van Schaik Publishers, Pretoria.

Calliess G (ed) *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (2011) Wolters Kluwer Law & Business, The Netherlands.

Campbell D (ed) *E-commerce Law and the Digital Signatures* (2005) Centre for International Legal Studies Oceana Publications Inc, Dobbs Ferry, New York.

Chamarik S & Goonatilake S (eds) *Technological independence- The Asian experience* (1994) United Nations University Press, Japan.

Chan H, Lee R, Dillon T & Chang E *E-commerce: Fundamentals and Applications* (2001) John Wiley & Sons Chichester, England.

Cheshire G C & North P M *Cheshire's Private International Law* 8ed (1970) Butterworths London.

Chissick M & Kelman A *Electronic Commerce: Law and Practice* 2ed (2000) Sweet & Maxwell, London.

Chorafas D N *The Internet Supply Chain: Impact on Accounting and Logistics* (2001) Palgrave, New York.

Christie R H *The Law of Contract in South Africa* 5ed (2007) LexisNexis Butterworths, Durban.

Cliffe L & Saul J S *Socialism in Tanzania: An interdisciplinary Reader* (1972) Vol 1, East African Publishing House, Nairobi.

Collier J G *Conflict of Laws* 3ed (2001) Cambridge University Press, Cambridge.

Collier-Reed D & Lehmann K *Basic Principles of Business Law* 2ed (2010) LexisNexis Butterworths, Durban.

Cronjé J B 'Trade in services and the regional integration process in southern Africa' in McCarthy C, Cronjé J B, Denner W, Fundira T, Mwanza W & Bursvik E (eds) *Supporting Regional Integration in East and Southern Africa – Review of Select Issues* (2010) Trade Law Centre for Southern Africa (Tralac) & The Royal Danish Embassy.

Davidson A *The Law of Electronic Commerce* (2009) Cambridge University Press, Cambridge.

De Kare-Silver M *E-shock: the new rules –Internet strategies for retailers and manufacturers* 2ed (2001) Amacom, New York.

De Vareilles-Sommières P (ed) *Forum Shopping in the European Judicial Area* (2007) Hart Publishing, Oxford.

Dicey A V, Morse C G, McClean, Briggs A, Hill J, & Collins L (eds) *Dicey & Morris on the Conflict of Laws* 13ed (2000) Volume I, Sweet & Maxwell, London.

- Dicey A V, Morse C G, McClean, Briggs A, Hill J, & Collins L (eds) *Dicey & Morris on the Conflict of Laws* 13ed (2000) Volume II, Sweet & Maxwell, London.
- Drexel J & Kur A (eds) *Intellectual Property and Private International Law* (2005) IIC Studies Vol 24, Hart Publishing, Oxford.
- Edward L & Waelde C (eds) *Law and the Internet* 3ed (2009) Hart Publishing, Oxford and Portland Oregon.
- Edward L & Waelde C (eds) *Law and the Internet: Regulating cyberspace* (1997) Hart Publishing, Oxford.
- Engel C & Keller K (eds) *Governance of Global Networks in the Light of Differing Local Values* (2000) Law and Economics of International Telecommunications, Nomos Book series, Baden-Baden.
- Fan M, Srinivansan S, Stallaert J & Whinston A *Electronic Commerce and the Revolution in Financial Markets* (2002) Thomson Learning, USA.
- Faure M & van der Walt A (eds) *Globalisation and Private Law: The Way Forward* (2010) Edward Elgar Publishing Limited, Cheltenham.
- Fawcett J (ed) *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (2002) Oxford University Press, Oxford.
- Fawcett J, Carruthers J & North P *Cheshire, North & Fawcett: Private International Law* 14ed (2008) Oxford University Press, Oxford.
- Fazio S *The Harmonisation of International Commercial Law* (2007) Kluwer International BV, The Netherlands.
- Fentiman R *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (1998) Oxford University Press, Oxford.
- Ferrari F & Leible S (eds) *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (2009) European Law Publishers GmbH, Munich.
- Fletcher I, Cremona M & Mistelis L (eds) *Foundations and Perspectives of International Trade Law* (2001) Sweet & Maxwell, London.
- Forsyth C F *Private International Law: The modern Roman-Dutch law including the jurisdiction of the Supreme Court* 3ed (1996) JUTA & Co Ltd, Lansdowne, Cape Town.
- Furmston M *Cheshire, Fifoot & Furmston's Law of Contract* 15ed (2007) Oxford University Press, Oxford.
- Gibson J T R & Visser C J (ed) *South African mercantile and company law* 8ed (2003) Juta & Co Ltd, Lansdowne, Cape Town.
- Gillies L E *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (2008) Markets and the Law, Ashgate Aldershot, England.

- Goode R *The Hamlyn Lectures: Commercial Law in the Next Millennium* (1998) Sweet & Maxwell, London.
- Guntram H H & Kaplan D H (eds) *Nested Identities: Nationalism, Territory, and Scale* (1999) Rowman & Littlefield Lanham, Maryland.
- Hayward R *Conflict of Laws* 4ed (2006) Cavendish Publishing Ltd London.
- Hess B, Pfeiffer T & Schlosser P *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* (2008) Verlag C H Beck Hart Nomos, München.
- Hodgin R W *Law of Contract in East Africa* (1975) East Africa Literature Bureau, Nairobi.
- Horn N (ed) *Legal Issues in Electronic Banking* (2002) Studies in Transnational Economic Law, Vol.17 Kluwer Law International The Hague, London and New York.
- Hornby AS & Cowie A P *Oxford Advanced Learner's Dictionary* 5ed (1995) Oxford University Press, Oxford.
- Horvath A & Villafranco J *Consumer Protection Law Development* (2009) American Bar Association (ABA), Section of Antitrust Law, ABA Publishing, USA.
- Jaffey A J E *Topics in Choice of Law* (1996) BIICL, London.
- James T (ed) *An Information Policy Handbook for Southern Africa — A Knowledge Base for Decision-Makers* (2001) IDRC: Development Bank of Southern Africa Midrand ZA.
- Kamuzora F R *E-commerce for Development: eTourism as a Case Show* (2006) Mzumbe Book Project, Mzumbe University, Morogoro.
- Kevan T & McGrath P *E-mail, the Internet and the Law* (2001) EMS Professional Publishing Ltd, Hertfordshire.
- Khosrow-Pour M (ed) *Encyclopaedia of Information Science and Technology* 2ed (2009) Information Resources Management Association, USA.
- Kierkegaard S (ed) *International Law and Trade – Bridging the East-West Divide* (2007) Ankara Bar Association Press, Ankara.
- Klosek J *Legal Guide to E-business* (2003) Greenwood Publishing Group, USA.
- Kohl U *Jurisdiction and the Internet: A Study of the Regulatory Competence over Online Activity* (2007) Cambridge University Press, Cambridge.
- Kono T, Paulus C G & Rajak H (eds) *Selected Legal Issues of E-Commerce* (2002) Kluwer Law International, The Hague, London and New York.
- Kon-Yung T & Van Puymbroeck R V (eds) *The World Bank Legal Review: Law and Justice for Development* (2003) Vol1 The World Bank/ Kluwer International, The Hague, London and New York.

- Kooiman J (ed) *Modern Governance: New Government-Society Interactions* (1993) SAGE Publishers, London.
- Kuchhal M C *Mercantile Law* 6ed (2006) Vikas Publishing House, New Delhi.
- Lessig L *CodeV2.0* (2006) Basic Books, New York.
- Lloyd I *Information Technology Law* 6ed (2011) Oxford University Press, Oxford.
- Lodder A R & Oskamp A (eds) *Information Technology & Lawyers: Advanced Technology in the Legal Domain, from Challenges to Daily Routine* (2006) Springer, Dordrecht, The Netherlands.
- Lookofsky J & Hertz K *Transnational Litigation and Commercial Arbitration: An Analysis of America, European and International Law* 2ed (2004) Juris Publishing, USA.
- Lowenfeld A F *International Litigation and the Quest for Reasonableness-Essays in Private International Law* (1996) Oxford University Press, Oxford.
- M Cappelletti, M Secombe & J Weiler (eds) *Integration Through Law* (1986) Vol.1 Book 2, Walter de Gruyter Berlin and New York.
- Macneil I R *Contracts Instruments for Social Cooperation in East Africa* (1968) Fred B Rothman & Co, South Hackensack, NJ.
- Marsiden C T (ed) *Regulating the Global Information Society* (2000) Routledge Taylor & Francis Group, London and New York.
- Marvin B *Private International Law in Common Law Canada, Cases, Text and Materials* (1997) Edmond Montgomery Publications Ltd, Toronto.
- Mason S (ed) *Electronic Evidence* 2ed (2010) LexisNexis Butterworths, London.
- May P *The Business of E-commerce: From Corporate Strategy to Technology (Breakthrough in Application Development)* (2000) Cambridge University Press, Cambridge.
- Mayss A *Principles of Conflict of Laws* 3ed (1999) Cavendish Publications Ltd, London.
- Mbelle A, Mjema G & Kilindo A A L (eds) (2002) *The Nyerere Legacy and Economic Policy Making in Tanzania* Dar-es-salaam University Press, Dar-es-salaam.
- McClellan D & Beevers K *Morris: The Conflict of Laws* 17ed (2009) Sweet & Maxwell, London.
- Mchome E S *Evictions and the Rights of People in Conservation Areas in Tanzania* (2002) Faculty of Law, University of Da-es-salaam.
- Mckendrick E *Contract Law* (2009) Palgrave Macmillan, Hampshire.
- McQuoid-Mason D *Consumer Law in South Africa* JUTA & Co Ltd, Lansdowne, Cape Town (1997).

- Me´nard C & Shirley M M (eds) *Handbook of New Institutional Economics* (2005) Springer, The Netherlands.
- Mestmaecker E & Engel C (eds) *Law and Economics of International Telecommunications* (2000) Baden-Baden (Nomos) Book series.
- Michael M *Chalmers' Sale of Goods Act* 17ed (1975) Butterworths, London.
- Mollet A & Lukumay Z *Electronic Transactions and the Law of Evidence in Tanzania* (2007) Iringa University College, Peramiho Printing Press, Songea.
- Murray A D *The Regulation of Cyberspace: Control in the Online Environment* (2007) Routledge-Cavendish, New York.
- Nditi N N N *General Principles of Contract Law in East Africa* 1ed (2009) Dar-es-salaam University Press, Dar-es-Salaam.
- Ngalindwa I & Mutagahywa B 'Tanzania' in Gillwald A (ed) *Towards an African e-index: ICT access and usage in 2005* (2005) The Likn Centre, South Africa.
- Nguluma A T 'The role of Law and Administrative Mechanisms in the Development of Science and Technology: Policies and Strategies in Post-independence Tanzania' in *Technology Policy Studies in Eastern Africa* (1986) E A Technology studies Network, IDRC-MR 242e.
- North P M & Fawcett J J *Cheshire and North's Private International Law* 14ed (2008) Oxford University Press, Oxford.
- Nygh P E *Autonomy in International Contracts* (1999) Oxford University Press, Oxford.
- Okot-Uma R W & Onunga J (2004) *Electronic Governance: an Eastern African Perspective* Commonwealth Secretariat and SFI Publishing, London.
- Padgham L, Parkes D, Mueller J & Parsons S (eds) *Proceedings of 7th International Joint Conference on Autonomous Agents and Multiagent Systems (AAMAS)* (2008) vol 2, Richland SC International Foundation for Autonomous Agents and Multiagent Systems (IFAAMAS).
- Panagariya A *E-commerce, WTO and Developing Countries* (2000) United Nations, New York and Geneva.
- Peel E *Treitel: The Law of Contract* 12ed (2009) Sweet & Maxwell, London.
- Pistor K & Wellons P (eds) *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (1999) Oxford University Press, New York.
- Plotkin M E, Wells B & Wimmer K (eds) *E-commerce Law & Business* (2003) Vol I, Aspen Publishers, New York.
- Polanski P (ed) *Customary Law of the Internet: In Search for a Supranational Cyberspace Law* (2007) IT & Law Series (No 13) TMC Press, The Hague.

- Poole J *Textbook on Contract Law* 10ed (2010) Oxford University Press, Oxford.
- Pound R *Jurisprudence* Vol III Part 4 & 5 (1959) West Publishing Co St Paul, Minn.
- Reed C & Angels J (eds) *Computer Law: the Law and Regulation of Information Technology* 6ed (2007) Oxford University Press, Oxford.
- Rickett C E F & Telfer T G W (eds) (2003) *International Perspectives on Consumers' Access to Justice* Cambridge University Press, Cambridge.
- Rosen A *The E-commerce Question and Answer Book: A Survival Guide for Business Managers* 2ed (2002) Amacom, New York.
- Russell S & Norvig P *Artificial Intelligence: A Modern Approach* 3ed (2010) Prentice Hall, Englewood Cliffs, NJ.
- Satola D, Sreenivasan R & Pavlasova L 'Benchmarking Regional e-Commerce in Asia and the Pacific and Assessment of Related Regional Activities,' in *Harmonisation of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs* United Nations New York (2004) (available at http://www.unescap.org/tid/publication/tipub2348_party1v.pdf (as accessed on 2/8/2007)).
- Saxby S *Encyclopedia of IT Law* (1990) Sweet & Maxwell, London.
- Schneider G P *Electronic Commerce* 7ed (2007) Galatea Training Services Limited, Singapore.
- Schmitthoff C M *The English Conflict of Laws* 3ed (1954) Stevens & Sons Ltd, London.
- Schwikkard P J & van der Merwe S E *Principles of Evidence* 2ed (2002) Juta & Co Ltd, Lansdowne, Cape Town.
- Schwikkard P J & van der Merwe S E *Principles of Evidence* 3ed (2009) Juta & Co Ltd, Lansdowne, Cape Town.
- Scoles E F, Hay, P *et al Conflict of Laws* 5ed (2005) West Group, St Paul, Minn.
- Sealy L S & Hooley R J A *Commercial Law: Text, Cases, and Materials* 4ed (2009) Oxford University Press Oxford.
- Seidman A & F Anang (eds) *21st Century Africa: Towards a New Vision of Self-Sustainable Development* (1992) Africa World Press Inc, Trenton NJ.
- Shaw M, Blanning R, Strader T & Whinston A (eds) *Handbook on Electronic Commerce* (2000) Springer-Verlag, Berlin.
- Simmons & Simmons *E-commerce Law: Doing Business Online* (2001) Palladin Law Publishing Ltd, Bembridge, Isle of Wight.
- Slot P J & Buttermann M (eds) *Globalisation and Jurisdiction* (2004) Kluwer International, Hague.

