

Electronic Contracts and their Legal Validity in Tanzania

Matolla Adam

4th Year Phd Candidate Assistant Lecturer, Tanzania Institute of Accountancy

Abstract

The objective of this assignment is to examine the validity of electronic contracts in Tanzania. This is through a brief examination of the current contract law, then a look on the electronic contract and whether the current contract law is sufficient to cater for online contracts.

And lastly is to take a look at the Electronic Transaction Act, 2015, whether it caters for the electronic contracts adequately. If not, what is to be done.

CHAPTER ONE

1.0 CONTRACT LAW IN TANZANIA

1.1 Introduction

A life of a human being is surrounded by different activities that he/she goes through in the process of surviving. In early times people were categorized or divided into different categories in which each of those categories specialized in several production activities. For example, there were pastoralists who mainly concentrated on the keeping of livestock animals and there was another group who concentrated on cultivation of crops for food. As time passes by, people develop the need for an exchange for one another's products. People started doing barter trade that involved the exchange of products, which later on resulted in the emergence of business that involved the exchange of a product by a certain currency known as money. And this exchange of one thing for another or money for goods and services typically is a major preoccupation for most of us and it is one of the parts of our lives.

As the result of these exchanges, there arose the need for a set of rules that will regulate this exchange for the benefit of both sides. Thus, contract law began, which is basically the law of exchange, which acted as a rule regulating all the agreements that these different classes of people decide to enter into in their process of exchanging products or services.

1.2 Definition of a contract

A contract is a word that has been defined by different scholars such as

Miler Jentz defined it as an agreement that can be enforced in a court of law, which involves two competent parties who agree to perform or to refrain from performing a certain act now or in the future.¹

A contract can be defined to mean a legally binding and legally enforceable promise, or a set of promises, between two or more competent parties². A contract can further be termed as an agreement with legal for-

¹ Miler R., Gaylord Jentz; Business law Today; Text & summarized cases- E-commerce, Legal, Ethical, and International Environment (Thomson west, sixth Edition) at pg. 219

² Davidson, Forsythe and B. Knowles: Business law principles and cases in the Legal Environment, (Aspen Publishers, New York, 2011) pg. 297

ce.³

The Law of Contract⁴ defines a contract to mean all agreement that are made by the free consent of the parties competent to contract for the lawful object and are not hereby expressly declared to be void

According to Joseph L. Frascogna in his book titled Principles of Business Law and the Legal Environment⁵ defined a contract as a promise which the law recognizes as creating a legal obligation of performance. According to him for a contract to exist it first should involve the making of a promise which creates an obligation of performance, there should also be a minimum of two persons. Thus, in his definition a contract requires a promise and at least two parties

A contract is further stipulated in the case of *Stanley Smith & Sons v. Limestone College*⁶ in this case the plaintiff contracted with the defendant to construct a gymnasium on campus that was completed on or before October 1 at a cost of \$655,178 paid by the college. And on October 1, the campus experienced a heavy rainfall which caused damage to the gymnasium, the Plaintiff then repaired it at the cost of \$37,255.24 and then he was seeking recovery under an express recovery. The court ruled in favor of the defendant giving it reason as follows; “A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. If agreement is manifested by words, the contract is said to be express, if it is manifested by conduct the contract is said to be implied. In either case the parties must manifest a mutual intent to be bound. With the actual agreement of the parties there is no contract. In this case the defendant never expressly promised to pay for the repair and therefore there is no express contract upon which plaintiff can achieve recovery”.

1.3 Historical background of contract law in Tanzania

A contract law before time it was an important aspect of law as it was substituted as a subdivision of the law of property, but with the increase of the importance of the Merchant class contract law also became important

A contract is an agreement with legal force, and it is obviously true that even before colonial invasions in Tanganyika people had customary systems of contracting. The systems were mainly based on oral agreements and they had binding force. The coming of colonialists in Tanganyika introduced written laws that apart from giving emphasis on written forms of contracts also recognized the existing forms of customary contracts in Tanganyika.⁷

1.4 Element of a contract

A person can define a contract as an agreement between two parties, but it should be noted that not every agreement is a contract, but rather that every contract is an agreement. Why don't we categorized every agreement as a contract, that is for an agreement to be considered as a contract it has to meet the required element of a contract. This is not only a matter of recognition but also so as to enforce a set of promises

³ Nditi, N. N. N, 'General Principles of Contract Law in East Africa', (1st Edn, DUP, Dar es Salaam, 2009), pg. 1.

⁴ S. 10 [CAP 345 R.E 2002]

⁵ Joseph L. Frascogna, 'Principles of Business Law and the Legal Environment', (Allyn and Bacon Inc. United State 1988) pg. 74

⁶ 322 S.E 2d 474 (S.C 1984)

⁷ See the Tanganyika Orders-in-council, 1920 especially under section 13 (4) with emphasis to recognition and respect of customary laws that are not repugnant to justice or morality. This was introduced in Tanganyika in 1st July 1920 (General Reception Clause).

or an agreement, courts look for the presence of certain elements. When these elements are present a court will find that the agreement is a contract⁸. Thus, the following are the elements that should exist in an agreement for it to be considered as a contract;

1.4.1 An Agreement

In this category an agreement is defined by S. 2(1) (e) to mean every promise and set of promise forming the consideration for each other. Thus, an agreement involves the making of an offer and well as acceptance of that offer by the parties.

