

Legal Aspects of Electronic Commerce: The Case in Ethiopia

Introduction

The century we are living in is the age of information and communication technology. Increased use of these electronic communications improve the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally.¹

Commerce is the exchange of goods and services. It can be either conventional or electronic. The conventional commerce is the exchange of goods and services with the physical meeting of people. Unlike the conventional commerce, electronic commerce is a real-time transaction in the virtual space.

E-commerce could have both cross-border and within a jurisdiction facets. A cross-border e-commerce is one that involves international online trade with sale or purchase of products via online shops across national borders.² The focus of this term paper is, however, limited to e-commerce within a single political entity; i.e. the Ethiopian context.

As e-commerce may have multitude of dimensions, the legal aspects of it is one. With the cognizance of these legal aspects, many multilateral private institutions and national governments have been enacting model laws and legislations to govern the e-commerce in their sphere of authorities. For instance, The United Nations Commission on International Trade Law (the UNICITRAL) and the African Union³ have enacted model laws that would govern the e-

¹ United Nations Convention on the Use of Electronic Communications in Contracts <http://www.uncitral.org/pdf/english/texts/elect_com/06-57452-ebook.pdf > accessed 15th May 2019 , preamble,

² Carmen Radut and Licuta Petria, Legal aspects of electronic commerce, <<http://mpa.ub.uni-muenchen.de/22313/> > accessed on May 20th 2019, p. 1

³ United Nations Convention on the Use of Electronic Communications in International Contracts (n 1) and African Union Convention on Cyber security and Personal Data protection <

commerce. In the Ethiopian case as well, the Ministry of Communication and Information Technology, has drafted a law to govern electronic commerce, e-Commerce⁴ and several other compartmentalized pieces of legislations are enacted that have relevance to the e-commerce.⁵

1. General Background of e-Commerce: Definition and Nature

The African Union Convention on cyber security and personal data protection has aptly defined electronic commerce as the act of offering, buying or providing goods and services via computer systems and telecommunications networks such as the internet or any optical or similar media for distance information.⁶

E-commerce simply defined as commercial transactions of service in an electronic format. It can be also defined as the process of buying and selling or exchange of products, services and information via computer network including the internet.⁷

E-commerce allows consumers to electronically exchange goods and services with no barriers of time or distance.⁸ Electronic commerce is based on electronic signature, and acceptance of standards for transmission security and data storage.⁹

<https://au.int/en/.../African-union-convention-cyber-security-and-personal-data-protection>>
accessed 15th may 2019

⁴<<https://www.2merkato.com/news/business-proclamations-and-regulations/893-ethiopia-working-on-e-commerce-law>> accessed 21st May 2019

⁵ See Electronic Signature Proclamation, 2018, Proc No. 1072, Fed Neg Gaz., Year 24, No. 25, National Payment system proclamation, 2011, Proc No 718, Fed Neg Gaz., Year 17 No. 84, Freedom of the Mass Media and Access to Information Proclamation, 2008, Proc 590, Fed Neg Gaz. Year 14 No 64, Computer Crime Proclamation, 2018, Proc No.958, Fed Neg Gaz. Year 22 No. 83, Ethiopian Commodity Exchange Proclamation, 2007, Proc No. 550, Fed Neg Gaz., year 1, No. 61

⁶ The African Union Convention on cyber security and personal data protection (n 3) Article1

⁷ Dr. P Ashokkumar, ‘ E-Commerce law and its legal Aspects’(January 2018) 4 International Journal of Law, 72-74

⁸ *ibid*

The market category of e-commerce includes B2B- Business –to-Business, B2C–Business-to-consumer, B2G- Business-to-Government and sometimes G2C- Government to citizen.¹⁰ Studying the legal aspects of e-commerce requires a profound knowledge of these market categories of e-commerce, nevertheless a rudimentary legal aspect of these market categories can be outlined as hereunder.