- Smith R G, Grabosky P & Urbas G *Cyber criminals on trial* (2004) Cambridge University Press, Cambridge.
- Spiro E *The General Principles of the Conflict of Laws* (1982) Juta & Co Ltd, Lansdowne, Cape Town.
- Stone P *EU Private International Law: Harmonisation of Law* 2ed (2010) Edward Elgar European Publishing Inc, Massachusetts.
- Stone R *The Modern Law of Contract* 8ed (2009) Routledge-Cavendish, London.
- Tang Z S *Electronic Consumer Contracts in the Conflict of Laws* (2009) Studies in Private International Law Vol 1, Hart Publishing, Oxford.
- Thanasankit T (ed) *E-commerce and Cultural Values* (2003) Idea Group Publishing, London.
- The World Development Report *Knowledge for Development* Oxford University Press, Oxford (1999).
- Thornton L, Ysmin C, Patric M & Pippa R (eds) *Telecommunications Law in South Africa* (2006) STE Publishers, Johannesburg.
- Treitel G H *The Law of Contract* 8ed (1991) Sweet and Maxwell, London.
- Twinning W *Law in Context: Globalisation and Legal Theory* (2000) Butterworths, London.
- Van der Merwe D P, Naudé B C, Moodley K & Terblanche S S *The Law of Evidence: Cases and Statutes* 4ed (2009) JUTA & Co Ltd, Lansdowne, Cape Town.
- Van der Merwe D, Roos A, Pistorius T & Eiselen S *Information and Communication Technology Law* (2008) LexisNexis, Durban.
- Van der Merwe S, van Huyssteen L F, Reinecke M F B & Lubbe G F *Contract, General Principles* 3ed (2007) JUTA & Co Ltd, Lansdowne, Cape Town.
- Van Houtte H *The Law of Cross-border Securities Transactions* (1999) Sweet & Maxwell, London.
- Walker J *Castel & Walker Canadian Conflict of Laws* 6ed (2005) LexisNexis Markham, Canada.
- Waters M (ed) *Modernity: Critical Concepts* (1999) Routledge, London.
- Wiener J *Globalisation and the Harmonisation of Law* (1999) Pinter Wellington House, London.
- Winn J K & Wright B *The Law of Electronic Commerce* 4ed (2008) Aspen Publishers, New York.
- Zimmermann R & Vesser D (eds) *Southern Cross: Civil Law & Common Law in South Africa* (1996) Clarendon Press, Oxford.

(ii) Journal Articles

- ABA, Committee on Cyberspace Law, Report: 'Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet,' (2000) 55 *Business Lawyer* 1801-1946.
- Akomolede T I 'Contemporary Legal Issues in Electronic Commerce in Nigeria' (2008) 3 *Potchefstroom Electronic Law Journal* 1-24.
- Akomolede T I 'Legal Analysis of formation of consumer contracts in E-commerce: the Nigerian experience' (2006) *European Journal of Social Sciences* 135-143.
- Al Ibrahim M, Ababneh A & Tahat H 'The Postal Acceptance Rule in the Digital Age.' (2007) 1 *Journal of International Commercial Law & Technology* (available at <http://www.jiclt.com/index.php/JICLT/article/viewFile/33/20> (as accessed on 11/06/2007)).
- Albert M R 'E-Buyer Beware: Why Online Auction Fraud Should be Regulated' (2008) 39 *American Business Law Journal* 575-643.
- Alboukrek K 'Adapting to a new world of E-Commerce: The need for uniform consumer protection in the international electronic marketplace' (2003) 35 *George Washington International Law Review* 425-460.
- Alden C & Soko M 'South Africa's Economic Relations with Africa: Hegemony and its Discontents' (2005) 43 *Journal of Modern African Studies* 367-39.
- Alexander G S 'The Application and Avoidance of Foreign Law in the Law of Conflicts' (1975) 70 *North Western University Law Review* 602-638.
- Algero M 'In Defense of Forum Shopping: A Realist Look' (1999) 78 *Nebraska Law Review* 79-112.
- Allen T & Widdison R 'Can Computer Make Contracts?' (1996) 9 *Harvard Journal of Law and Technology* 25-52.
- Altenburg T & Von Drachenfel C 'The 'New Minimalist Approach' to Private Sector Development: T Critical Assessment' (2006) 24 *Development Policy Review* 387-411.
- Anderson C 'Electronic Commerce: In Search of the Perfect Market' (1998) 26 *IEE Engineering Management Review* 67-82.
- Anderson R C 'Enforcement of Contractual Terms in Click-wrap Agreements' (2007) 3 *Shidler Journal of Law, Communications & Technology* (available at <http://www.lctjournal.washington.edu/Vol3/a011Cormier.html> (as accessed on 24/7/2007)).
- Anil S 'Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues,' (2001) 9 *International Journal of Law and Information Technology* 93-114.
- Aoki K 'Considering Multiple and Overlapping Sovereignties: Libertarianism, National Sovereignty, "Global Intellectual Property, and the Internet."' (1998) 5 *Indiana*

Journal of Global Studies 443-474.

- Ayogu M & Hodge J 'Understanding Telecom Sector Reforms in South Africa: A Political Economy Perspective' (2002) 20 *Journal of Contemporary African Studies* 275-291.
- Ayres I & Gertner R 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *The Yale Law Journal* 87-130.
- Bain M & Subirana B 'E-commerce oriented software agents: Some legal challenges of advertising and semi-autonomous contracting agents.' (2003) 19 *Computer Law & Security Report* 282-288.
- Bangemann M 'Which rules for the online world? The European Union Contribution' (1999) 1 *Journal of Policy, Regulation and Strategy for Telecommunications Information and Media* 11-15.
- Barlow J P 'Key note Address, Symposium on "Fundamental Rights on the Information Superhighway" at the New York School of Law 1994' (1994) *Annual Survey of American Law* 335-362.
- Barnes J K 'Telemedicine: A Conflict of Laws Problem Waiting to Happen-How will Interstate and International Claim be Decided?' (2006) 28 *Houston Journal of International Law* 491-530.
- Bell J, Gomez R, Hodge P & Mayer-Schönberger V 'Electronic Signature Regulation: An Early Scorecard – Comparing Electronic Signatures Legislation in the US and the European Union' (2001) 17 *Computer Law & Security Report* 399-402.
- Ben-Shahar O 'Contracts without Consent: Exploring a New Basis for Contractual Liability' (2003-2004) 152 *University of Pennsylvania Law Review* 1829-1872.
- Berman P S 'The Globalisation of Jurisdiction' (2002) *University of Pennsylvania Law Review* 311-533.
- Bhaloo S 'Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective' (2004) 8 *Computer Law Review and Technology Journal* 225-280.
- Bishop R D & Lee D B 'Enforceability of Forum-Selection Clauses in International Commercial Contracts' (1995) 4 *Currents International Trade Law Journal* 20-42.
- Block D 'Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites' (2002) 14 *Loyola Consumer Law Review* 227-244.
- Boodman M 'The Myth of Harmonisation of Laws' (1991) 39 *American Journal of Comparative Law* 699-724.
- Borchers P J 'The Internationalisation of Contract Choice of Law' (1995) 28 *Vanderbilt Journal of Transnational Law* 421-486.
- Borchers P J 'Tort and Contract Jurisdiction via the Internet: The 'Minimum Contacts' Test and

- the Brussels Regulation Compared' (2003) *Netherlands International Law Review* 401-418.
- Bortz T 'Electronic Communications and Transactions Act' (2002) 8 *Tech Werks* 1.
- Boss A 'The Uniform Electronic Trade Transactions Act in a Global Environment' (2001) 37 *Idaho Law Review* 276-321.
- Boyle J 'Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors,' (1997) 66 *University of Cincinnati Law Review* 177-206.
- Brechbüh H I, Bruce R, Dynes S & Johnson M E 'Protecting Critical Information Infrastructure: Developing Cybersecurity Policy' (2010) 16 *Information Technology for Development* 83-91.
- Braucher J 'Delayed Disclosure in Consumer E-commerce as an Unfair and Deceptive Practice' (2000) 46 *Wyne Law Review* 1805-1868.
- Buono F M & Friedman J A 'Maximizing the Enforceability of Click-Wrap Agreements' (2000) 4 *Journal of Technology Law and Policy* 3 (available at <http://journal.law.ufl.edu/~techlaw/4-3/friedman.html> (as accessed on 27/8/2009)).
- Burgess A 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and Suggestion' (1986) 15 *Anglo American Law Review* 255-280.
- Burk D L 'Patents in the Cyberspace: Territoriality and Infringement in Global Computer Networks' (1993) 68 *Tulane Law Review* 1-67
- Callies G P 'The Making of Transnational Contract Law' (2008) *Indiana Journal of Global Legal Studies* 1-16.
- Cameron B 'Jurisdiction and the Internet' (2000) 42 *Computer and the Law* 13-21.
- Capper D 'Common Mistakes in Contract' (2009) *Singapore Journal of Legal Studies* 457-473.
- Carter P B 'The Role of Public Policy in English Private International law' (1993) 42 *International and Comparative Law Quarterly* 1-10.
- Casey T D & Magenau J 'A Hybrid Model of Self-Regulation and Governmental Regulation of Electronic Commerce' (2002) 19 *Santa Clara Computer & High Technology Law Journal* 1-36.
- Catchpole J 'The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principle Establishment' (2001) 9 *International Journal of Law and Information Technology* 1-20.
- Chalton S 'Software Licensing Implications of the Copyright, Designs and Patents Act' (1989–1990) 1 *Computer Law and Security Report* 6-10.
- Chandler J "'Science Discovers, Genius Invents, Industry Applies, and Man Adapts Himself...': Some Thoughts on Human Autonomy, Law, and Technology' (2010) 30 *Bulletin of Science, Technology & Society* 14–17.

- Chen C 'United States and European Union Approaches to Internet Jurisdiction and their Impact on E-Commerce' (2004) 25 *University of Pennsylvania Journal of International Economic Law* 423-454.
- Christensen S 'Formation of Contracts by Email - Is it Just the Same as the Post?' (2001) 1 *Queensland University of Technology Law & Justice Journal* (QUTLJJ3) (available at <http://www.austlii.edu.au/au/journals/QUTLJJ/2001/3.html> (as accessed 21/9/2007)).
- Clapperton D & Corones D 'Unfair terms in 'clickwrap' and other electronic contracts' (2007) 35 *Australian Business Law Review* 152-180.
- Coates J F 'Law and Technology in the Twenty-First Century' (1996) 52 *Technological Forecasting and Social Change* 255-268.
- Coetzee J 'Incoterms, Electronic Data Interchange and the Electronic Communications and Transactions Act' (2003) 15 *South African Mercantile Law Journal* 1-15.
- Coetzee J 'The Convention on the Use of Electronic Communications in International Contracts: Creating an International Legal Framework for Electronic Contracting' (2006) 18 *South African Mercantile Law Journal* 245-258.
- Cohen M R 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553-592.
- Collier D 'e-Mail and SMS contracts: Lessons from the Labour Court' (2008) 16 *Juta's Business Law* 20-22.
- Collier D 'Evidently Not So Simple' (2005) 13 *JUTA 's Business Law* 6-9.
- Collins L 'Some Aspects of Service out of the Jurisdiction in English Law' (1972) 21 *International and Comparative Law Quarterly* 656-68.
- Colón-Fung I 'Protecting the New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transactions' (2007) 12 *Fordham Journal of Corporate & Financial Law* 233-252.
- Connolly C & Ravindra P 'International eCommerce Regulation: First UN Convention on eCommerce finalised.' (2006) 22 *Computer Law & Security Report* 31-38.
- 'Conflict of Laws: Party Autonomy in Contracts' (1957) 57 *Columbia Law Review* 553-576.
- Cox S E 'Interested Forum' (1997) 48 *Mercer Law Review* 727-756.
- Crenshaw E M & Robison K K 'Globalization and the Digital Divide: The Roles of Structural Conduciveness and Global Connection in Internet Diffusion' (2006) 87 *Social Science Quarterly* 190-207.
- Cutler C A 'Locating "Authority" in the Global Political Economy' (1999) 43 *International Studies Quarterly* 59-81.
- Dahiyat E A R 'Intelligent agents and contracts: Is a conceptual rethink imperative?' (2007) 15 *Journal of Artificial Intelligence Law* 375-390.

- Damanpour F 'E-business E-commerce Evolution: Perspective and Strategy' (2001) *Managerial Finance* 16-33.
- De Duca L F, Kritzer A H & Nagel D 'Achieving Optimal Use of Harmonization Techniques in an Increasingly Interrelated Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane' (2009) *27 Penn State International Law Review* 641-654.
- Delacourt J T 'The International Impact of Internet Regulation' (1997) *38 Harvard International Law Journal* 207-235.
- Deveci H A 'Internet Jurisdiction-Personal jurisdiction: Where cyberspace meets the real world –Part 1' (2005) *21 Computer Law & Security Report* 464-477.
- 'Developments in the law: The Law of Cyberspace' (1998-1999) *112 Harvard Law Review* 1680-1704.
- Dewey J 'Logical Method and Law' (1914-1925) *10 Cornell Law Quarterly* 17-27.
- Diamond A L 'Sale of Goods in East Africa' (1967) *16 International and Comparative Law Quarterly* 1045-1087.
- Diedrich F 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG' (1996) *8 Pace International Law Review* 303-338.
- Dodd E M (Jr) 'Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws' (1926) *39 Harvard Law Review* 533-562.
- Dodd J C & Hernandez J A 'Contracting in Cyberspace' (1998) *Computer Law Review & Technology Journal* 1-38.
- Drahozal C R 'Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards' (2003) *3 Peppdine Dispute Resolution Law Journal* 419-434.
- Drobnig U 'Substantive Validity' (1992) *40 American Journal of Comparative Law* 635-644.
- Due J M 'Liberalization and Privatization in Tanzania and Zambia' (1993) *21 World Development* 1981-1988.
- Durtschi C, Hillison W & Pacini C 'Web-Based Contracts: You could be burned!' (2002) (13) *5 Journal of Corporate Accounting and Finance* (available at <http://www3.interscience.wiley.com> (as accessed on 28/8/2007)).
- Dutson S 'The Conflict of Laws and Statutes: The International Operation of Legislation Dealing with Matters of Civil Law in the United Kingdom and Australia' (1997) *60 Modern Law Review* 668-689.
- Easterbrook F H 'Cyberspace and the Law of Horse' (1996) *University of Chicago Legal Forum* 207-216.

- Edelman L B 'Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality' (2004) 38 *Law & Society Review* 181-198.
- 'E-commerce: An International Effort' (2000) 5 *ejournalUSA: Economic Perspectives*. Available at <http://usinfo.state.gov/journals/journals.htm> (as accessed on 12/2/ 2007).
- Einhorn D 'The Enforceability of "Term-open" Software Licence Agreements' (1985) 67 *Journal of the Patent and Trademark Office Society* 509-529.
- Eiselen S 'Electronic Commerce and the CISG: Formation, Formalities and Validity' (2002) *Vindobona Journal of International Commercial Law & Arbitration* 305-318.
- Eiselen S 'Electronic Commerce and the UN Convention on Contracts for International Sale of Goods (CISG) 1980' (1999) 6 *EDI Law Review* 21-46.
- Eiselen S 'The Electronic Data Interchange Agreement' (1995) 7 *South African Merchantile Law Journal* 1-18.
- Eksi N 'The Law Applicable to Consumer Contracts under the EU Rome Convention' (2005) *Journal of South African Law* 299-315.
- Elkin-Koren N & Salzberger E M 'Law and Economics in Cyberspace' (1999) 19 *International Review of Law and Economics* 553-581.
- Endeshaw A 'Regulating the Internet: clutching at a straw?' (1998) 20 *Computer Communications* 1519-1526.
- Enonchong N 'Public policy in the Conflict of Laws: A Chinese Wall Around Little England?' (1996) 45 *International & Comparative Law Quarterly* 633-661.
- ESCAP '*The Asia-Pacific Trade and Investment Review* (2005)'.
- Farooq A 'Electronic commerce: an Indian perspective' (2001) 9 *International Journal of Law and Information Technology* 133-170.
- Farrell H 'Constructing the International Foundations of E-Commerce: The EU-US Safe Harbor Arrangement' (2003) 57 *International Organization* 277-306.
- Fawcett J 'A New Approach to Jurisdiction over Companies in Private International Law' (1988) 37 *International and Comparative Law Quarterly* 645- 667.
- Fawcett J 'Evasion of Law and Mandatory Rules in Private International Law' (1990) 49 *Cambridge Law Journal* 44-62.
- Feliu S 'Against Cyberanarchy' (1998) 65 *University of Chicago Law Review* (1999) 1233.
- Feliu S 'Intelligent Agent and Consumer Protection' (2001) 9 *International Journal of Law and Information Technology* 235-248.
- Fentiman R 'Foreign Law in English courts' (1992) 108 *Law Quarterly Review* 142-143.
- Ferrari F 'Forum Shopping Despite International Uniform Contract Law Conventions' (2002)

51 *International & Comparative Law Quarterly* 689-707.