An offer

An offer may be defined as a clear statement of the terms on which one party known as the offeror is prepared to do business with the other party known as the offeree⁹. This may be said to involve making of a promise to do something in return of something else from the person you're making your offer to. This offer that is made, it should be made with the intention that it will become binding upon acceptance of such offer, such as it was stated in the case of *Fisher v. Bell*¹⁰ in which the defendant exhibited a flick knife in his shop window which resulted to him prosecuted under S. 1(1) of the Restriction of Offensive Weapons Act 1959 for "offering for sale" an offensive weapon. The court ruled in favor of the defendant reasoning that he had not made an offer but rather it was an invitation to treat, because goods in a shop window even those bearing a price tag represent an invitation to treat and not an offer. In his reasoning an offer may be made when customers make offers by saying that they are prepared to do business at the price shown. Seller may then decide if they want to accept or not; if they accept then a contract arises.

After a person makes an offer, it is important to note that, this offer should be communicated to the intended party so that acceptance to be given. And this communication may either be oral or written; this can be seen in the case of *Carlill v. Carbolic Smoke Ball Co. Ltd*¹¹ in this case the defendant published an advertisement which declared that their product would prevent influenza and promised that they would pay £100 to any person who having used the product correctly, still caught influenza. The court held that the advertisement was a unilateral offer made to the public that can be accepted by anyone who knew of it, and that the £1000 bank deposited showed intention to enter into a contract and it was the evidence that the advertisement was not just a puff.

*Acceptance*¹²

After communication is done, acceptance follows in which an acceptance involves the offeree's assent to all the terms of the offer. In this, acceptance involves the offeree's exercise of the power given by the offer to assent to the offer by performing the act or forbearance, or by giving a return promise in reliance on and in compliance with the offer¹³. In the acceptance of an offer, the offeree is required to agree with all the terms of the offer and not to introduce new terms to it as it was seen in the case of *Jones v. Daniel*¹⁴

⁸ Catherine Macmillan: Element of the Law of Contract, (2012), University of London Publication Office, United Kingdom
Extracted at http://www.londoninternational.ac.uk/sites/default/files/programme_resources/laws/ug_subject_guides/elements_law_contract-subjectguide4chapters.pdf on 20th July 2024, @ 11:30 A.M

⁹ Alix Adams, 'Law for Business Student', ((Pearson Education Limited, London, UK (Fifth Edition), (2008) at pg. 64

¹⁰ 1961, CA

¹¹ 1893, CA

¹² S. 6 of The Law of Contract Act [CAP 345 R.E 2002]

¹³ Joseph L. Frasca, 'Principles of Business Law and the Legal Environment', (Allyn and Bacon Inc. United State, 1988) pg. 94

¹⁴ 1894

that the offeree responded by submitting a draft contract that included some new terms. This respond was held to be a counter-offer and not an acceptance.

As in an offer, in acceptance there too should also be a communication of acceptance to the offeror. But communication of the acceptance depends with the type of the contract for example in bilateral contract a contract comes into existence the moment the return promise requested if it is effectively communicated to the offeror, while in unilateral contracts the contract comes into existence the moment the requested act or forbearance has been performed¹⁵.

In this, the law looks at the agreement from the viewpoint of a reasonable person and asks whether such a person would believe that an offer and acceptance of that offer has occurred.

1.4.2 Consideration

For an agreement to become legally binding and enforceable by the court of law, it must include what is known as consideration. Consideration involves the benefit that each party will get for him to agree to such a deal. Under common law, the basis for enforcement of a promise is the consideration. Consideration can be defined as a value given in return for a promise¹⁶. For the court to be able to categorize an agreement as a contract, it has to see the evidence that the agreement is mutual and this can be proved by the existence of the exchange of value which is considered as a quid pro quo of the contract formation; meaning nothing goes for nothing.

In *Currie v. Misa*¹⁷ the court held that a contract has to have a consideration that was held to constitute a benefit to one party or a detriment to the other party. It is said that it is a traditional rule that an exchange is considered if it creates a legal detriment to the promisee (the party to whom the promise is made) or a legal benefit to the promisor¹⁸.

1.4.3 Free consent

Formation of a contract also requires a genuine consent, which is a person should enter into a contract of their own free choice. S. 13¹⁹ free consent is stated to exist when two or more persons agree upon the same thing in the same sense. A person should enter into a contract with the desire to do so and this will help the other party to rely on their bargain. However, the consent should not only be considered on the issues of duress²⁰ which usually involves violence or threat of violence as in the case of *Barton v. Armstrong*²¹ in which the defendant was the chairman and the plaintiff was the director of an Australian company. Armstrong threatened to have Barton killed if he did not sign an agreement to buy out Armstrong's interest in the company on very favorable terms. The Privy Council held that the agreement was signed under duress and could be avoided by Barton.

But it should also be considered on the issue of the knowledge of key information, since there may be circumstances where a person may agree to a contract due to misrepresentation of some key information

¹⁵ Joseph L. Frascogna, 'Principles of Business Law and the Legal Environment', (Allyn and Bacon Inc. United State, 1988), pg. 95

¹⁶ Miler Jentz, 'Business law Today; Text & summarized cases- E-commerce, Legal, Ethical, and International Environment', (sixth Edition) at pg. 250

¹⁷ 1875

¹⁸ Meiner R., Ringleb A. and Frances Edwards, 'The Legal Environment of Business'; (Thomson south-western west, Eighth Edition, 2003) at pg. 293

¹⁹ The Law of Contract Act [Cap 345 R.E 2002]

²⁰ Because a consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake as per S. 14 of the Law of Contract Act [CAP 345 R.E 2002]

²¹ 1975

surrounding the transaction. Thus, without knowledge, there is no real free consent by the parties and the contract becomes void or voidable depending on the circumstances²².