2. E-Commerce Law

Before embarking the discussion on legal aspects of ecommerce, it is imperative to uncover the e-commerce law itself. The preliminary focus of e-commerce law is on enforcing the validity of electronic contracts and ensuring that the parties can be held to their bargains. Once the contractual issues have been addressed, e-commerce law analysis shifts to a series of legal issues that may govern the transaction. These include jurisdiction (which court or arbitral tribunal can adjudicate a case), consumer protection issues, taxation, privacy, domain name disputes (Intellectual property rights disputes), as well as the role and potential liability of intermediaries such as Internet service providers.¹¹

The electronic signature law of Ethiopia, for instance, as part of the e-commerce law in its preamble provides that, it has become necessary to create conducive legal framework to promote electronic commerce and electronic services in the country¹²; and it has become necessary to provide legal recognition to the exchange of electronic messages and determine the rights and obligations of participating parties.¹³ Thus, it is vividly inferable that, there is a consensus in the legislature that e-commerce has multitude of legal issues that needs prudent e-commerce law.

2.1. Whose power is it to come up with e-Commerce law in Ethiopia?

⁹ *ibid*

¹⁰ Michael Geist, ‘A guide to global e-commerce law’ [_<https://www.itu.int/ITU-T/special-projects/ip-policy/final/Attach04.doc>](https://www.itu.int/ITU-T/special-projects/ip-policy/final/Attach04.doc) , accessed 23rd may 2019, 1

¹¹ *ibid* 2

¹² Electronic Signature Proclamation (n 5), preamble, first paragraph

¹³ *ibid*, preamble second paragraph

The FDRE constitution lays the federal state structure.¹⁴ The federal government has the power to enact a Commercial Code.¹⁵ As e-commerce is an aspect of commercial matter, the federal government has come up with draft e-commerce law.¹⁶ It has also enacted several compartmentalized pieces of legislations relevant to e-commerce. The National Payment System proclamations¹⁷, the Electronic Signature proclamations¹⁸ and the Value Added Service directives of Ministry of IT and communications¹⁹ are good examples to this assertion.

2.2. The scope of e-Commerce Law

The scope of e-commerce law in Ethiopia shall be seen in line with the Commercial Code article 5 and the Commercial registration and business licensing proclamation of 980/2016. All the listed acts of commerce in the Code can be of susceptible to e-commerce and demand the application of e-commerce law.

Here one may raise a regulatory issue that, should there be additional registration and licensing requirements to those desiring to engage in the e-commerce than that is required in conventional businesses? The existing Commercial Registration and Licensing Proclamation and regulations have nothing to say in this regard. Thus, it seems prudent to have put in place some additional licensing requirements to those who want to engage in e-commerce that can address the unique traits of it. However, the Value Added Services Directive of MCIT(now the Ministry of Innovation and Technology) that governs services which are not basic telecommunication services or additional services using Mobile, Internet or Fixed Line telecommunication services, such as payment transaction services that includes mobile money transfer, m-banking and m-

¹⁴ Federal Democratic Republic of Ethiopia Constitution, 1995, Proc No. 1, Fed Neg. Year 1, No.1, Art 50(1)

¹⁵ FDRE Constitution (n 14) , Art 55(4)

¹⁶ 2merkato.com(n 4)

¹⁷ National Payment System Proclamation(n 5)

¹⁸ Electronic Signature Proclamation(n 5)

¹⁹ Ministry of Communication and Information Technology Value Added service Directive, No. 3/ 2011

commerce²⁰ cannot be simply overlooked as it requires pre-licensing qualifications. According to this directive, a person who desires to provide a Value Added Services shall obtain a license from the Ministry in accordance with the Directive and is required to interconnect Equipment and systems s/he/it uses for service provision only with Ethio-Telecom's equipment, systems and infrastructure.²¹

3. Legal Aspects in e-Commerce

3.1. Designation and Parties in e-Commerce Law

As parties in conventional transactions can be referred as offeror and offeree, parties in electronic transaction can be designated as originator and addressee. 'Originator' of an electronic communication means a party by whom or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication.²² Whereas, 'addressee' of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication.²³