Finocchiaro G 'The conclusion of the electronic contracts through "software agents" A false legal problem? Brief considerations' (2003) 19 *Computer Law & Security Report* 20-24.

Fischer J P 'Computer as Agent: A proposed approach to Revised U.C.C. Article 2' (1997) 72 *Indiana Law Journal* 545-570.

Foss M & Bygrave L A 'International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law' (2000) *International Journal of Law and Information Technology* 99-138.

Fry B P 'Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions' (2000-2001) 37 *Idaho Law Review* 237-273.

Fuchs C & Horak E 'Africa and the digital divide' (2008) 25 *Telematics and Informatics* 99-116.

Furuholt B & Kristiansen S 'A rural-Urban Digital divide? Regional Aspect of the Internet Usage in Tanzania' (2007) 31 *The Electronic Journal of Information Systems in Developing Countries (EJSDC)* 1-15.

Furuholta B, Kristiansen S & Wahid F 'Gaming or gaining? Comparing the use of Internet cafe's in Indonesia and Tanzania' (2008) 40 *The International Information & Library Review* 129-139.

Gabriel H D 'The Fear of the Unknown: The need to Provide for Special Procedural Protections in the International Electronic Commerce' (2004) 50 *Loyola Law Review* 307-331.

Gamertsfelder L 'Electronic Bills of Exchange: Will the Current Law Recognise Them?' (1998) 50 *University of New South Wales Law Journal* 566-577.

Gary T H 'Minimum Contacts in Cyberspace: The Classic Jurisdiction Analysis in a new setting' (2002) 1 *Journal of High Technology Law* 85-99.

Gautrais V 'The Colour of Consent' (2003-2004) 1 *University of Ottawa Law & Technology Journal* 189-212.

Geist M 'Is there a there there? Toward a Greater Certainty for Internet Jurisdiction' (2001) 16 *Berkeley Technology Law Journal* 1345-1406.

Georgakopoulos N L 'Predictability and Legal Evolution' (1997) 17 *International Review of Law and Economics* 475-489.

Gillies L 'A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union' Commentary (2001) 1 *The Journal of Information, Law and Technology (JILT)* (part 2.1) (available at <http://elj.warwick.ac.uk/jilt/01-1/gillies.html> (as accessed on 27/5/2010)).

Gillies L 'Choice of Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation' (2007) *Journal of Private Law* 89-

- Gillies L 'Jurisdiction for Consumer Contracts European Union: Modified Rules of Jurisdiction for Electronic Consumer Contracts' (2001) 17 *Computer Law & Security Report* 395-433.
- Glatt C 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 *International Journal of Law and Information Technology* 34-68.
- Gluck G 'Standard Form Contract: Contract Theory Reconsidered' (1979) 28 *International and Comparative Law Quarterly* 72-90.
- Goldsmith E & McGregor L T 'E-commerce: consumer protection issues and implications for research and education' (2000) 24 *Journal of Consumer Studies & Home Economics* 124-127.
- Goldsmith J L 'The Internet and the Abiding Significance of Territorial Sovereignty' (1997-1998) 5 *Indiana Journal of Global Legal Studies* 475-492.
- Gonzalo S 'A Business Outlook Regarding Electronic Agents' (2001) 9 *International Journal of Law and Information Technology* 189-203.
- Goodrich H F 'Foreign Facts and Local Fancies' (1938) 25 *Virginia Law Review* 26-36.
- Grabner-Kraeuter S 'The Role of Consumers' Trust in Online-Shopping' (2002) 39 *Journal of Business Ethics* 43-50.
- Gregory J D 'Solving legal issues in electronic commerce' (1999) 32 *Canadian Business Law Journal* 84-132.
- Gregory J D 'The Proposed UNCITRAL Convention on Electronic Contracts' (2003) 59 *Business Lawyer* 313-343.
- Gregory J D 'The UETA and UECA – Canadian Reflections' (2001) 37 *Idaho Law Review* 441-446.
- Gruson M 'Governing Law Clauses in Commercial Agreements-New York's Approach' (1985) 18 *Columbia Journal of Transnational Law* 323-380.
- Guzman A T 'Arbitrator Liability: Reconciling Arbitration and Mandatory rules' (2000) 49 *Duke Law Journal* 1279-1334.
- Haber S & Stronetta W S 'How to Time-Stamp a Digital Document' (1991) 3 *Journal of Cryptology* 99-111.
- Harland D 'The United Nations Guidelines for Consumer Protection' (1987) 10 *Journal of Consumer Policy* 245-266.
- Harris J 'The Brussels I Regulation and the Re-Emergence of the English Common Law' (2008) 4 *The European Legal Forum* I-182- I-189.
- Hartkamp S 'Modernisation and Harmonisation of Contract Law: Objectives, Methods and

- Scope', Acts of the Congress to celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law (UNIDROIT) (2003) *Unification Law Review* 81-90.
- Heinrich G 'Harmonized Global Interchange?-UNCITRAL's Draft Model Law for Electronic Data Interchange.' 18 July (1995) (3) Web *JCLI, Part I* (available at <http://webjcli.ncl.ac.uk/articles3/contents3.html> (as accessed on 12/10/2007)).
- Heise W W r 'Towards Reasonable Limitations on the Exercise of General Jurisdiction' (2004) 41 *San Diego Law Review* 1035-1056.
- Hentz J J 'South Africa and the Political Economy of Regional Cooperation in Southern Africa' (2005) 43 *Journal of African Modern Studies* 21-51.
- Hillman R A & Rachlinski J J 'Standard-Form Contracting in The Electronic Age' (2002) 77 *New York University Law Review* 429-495.
- Holmes O W 'The Path of the Law- The Symposium: The Path of the Law Today' (1998) 78 *Boston University Law Review* 699-716.
- Honey R 'An Introduction to the Symposium: Interrogating the Globalisation Project' (2002) 12 *Transnational Law & Contemporary Problems* 1-12.
- Horton S & McLaren J 'Supply Constraints in the Tanzanian Economy: Simulation Results from a Macroeconometric Model' (1989) 11 *Journal of Policy Modelling* 297-313.
- Hu Q, Wu X & Wang C K 'Lessons from Alibaba.com: government's role in electronic contracting' (2004) 6 *Info* 298-307.
- Hyden G & Kalstrom B 'Structural Adjustment as a Policy Process: The Case of Tanzania' (1993) 21 *World Development* 1395-1404.
- Ismail I A & Kamat V R 'Evaluation of legal risk for e-commerce in construction' (2006) 132 *Journal of Professional Issues in Engineering Education and Practice* 355-360.
- J A Estrella-Faria 'E-Commerce and International Legal Harmonisation: Time to Go beyond Functional Equivalence?' (2004) 16 *South African Mercantile Law Journal* 529-555.
- J A Estrella-Faria 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) *Unification Law Review* 1-30.
- Jackson J H 'International Economic Laws in Times that are Interesting' (2000) 3 *Journal of International Economic Law* 3-14.
- Jacobs W 'The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts' (2004) 16 *South African Mercantile Law Journal* 556-567.
- Jacobs W, Stoop P N & Van Niekerk R 'Fundamental Consumer Rights under the *Consumer Protection Act* 68 of 2008: A Critical Overview and Analysis' (2010) 13 *Potchefstroom Electronic Law Journal* 301-406.
- Jaffey A J E 'The Foundations of Choice of Law' (1982) 2 *Oxford Journal of Legal Studies*

368-392.

- Jamal K, Maier M & Sunder S 'Privacy in E-Commerce: Development of Reporting Standards, Disclosure, and Assurance Services in an Unregulated Market' (2003) 41 *Journal of Accounting Research* 285-309.
- Jansen J H 'A new era for e-commerce in South Africa' *De Rebus - SA Attorneys' Journal* (2002).
- Jarvenpaa S L, Tractinsky N & Saarinen L 'Consumer Trust in an Internet Store' (2000) 1 *Information Technology and Management* 45-71.
- Jobodwana Z N 'E-Commerce and Mobile Commerce in South Africa: Regulatory Challenges' (2009) 4 *Journal of International Commercial Law and Technology* 287-298.
- Johnson R P & Post D 'Law and Borders-The Rise of Law in the Cyberspace' (1996) 48 *Stanford Law Review* 1367-1402.
- Joireman S F 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 *Journal of Modern African Studies* 571-596.
- Jones G 'Failings in the Treatment of Electronic Signatures' (2003) 1 *Hertfordshire Law Journal* 101-106.
- Jones G 'Trusted? Third? Parties' (2004) 2 *Hertfordshire Law Journal* 62-66.
- Juenger F K 'Contract Choice of Law in Americas' (1997) 45 *The American Journal of Comparative Law* 195-208.
- Kaaya J 'Implementing eGovernment services in East Africa: Assessing status through content analysis of government websites' (2004) 2 *Electronic Journal of E-government* 39-54.
- Kahn-Freund O 'Book Review' (1970) 18 *American Journal of Comparative Law* 429-441.
- Kahn-Freund O 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 *Transactions of the Grotius Society, Problems of Public and Private International Law, Transactions for the Year 1953* 39-83.
- Kalofolia P 'Electronic Bills of Lading: Legal Obstacles and Solutions' (2004) 2 *Hertfordshire Law Journal* 45-54.
- Kalow G M 'From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications' (1997) 65 *Fordham Law Review* 2241-2274.
- Kamuzora F 'The Internet as an Empowering Agent for Small, Medium and Micro Tourism Enterprises in Poor Countries' (2005) 3(4) *e-Review of Tourism Research (eRTR)* 82-90 (available at <http://ertr.tamu.edu> (as accessed on 23/5/2010)).
- Karayanni M M 'The Public Policy Exception to the Enforcement of Forum Selection Clauses' (1995-1996) 34 *Duquesne Law Review* 1009-1055.
- Katsh E 'Rights, Camera, Action: Cyberspatial Settings and the First Amendment' (1995) 104

Yale Law Journal 1681-1718.

Keller B P 'Condemned to Repeat the Past: The Re-emergence of Misappropriation and Other Common Law Theories of Protection of Intellectual Property' (1998) 11 *Harvard Journal of Law & Technology* 401-428.

Keller M 'Lessons for The Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States' (2004) 23 *John Marshall Journal of Computer & Information Law* 1-74.

Kelly D S L 'International Contracts and Party Autonomy (*Based on Golden Acres Ltd v Queens Estate Pty Ltd*)' (1970) 19 *The International and Comparative Law Quarterly* 701-705.

Kelsen H 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53 *Yale Law Journal* 207-220.

Kennedy J 'The Unification of Law' (1910) 10 *Journal of the Society of Comparative Legislation* 212-219.

Kidd D & Daughtrey W J 'Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions (1999-2000) 26 *Rutgers Computer & Technology Law Review* 215-276.

Kierkegaard S M 'E-contract formation: U.S. and EU perspectives' (2007) 3 *Shidler Journal of Law, Communications & Technology* 12 (available at <http://www.lctjournal.washington.edu/Vol3/a012Kierkegaard.html> (as accessed on 30/1/2010)).

Kirby N 'The Privacy of the Consumer: Consumer law' (2009) 9 *Without Prejudice* 28-29.

Klass G 'Intent to Contract' (2009) 95 *Virginia Law Review* 1437-1503.

Kohl U 'Eggs, Jurisdiction, and the Internet' (2002) 51 *International and Comparative Law Quarterly* 555- 582.

Kumar J V S 'Consumerism in India' (2008) 2 *Orient Journal of Law and Social Sciences* 57-61.

Kunz C L, Ottavian J, Ziff E, Moringiello J M, Porter K & Debrow J 'Browse-wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59 *Business Lawyer* 279-312.

Kunz C L, Thayer H, Del Duca M F, & Debrow J 'Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent' (2001) 57 *Business Lawyer* 401-429.

Kye C 'Ecommerce in the EU: Bridging Businesses and Consumers Abroad' (2001) 17 *Computer Law & Security Report* 25-27.

Lando O & Nielsen P A 'The Rome I Regulation' (2008) 45 *Common Market Law Review* 1687-1725.

- Lando O 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *American Journal of Comparative Law* 379-402.
- Lanza E 'Personal Jurisdiction Based on Internet Contacts' (2000) 24 *Suffolk Transnational Law Review* 125-148.
- Leamer E E & Storper M 'The Economic Geography of the Internet Age' (2001) 32 *Journal of International Business Studies* 641-665.
- Lee T H 'International Law, International Relations Theory, and Pre-emptive War: The Vitality of Sovereign Equality Today' (2004) 67 *Law and Contemporary Problems, Case Studies in Conservative and Progressive Legal Order* 147-167.
- Lemley M A 'Terms of Use' (2006) 91 *Minnesota Law Review* 459-483.
- Leng T K 'Electronic contracting: legal effects of input errors in e-Contracting' (2006) 22 *Computer law & Security Report* 157-164.
- Lessig L 'Architecting Innovation' (2000-2001) 49 *Drake Law Review* 397-405.
- Lessig L 'The Law of Horse: What Cyber Law Might Teach' (1999-2000) 113 *Harvard Law Review* 501-549.
- Lessig L 'The Path of Cyberlaw' (1995) 104 *Yale Law Journal* 1743-1756.
- Lessig L 'The Zones of Cyberspace' (1996) 48 *Stanford Law Review* 1403-1412.
- Lessig L 'What things Regulate Speech: CDA 2.0 vs Filtering' (1998) 38 *Jurimetrics Journal* 629-670.
- Lilly G C 'Jurisdiction over Domestic and Alien Defendants' (1983) 69 *Virginia Law Review* 85-152.
- Lim K H, Leung K, Sia C L & Lee M K O 'Is eCommerce boundary-less? Effects of Individualism-Collectivism and Uncertainty Avoidance on Internet shopping' (2004) 35 *Journal of International Business Studies* 545-559.
- Lipstein K 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 *International and Comparative Law Quarterly* 884-902.
- Longworth E 'Role of contracts in trans-border data flow: EU directive and implications for international business' (2001) 8 *Privacy Law & Policy Reporter* 27, (available at <http://www.austlii.edu.au/au/journals/PLPR/2001/27.html> (as accessed on 5/4/2010)).
- Louta M, Ioanna R & Lambros P 'An intelligent agent negotiation strategy in the electronic marketplace environment' (2008) 187 *European Journal of Operational Research* 1327-1345.
- Luttermann L 'Jurisdiction clauses in trust instruments—creating certainty or muddying the waters?' (2011) 17 *Trusts & Trustees* 293-301.
- Macneil R 'The Many Futures of Contracts' (1974) 47 *South California Law Review* 691 -816.