1.4.4 Capacity

Capacity to contract is among the important ingredient for a valid contract to be formed. A person is required to be legally capable of entering into a contract, that is a man/woman of full age and competent to understand what he is agreeing to and this if done freely and voluntarily it shall be held sacred and it shall be enforced in a court of law²³.

Any person who is of the sound mind and has reached the age of the majority and has not otherwise incapacitated by the law is to be considered as a person who is capable of entering into a contract as per S. 11(1)²⁴. However, there are groups of people that are considered incapable of entering into a contract or have limited capacity includes people like Minor who is a person under the age of the majority in common law the age of majority is twenty-one years²⁵ but now days in most of the state law including Tanzania the age of majority has been changed to 18 years old. All agreement made by a person who is not hereby to be competent to contract is a void contract.²⁶ Incompetent person includes people who have been put under guardianship by the court order as well as those people who are mentally ill because a contract is a consensual transaction, the part therefore must have a certain level of mental capacity²⁷ for that agreement to be valid; and if he lacks such a mental capacity the contract may then become voidable. And lastly is an intoxicated person, an intoxicated person is said to be the one who is under the influence of drugs or alcohol. The court usually rules that contract to be voidable if a person entered when he was intoxicated simply because it is believed that he is unable to understand the nature and consequences of his actions or he is unable to act in a reasonable manner²⁸. But the court must satisfy itself because intoxication may sometimes be voluntary, so after the intoxication wears off the intoxicated party tried to ratify the wrong done²⁹.

1.4.5 Intention to create legal relation

For the court to enforce a contract, the agreement itself should be lawful. The principle of freedom of contract is subjected to a basic rule that courts will not uphold an agreement that is illegal or contrary to public policy³⁰. A contract requires the parties to have the intention to create a legal relation, and this becomes possible if the agreement they are entering involve a lawful object³¹. There won't be an intention to create a legal relation in case an agreement entered is illegal or contrary to the law for example in the case of *Pearce v. Brooks*³², in this the defendant let a coach out on a hire to Brooks who is a prostitute knowing that it would use by her for her to ply her trade. The couch was returned in a damaged state. The defendant was unable to recover the hire charges or for the damage as the court held that the contract was

²² Meiner, Ringleb and Edwards, 'The Legal Environment of Business', ((Thomson south-western west, Eighth Edition, 2003), at pg. 300

²³ Denis Keenan & Sarah Riches, 'Business law', (Pearson Education Limited, England, Eighth Edition, 2007) pg. 237

²⁴ The Law of Contract Act [CAP 345 R.E 2002]

²⁵ Smith, L.Y. Mann, R. and Roberts. B.S, 'Essential of Business Law and the Legal Environment; (West Publishing Company, United State of America, Fourth Edition,1992) pg. 227

²⁶ S. 11(2) OF The Law of Contract Act [CAP 345 R.E 2002]

²⁷ Ibid pg. 232

²⁸ Ibid pg. 233

²⁹ Ibid pg. 233

³⁰ Denis Keenan & Sarah Riches, 'Business law', (Pearson Education Limited, England, Eighth Edition, 2007); pg. 248

³¹ S. 10 of The Law of Contract Act [CAP 345 R.E 2002]

³² 1866

illegal simply because the contract was illegal and it was for an immoral purpose. They had effectively aided and abetted soliciting.

1.5 Classification of Contracts

A contract can be categorized into different types mainly based on their legal distinctions such as their formation, performance, discharge and enforceability. Thus, categorized into the following;

Bilateral and unilateral contracts;

In this first category of the types of contracts, their main difference is based on what an offeree must do to indicate acceptance the offer and bind the offeror to a contract.

In bilateral contracts, a contract is formed when offeror's promise is answered with the offeree's promise of acceptance³³. This type of a contract involves the return of a promise for acceptance by the offeree to the offeror's offer, thus the main requirement for an acceptance to be considered successful is by the return of the promise of acceptance by the offeree.

While in Unilateral contracts, a contract is said to be accepted by the performance of an act or the refrain of performance of that act proposed by the offeror. In this type of a contract, only after performance of an act and not the return of a promise then a contract may be said to exist³⁴. In other words, a contract is formed not at the moment when promises are exchanged but rather when the contract is performed³⁵.

Express and Implied contracts.

These two types of contracts mainly differs when it comes to the manner of forming a contract in the sense that one involves entering into an agreement expressly in written or oral words while the other involves their conduct.

In express, a contract is said to be formed by a direct statement by the parties of a promise or promises to each other³⁶, For example an oral agreement a friend's mobile phone and a written agreement to buy a car from the dealership. Thus, in this a requirement is the assent in either oral or written. While in Implied, this type of a contract requires an act or conduct. For a contract to be categorized as an implied contract it has to be formed by the conduct of the parties which defines at least some of the terms of a contract and this do not involve the directly statement of the promises to one another³⁷.

Formal and informal contracts

A formal contract is that type of a contract that requires a special form or method of creation so as to be enforced³⁸, example of formal contracts includes the contract under seal, recognizances, negotiable instruments such as checks, notes, draft and certificate of deposit and letter of credit³⁹.