3.2. The Legal Recognition and Validity of Electronic Communications/Messages

The principle of recognition and validity of electronic communications is patently set in the United Nations Convention on the Use of Electronic Communications in International Contracts. The convention provides 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.²⁴

In the same fashion the Ethiopian Electronic Signature Proclamation states that, 'No electronic message shall be denied legal effect, validity or admissibility in any legal proceeding, solely on

²⁰ *ibid*, Art 2(4); Art 2(6)

²¹ *ibid*, Art 3(1) &(4)

²² United Nations Convention on the Use of Electronic Communications in Contracts(n 1), Art 4(d)

²³ *ibid*, Art4(e)

²⁴*ibid*, Art 8(1)

the ground that it is in electronic form.²⁵ Furthermore, it continues saying that, ‘Where any law requires that information shall be in writing, such requirement shall be deemed to have been satisfied if such information is rendered or made available in an electronic form and accessible so as to be usable for subsequent reference.’²⁶

3.3. E-Commerce and Contract Formation

3.3.1. E- Consent : Time and Place of Offer and Acceptance

An offer or acceptance of an offer can be expressed in electronic form. However, disputes may arise as to when and where an offer and acceptance is made and consummated. As offer and acceptance is made through electronic communications, it is versatile to have a clear cut rule. In this regard, the Electronic Signature law of Ethiopia has a legal presumption that states, ‘In any civil proceedings involving electronic message signed with a reliable electronic signature, it shall be presumed, unless the contrary is proved, that: (1) the electronic signature is the signature of the subscriber; (2) the electronic signature was affixed by that person with the intention of approving the electronic message; and (3) the electronic message and the signature has not been altered since the specific point in time to which the electronic signature was affixed.’²⁷ Such legal presumption would prevent denial of offer and acceptance.

As to the place of offer and acceptance, the United Nations Convention on the Use of Electronic Communications in International Contracts provides that, an electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.²⁸ In the Ethiopian Case the Civil Code provides a rule as to contracts made between absent parties stating that, a contract made between absent parties shall be deemed to be made at the place where and time when the acceptance was sent to the offeror and a contract made by telephone shall be deemed to be made at the palace where the party was called.²⁹ The issue will be should we maintain the cited Civil

²⁵ Electronic Signature Proclamation (n 5), Art 5(1)

²⁶ *ibid*, Art 5(3)

²⁷ *ibid*, Art 7

²⁸ United Nations Convention on the Use of Electronic Communications in Contracts, Art 10(3)

²⁹ Civil Code of the Empire of Ethiopia, 1960, Proc No. 165 Neg Gaz., Year 19th, No. 2, Art 1792(1)&(2)

Code provision to e-commerce transactions that could be made over several electronic mediums? The logical conclusion shall be in the affirmative with *mutatis mutandis*, having the necessary changes being made, to each electronic medium of communications.

3.3.2. Electronic Signatures

Kzechzunowich has expressly state the role of signature as, it is the signature that validates the text.³⁰ Electronic signature is defined as information in electronic form, affixed to or logically associated with, an electronic message, which may be used to identify the signatory in relation to the electronic message and to indicate the signatory's approval of the information contained in the electronic message.³¹ This is a paradigm shift from the Civil Code that requires hand written signatures or thumb marks to be affixed to the document.³²

Where any law or customary practice requires a signature of a person or provides consequences for the absence of a signature, that requirement is deemed to be satisfied where, reliable electronic signature is used in the light of all the circumstances: (a) that is appropriate for the purpose for which the data message was generated or communicated; (b) an agreement entered between parties regarding electronic signature; or (c) considering other conditions such as the nature, extent, and type of the transaction, capability of identifying contracting parties, and the essence of the electronic message.³³

The Electronic signature law, similarly on the admissibility of electronic communications provides that, no electronic signature shall be denied legal effect, validity or admissibility as evidence in any legal proceeding, solely on the ground that it is in electronic form.³⁴

3.3.3. Form of e-Contract

³⁰ George Kzechzunowich, 'Formation and effects of contracts in Ethiopian Law' (1983) 1 Journal of Ethiopian Law 86