- Madon S 'The Internet and Socio-Economic Development: Exploring the Interaction' (2000) 13 *Information Technology & People* 85-101.
- Mafu S 'From the Oral Tradition to the Information Era: The Case of Tanzania' (2004) 6 *International Journal on Multicultural Societies (IJMS)* 99-124.
- Makhaya G & Roberts S 'Telecommunications in developing countries: reflections from the South African experience' (2003) 27 *Telecommunications Policy* 41-59.
- Mann F A 'The Interpretation of Uniform Statutes' (1946) *Law Quarterly Review* 278-291.
- Mann F A 'The Proper Law of Contract' (1950) 3 *International Law Quarterly* 60-73.
- Mann F A 'Uniform Statutes in English Law' (1983) 99 *Law Quarterly Review* 376-406.
- Masalu D C P 'Evolution of information and communication technology in Tanzania and its impact on ocean data and information management' (2005) 48 *Ocean & Coastal Management* 85-95.
- Maswera T, Dawson R & Edwards J 'E-commerce adoption of travel and tourism organisations in South Africa, Kenya, Zimbabwe and Uganda' (2007) 30 *Telematics and Informatics* 1-14.
- Mather H 'Choice of Law for International Sales Issues Not Resolved by the CISG' (2001) 20 *Journal of Law and Commerce* 155-208.
- Mayewski C E 'The Presence of a Web Site as a Constitutionally Permissible Basis for Jurisdiction' (1997) 73 *Indiana Law Journal* 297-328.
- Mazzotta F G 'Notes on the United Nations Convention on the Use of Electronic Communications in the International Contracts and Its Effects on the United Nations Convention on the Contracts for the International Sale of Goods' (2006-2007) 33 *Rutgers Computer & Technology Law Journal* 251-298.
- McClellan J D 'Jurisdiction and Judicial Discretion' (1969) 18 *International and Comparative Law Quarterly* 931-948.
- McClellan J D 'The Meaning of Residence' (1962) 11 *International & Comparative Law Quarterly* 1153-1168.
- McNiel M J 'Trade Secret Protection for Mass Market Computer Software: Old Solutions for New Problems' (1987) 51 *Albany Law Review* 293-332.
- Moore K A & Parisi F 'Rethinking Forum Shopping in Cyberspace' (2001-2002) 77 *Chicago-Kent Law Review* 1325-1355.
- Morales-Gomez D & Melesse M 'Utilising information and communication technologies for development: the social dimensions' (1998) 8 *Information Technology for Development* 3-11.
- Moringiello M & Reynolds WL 'Survey of the Law of Cyberspace: Internet Contracting Case in 2004-2005' (2005) 61 *The Business Lawyer* 433-446.

- Morrison D E & Firmstone J 'The social function of trust and implications for e-commerce' 19 (2000) *International Journal of Advertising* 599-623.
- Morse E A 'Extraterritorial Internet Gambling: Legal Challenges and Policy Options' (2007)1 *International Journal of Intercultural Information Management* 33-48.
- Mostert H 'Tenure Security Reform and Electronic Registration: Exploring Insights from English Law' (2011) 14 *Potchefstroom Electronic Law Journal* 85 (available at <http://www.journals.co.za/WebZ/ej/AdvancedQuery?sessionid=01-52982-1704359156> (as accessed on 27/7/2011)).
- Mutula S M & Ahmadi M 'The Contradictions of Tanzania Government policies on the Internet service provision: case study of Dar-es-salaam city' (2002) 20 *Library Hi Technology* 259-369.
- Nangela D J 'E-commerce and the Law in Tanzania: Developments and Constraints' (2004) 4 *Oriental Journal of Law and Social Sciences (OJLS)* 18-35.
- Naudé T 'Enforcement Procedures in Respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective'(2011) 127 *South African Law Journal* 515-547.
- Naudé T 'The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2009) 126 *South African Law Journal* 505-536.
- Ndulo M 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101-118.
- Neersø P 'Selected Aspects of Tanzania's Policies on Foreign Investment' (1974) 2 *World Development* 139-144.
- Newman A L & Bach D 'Self –Regulatory Trajectories in the Shadow of Public Power: Resolving Digital Dilemmas in Europe and the United States.' (2004) 17 *Governance: An International Journal of Policy, Administration, and Institutions* 387-413.
- Noll J 'European Community & E-commerce: Fostering Consumer Confidence' (2002) 9 *Electronic Communication Law Review* 207-219.
- North P 'Private International Law: Change or Decay?'(2001) 50 *International & Comparative Law Quarterly* 477-508.
- O'Hara E A & Ribstein L E 'From Politics to Efficiency in Choice of Law' (2000) 67 *University of Chicago Law Review* 1151-1232.
- O'Hara E A 'Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection' (2005) 153 *University of Pennsylvania Law Review* 1883-1950.
- O'shea K & Skeahan K 'Acceptance of Offers by E-Mail -How Far Should the Postal Acceptance Rule Extend?' (1997) 13 *Queensland University of Technology Law Journal* 247-262.

- Ong R 'Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong' (2004) 12 *International Journal of Law and Information Technology* 101-122.
- Oppong R F 'Private International Law in Africa: Past, Present and Future' (2007) 55 *American Journal of Comparative Law* 677-720.
- Oreku G S, Li J, Kimeli K & Mtenzi F J 'State of Tanzania E-Readiness and E-Commerce: Overview' (2009) 14 *Information Technology for Development* 302-311.
- Øren J S T 'Electronic Agents and the Notion of Establishment' (2001) 9 *International Journal of Law and Information Technology* 249-274.
- Øren J S T 'International Jurisdiction Over Consumer Contracts in e-Europe' (2003) 52 *International Comparative Law Quarterly* 665-695.
- Overby A B 'UNICITRAL Model Law on E-commerce-Will Cyberlaw be Uniform? An Introduction to the UNICITRAL Model Law on Electronic Commerce' (1999) 7 *Tulane Journal of International & Comparative Law* 219-238.
- Pacini, C Andrews & W Hillison 'To agree or not to agree: Legal issues in online contracting' (2002) 45 *Business Horizons* 43-52.
- Pappas C W 'Comparative US & EU Approaches to E-commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation' (2003) 31 *Denver Journal of International Law and Policy* 325-347.
- Pauknerová M 'Mandatory Rules and Public Policy in International Contract Law' (2010) 11 *ERA-Forum Journal of Humanities, Social Sciences and Law* 29-43.
- Paulsen M G & Sovern M I 'Public Policy in the Conflict of Laws' (1956) 56 *Columbia Law Review* 969-1016.
- Pelzer F C 'Annual Survey of South Carolina Law: Civil Procedure Unchartered Territory: Personal Jurisdiction in the Internet Age' (2000) 51 *South Carolina Law Review* 745-758.
- Perritt H H (Jr) 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 *Ohio State Journal on Dispute Resolution* 675-703.
- Perritt H H (Jr) 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance' (1998) 5 *Indiana Journal of Global Legal Studies* 423-442.
- Phang A 'Contract Formation and Mistake in Cyberspace –the Singapore Experience' (2005) 17 *Singapore Academic Law Journal* 361-410.
- Pistorius T 'Click-Wrap and Web-Wrap Agreements' (2004) 16 *South African Mercantile Law Journal* 568-576.
- Pistorius T 'The Legal Effects of Input Errors in Automated Transactions: South African Matrix' (2008) 2 *Journal of Information, Law & Technology (JILT)* at 3 (available at http://www.go.warwick.ac.uk/jilt/2008_2/pistorius2 (as accessed on 13/10/10)).

- Pistorius T 'Formation of Internet Contracts: An Analysis of the Contractual and Security Issues' (1999) 11 *South African Mercantile Law Journal* 282-299.
- Pistorius T 'From snail mail to e-mail-a South African Perspective on the web of conflicting rules on the time of e-contracting' (2006) 39 *CILSA* 178-213.
- Pistorius T 'Nobody Knows You're a Dog: Attribution of Data Messages' (2002) 14 *South African Mercantile Law Journal* 737-747.
- Pistorius T 'The Enforceability of Shrink-Wrap Agreements in South Africa' (1993) 5 *South Africa Mercantile Law Journal* 1-19.
- Pistorius T 'The Rights of User of a Computer Programme and the Legality of 'Shrink-wrap' Licences' (1991) 3 *South Africa Mercantile Law Journal* 57-72.
- Polanski P P 'International electronic contracting in the newest UN Convention' (2007) 2 *Journal of International Commercial Law and Technology* 112-120.
- Polanski P P 'Towards a supranational Internet law' (2006) 1 *Journal of International Commercial Law and Technology* 1-9.
- Prebble J 'Choice of Law to Determine the Validity and Effect of Contracts: A comparison of English and American Approaches to the Conflict of Laws' (1973) 58 *Cornell Law Review* 433-536.
- Pretorius C J 'The Incorporation of Contractual Terms and Reliance' (2004) *Journal of South African Law* 416-425.
- Radin M J & Wagner R P 'The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace' (1998) 73 *Chicago-Kent Law Review* 1295-1318.
- Rahman M O, Mohammad N, Rahman M M 'Towards understanding personal jurisdiction in cyberspace: An overview of American try-out for internet cases' (2008) 50 *International Journal of Law and Management* 105-120.
- Rakoff T D 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173-1283.
- Ramberg C 'The E-commerce Directive and Formation of Contract in a Comparative Perspective' (2001) 26 *Entertainment Law Review* 429-450.
- Rashbat E S 'Foreign Exchange Restrictions and Public Policy In The Conflict Of Laws: Part II' (1943) 41 *Michigan Law Review* 1089-1118.
- Rawls A 'Contract formation in an internet age' (2009) 10 *Columbia Science and Technology Law Review* 200-231.
- Raysman R & Brown P 'Clarifying the Rules for Click-wrap and Browse-wrap Agreements' Thursday, November 14 (2002) 228 *New York Law Journal* —NO. 93. Available at http://www.thelen.com/resources/documents/nylj_11-14-021.pdf (as accessed on 3/9/2007).

- Reed C 'What is a signature?' (2000) 3 *Journal of Information, Law and Technology (JILT)* (available at <http://elj.warwick.ac.uk/jilt/00-3/reed.html/> (accessed on 16/5/2010)).
- Reetz C R & Martinez-Fraga P J 'Forum *Non conveniens* and the Foreign Forum: A Defense Perspective' (2003-2004) 35 *University of Miami Inter-American Law Review* 1-20.
- Reichertz P S 'Understanding Government Regulation of the Marketing and Advertising of Medical Devices, Drugs, and Biologics: The Challenge of the Internet' (1997) *Food & Drug Law Journal* 303-308.
- Reid J P 'Law and History' (1993) 27 *Loyola of Los Angeles Law Review* 193-227.
- Reidenberg J 'Governing Networks and Rule Making in Cyberspace' (1996) 45 *Emory Law Journal* 911-930.
- Reisch L A 'Potentials, Pitfalls, and Policy Implications of Electronic Consumption' (2003) 12 *Information & Communication Technology Law* 94-109.
- Rennet G 'Is Elimination of Forum Shopping by Means of International Uniform Law an 'Impossible Mission?' (2005) 2 *Macquarie Journal of Business Law* 119-134.
- Ribstein L E 'Law v Trust' (2001) 81 *Boston University Law Review* 553-590.
- Robertson M 'Is Assent Still a Prerequisite for Contract formation in Today's Economy?' (2003) 78 *Washington Law Review* 265-296.
- Rosett A 'Unification, Harmonisation, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 *American Journal of Comparative Law* 683- 697.
- Roth P M 'The Passing of Risk' (1979) 27 *The American Journal of Comparative Law* 291-310.
- Rothchild J 'Protecting the Digital Consumer: The Limits of Cyberspace Utopianism' (1999) 74 *Indiana Law Journal* 893-990.
- Rusch L J 'The Relevancy of evolving domestic and international law on contracts in the classroom: Assumptions about assent.' (1997) 72 *Tulane Law Review* 2043-2087.
- Ruse H G 'Electronic Agents and the Legal Protection of Non-Creative Data Bases' (2001) 9 *International Journal of Law and Information Technology* 295-326.
- Salam A F, Rao H R & Pegels C C 'Consumer-Perceived Risk in E-commerce Transactions' (2003) 46 *Communications of ACM* 325-331.
- Savirimuthu J 'Online Contract Formation: Taking Technology Infrastructure Seriously' (2005) *University of Ottawa Law & Technology Journal* 105-144.
- Schu R 'Consumer Protection and Private International Law in Internet Contracts' (1997) 5 *International Journal of Law and Information Technology* 192-229.
- Schulze C 'Electronic Commerce and Civil Jurisdiction, with Special Reference to Consumer

- Contracts' (2006) 18 *South African Mercantile Law Journal* 31–44.
- Schulze C 'The 2005 Hague Convention on Choice of Court Agreements' (2007) 19 *South African Mercantile Law Journal* 140-150.
- Schwartz M 'Tear-me-open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion' (1986) 7 *Computer Law Journal* 261-288.
- Shah P A 'The Uniform Computer Information Transaction Act' (2000) 15 *Berkeley Technology Law Journal* 85-108.
- Shemi B A S & Magembe A P 'Challenges and Prospects of e-Commerce in Africa: The Need for Strategic Alliances and Collaboration' (2003) 1 (3) *Chimera USA-AFRICA Institute* 26-30 (available at <http://www.usafrica.org/Chimera-Fall03.pdf> (as accessed on 13th August 2007)).
- Sibanda O S 'Anti-spam: a Comparative Appraisal of Canadian, European Union and South African Regulatory Regimes' (2008) 2 *Journal of Information, Law & Technology (JILT)* (available at http://go.warwick.ac.uk/jilt/2008_2/Sibanda (as accessed on 15/10/2010)).
- Sibanda O S 'The Strict approach to party autonomy and choice of law in e-contracts in South Africa: Does the approach render South Africa an unacceptable jurisdiction?' (2008) 2 *De Jure* 320- 329.
- Simpson M & Docherty A J 'E-commerce adoption support and advice for UK SMEs' (2004) 11 *Journal of Small Business and Enterprise Development* 315–328.
- Smedinghoff T J & Bro R H 'Moving with change: Electronic Signature Legislation as a vehicle for advancing E-commerce' (1999) 17 *John Marshall Journal of Computer and Information Law* 723-768.
- Smith B L 'The *Third Industrial Revolution: Policymaking for the Internet*' (2001) 3 *Columbia Science & Technology Law Review* 1-45.
- Smith G P "'Tear-open Licences" -Are they Enforceable in England?' (1986) 2 *Computer Law and Practice* 128-131.
- Snail S 'An Overview of South African e-consumer law in the context of the Electronic Communications and Transactions Act (part 2)' (2007) 15 *Juta Business Lawyer* 54-60.
- Snail S 'South African e-consumer law in the context of the ECT Act--Part.1' (2007) 15 *Juta Business Lawyer* 40-46.
- Snail S 'Electronic Contracts in South Africa- A Comparative Analysis' (2008) 2 *Journal of Information, Law & Technology* (available at http://go.warwick.ac.uk/jilt/2008_2/snail (as accessed on 8/9/2010)).
- Snyder D V 'Private Law Making' (2003) 64 *Ohio State Law Journal* 371-448.
- Sohmen P 'Taming the Dragon: China's Efforts to Regulate the Internet' (2001) 1 *Stanford Journal of East Asian Affairs* 17-26.