Informal contract or simple contract on the other hand includes all other contracts that do not qualify as formal contract meaning those that does not depend on formality for their legal validity⁴⁰. Informal

³³ Henry R. Cheeseman, 'Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment', (Pearson Education Inc, Upper Saddle River, New Jersey. Fourth Edition, 2003) Pg. 204

³⁴ Ibid pg. 204

³⁵ Miler R., Gaylord Jentz; Business law Today; Text & summarized cases- E-commerce, Legal, Ethical, and International Environment (Thomson west ,2006, Seventh Edition) at pg. 232

³⁶ Meiner, Ringleb and Edwards, 'The Legal Environment of Business', (Thomson south-western west. Eighth Edition, 2003) at pg. 284

³⁷ Ibid pg. 285

³⁸ Miler R., Gaylord Jentz; Business law Today; Text & summarized cases- E-commerce, Legal, Ethical, and International Environment (Thomson west ,2006, Seventh Edition) at pg. 233

³⁹ Ibid pg. 233

⁴⁰ Henry R. Cheeseman, 'Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment' (Pearson Education Inc, Upper Saddle River, New Jersey, Fourth Edition, 2003), Pg. 208

contract is enforceable in law just like formal contracts, the fact that they are have no special form does not minimize their legality except for certain kinds of contract that are required to be in writing.

Executory and executed contracts

Contracts differ depending on the mode manner and other requirements, contracts of this category they are classified on the basis of when they are performed.

Executory contract involves those kinds of contracts that have not been fully performed by the parties. In this a contract may be partially or entirely unperformed by one or more of the parties⁴¹ while executed contracts are those contract that have been fully performed by both of the parties⁴². An executed contract is basically no longer a contract because the parties have already performed their duties to the contract thus released of the contractual obligations.

Valid, void, voidable and unenforceable contracts

This category mainly bases on the enforceability of contracts dividing them in four types, namely valid contracts, void contracts, voidable contracts and unenforceable contracts.

A valid contract is a contract that has met the entire required elements for a contract to be recognized as a legal contract. For it to be valid, elements like an agreement by the parties, supported by a legally sufficient consideration, done between the people with capacity to contract with their free consent and accomplish a lawful object⁴³.⁴⁴

A void contract is the one that has no legal effect⁴⁵ because it does not meet the required element for a valid contract. In this there is no contract *ab initio* meaning from the beginning for example a person may enter in an agreement to sell illegal drugs in which by law this will not be considered as a contract because it involves an illegal object thus lacks the element of the intention to create legal relation thus not a contract hence a void contract.

A voidable contract is a contract that is not valid but also not yet void. In this a contract is said to be voidable where one of the parties to a contract has the right to avoid legal obligation without incurring liability⁴⁶. This is an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others⁴⁷. A party to a contract has the right or option to avoid or approve that contract because of the manner in which that contract was formed or the existence of the lack of the capacity to contract due to the fact that it was entered by a minor, an insane person, intoxicated person, a person acting under duress, undue influence, or fraud and in cases involving mutual mistake⁴⁸. Incase parties decided to avoid then they become released from their contractual obligations but a party/parties may also decide to ratify the contract which may make it valid contract and hence each party becomes obliged to perform their duties.

⁴¹ Smith, L.Y. Mann, R. and Roberts. B.S, 'Essential of Business Law and the Legal Environment; (West Publishing Company, United State of America, Fourth Edition,1992) pg. 155

⁴² Meiner, Ringleb and Edwards, 'The Legal Environment of Business', (Thomson south-western west, Eighth Edition, 2003), at pg. 285

⁴³ Henry R. Cheeseman, 'Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment', (Pearson Education Inc, Upper Saddle River, New Jersey. Fourth Edition, 2003). Pg. 208

⁴⁴ S. 2(1) (h) of The Law of Contract Act [CAP 345 R.E 2002]

⁴⁵ Ibid pg. 208

⁴⁶ Meiner R., Ringleb A. and Frances Edwards, 'The Legal Environment of Business'; (Thomson south-western west, Eighth Edition, 2003), at pg. 285

⁴⁷ S. 2(1) (I) of The Law of Contract Act [CAP 345 R.E 2002]

⁴⁸ Henry R. Cheeseman, 'Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment', (Pearson Education Inc, Upper Saddle River, New Jersey. Fourth Edition, 2003). Pg. 208

⁴⁸ Ibid pg. 208

An unenforceable contract, is a contract where there is no remedy for a contract that was initially valid as a result of the performance of the contract has become illegal or contrary to public policy. A contract may become unenforceable when for example when a contract fails to satisfy the requirement of a certain statute like the statute of fraud that requires certain kinds of contract be in writing to be enforced⁴⁹.

Quasi contracts

The word quasi in Latin word meaning “as if” or “analogous to” thus quasi contract means agreement that are as if they are contracts. Quasi contract is also known as implied-in-law contracts are basically not contracts because their neither implied nor express contracts meaning they’re not based on express or implied promise. Quasi contract is therefore not contract but rather a fiction contract imposed on parties by the court ‘as if’ the parties had entered into an actual contract⁵⁰, this doctrine is intended to prevent injustice enrichment and unjust detriment by providing monetary damages to a plaintiff for providing work or services to a defendant even though no actual contract existed between the parties⁵¹.