- Sommer A A 'Random Thoughts on Disclosure as "Consumer" Protection' (1971) *The Business Lawyer* 85-94.
- Sorieul R, Clift J R & Estrella-Faria J A 'Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law (UNCITRAL)' (2001) 35 *The International Lawyer* 107-122.
- Spiekermann S & Pallas F 'Technology Paternalism— Wider Implications of Ubiquitous Computing' *Poesies & Praxis* (2006) 4 *International Journal of Technology Assessment and Ethics Science* 6–18.
- Spiro E 'Jurisdiction by Consent' (1967) 84 *South African Law Journal* 295-307.
- Stacy H 'Relational Sovereignty' (2003) 55 *Stanford Law Review* 2029-2059.
- Stalla-Bourdillon S 'Regulating the electronic marketplace through extraterritorial legislation: Google and eBay in the line of fire of French judges' (2010) 24 *International Review of Law, Computers & Technology* 39–49.
- Stern R H 'Shrink-Wrap Licences of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?' (1985) 11 *Rutgers Computer & Technology Law Journal* 51-92.
- Stravitz H B 'Personal Jurisdiction in the Cyberspace: Something More is Required on the Electronic Stream of Commerce' (1998) 49 *South Carolina Law Review* 925-941.
- Sturley F 'International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts Interpretation' (1986-1987) 27 *Virginia Journal of International Law* 729-802.
- Suffredin B R 'Practical Guidelines for Creating Enforceable Online Agreements' (2003) 2 *International IT Outsourcing News Letter* 1-9. (Available from <http://www.mayerbrown.com/publications/article.asp?id=1817&nid=6> as accessed on 5/4/2010).
- Swire P P 'Elephants and Mice Revisited: Law and Choice of Law on the Internet' (2005) 153 *University of Pennsylvania Law Review* 1975-2001.
- Symeonides S C 'Choice of Law in the American Courts in 2004: Eighteenth Annual Survey' (2004) 52 *American Journal of Comparative Law* 919-994.
- Symeonides S C 'Choice of Law in the American Courts in 2005: Nineteenth Annual Survey' (2005) 53 *American Journal of Comparative Law* 559-652.
- Tang Z S 'Parties' Choice of Law in E-Consumer Contracts' (2007) 3 *Journal of Private International Law* 113-136.
- Tang Z S 'Private International Law in Consumer Contracts: A European Perspective' (2010) 6 *Journal of Private International Law* 225-248.
- Taylor D H 'The Forum Selection Clause: A Tale of Two Concepts' (1993) 66 *Temple Law Review* 785-856.
- Tedre M, Bangu N & Nyagava S I 'Contextualised IT Education in Tanzania: Beyond

- Standard IT Curricula' (2009) 8 *Journal of Information Technology Education* 101-124.
- Tetley W (QC) 'Mixed Jurisdictions: Common Law vs Civil Law (codified and un-codified)' Part II (1999) 4 *Uniform Law Review (NS)* 591-619.
- Thomas S K 'The Protection and Promotion of E-Commerce: Should there be a Global Regulatory Scheme for Digital Signatures' (1998-1999) 22 *Fordham International Law Journal* 1002-1063.
- Tladi S 'The Regulation of Unsolicited Commercial Communications (SPAM): Is the Opt-Out Mechanism Effective?' (2008) *South Africa Law Journal* 178-192.
- Topping C R 'The Surf is Up, But Who Owns the Beach?-Who should Regulate Commerce on the Internet?' (1999) 13 *Notre Dame Journal of Law, Ethics & Public Policy* 179-238.
- Trachtman J P 'Cyberspace, Sovereignty, Jurisdiction, and Modernism' (1998) 5 *Indiana Journal of Global Legal Studies* 561-581.
- Trebilcock M J 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economic in the House of Lords' (1976) 26 *University of Toronto Law Journal* 359-385.
- Tuma E S & Ward R C 'Contracting Over the Internet in Texas' 52 (2) *Baylor Law Review* 381-415.
- Turpin C 'Postal Contracts: Attempted Revocation of Acceptance' (1975) 34 *Cambridge Law Journal* 25-26.
- Twitchell M 'The Myth of General Jurisdiction' (1988) 101 *Harvard Law Review* 610-681.
- Udo G J 'Privacy and Security Concerns as a Major Barrier for E-commerce: A Survey Study' (2001) 9 *Information Management and Computer Security* 165-174.
- Unger J 'The Unknown Province of the Conflict of Laws' (1957) 43 *Transactions of the Grotius Society: Problems of Public and Private International Law, Transactions for the Year 1957* 87-108.
- Valerie W 'The Electronic Formation of Contracts and the Common Law Mailbox Rule' (2004) 56 *Baylor Law Review* 175-204.
- Verheul J P 'The Forum (Non) Conveniens in English and Dutch Law and under Some International Conventions' (1986) 35 *International and Comparative Law Quarterly* 413- 423.
- Von Mehren & D Trautman A T 'Jurisdiction to Adjudicate: A suggested Analysis' (1966) *Harvard Law Review* 1121-1163.
- Von Mehren A T 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology' (1974) 88 *Harvard Law Review* 347-371.

- Vulkan N 'Economic Implications of Agent Technology and E-Commerce' (1999) 109 *The Economic Journal* 67–90.
- Wade C E (Jr) 'Jurisdiction: *In Rem* Symposium on Conflicts of Law in Oklahoma' (1965) 18 *Oklahoma Law Review* 431-433.
- Wan Y & Liu Y 'The Impact of Legal Challenges on the Evolution of Web-based Intelligent Agents' (2008) 3 *Journal of International Commercial Law and Technology* 112-119.
- Wang F 'Obstacles and Solutions to Internet Jurisdiction: A Comparative Analysis of the EU and US laws' (2008) 3 *Journal of International Commercial Law and Technology* 233-241.
- Ware S J 'Default Rules from Mandatory Rules: Privatizing Law through Arbitration' (1998-1999) 83 *Minnesota Law Review* 703-754.
- Watnick 'V The Electronic Formation of Contracts and the Common Law Mailbox Rule' (2004) 56 *Baylor Law Review* 175-204.
- Weiler J H 'Forum Non Conveniens: An English Doctrine?' (1978) 41 *Modern Law Review* 739-744.
- Weiss A 'National Borders in Cyberspace' (2002) 6 *The Myth of Global Village* 20-25.
- Weitzenboeck E M 'Electronic Agents and Formation of Contracts' (2001) 9 *International Journal of Law and Information Technology* 204-234.
- Weser M 'Bases of Judicial Jurisdiction in the Common Market Countries' (1961) 10 *American Journal of Comparative Law* 323-344.
- Wille D 'Personal Jurisdiction and the Internet Proposed Limits on State Jurisdiction over Data Communications in Tort Cases' (1998) 87 *Kentucky Law Journal* 95-202.
- Winfield P H 'Some Aspects of Offer and Acceptance' (1939) 55 *Law Quarterly Review* 499-513.
- Winn J K 'Emerging Issues in Electronic Contracting, Technical Standards and Law Reform' (2002) 3 *Uniform Law Review* 699-711.
- Winn J K 'The Emperor's new clothes: the shocking truth about digital signatures and the Internet commerce' (2000-2001) 37 *Idaho Law Review* 353-388.
- Wolff M 'The Choice of Laws by Parties in International Contracts' (1939) 73 *United States Law Review* 203-216.
- Wyatt D 'Choice of Law in Contract Matters. A Question of Policy' (1974) 47 *Modern Law Review* 399-419.
- Xanthaki H 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659-673.
- Yeo T M 'The Effective Reach of Choice of Law Agreements' (2008) 20 *Singapore Academy of Law Journal* 723-745.

- Yntema H E 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297-317.
- Young L 'Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts' (1997) 35 *Columbia Journal of Transnational Law* 663-665.
- Zainol Z A 'Electronic Data Interchange (EDI) and Formation of Contract: A Malaysian Perspective' (1999) 7 *International Journal of Law and Information Technology* 256-269.
- Zamora S 'NAFTA and Harmonisation of Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12 *Arizona Journal of International and Comparative Law* 401-428.
- Zekos G I 'State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction' (2005) 13 *International Journal of Law and Information Technology* 1-37.
- Zembek R S 'Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace' (1996) 6 *Albany Law Journal of Science & Technology* 339-382.
- Zhang M 'Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law' (2006) 20 *Emory International Law Review* 511-552.
- Zhongzhou L 'E-commerce Business Models in the Developing Countries: Some Examples from a Survey by UNCTAD' *The Courier ACP-EU Dossier* (May-June, 2002) 62-64.
- Zlotinik M 'Telecommunications Monopoly in South Africa: Some Human Rights Aspects and Options for Future Regulation' (1999) 43 *Journal of African Law* 214-233.
- Zondo-Kabini H 'Application of the Electronic Communications and Transactions Act to Online Merchants from Other Jurisdictions' (2003) 1 *Northwestern Journal of Technology and Intellectual Property* 78-83.

(iii) Reports

- A European Initiative in Electronic Commerce COM (97) 157 final). Available at <ftp://ftp.cordis.europa.eu/pub/esprit/docs/ecomcom.pdf> (as accessed on 20/6/2010).
- Annual Report of the Department of Communications in terms of the Public Finance Management Act, 1999; submitted by the Director-General of the South Africa Department of Communication on 21st September, 2007, introducing the 2006-2009 Strategic plan of the department (at 6). (The Report is available at http://www.doc.gov.za/index.php?option=com_docman&task=cat_view&gid=71&Itemid=431 (as accessed on 26/2/2008)).
- Asia-Pacific Trade and Investment Review Vol 1 No.1 April (2005).
- Backus M *E-Governance and Developing Countries*, IICD Research Report –No 4 April (2001) 10 (available at <http://www.ftpiicd.org/files/research/reports/report3.pdf> (as accessed on 24/9/07)).
- Baker S 'The Survey of IT in Tanzania.' *Report submitted to the Tanzania Commission for Science and Technology* (1993).

BCLI Report, No 45–Wills, Estates and Succession: A Modern Legal Framework.’ Prepared by members of the Succession Law Reform, British Columbia Law Institute (2006) 32. This Report is available at http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/404296/succession_report.pdf (as accessed on 9/8/2010).

Beck T & Demirgüç-Kunt A *Growth and Poverty: Public Policy for Private Sector*. Note No. 268 Washington DC World Bank (2004).

Bourély N ‘The context for transactional legal harmonisation in the Americas: A background to the SLA/CIDA Project.’ (No date) at 12, (available at <http://www.oas.org/legal/english/osla/bourelly.doc> (as accessed on 27/07/07).

Corones S & Christensen S *Comparison of Generic Consumer Protection Legislation* (2007) (Report) 33-34 (available at http://www.pc.gov.au/_data/assets/pdf_file/0008/73691/consumerprotectionlegislation.pdf (accessed 23/6/10).

EAC Secretariat –Presentation: ‘Present and Future Trends of the East African Community’ (available at http://www.eac.int/documents/EAC_Presentation.pdf (as accessed on 17/7/07)).

Economic Commission for Africa ECA/ ECOWAS Report: ‘*The Development of an E-commerce Legal Framework for ECOWAS*’ (2005) (available at <http://www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf> (as accessed on 20/6/2010)).

Emery L, Gordon A, Krieshok G & Pompe A Information Policy Country Report: South Africa Foundations of Information Policy Analysis and Design (2009) 2 (available at [http://deepblue.lib.umich.edu/bitstream/2027.42/64841/1/IPOL%20Country%20Report%20-%20South%20Africa%20\(2009\).pdf](http://deepblue.lib.umich.edu/bitstream/2027.42/64841/1/IPOL%20Country%20Report%20-%20South%20Africa%20(2009).pdf) (as accessed on 14/10/2010.))

Gaillard J ‘Science in Africa at the Dawn of the 21st Century’ EU Commission, DG XII Final Report-Country Report-(Tanzania) (2000).

General Assembly Official Records 66th Session Supp. No.17 (A/60/17).

Giuliano M & Lagarde P *Report on the Convention on the Law Applicable to Contractual Obligations* (1980) OJ C282/1. (Available at http://aei.pitt.edu/1891/1/Obligations_report__Guiliano_OJ_C_282.pdf (as accessed on 20/6/2011)).

Irish Law Reform Commission Consultation Paper ‘*Documentary and Electronic Evidence*’ (LRC CP 57- 2009) Ballsbridge Dublin (2009) 30. This report is available at http://www.lawreform.ie/_fileupload/consultation%20papers/cpDocumentaryandElectronicEvidence.pdf (as accessed on 20/10/2010).

ITU *East Africa Regional Information Infrastructure Report– Volume I* ITU Geneva (2007) 9 – available at http://www.itu.int/dms_pub/itu-d/opb/lcd/D-LDC-ICTEARI-2007-PDF-E.pdf (as accessed on 3/3/2009).

Law Commission/Land Registry Report: *Land Registration for the Twenty-first Century, a Conveyancing Revolution*, Her Majesty's Land Registry, Law Com No 271 (2001) available at <http://www.lawcom.gov.uk/docs/lc271.pdf> (as accessed on 11/8/2010).

Legal Aspects of Electronic Commerce: Work by the United Nations Commission on International Trade Law, (UNCITRAL), *Meeting of Commonwealth Law Ministers and Senior Officials*, Port of Spain, Trinidad and Tobago, 3-7 May, 1999, Memoranda Vol.2, Commonwealth Secretariat, Marlborough House, London, September (2001).

Mutagahywa B, Kinyeki C & Ulanga J *A Review of E-Government Related Interventions in PSRP Phase I and Advise on a Strategy Framework Towards PSRP Phase II*, United Republic of Tanzania, President's office Public Service Management May (2007).

OECD 'Economic and Social Impact of E-commerce: Preliminary Findings and Research Agenda' *OECD Digital Economy Papers* No. 40 OECD Publishing (1999).

OECD Background Report *Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy* DSTI/CP (2009)20/FINAL Washington D.C., 8-10 December 2009 (available at <http://www.oecd.org/dataoecd/44/13/44047583.pdf> (as accessed on 22/10/2010)).

OECD *Best Practice Example under the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* DSTI/CP(2002)2/FINAL (2002).

Oguttu F, Ngowi H P & Millanzi M 'SME competitiveness facility (SCF) SME export market prospects desk study Volume II: Detailed study output' (2006) A consultant Report (available at <http://www.marketaccessz.org/wp-content/uploads/2011/03/SCF-FINAL-REPORT-vol-II.pdf> (as accessed on 26/6/2011)).

Quimbo R 'The ASEAN Legal Framework and Its Challenges' in UN Economic and Social Commission for Asia and the Pacific (UNESCAP), *Harmonised Development of Legal and Regulatory Systems for E-commerce in Asia and the Pacific: Current Challenges and Capacity-Building Needs.*, Studies in Trade and Investment No. 54 (ST/ESCAP/2348) United Nations New York (2004) 81 (available at http://www.unescap.org/tid/publication/tipub2348_party1v.pdf (as accessed on 2/8/2007)).

RAPEX: The Commission's Rapid Alert System for Non-Food Products (RAPEX) Annual Report (2007) [available at http://ec.europa.eu/consumers/safety/rapex/docs/rapex_annualreport2008_en.pdf (as accessed on 9/5/2008)).

Schwab A Report A7-0038/2011 'Consumer rights (final vote) COM (2008)0614 – C6-0349/2008 – 2008/0196(COD) Proposal for Directive' (available at <http://www.europarl.europa.eu/document/activities/cont/201106/20110616ATT21551/20110616ATT21551EN.pdf> (as accessed on 29/6/2011)).

The UNCITRAL '*Legal Aspect of Electronic Commerce: Work by the United Nations Commission on International Trade Law (UNCITRAL)*' (LMM (99) 7. (Paper prepared for the Commonwealth Secretariat by UNCITRAL, and produced in 1999 *Meeting of Commonwealth Law Ministers and senior officials*, Port Spain, Trinidad and Tobago, 3-7 May 1999-Memoranda Vol.2

The United Republic of Tanzania *Analytical Report Vol X* National Bureau of Statistics Ministry of Planning, Economy and Empowerment Dar es Salaam August,(2006) 1 (available at <http://www.nbs.go.tz/pdf/2002popcensus.pdf> (as accessed on 28/6/2011)).

The World Bank '*Promoting Private Sector Investment and Innovation to address the Information and Communication Needs of the Poor in Sub-Saharan Africa*' InfoDev & ALCATEL The International Bank for Reconstruction and Development /The World Bank Washington D.C (2005).

The World Bank *World Development Report: Entering the 21st Century* The World Bank Oxford University Press (2000).

Uganda Law Reform Commission *A Study Report on Electronic Transactions Law* (Law Com Pub.No.10 of 2004)

Ulanga P R 'Report on Cyber Security in Tanzania' (2005) (available at <http://www.itu.int/osg/spu/cybersecurity/material.html> (as accessed on 25/2/.2007)).

UNCTAD *Building Confidence: E-commerce and Development Report 2000* (UNCTAD/SDTE/MISC.11).

UNCTAD *Electronic Commerce: Legal considerations* (UNCTAD/SDTE/BFB/1 15 May 1998).

UNCTAD *Information Economy Report 2006: The development perspective* (UN Doc. UNCTAD/SDTE/ ECB/2006/1).

UNCTAD *Investment Policy Review: The United Republic of Tanzania* (UNCTAD/ITE/IPC/Misc.9).

UNECA: *Attainment of the MDGS and Implementation of NEPAD in North African Countries: Progress Prospects ECA-NA/TNG/ICE/XX/4/REV.1*, March 2005, (Submitted at the 20th Meeting of the Intergovernmental Committee of Experts (ICE) of the ECA Sub-regional Office for North Africa, Tangier, Morocco 13-15 April 2005.

UNECA: *The ECA/IDRC Pan-African Initiative on e-Commerce Report* (Economic Commission for Africa) E/ECA/DISD/CODI.2/30.

United Nations Development Programme *Human Development Report* Oxford University Press New York (2001).

UNECA: Resolution 795 (XXX) of 3 May 1995, "Building Africa's Information Highway" and Resolution 812 (XXXI).

(iv) Technical/Working and Conference Papers

Goldstein A & O'Connor D 'E-commerce for Development: Prospects and policy Issues' *OECD Development Centre Technical Paper, No.164*, (2000) (available at <http://www.oecd.org/dev/publication/tp1a.htm> (as accessed on 5/10/2007)).

Goodrich P '*The Posthumous Life of the Postal Rule: Requiem and Revival of Adams v Lindsel*' Benjamin N Cardozo School of Law, Jacob Burns Institute for Advanced Legal Studies,

Working Paper No. 127. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=760377 (as accessed on 26/11/2007).

Henry O 'Internet banking, e-commerce and related supervisory challenges' Paper presented during the XVIII Annual Conference of the Caribbean Group of Banking Supervisors, May 18-19, 2000. Curacao, Cayman's Islands.

Jackson A C 'Gambling, Technology And Society: Social Issues' Paper presented at the conference *Gambling, Technology and Society: Regulatory Challenges for the 21st Century*, convened by the Australian Institute of Criminology in conjunction with the Australian Institute for Gambling Research and held in Sydney, 7-8 May 1998 (available at <http://www.aic.gov.au/events/aic%20upcoming%20events/1998/gambling.aspx> (as accessed on 5/6/2011)).

Massati S A L 'Issues and constraints in commercial dispute resolution challenges in regulatory framework and institutional capacities in Tanzania: The experience of the commercial court Of Tanzania' (a paper presented at the Conference on the Role of ICT in the Administration of Commercial Justice, held at Arusha, Tanzania, on 23 – 26, September 2007).

Moodley S 'Competing in the Digital Economy? The Dynamics and Impacts of B2B E-commerce on the South African Manufacturing Sector.' *Discussion Paper No. 2002/79*, WIDER, United Nations University, August, 2002.

Murray A D 'Free Expression and Censorship through Design Protocols: A Misapplication of the ICANN UDRP' - A conference paper, *BILETA 17th Annual Conference*, April 5th to 6th, 2002. Free University Amsterdam.

Mussa M 'Global Economic Prospects: Surviving a Mild Case of Stagflation.' Paper presented at the *Fourteenth Semiannual Meeting on Global Economic Prospects*, September 26, 2008. (Peterson Institute for International Economics).

Singh A & Tanburn J 'ICTs and enterprises in developing countries: Hype or opportunity?' *Seed Working Paper, Number 17* Geneva: International Labour Office (2001).

UNCITRAL Secretariat '*Electronic Commerce and International Legal Harmonisation: Time to go beyond Functional Equivalency?*' ICT and E-business Strategies for Development, High Level Regional Conference for Transition Economies, Geneva, 20-21 October 2003.

UNCITRAL Secretariat '*Legal Aspects of Electronic Commerce: Explanatory Note on the Convention on the Use of Electronic Communications in International Contracts*' Note by the Secretariat, United Nations Commission on International Trade Law Thirty-ninth session New York 19 June-7 July 2006. A/CN.9/608/Add.2.

UNCTAD: *Background Paper on Developments and Main Issues in Electronic Commerce and Information and Communication Technologies* (UNCTAD:TD/B/COM.3/4919) December 2002, Trade and Development Board Commission on Enterprise, Business Facilitation and Development, at its Seventh session Geneva, 24–28 February 2003.

(v) Dissertations and Unpublished Papers

B Raut *Determining Judicial Jurisdiction in the Transnational Cyberspace* (SJD Thesis, School of Law, Queensland University, 2004). (Available at <http://eprints.qut.edu.au/15830/> (as accessed on 15/6/2010)).

Bakari J K *Towards a holistic approach for managing ICT security in developing countries: A case study of Tanzania* (Unpublished PhL Licentiate Thesis, Stockholm University and Royal Institute of Technology 2005).

De Villiers M R H *Consumer Protection under the Electronic Communications and Transactions Act of 2002* (LLM (Mercantile Law) Dissertation, University of Johannesburg 2004) (available at <http://ujdigispace.uj.ac.za:8080/dspace/bitstream/10210/1848/1/MRHdeVilliers.pdf> (as accessed on 27/6/2011))

Der Merwe P B van *Mobile Commerce over GSM: a Banking Perspective on Security* (MSc (Electronics) Dissertation, University of Pretoria (2003). Available at <http://upetd.up.ac.za/thesis/available/etd-07202004-111814/unrestricted/00dissertation.pdf> (as accessed on 27/7/2011)).

Huffmann J *Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops* (Unpublished LLM Dissertation, School for Advanced Legal Studies, Faculty of Law, University of Cape Town 2004).

Kassim S R *Internet usage for Commercial purposes in Tanzania* (Unpublished MBA Dissertation, University of Dar-es-salaam 2000).

Koyugi JO *The Uneasy Case for Copyright Protection in Computer Programs: A challenge to the Copyright and Neighbouring Rights Act, 1999* (Unpublished LLM Dissertation, University of Dar-es-Salaam 2005).

Maelik R J *Electronic Commerce in International Trade Law* (Unpublished LLM -Course Work Paper, School for Advanced Legal Studies, University of Cape Town 2007).

Majuva C *Development Dynamics and Future Prospect of Electronic Commerce for Developing Countries: A case of Tanzania* (Unpublished MBA Dissertation, University of Dar-es-salaam 2000).

Mganga B E K *The Use of Electronic Evidence in Administration of Justice in Tanzania* (Unpublished Advanced Course Work Paper 2, Faculty of Law, University of Dar-Es-Salaam 2008).

Mhayaya S G *A Study of the Potential Usage of ICT (E-Government) in improving efficiency and effectiveness of 'Executive Functions' of the Government including delivery of public services- Case of Tanzania* (Unpublished Masters of Science in Engineering Management (MScEMA) Dissertation, University of Dar-es-salaam 2004).

Mwang'amba N *Internet Industry: Regulatory Perspectives in Tanzania* (Unpublished LLB

Dissertation, University of Dar-es-salaam 2001).

Nnafie I *Internet cafes in Dar es Salaam: Problems and Opportunities: Recommendations for e think tank Tanzania* (Msc. Thesis, Eindhoven University of Technology 2002) (available at <http://www.tzonline.org/pdf/surveyoninternetcafesindsm.pdf> (as accessed on 2/5/2007)).

Nditi N N N *Consumer Protection Law and Practice: Its Relevancy and Reality in Developing Economy with Special Reference to Tanzania* (Unpublished PhD Thesis, University of Dar-es-Salaam 1987).

Ndumbaro D D A *Critical Assessment of the Law Relating to Consumer and Consumer Protection in Tanzania: A Particular Emphasis on Food Law and the Protection of Infants* (Unpublished LLM Thesis, University of Dar-es-Salaam 2003).

Shange M B 'A system-based approach to land registration analysis and improvements. A case study of the KwaZulu-Natal Deeds Registration system (MSc (Environment and Development) Dissertation, School of Environmental Sciences, University of KwaZulu-Natal, 2010). (Available at <http://dspace.ukzn.ac.za:8080/jspui/handle/10413/644> (as accessed on 25/5/2011)).

Sulla E *Performance of Card-Based Payment Systems on Customer Satisfaction in Financial Institutions in Tanzania, Case study of CRDB Bank Ltd* (Unpublished MBA (Finance) Dissertation, University of Dar-es-Salaam 2004).

Van Eeden E P *The Regulation of Trade Practices: A Comparative Study* (Unpublished PhD Thesis, University of South Africa 1984).

(vi) Other Online Resources

'An Overview of State Science and Technology Strategic Planning' in AAAS *Science and Technology Year-Book, State Science and Technology Institute* (1999) (available at <http://www.aaas.org/spp/yearbook/contents.htm> (as accessed on 4/12/2005)).

'Data Privacy and Consumer Protection in South Africa E-commerce' (available at <http://www.commerce.uct.ac.za/informationssystem/staff/PersonalPages/jvbelle/pubs/CA TI04.do>.(As accessed on 25/9/08)).

'Draft EAC Legal Framework for Cyberlaws: Phase II February 2011' (available at http://www.meaca.go.ug/index.php?option=com_docman&task=doc_download&gid=27&Itemid=6 (as accessed on 4/6/2011)).

'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation' COM (2002) 654 final, 14 January 2003 (available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf (as accessed 25/8/2010)).

'Harmonisation of E-commerce Legal Framework for Southern Africa' DOT-COMments News letter, March, 2007 vol19 (available at http://www.dot-com-alliance.org/newsletter/article.php?article_id=30 (as accessed on 23/8/2007)).

‘Mobile Commerce: opportunities and challenges’ A GS1 Mobile Com White Paper (available at http://www.gs1.org/docs/mobile/GS1_Mobile_Com_Whitepaper.pdf (as accessed on 23/10/2010)).

‘Negotiating the Net: The case for South Africa’ (available at http://www.cidcm.umd.edu/ntn/summary_files/v3_document.htm (as accessed on 22/9/2008)).

‘Safaricom’s M-PESA Service wins Global Award’ -available at <http://www.itnewsafrika.com/?p=2263> (as accessed on 3/9/2010).

‘The Association of Chief Police Officers’ (ACPO) Good Practice Guide for Computer-Based Electronic Evidence’ (available at http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf (as accessed on 4/6/2011)).

‘The Hague Choice of Court Convention and International Commercial Litigation.’ Address by the Honourable J J Spigelman AC Chief Justice of New South Wales Commonwealth Law Conference 2009 Hong Kong, 7 April 2009 (available at [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman070409.pdf/\\$file/spigelman070409.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman070409.pdf/$file/spigelman070409.pdf) (as accessed on 11/11/2010)).

African Information Society Initiative (AISI): An Action Framework to Build Africa's Information and Communication Infrastructure UN Economic Commission for Africa, (available at <http://www.uneca.org/aisi/> (as accessed on 12/8/2007)).

AG review of the Bills of Exchange Act, July 2003, Commonwealth of Australia (2003)(available at <http://ncp.ncc.gov.au/docs/AG%20review%20of%20the%20Bills%20of%20Exchange%20Act,%20July%202003.pdf> (as accessed on 20/4/2011)).

Angelov S & Grefen P 'A Case study on Electronic contracting in on-line advertising -status and prospects' (available at <http://is.tm.tue.nl/staff/sangelov/Doc/External/AngelovProVe06.pdf> (as accessed on 26/11/2007)).

Arora G K, Hanneghan M & Merabti M ‘P2P Overlay Network to Support E-commerce’ (available at <http://www.cms.livjm.ac.uk/pgnet2006/Programme/Papers/2006-101.pdf> (as accessed on 7/10/2008)).

Ashcroft J ‘Electronic Crime Scene Investigation: A Guide for First Responders’ U.S. Department of Justice Office of Justice Programs New York (2001) (available at <http://www.ncjrs.gov/pdffiles1/nij/187736.pdf> (as accessed on 23/4/2011)).

Barlow P J ‘A Declaration of Independence for Cyberspace’ (available at <http://homes.eff.org/~barlow/Declaration-Final.html> (as accessed on 06/08/2007)).

Barlow P J ‘The Economy of Ideas: A Framework of rethinking Patents and Copyrights in Digital age (Everything you know about Intellectual Property is Wrong) WIRED (available at <http://www.ifla.org/documents/infopol/copyright/jpbarlow.htm> (as accessed on 30/7/2008)).