CHAPTER TWO

2.0 ELECTRONIC CONTRACTS AND THEIR VALIVIDITY IN TANZANIA LAWS

2.1 Meaning of Electronic Contracts

Earlier people used to contract using the traditional mode of contracting that involved entering into contract in our physical world, recently with the development of the field of information and communication, electronic commerce emerged. Electronic commerce is a term used to mean the selling and buying of products or services over the electronic systems such as the internet and other computer networks⁵² which make up the Internet. With the development of electronic commerce people stated to conduct their business using electronic means and, in the process, they find themselves in the need of entering into contract known as electronic contract so as to protect their interest, this entails contractual arrangements electronically.

Electronic contract can therefore be defined to mean an agreement created and signed in an electronic form meaning no paper or other hard copy material have been used. In our traditional world a contract is formed when parties agree to an offer made, the acceptance of an offer or any other matter that is material to the formation or operation of a contract may be expressed.

In electronic contract, an agreement that is made by means of information in an electronic communication; or by an act that is intended to result in electronic communication, such as touching or clicking on an appropriate icon or other place on a computer screen, or by speaking make a formation of a contract complete. A contract that is formed by the means of an electronic form is a valid and enforceable contract just like traditional contracts. A contract is not invalid or unenforceable by reason only of being in electronic form.

Moreover, still a contract may either be incorporated in writing and or oral agreements but using electronics as the channel to communicate the contractual arrangements, making our traditional form of

⁴⁹ Smith, L.Y. Mann, R. and Roberts. B.S, ‘Essential of Business Law and the Legal Environment; (West Publishing Company, United State of America, Fourth Edition,1992) pg. 155

⁵⁰ Miler R., Gaylord Jentz; Business law Today; Text & summarized cases- E-commerce, Legal, Ethical, and International Environment (Thomson west ,2006, Seventh Edition) at pg. 233

⁵¹ Henry R. Cheeseman, ‘Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment’, (Pearson Education Inc, Upper Saddle River, New Jersey. Fourth Edition, 2003). Pg. 207

⁵² Daudi Nyakama, “Electronic contract in Tanzania: An appraisal of the legal framework” (LLM Diss., ST. Augustine University of Tanzania, 2011) pg. 31

contract outdated or old forms of contract. The reason being that in the traditional contract the exchange was mainly of a paper-based mode which was time consuming and expensive to business but the new electronic mode of contracting businesses can be improved efficiently, reduce paperwork and simplify their operations. This is because the virtual cyberspace is time saving and boundless by challenges of distance, thus it gives an opportunity for parties to enter into a contract over internet.

2.2 Types of Electronic contracts

Electronic contract may be categorized into three forms, such as electronic data interchange (EDI), Email-based contract and Web-based contracts.

Electronic Data Interchange (EDI), this is one of the forms of an electronic contracts which involves electronic transfer of agreed standard-structured information from one computer to another.⁵³ This was developed in 1970s with the development of the computing industry to replace the paper-based contracts.⁵⁴ This form involved transaction of data interchange characterized with general trading documents like invoices, purchase orders and customs declarations and specific types of communications like electronic fund transfers. It is also characterized by technical data interchange like computer-aided-design or computer-aided-manufacturing (CAD/CAM) applications.⁵⁵ In this type of a contract one of the requirement for forming a contract is by having a prior agreement partners agreement in which just like in a traditional contract where the element of consent is required, in EDI also an element of consent of parties is required such as *consensus ad idem*, intention to create legal relations and lawful consideration.⁵⁶ Therefore, in EDI legal questions as to the terms, consent, time and place of contract may arise, and create legal challenges may also arise in the process of verifying their validity.

E-mail based contracts; this is the second type in which the contract is formed through the use of email communication. The use of emails constitutes the greatest part of traffic on the internet⁵⁷

In an email is the sender types it out, inserts an address and sends it to the recipient which he may also choose to send attachment that contains the terms of their contract. This mode is exactly the same process he would have done with a conventional physical letter but the different in this is that it is done through the use of the internet.

Web-based contracts, this is another type of online contract that are usually in a standard form contract also referred to as contract of adhesion meaning a contract between two parties that does not allow negotiations. The offeree is in no position to change the terms of the contract but rather to accept or leave it⁵⁸. This last type of an electronic contract can further be divided into the three common of electronic contract that we daily enter in the process of using the computer system or networks, which includes;

Shrink-wrap Agreements

The term "shrink wrap agreement" refers to the purchase agreements that are attached to shipped products, usually bound by shrink wrap (plastic wrapping) that contain terms and conditions. Shrink wrap

⁵³ See C Glatt, (1998), "Comparative Issues in the formation of Electronic Contracts", 6 (1), *International Journal of Law and Information Technology* 34-68, at 37. See also article 2 of the UNCITRAL Model Law on Electronic Commerce available at <http://www.un.or.at/uncitral/english/texts/electronic/ml-ec.htm> as accessed on 20th July, 2024.

⁵⁴ See Heinrich, G, (1995) "Harmonized Global Interchange"- UNCITRAL's Draft Model Law for Electronic Commerce Data Interchange" 3 Web JCLI, Part I retrieved from <http://webjcli.ncl.ac.uk/articles3.html> on 6th July 2015

⁵⁵ See Saxby, (1990), *Encyclopedia of Information Technology Law*.

⁵⁶ See Zainol. Z. A, (1999), "Electronic Data Interchange and Formation of Contract" retrieved from <http://webjcli.ncl.ac.uk/articles3.html> on 20th July 2024 12:25 P.M

⁵⁷ See L Davies _Contracts formation on the Internet: Shattering a few Myths 'in Edward & Waelde (n7) 97-120.