- Bekefi T *Tanzania: Lessons in building linkages for competitive and responsible entrepreneurship*. UNIDO and Kennedy School of Government, Harvard University (2006) 17 (available at http://www.daedalusadvising.com/Comp_Entr_Tanzania.pdf (as accessed on 26/6/2011)).
- Boss A ‘Electronic Commerce: Globalisation of Domestic Law or Domestication of Globalised Law?’ (Available at <http://www.aals.org/2005midyear/commercial/AmyBossOutline.pdf> (as accessed on 1/8/2010)).
- Bourély N ‘The context for transactional legal harmonisation in the Americas: A background to the SLA/CIDA Project’ (*no date*) (available at <http://www.oas.org/legal/english/osla/bourelly.doc> (as accessed on 27/07/07)).
- Boynton B C ‘Identification of Process Improvement Methodologies with Application in Information Security,’ *Proceedings of the 4th Annual Conference on Information Security Curriculum Development ’07* ACM New York, September 28-29 (2007) (available at <http://delivery.acm.org/10.1145/1410000/1409939/a28-boynton.pdf?key1=1409939&key2=3621096821&coll=GUIDE&dl=GUIDE&CFID=108407726&CFTOKEN=82589189> (as accessed on 12/10/10)).
- Brown D & Isakovic M ‘Security And Privacy Laws: Striking The Balance’ Report on a Seminar Sponsored by the Commonwealth Centre For Electronic Governance and a Roundtable Lunch Hosted by the Public Policy Forum, October 20 & 21, 2003 – Ottawa, Ontario Canada, (available at http://www.ppforum.ca/sites/default/files/sp_law_outcomes_report.pdf (as accessed on 21/10/2010)).
- Buys R ‘How Will the Consumer Protection Provisions of the New ECTA Affect Your Web Site?’ available at <http://www.buys.co.za> (as accessed on 6/8/2008).
- Bygrave L A & Svantesson D ‘Jurisdictional Issues and Consumer Protection in Cyberspace: The View from “Down Under”’ (available at http://folk.uio.no/lee/oldpage/articles/CLE_paper.pdf (as accessed on 23/10/2010)).
- Chege K ‘AU: African ICT Policies Must Match Regional Needs’ (available at <http://www.scidev.net/en/news/au-africa-ict-policies-must-match-regional-needs.html> (as accessed on 3/9/2010)).
- Chief Registrar of Deeds and Law Society of South Africa, *Policy Document on the Electronic Deeds Registration System (E-Drs)* (Department of Rural Development and Land Reform Pretoria 2009) (page 1, 9) (available at www.ruraldevelopment.gov.za/.../E_DRS/SADJ%20Artical%20on%20e-DRS%20POLICY%20DOCUMENT.doc (accessed on 10/7/2010)).
- CR2 Channel Banking Innovation Case study: *CRBD Bank introduces smart card services to Tanzania with TemboCard, April 2005* (available from http://www.cr2.com/pdf/CRDB_Apr05.pdf (as accessed on 27/10/2007)).
- Dagada R, Eloff M M & Venter L M ‘Too Many Laws but Very Little Progress: Is South African Highly Acclaimed Information Security Legislation Redundant?’ *Proceedings of the 8th Annual ISSA Conference, 6 -8 July 2009, University of Johannesburg's School of*

- Tourism and Hospitality facility, Auckland Park, Johannesburg, Gauteng, South Africa, available at <http://uir.unisa.ac.za/bitstream/10500/2660/1/dagada.pdf> (as accessed on 12/10/2010).
- Daniel S K (ed) *The Impact of The Regulatory Framework on E-Commerce in Singapore* Symposium Technology Law Development Group Singapore Academy of Law 5 April (2002) (available at http://www.lawnet.com.sg/legal/ln2/comm/PDF/The_impact_of_the_regulatory_framework_on_e_commerce_in_SG.pdf. (as accessed on 29/6/2011)).
- Daya Y & Steenkamp E 'Trade Potential Between South Africa and Nigeria' *Directorate International Trade: Trade Research Desk Department Of Agriculture, Pretoria* (2005) (available at <http://www.daff.gov.za/docs/researchP/NigeriaStudy.pdf> (as accessed on 4/5/2011)).
- De Wet P Industry gets ECT Act breather (South Africa) (2002), available at <http://www.itweb.co.za/sections/internet/> (as accessed on 3/6/2009).
- Department of Business Regulation and Enterprise Reform (BERR) 'Consultation on EU Proposals for a Consumer Rights Directive' November 2008 (available at <http://www.bis.gov.uk/files/file48791.pdf> (as accessed on 29/6/2011)).
- Department of Communications *Discussion Paper on Electronic Commerce* (July 1999) (available at <http://www.azouk.com/163804/Discussion-Paper-on-e-commerce-South-Africa/> (as accessed on 12/8/ 2010)).
- Department of Land Affairs Strategic Plan 2005-2010, 'Sustainable Land and Agrarian Reform: A Contribution to Vision 2014' March 2005 (available at <http://www.info.gov.za/view/DownloadFileAction?id=127095> (as accessed on 27/10/2010)).
- Department of Rural Development and Land Reform's *Annual Report 1April 2009-31 March 2010* (available at http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_library/documents/Publications/Annual_Report/April2009-March2010.pdf (as accessed on 28/10/2010)).
- EAC Secretariat –Presentation: 'Present and Future Trends of the East African Community' (available at http://www.eac.int/documents/EAC_Presentation.pdf (as accessed on 17/7/07)).
- ECOWAS 'ECOWAS in Brief' (available at <http://www.ecowas.int/> (accessed on 22/8/2007)).
- Estrella-Faria J A 'Legal Harmonisation through Model Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)' (no date) (available at http://www.justice.gov.za/alraesa/conferences/papers/s5_faria2.pdf (as accessed on 20/8/2010)).
- Eurostat Press Release (available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/4-19012010-BP/EN/4-19012010-BP-EN.PDF (as accessed on 20/6/2011)).
- Foster J B & McChesney R W 'The Internet's Unholy Marriage to Capitalism' (2011) 62

Monthly Review (available at <http://monthlyreview.org/2011/03/01/the-internets-unholy-marriage-to-capitalism> (as accessed on 28/6/2011)).

Gabriela-Sarmiento M 'Basic E-Commerce Training for Pakistan Legislative Requirements for E-Transactions' - a Seminar paper delivered during International Telecommunication Union (ITU) Electronic Commerce for Developing Countries (ECDC), 30th March-3-April, 2001 Islamabad, Pakistan, (at page 4) (available at <http://www.itu.int/ITU-D/e-strategy/ecdc/Seminars/pakistan/legalaspectsofe-commerce.pdf> (as accessed on 23/07/2007)).

Giesela R 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' CLPE Research Paper No. 4/2007 (available at SSRN: <http://ssrn.com/abstract=921842> (as accessed on 2/5/2008)).

Green Paper on Electronic Commerce for South Africa, Coordinated and compiled by the Department of Communications, Republic of South Africa, November, 2000 (available at http://www.capegateway.gov.za/Text/2004/6/green_paper_on_electronic_commerce.pdf (as accessed on 26/2/2008)).

Grefen P & Angelo S 'On Deep e-Contracting' (available at <http://www.ub.utwente.nl/webdocs/ctit/1/0000007b.pdf> (as accessed on 2/9/2007)).

Grefen P & Angelo S 'On Deep e-Contracting' (available at <http://www.ub.utwente.nl/webdocs/ctit/1/0000007b.pdf> (as accessed on 2/9/2007)).

Gregory J D '*Technology Neutrality and the Canadian Uniform Acts*' 4th International Conference on law via the Internet, Montreal, 2nd-4th October, 2002 (available at <http://www.lexum.umontreal.ca/conf/conf2002/actes/gregory.html> (as accessed on 24/07/2007)).

Haines A 'The Impact of the Internet on the Judgments Projects: Thoughts for the Future' Prel Doc No 17 of 2002 (available at http://www.hcch.net/upload/wop/gen_pd17e.pdf (as accessed on 23/5/2011)).

Hew D 'Towards ASEAN Economic Community by 2020: Vision or Reality?' Institute of South East Asian Studies, *VIEW POINTS*, 16 June, 2003 (available at <http://www.iseas.edu.sg/viewpoint/dhjun03.pdf> (as accessed on 11/08/2007)).

HIPSSA Project 'ICT Regulatory Harmonisation: a Comparative Study of Regional Initiatives' Support for Harmonisation of ICT Policies in Sub-Sahara Africa (HIPSSA), Activity G-1 of HIPSSA Project (2009) (available at http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/docs/D_REGHIPSSA-2010_E.pdf (as accessed on 3/9/2010)).

Hofman J Consumer Protection and E-Law (2002) (available at <http://web.uct.ac.za/depts/itlaw> (as accessed on 24/9/2008)).

Internet Law & Policy Forum (ILPF) 'Survey of International Electronic and Digital Signature Initiatives' (1999), available at <http://www.ilpf.org/digsig/survey.htm> (as accessed: 9/6/2008).

- Irish Council for Bioethics in *Biometrics: Enhancing Security or Invading Privacy? Opinion*
The Irish Council for Bioethics, Dublin (2009) (available at
http://www.bioethics.ie/uploads/docs/Final_Biometrics_Doc_HighRes.pdf (as accessed
on 21/10/2010)).
- ITU Discussion Paper on Policy Considerations for Electronic Commerce' *World
Telecommunication Day* (1999) (available from:
<http://www.itu.int/newsarchive/wtd/1999/intro-dp.html> (as accessed on 23/3/ 2007)).
- Johnson S & Jones B 'Internet Activity and Jurisdiction over Foreign Defendants' (available at
http://www.Dunn.Com/Papers/Paper_3.Shtml (as accessed on 26/3/2008)).
- Kasekende L, Mlambo K, Murinde V & Zhao T 'Restructuring for Competitiveness: The
Financial Services Sector in Africa's Four Largest Economies' in *The Africa
Competitiveness Report 2009* World Economic Forum, the World Bank and the African
Development Bank (2009) 49-81 (available at
http://www.workinfo.com/Workforce/21821_africa_competitiveness.pdf (as accessed on
4/5/2011)).
- Kinyanjui M N & McCormick D 'E-commerce in the Garment Industry in Kenya: Usage,
Obstacles and Policies.' Report for Project e-commerce for Developing Countries:
Building an Evidence Base for Impact Assessment, London School of Economics and
Political Science and Institute of Development Studies Sussex (August 2002) at 1,
(available at
http://www.ids.ac.uk/UserFiles/File/globalisation_team/B2BKenyagarmentsfinal.pdf (as
accessed on 27/3/2008)).
- Klang M 'Controlling Online Information: Censorship & Cultural Protection'-A presentation
given at "WSIS, Internet Governance and Human Rights" Uppsala, October 3, 2005
(available at http://www.kus.uu.se/pdf/publications/ICT/klang_03_oct.pdf (as accessed on
30/4/2008)).
- Kobayashi B H & Ribstein LE 'A Recipe for Cookies: State Regulation of Consumer
Marketing Information' (available at
<http://www.federalismproject.org/masterpages/ecommerce/cookies.pdf> (as accessed on
31/3/2008)).
- Kumar J 'Determining Jurisdiction in Cyberspace' (2006) 1 (available at
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=919261 (as accessed on
24/3/2008)).
- Lake S 'E-commerce and LDCs Challenges for Enterprises and Governments' –a paper
presented to an e-commerce and LDCs Round Table Discussions, Kathmandu – Nepal –
30-31 May 2000 Electronic Commerce Section, SITE / UNCTAD. (Available at
http://r0.unctad.org/ecommerce/event_docs/kathmandu_background.pdf (as accessed on
28/6/2009)).
- Latimer P 'Signatures, Squiggles and Electronic Signatures' (available at
<http://ssrn.com/abstract=1601169> (as accessed on 23/8/2010)).
- Lawrie M 'The History of the Internet in South Africa: How it began' (1997) (available at

- <http://osdir.com/ml/operators.ioz/2006-06/msg00001.html> (as accessed on 23/9/2008)).
- Li L H *How to Identify eCommerce Opportunities: Developing the Electronic Commerce Business Value (EBV) Framework—A Joint Publication with Infocomm Development Authority of Singapore (IDA) Cap Gemini Ernst & Young Consultants Singapore Pte Ltd and Infocomm Development Authority of Singapore (IDA)* (2000) (available at <http://www85.homepage.villanova.edu/timothy.ay/MIS3030/ecommerceOpp.pdf> (as accessed on 29/6/2011)).
- Lodder AR ‘Chapter 4: Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market’ (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009945 (as accessed on 30/8/2010)).
- Machira P ‘Mobile transactions outsmart banking’ *The Sunday Observer* (available at <http://www.ippmedia.com/ipp/observer/2008/12/28/128858.html> (as accessed on 28/2/2009)).
- Magille J K ‘Impact of E-Commerce on Taxation’ A Presentation to Stakeholders Forum on Impact of E-Commerce on Taxation organised by the Tanzania Revenue Authority and held on 6th July 2006 (available at http://www.tanzaniagateway.org/docs/eCommerceImpactonTaxation_July2006.pdf (as accessed on 23/ 7/ 2007)).
- Malimbo P ‘The Internet leaves no footprints in Tanzania’ (available at <http://2009.inwent-ij-lab.org/?p=106> (as accessed on 23/6/2011))).
- Mensah A O, Bahta A & Mhlanga S ‘E-commerce challenges in Africa: issues, constraints, opportunities.’ Briefing Paper, World Summit on Information Society, Geneva 2003-Tunis 2005) (available at <http://www.uneca.org/aisi/docs/PolicyBriefs/Ecommerce%20challenges%20in%20Africa.pdf> (accessed on 12/8/2007)).
- METRICS 2.0, Oct. 26, 2006, Online Consumer Spending to Hit \$170 Billion in 2006 (available at http://www.metrics2.com/blog/2006/10/26/online_consumer_spending_to_hit_170_billion_in_200.html (as accessed on 8/7/ 2007)).
- Mgaya K 'Development of Information Technology in Tanzania' in E Drew & F G Foster (Eds) *Information Technology in Selected Countries* Tokyo United Nations University Press (1994) 134-148 (available at <http://www.unu.edu/unupress/unupbooks/uu19ie/uu19ie0i.htm> (as accessed on 23/5/2011)).
- Miller J ‘Promoting Electronic Commerce in South Africa: Some Academic Perspectives’ (available at <http://www.trigrammic.com/downloads/Promoting%20Electronic%20Commerce%20in%20South%20Africa.pdf> (as accessed on 22/10/2010)).
- Milosevic Z & Bond A ‘Electronic Commerce on the Internet: What Is Still Missing?’ available at <http://www.isoc.org/HMP/PAPER/096/html/paper.html> (as accessed on 29/8/2007).

- Molkner K 'Legal Structures to Promote Economic Growth' Reform Focus No.1, (1997) (available at http://www.cipe.org/publications/ert/e23/E23_07.pdf (as accessed on 15/4/2008)).
- Moriuchi Y 'e-Government' Global Business Dialogue on Electronic Commerce, (GBDe)- Tokyo recommendations, September 14, 2001 (available at http://www.gbd-e.org/IG/eGov_top.html (as accessed on 1/10/2007)).
- Mostert W 'How the New E-business Legal Landscape Provides a Competitive Edge' Deloitte & Touche Legal, Technology Law (2002) (available at [http://www.deloitte.com/assets/DcomSouthAfrica/Local%20Assets/Documents/How%20new%20ebusiness%20legal%20landscape%20creates%20a%20competitive%20edge\(1\).pdf](http://www.deloitte.com/assets/DcomSouthAfrica/Local%20Assets/Documents/How%20new%20ebusiness%20legal%20landscape%20creates%20a%20competitive%20edge(1).pdf) (as accessed on 8/8/2010)).
- Murray A D 'Entering into contracts electronically: the real W.W.W.' at 11 (available at <http://www.100megsfree4.com/andrewmurray/Contracts.pdf> (as accessed on 16/10/2010)).
- Mussa M 'Factors Driving Global Economic Integration' (available at <http://www.imf.org/external/np/speeches/2000/082500.htm> (as accessed on 3/8/2008)).
- Mutagahywa B & Kajiba J 'Connectivity and E-commerce (in Tanzania)' /Economic and Social Research Foundation (ESRF) (2000) (available at <http://www.tzonline.org/dbtw-wpd/exec/dbtwpub.dll> (as accessed on 17/8/2007)).
- N Zantsi & M Eloff 'Guide to South African Law' (available at <http://icsa.cs.up.ac.za/issa/2003/Publications/001.doc> (as accessed on 23/9/2008)).
- Nielinger O 'Creating an Environment for ICT in Tanzania– Policy, Regulation and Markets' Institut Für Afrika-Kunde-Hamburg Institute of African Affairs (2004) (available at http://www.tanzaniagateway.org/docs/Creating_an_environment_for_ICT_in_Tanzania_policy_regulation_markets.pdf (as accessed on 4/03/2007)).
- Nyagetera B M 'Investment, Foreign Aid and Self Reliance in Tanzania: A State-of-the-Art Review' ESRF Discussion Paper Series No.001 ESRF (no date) (available from: <http://www.esrftz.org/pdf/Discussion001.pdf> (as accessed on 1/2/2007)).
- OECD 'Defining and measuring e-commerce: a status report' OECD DSTI/ICCP/IIS (99)4/FINAL (available at <http://www.oecd.org/dataoecd/12/55/2092477.pdf> (as accessed on 26/10/2007)).
- OECD- 'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data,' OECD (2001) (available at <http://www.uhoh.org/oecd-privacy-personal-data.PDF> (as accessed on 9/4/2008)).
- OECD 'Recommendation on Electronic Authentication' OECD, Paris, (2007), available at www.oecd.org/dataoecd/32/45/38921342.pdf (as accessed on 20/10/2010).
- OECD 'The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Social Agenda' OECD, (1999) (available at <http://www.oecd.org/dataoecd/3/12/1944883.pdf> (as accessed on 26/10/2007)).