⁵⁸ Daudi Nyakama, "Electronic contract in Tanzania: An appraisal of the legal framework" (LLM Diss., ST. Augustine University of Tanzania, 2011) pg. 36

agreements can include the following terms: licenses, rights of use, fees and payments, forum clauses, warranties and limitations of liability.⁵⁹ In a cyber world like in the process of doing electronic business, this agreement may be accompanied goods purchased online. The opening of the product in shrink-wrap agreement indicates that the buyer has assented to the terms of the agreement, which rises mostly after the user is given a period of time often 30 days to accept or reject the goods based on the license or contract terms.⁶⁰ The issue as to whether the buyer will be able to assent to the terms that he can't access unless opens the package.

The legality of this type of a contract is dealt in the two US cases. One of cases follows *ProCD v. Zeidenberg*⁶¹ in which the trial court held in favor of Zeidenberg that such contracts are not enforceable. In *Hills v. Gateway*⁶² the trial court also ruled in favor of Hills that the contracts were not enforceable. But in appeal the decision of both cases was reversed reasoning that the contracts were enforceable because the licensee had the consent and decision to accept or reject the terms of the contract by returning the purchased goods. The court found that with the "accept or return" nature of these agreements the licensee had adequate protection against contract they did not want to accept, they had the option of returning the goods and not accept them but their action of keeping the goods indicates their consent to be bound by those license agreements.

Click-wrap Agreements

Another type of web-based agreement is the click-wrap agreement that involves a party or buyer to expressly accept to be bound by the terms and the condition before purchasing the said software or product. The name "click wrap" came from the use of "shrink wrap contracts" commonly used in boxed software purchases, which "contain a notice that by tearing open the shrink-wrap, the user assents to the software terms enclosed within."⁶³ This kind of contract is mostly used by many software companies to sell their software over the internet or in physical packages where the software is later installed in a computer. These software companies display a series of dialogue boxes on the computer screen that state the terms of the agreement before the software is downloaded or installed by potential licensee. These terms of a click-wrap agreement are typically not negotiable⁶⁴.

The licensee indicates his required consent through clicking on a prompt button which indicates 'I agree' or 'I accept' such terms before concluding a transaction or downloading or installing a purchased software.⁶⁵ A person may choose to reject the terms by clicking cancel or closing the window. If he chooses to reject, the user can no longer use or purchase the product or service. Classically, such a take-it-or-leave-

⁵⁹ http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93_text.html#Shrinkwrap%20License%20Cases_T, accessed on 20th July 2024, at 11:00 A.M

⁶⁰ Henry R. Cheeseman, "Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment", (Pearson Education Inc, Upper Saddle River, New Jersey, Fourth Edition, 2003). Pg. 222

⁶¹ 86 F.3d 1447 (7th Cir. 1996).

⁶² 2000, Inc., 105 F.3d 1147 (1997)

⁶³ See Richard G, (1996), "Computer software law and legislation in United States", http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93_text.html#Shrinkwrap%20License%20Cases_T, accessed on 20th July 2024 at 12:14 P.M

⁶⁴ Henry R. Cheeseman, "Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment", (Pearson Education Inc, Upper Saddle River, New Jersey, Fourth Edition, 2003). Pg. 208

⁶⁵ See 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.

it contract was described as a contract of adhesion, which is a contract that lacks bargaining aspect, forcing one party to be favored over the other.⁶⁶

In *Specht v Netscape Communications Corp*⁶⁷ the court gave the clearest definition of a click wrap license, it was contended that a click wrap license presents the user with a message on his computer screen requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked. For example, the terms may appear in the following words; “do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close.”

A question arises as to the enforceability of the click-wrap agreement since the lack of paper and signature of traditional contract. The court ruled them to be enforceable contract by applying the general principle of the uniform commercial code Article 2 ‘sales’ that provide that a contract for sale of goods may be made in a manner sufficient to show agreement, including the conduct by both parties that recognizes the contract existence and in the case of click-wrap agreement this is shown by the click of the button ‘I agree’ in which a party is considered to manifest his consent to enter into a contract⁶⁸.

Browse-wrap Agreements

In this type, there is no indication of the requirement of consent before accessing an online product or services. This differs from other types of web contracts such as shrink-wrap licenses and click wrap agreement where consent is important before formation of a contract.

In *Specht v. Netscape*,⁶⁹ the court looked at the enforceability of a browse-wrap contract entered into on the Netscape website.⁷⁰ Users of the site were urged to download free software available on the site by clicking on a tinted button labeled "download". Only if a user scrolled down the page to the next screen did he come upon an invitation to review the full terms of the program's license agreement, available by hyperlink. The plaintiffs, who had not seen the agreement, downloaded the software and were later sued for violation of federal privacy and computer fraud statutes arising from the use of the software. The Second Circuit then noted that an essential ingredient to contract formation is the mutual manifestation of assent. The court found that a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms. Because the plaintiffs were not put on notice of these terms, they were not bound by them.

2.3 Formation of E-contract

An online contract requires certain elements or steps so as for it to be considered a valid contract hence enforced. In traditional contracts the required element includes the intention to create legal relation, the free consent, consideration, capacity to contract and the mutual agreement. But in creating electronic contract few of these elements have experienced critics of their existence.

Mutual consent, this is one of the important elements in the formation of a contract. This element has become one of the issues in creating an online contract. Some people argue that most of the agreement entered online does not consider this requirement. But in most of the agreement formed online such as

⁶⁶ *ProCD v. Zeidenberg*

⁶⁷ 150 F.Supp.2d 585 (S.D.N.Y. 2001), 306 F.3d 17 (2d Cir. 2002).