- OECD 'The economic impact of counterfeiting and piracy' OECD, Paris, (2007) available at www.oecd.org/dataoecd/13/12/38707619.pdf (as accessed on 20/10/2010).
- OECD Policy Guidance on Online Identity Theft, OECD, Paris (2008) available at www.oecd.org/dataoecd/49/39/40879136.pdf (as accessed on 20/10/2010).
- Offermann K H (ed) 'Directorate-General for Research Working Paper: Abridged Multilingual Edition, Legal Affairs Series JURI 105 AXX 03-2001' PE 303.747/AM, European Parliament L-2929 Luxembourg (2001) 18 (available at http://www.europarl.europa.eu/workingpapers/juri/pdf/105a_xx.pdf (as accessed on 23/10/2010)).
- Ogunyem D 'Legal Framework for E-Commerce in ECOWAS' -*The African Regional Preparatory Conference for the WSIS Workshop on e-Strategies Accra, 29 January, (2005)* (available at <http://www.uneca.org/disd/events/accra/e-strategy/Legal%20Framework%20for%20E-Commerce%20in%20ECOWAS.ppt> (accessed on 13/8/2007)).
- Oppong R 'Choice Of Law And Forum Agreement Survives A Constitutional Challenge In The Kenya Court Of Appeal' available at http://eprints.lancs.ac.uk/30789/1/R-F-OPPONG-KENYA_COMMENT-CLB.pdf (as accessed on 30/1/2011).
- Peacey B 'Socio-Economic Impacts of ICT' *E-government@ the Local Level – A Discussion Paper* ICT and Community Series (*Working Paper 1*) (2002) (available at http://www.slis.indiana.edu/faculty/hrosenba/www/1574/pdf/peacy_egov.pdf (as accessed on 23/06/10)).
- Polanski P P 'Convention on E-contracting: The Rise of International Law of Electronic Commerce?' 19 Bled eConference eValues, Bled Slovenia, June 5-7, (2006) (available at [http://ecom.fov.uni-mb.si/proceedings.nsf/0/48ecfcae60f83bf6c12571800036bae9/\\$FILE/49_Polanski.pdf](http://ecom.fov.uni-mb.si/proceedings.nsf/0/48ecfcae60f83bf6c12571800036bae9/$FILE/49_Polanski.pdf) (as accessed on 22/10/2010)).
- Pribetic A I 'Hague Convention on Choice of Court Agreements' (2005) 10 *The Globetrotter* 2-5 (available at http://www.smhilaw.com/Publications/intglaug05_extract.pdf (as accessed on 11/11/2010)).
- Ray LC 'Guide to Government to Consumer Markets' (available from http://www.business.com/directory/government_and_trade/g2c_markets/ (as accessed on 7/10/2008)).
- S Vatanasakdakul, W Tibben & J Cooper 'What Prevent B2B eCommerce Adoption In Developing Countries?: A Socio-Cultural Perspective 17th Bled eCommerce Conference EGlobal Bled, Slovenia, June 21 - 24, 2004 (available at [http://ecom.fov.uni-mb.si/proceedings.nsf/0/1a2a660a13eca91bc1256ee00038be7f/\\$FILE/51Vatana.pdf](http://ecom.fov.uni-mb.si/proceedings.nsf/0/1a2a660a13eca91bc1256ee00038be7f/$FILE/51Vatana.pdf) (as accessed on 4/10/2010)).
- SADC: Memorandum of Understanding on Co-operation in Taxation and Related matters (2003), Article III. para 3 (available at http://www.sadc.int/key_documents/memoranda/taxation.php (as accessed on 24/8/2007)).

- SADC: Regional Indicative Strategic development Plan, (RISDP) (available at http://www.sadc.int/content/english/key_documents/risdp/SADC_RISDP_English.pdf (as accessed on 24/8/07)).
- Schafer B 'The taming of the sleuth – problems and potential of autonomous agents in crime investigation and prosecuting' 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World? April, 2005, Queen's University of Belfast (available at <http://www.bileta.ac.uk/document%20library/1/the%20taming%20of%20the%20sleuth%20%E2%80%93%20problems%20and%20potential%20of%20autonomous%20agents%20in%20crime%20investigation%20and%20prosecuting.pdf> (as accessed on 2/3/2010)).
- Shayo L K 'The Role of Computers in Developing Countries with reference to East Africa.' Doc. IC/84/224-Marked 'Internal Report (Limited distribution)-IAEA & UNESCO International Centre for Theoretical Physics, June, 14, 1985, (available from <http://streaming.ictp.trieste.it/preprints/P/84/224.pdf> (as accessed on 5/7/ 2007)).
- Sheriff S *Rural Access: Options and Challenges for Connectivity and Energy in Tanzania* Findings of a study carried out for the International Institute for Communication and Development (IICD), Information and Communication Technology Resource Centre (ICT-RC), Tanzania. (Jointly published by SWOPnet/IICD 2ed, July 2007). (Available at <http://www.iicd.org/files/Rural-Connectivity-Tz-2007-Suhail-Sheriff.pdf> (as accessed on 25/6/2011)).
- Sibanda O S 'Choice of Law, Jurisdiction, and Recognition and Enforcement of Judgements in "Click wrap" Transactions in South Africa' (available at <http://www.lspi.net/2008/2007/P-S.html#Sibanda> (as accessed on 23/10/2010)).
- Siphana S 'Overview of the ASEAN Agreements' (available at http://www.moc.gov.kh/econo_intergration/asean/overview-asean_agre01.htm (Accessed on 4/8/2007)).
- Sitta S J 'Integrity Environment and Investment Promotion: The case of Tanzania' A Conference Paper Presented to Alliance for Integrity Government & Business Roles in Enhancing African Standards of Living Co-organised by the OECD, NEPAD, UN Global Compact and Transparency International, in Addis Ababa on 7-8 March 2005 (available at <http://www.oecd.org/dataoecd/11/37/34571058.pdf> (as accessed on 25/5/2009)).
- Sommer P 'Downloads, Logs and Captures: Evidence from Cyberspace' (available at <http://www.pmsommer.com/dload01.pdf> (as accessed on 22/10/2010)).
- South African Law Reform Commission (SALRC) Discussion Paper 109 (Project 124) *Privacy and Data Protection* (2005) (available at <http://www.justice.gov.za/salrc/dpapers/dp109.pdf> (as accessed on 20/5/2011)).
- South African Law Reform Commission's Issue Paper 27 (Project 126) *Review of the Law of Evidence - Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues* (available at http://www.justice.gov.za/salrc/papers/ip27_126_2010.pdf (as accessed on 5/9/2010)).
- Sridhar K S & V Sridhar 'Telecommunications Infrastructure and Economic Growth: Evidence

- from Developing Countries' (*no date*) (available at http://www.researchictafrica.net/images/upload/Telecom_infrast_economic_growth.pdf (as accessed on 29/11/2007)).
- Tanigaki S 'Reshaping Japan: The Role of Science and Technology', in *AAAS Science and Technology YearBook* (1999) Part 3.8 (available at <http://www.aaas.org/spp/yearbook/contents.htm> (as accessed on 25/9/2005)).
- Tanzania Development Vision 2025 (available at <http://www.tzonline.org/> (as accessed on 5/2/2007)).
- The Australian Treasury *Review of building consumer sovereignty in electronic commerce: A best practice model for business* Discussion Paper, November 2003 (available from http://www.ecommerce.treasury.gov.au/bpmreview/content/_download/BPM_Review.pdf (as accessed on 23/7/2007)).
- The Bank of Tanzania: Summary of economic developments for the period January – march 2008 (available at <http://www.bot-tz.org/Publications/EconomicDevelopmentsJan-Mar2008.pdf> (as accessed on 4/11/2008)).
- The Businessweek 'The New Economy: What It Really Means'-available at <http://www.businessweek.com/1997/46/b3553084.htm> (as accessed on 16/4/2008)).
- The OECD '*Guidelines for Consumer Protection in the Context of Electronic Commerce* (1999) OECD Council (available at <http://www.oecd.org> (as accessed on 13/10/2010)).
- The Tanzania Law Reform Commission: 'Position paper on E-commerce' (available from <http://www.lrct-tz.org/Positionpaperone-COMMERCE.DOC> (as accessed on 15/4/2008)).
- The United Republic of Tanzania *National ICT Policy* Ministry of Communication, Science and Technology (2003).
- The United Republic of Tanzania *National Research and Development Policy Ministry of Communication, Science and Technology* (2010).
- The United Republic of Tanzania *Tanzania's National Science & Technology Policy*, Ministry of Science, Technology and Higher Education (1996).
- The United Republic of Tanzania *Telecommunication policy*, Ministry of Transport and Communication (1997).
- The United Republic of Tanzania *The Integrated Framework for Trade Development: Volume II -Final Version*, Dar es Salaam, Ministry of Industry and Commerce (1999) (Prepared for the Consultation on Trade-Assistance). (Available at <http://www.tzonline.org/dbtw-wpd/exec/dbtwpub.dll> (as accessed on 25/6/2009)).
- The United Republic of Tanzania *Trade Policy*, Ministry of Trade & Industry (2003).
- The United Republic of Tanzania: The Economic Survey 2009 (available at <http://www.tanzania.go.tz/economicsurveyf.html> (as accessed on 25/6/2011)).
- The United States Department of Commerce 'The Emerging Digital Economy.' Available at

- <http://www.technology.gov/digeconomy/ederept.pdf> (as accessed on 10/9/2007).
- The WHITE HOUSE, *A Framework for Global Electronic Commerce* (1997) (available at <http://www.ta.doc.gov/digeconomy/framewrk.htm> (as accessed on 20/3/2007)).
- Thornton L 'South Africa' in *Telecommunication Laws and Regulations 2010: A practical insight to cross-border Telecommunication Laws and Regulations*, Published and reproduced with kind permission by Global Legal Group Ltd London (2010) (available at http://thornton.co.za/resources/TEL10_Chapter-35_South-Africa.pdf (as accessed on 10/8/2010)).
- Tunis Declaration '*Declaration on E-commerce for Development, 2003 adopted during High-level Conference for Africa Electronic Commerce Strategies for Development*' (available at http://www.unctad.org/sections/wcmu/docs/site_ecb_ecom0008_en.pdf (as accessed on 13/8/2007)).
- Twaakyondo *et al* 'Factors Shaping Successful Public Private Partnership in the ICT Sector in Developing Countries: The Case of Tanzania' (2002) (available at <http://www.cpsu.org.uk/downloads/Annex3.pdf> (as accessed on 14/05/07)).
- UN Guidelines for Consumer Protection, A/RES/39/248 16 April 1985 (as expanded in 1999) (available at http://www.un.org/esa/sustdev/publications/consumption_en.pdf (as accessed on 7/5/2011)).
- Valcke P 'Legal Aspects of Electronic Commerce' (available from http://www.katelco.kz/UNESCO/presentations/EC/Peggy_Valcke.doc. (as accessed on 24/3/2008)).
- Wagao J H 'Adjustment of Policies in Tanzania, 1981-1989: The Impact of Growth, Structure and Human Welfare' *Innocent Occasional Papers*, Number 9, UNESCO (1990) (available at http://www.unicef-irc.org/publications/pdf/eps9_low.pdf (as accessed on 24/6/2011)).
- Watson R T 'U-Commerce: The Ultimate' (available at http://www.acm.org/ubiquity/views/r_watson_1.html (as accessed on 23/10/2010)).
- Watson R, Pitt L F, Berthon P & Zinkhan G M 'U-Commerce Expanding the universe of marketing' available at <http://www.terry.uga.edu/~rwatson/Passau/u-comslides.pdf>, or <http://www.cis.gsu.edu/~emonod/u-tour/watson-u-commerce-2002.pdf> (as accessed on 23/10/2010).
- Weitzenböck E M 'Electronic Agents and Contract Performance: Good Faith and Fair Dealing' (available at <http://www2.cirsfid.unibo.it/~agsw/lea02/pp/Weitzenboeck.pdf> (as accessed on 20/2/2008)).
- Wilson S 'Current issues in the Rollout of a National Authentication Framework' - A paper presented at the 1998 Information Industry Outlook Conference, –Canberra. Hosted by the ACS Canberra Branch, in cooperation with DIST, Saturday 7 November 1998 (available at <http://www.acs.org.au/> (as accessed on 24/8/2006)).
- Wilson S 'Towards an Australian strategy for the information economy' Ministerial Council for

the Information Economy, July 1998 (available at <http://www.noie.gov.au/nationalstrategy/index.html> (as accessed on 25/3/2008)).

World Digital Economy - E-Commerce and M-Commerce Trends (available at <http://www.mobilecommercetrends.com/world-digital-economy-e-commerce-and-m-commerce-trends-new-market-report-and-analysis/> (as accessed on 28/6/2011)).

Wright C S 'Electronic Contracting in Insecure World' GIAC Legal Issue (GLEG) 2008 (available at http://www.sans.org/reading_room/whitepapers/legal/electronic-contracting-insecure-world_2088 (as accessed on 28/10/2010)).

WTO Summary of country's commitments (available at http://www.wto.org/english/news_e/pres97_e/bt-summ3.htm (as accessed on 16/3/2008)).

Xinhua 'China's E-commerce turnover up 22% in 2010' (available at http://www1.chinadaily.com.cn/china/2011-01/19/content_11877124.htm (as accessed on 28/6/2011)).

(vii) List of Websites Visited

<http://icsa.cs.up.ac.za>

<http://www2.cirsfid.unibo.it>

<http://www.nap.edu/>

<http://www.ispa.org.za/>

<http://ipc-lis.mit.edu/>

<http://www.internetworldstats.com/>

<http://www.ICLG.co.uk>

<http://www.saaa.gov.za/>

<http://www.ustr.gov/>

<http://www.unctad.org>

<http://www.uncitral.org>

[http://conflictoflaws.net /](http://conflictoflaws.net/)