⁶⁸ Henry R. Cheeseman, “Contemporary Business & E-commerce Law; Legal, Global, Digital and Ethical Environment”, (Pearson Education Inc, Upper Saddle River, New Jersey, Fourth Edition, 2003). Pg. 208

⁶⁹ *Specht v. Netscape Communications Corp.* 306 F.3d 17 (2d Cir.2002).

⁷⁰ *Ibid*

Click-wrap agreement the consent is usually indicated when a purchaser has clicked the ‘I agree’ button. by clicking this you indicate that you have read the terms and condition and hence you agree with them thus the contract becomes valid and enforceable when consent is given in this manner.

Signature is another issue aroused in the formation of an online contract. But a signature is not necessary for either online or offline contracts to be valid, provided the other elements are present because even in an offline contract a contract can either made either orally or in writing thus existence of a signature in oral contracts is not possible.

2.4 Validity of E-contract in Tanzania’s laws

Up-to-date the law of contract in Tanzania is still governed by *the Law of Contract Act*⁷¹ and the *sale of goods Act*⁷². All these laws still regulate the traditional way of forming contracts whereas the Electronic Contracts are recognized by *the Electronic Transactions Act, No. 13 of 2015*,

Now the issue at hand is whether the current law recognizes an online contract as a valid contract. For a contract to be considered as a valid contract under the Tanzanian law, it has to meet the basic requirement for a formation of a valid contract that were earlier discussed. With the formation of an online contract several problems arise in determining these important elements;

Consent

In Tanzania the law of contract requires for a contract to be valid first there should consent (*Consensus ad idem*) as per S. 10⁷³

“All 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”

And the Act further provides that mutual consent is said to exist when two person or more agree the same thing in the same sense⁷⁴. In an online environment, establishing the necessary consent in the form of *consensus ad idem* between the parties may be difficult. Because it is difficult to prove that the person entering the contract had the capacity to form the necessary intention to form an enforceable contract, especially when E-agents are used in the process. E-agent can be defined as ‘anything that can perceive its environment through sensors and acting within that environment through effectors’.⁷⁵ Examples of E-agent may include computer programs that have the ability perform certain function desired by their programmer or by themselves. This is mostly used by online website that performs certain offer automatic and reply but sending automated mails or responds without being operated by a human being (automatism). It should be noted that requires the consent of the parties⁷⁶ in this case are to be referred to as human. Which in electronic contract the use of e-agent who is not person capable of validly consent to be bound in contract in the sense envisaged by the Act render the contract makes the contracts entered to be a void contract.

⁷¹ CAP 345 [R.E 2002]

⁷² CAP 214 [R.E 2002]

⁷³ The Law of Contract Act [CAP 345 R.E 2002]

⁷⁴ See S. 13 of The Law of Contract Act [CAP 345 R.E 2002]

⁷⁵ See 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.

⁷⁶ 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

However, *the Electronic Transaction Act*, provides for the same requirements used in non-electronic contract to be met in e-contracts as provided for under *S.5 of the Electronic Transactions Act*.⁷⁷

Another issue with the electronic contract is the issue of the advertisement in some website, whether they are offers an invitation to treaty as well as when such acceptance is complete. A valid contract under the law of contract in Tanzania requires a valid offer to be made by the offeror and be accepted by the offeree for a mutual consent to be said to exist. In E-commerce there is a controversial as to whether they are valid offer or just mere invitation to treaty. Invitation to treaty does not constitute a valid offer because sometimes may constitute an offer and sometimes it may be an invitation to treaty for example in most electronic commerce the website may display their goods in an open window in the process of advertising them and interested buyer may offer to buy the product. In Light of the stated fact the current *Electronic Transactions Act* caters for the issue offer and acceptance as provided for under *S. 21 and 22* respectively of the same Act.

Up-to-date the law in Tanzania has not accommodated electronic transactions and there isn't a case in Tanzania that have 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 for online contract to be valid. But shortly a contract to be a valid contract there should be a valid offer that stipulate the mutual consent of the parties to contract.

Section 2(1) (a) and ⁷⁸ defines what is a proposal and what constitute an acceptance. An acceptance is required to be absolute and unqualified and it should be expressed in some usual and reasonable manner, unless the proposal describes the manner in which it should be accepted. But in the case of online contract for example the browse-wrap agreement where the terms and condition of the agreement may be located elsewhere far below the screen or in another website accessed through hyperlink in Tanzania the communication of an offer is not complete because the terms are not easily obtained and hence acceptance is not also there. 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.⁷⁹ Thus not valid under the Tanzania law of contract

The law of contract in Tanzania requires specific requirement to be met in forming a contract, but in electronic contract a lot of the issues such as the time and place of contracting, issues concerning proof of contract like authentication, attribution and repudiation of online contract and also some legal formality required by the law in formation of certain type of contract has somehow been tried to be resolved by *the Electronic Transactions Act, specifically under Part V* of the same Act.

“THE ELECTRONIC TRANSACTIONS ACT, No.13 2015” that was recently passed by the parliament of Tanzania. it provides for all issues concerning electronic transaction, electronic contract being among them stipulated under Part V.

⁷⁷ The Electronic Transactions Act, No. 13 OF 2015

⁷⁸ The Law of Contract Act [CAP 345 R.E 2002]

⁷⁹ See R G Kunkel _Recent Developments in Shrink-wrap, Clickwrap and Browse wrap 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

2.5 A General overview of the Electronic Transaction Act, 2015

The Act was passed on 2015 and it is currently in force. The said electronic contract is legally recognized by the said law in Tanzania.

The Act specifically provides under S. 21⁸⁰ that (1) For avoidance of doubt, a contract may be formed electronically unless otherwise agreed by the parties and (2) Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the ground that an electronic record was used for that purpose. Hence when this law came into force it began recognizing online contract in Tanzania.

The Act also solved some of the problems that were a hindrance to legal recognition of electronic contract as valid contract in our current laws;

Issue like the time and place of contracting is solved by the provision of S. 22 that provides for the time of dispatch and receipt of electronic communication to be when it enters a computer system outside the control of the originator or of the person who sent the electronic communication on behalf of the originator. And S. 25 clearly state that the time and place of contract formation shall be where acceptance of the offer becomes effective.

The issue concerning formality of some of the types of contracts like the requirement of some types of contracts to be in writing or the requirement of signatures for example the Land Act⁸¹ requires certain contracts, such as mortgage instruments or lease agreements, to follow a prescribed form with signature and other formal requirements.

The Act also provides for legal recognition of electronic signature firstly by defining what compose of an electronic signature as per S. 3⁸² that

“Electronic signature” means data, including an electronic sound, symbol or process, executed or adopted to identify a party, to indicate that party’s approval or intention in respect of the information contained in the electronic communication and which is attached to or logically associated with such electronic communication;

The law further goes as to state that when the law requires a signature then that requirement shall be met by a secure electronic signature made under this Act. **S. 5(1)** also solves the issue of formality when it comes to the issue of the requirement of a contract to be in writing by clearly stating that ‘where a law requires information or transaction to be in a prescribed non-electronic form or in writing, such requirement shall be met by an information or a transaction entered in electronic form that is (a) organized in the same or substantially the same way as the prescribed non-electronic form; (b) accessible to the other person for subsequent reference; and (c) capable to be retained by the other person’.

2.6 Inadequacy of the *Electronic Transactions Act*.

The Act may be facing several critics as it fails to specifically provide for the important requirement of the element of consent in electronic transaction. Most of the online contract faces challenges when it comes to the issue of determining the consent of the party to the said contract. This has not addressed the issue of consent in online contracts.

⁸⁰ The Electronic Transaction Act, No. 13 of 2015

⁸¹ Act No 4 of 1999 (Cap 113.) also S.3 and 89 of the Bill of Exchange Act Cap 215 which require contracts relating to negotiable instruments to be in writing

⁸² The Electronic Transaction Act, NO. 13 of 2015

The Act has also failed to clearly indicate what an offer is and what is an indication when it comes to formation of an online contract, because this has been an issue in various jurisdictions especially on web-based contracts.

The Act has also failed to provide for the jurisdictional issues concerning electronic contracts. It is well known that in online activities a boundary is not hindrance a factor that when it comes to formation of a contract. People may enter a contract while they are in different states and they may also be in foreign state as well, so the law ought to provide the jurisdiction of the courts when it comes to such circumstances.

CHAPTER THREE

3.1 CONCLUSION

A contract plays an important role in the daily activities of human beings. A contract act as a guidance in insuring that people gets what they were promised by others. A lot of transaction and business require a legal contract so that people can be able to enforce their agreement in the court of law. In Tanzania the law recognizes a contract as an agreement that is made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void⁸³.

As time goes on the world undergo development in different sectors and information technology is one of the fields that has developed. With these development new ways of doing business also has emerges that is an online commerce. In online commerce several issues have been introduced in ensuring the business are conducted smoothly; Electronic contract emerges as the result of E-commerce. People now have the need to form their contract using the online medium.

In Tanzania, the law that governs contractual activities only provides for or covers for both the traditional contracts and online contracts. Thus, legally in Tanzania E-contract is a valid contract simply because they do meet some important requirements required for contracts. The current legal regime even if it is used on online contract, it is still inadequately cover electronic contracts because Cyber Contracts are entirely created by exchange of electronic data whereby an offer and acceptance are made by a combination of electronic communications, paper documents, faxes and orally which the current law does not carter for such communications.

Therefore, while the Internet and electronic environment has posed challenges to traditional contracts law, these developments can also be viewed as an opportunity to improve the law

3.2 RECOMMENDATION

The existing law needs to be reformed to cope up with technological developments.

It is well known that currently the Electronic Transaction Act, which provides for electronic contract under Part V. but still it does not completely carter for all issues concerning electronic contracts.

For example, the issue of consent the law should require all online users to provide for clear and indisputable mechanisms of demonstrating consent for example by requiring customers to type the word 'I accept' or enter a particular word in a correct order instead of a mere simple click of a button that is not sufficient to prove consent.

⁸³ S. 10 Of the Law of Contract Act [CAP 345 R.E 2002]

Thus, there should be a specific single piece of legislation that only deals with issues concerning electronic contracts. An Act that can cater for the issue of consent and all other important element of a valid contract formed online.

Generally, most African Countries lack cyber laws and harmonized policies and laws within the African context. I suggest that in order to prevent unauthorized access and misuse of computer systems and to building confidence on the use of ICT, cyber security must become a major concern for governments in Tanzania due to the danger that such threats pose.

To courts of law, we recommend that construction of cyber contracts be linked to contractual principles that can afford such technological advancement.

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