³¹ Electronic signature Proclamation (n 5), Art 2(6)

³² Civil Code (n 29), Art 1728

³³ Electronic Signature Proclamation (n 5), Art 6(2)

³⁴ *ibid*, Art 6(1)

As to the form of e-contracts the United Nations Convention on the Use of Electronic Communications in International Contracts has a rule that, ‘Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form. Where 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.’³⁵

The African union convention, likewise, provides that, where a written document is required for the validity of a legal act, there must be a legal rule set for the functional equivalence between electronic communication and paper based documents.³⁶

As it is stated above, in the Ethiopian case as well, the Electronic signature proclamation states that, ‘Where any law requires that information shall be in writing, such requirement shall be deemed to have been satisfied if such information is rendered or made available in an electronic form and accessible so as to be usable for subsequent reference.’³⁷ This is a huge paradigm departure from the Civil Code that prescribes of any contract required to be in writing shall be supported by *a special document* signed by all the parties bound to the contract.³⁸ (Emphasis added) The National payment system proclamation of Ethiopia, on the other hand, provides that any issuer of payment instruments shall prepare clear and standard sample terms and conditions, in relation to electronic fund transfers and stored value cards, applicable to all its customers in similar manner and make it available for their review and possible agreement.³⁹ And the National Bank of Ethiopia shall approve such terms.⁴⁰ The approval process of the contract form by the NBE would invariably touch the form of the contract too.

3.4. Admissibility and evidential weight of electronic communications

³⁵ United Nations Convention on the Use of Electronic Communications in Contracts, Art 9(1)&(2)

³⁶ African Union Convention on Cyber security and Personal Data protection (n 2), Ar. 6(a)

³⁷ Electronic signature proclamation (n 5), Art 5(3)

³⁸ Civil Code (29), Art 1727(1)

³⁹ The National Payment system Proclamation (n 5), Art 19(1)

⁴⁰ *ibid*, 19(2)

The African union convention on electronic commerce has the following to say regarding the admissibility and evidentiary value of electronic communications. A written document in electronic form is admissible in evidence in the same way as paper based documents and shall have the same force of law, provided that the person from whom it originates can be duly identified and that it has been made out and retained in a manner that guarantees its integrity.⁴¹

The National payment systems proclamation of Ethiopia with respect to the evidences of transfer of funds provides that, notwithstanding any provision to the contrary in any other law or customary practice, information as to any transfer of funds through a system which is contained in any document, computer print-out, hard copy, microfilm, floppy or hard disc or any other electronic media or form shall be admissible in any court as evidence of the transfer concerned.⁴²

3.5. E-commerce and Adjudication of Disputes

Disputes are inevitable in each market category of e-commerce and proper dispute resolution mechanisms shall be in order. For instance, the National Payment system proclamation of Ethiopia provides that, Operators, participants and issuers of payment instruments shall establish internal complaint handling procedures in relation to electronic fund transfers and stored value facilities, and shall advise users on the procedures for lodging complaints.⁴³ The National Bank may prescribe the compliant handling procedures through directive.⁴⁴ Albeit so far it does not come up with any. This law envisages at least the unique feature of e-commerce, e-payment and foresee the desirability of dispute settlement mechanism proper to it.

3.6. E-commerce and Consumer Rights Protection

E-commerce is normally thought of in consumer [rights] protection terms in relation to business-to-consumer transactions.⁴⁵ Relevant national policies for consumer protection that encourage good practices are also applicable to e-commerce in areas including information disclosure,

⁴¹ African Union Convention on Cyber security and Personal Data protection (n 3), Art 6(5)

⁴² The National Payment system Proclamation (n 5), Art, 23(1)

⁴³ *ibid*, Art 20(1)

⁴⁴ *ibid*, Art 20(2)

⁴⁵ Consumer protection in electronic commerce, < https://unctad.org/meetings/en/sessional_documents/cicplpd/7-en-pdf> accessed on 19th May 2019, 2

contract terms, secure payment mechanisms, consumer privacy and data security and dispute resolution and redress.⁴⁶ The trade competition and consumer protection proclamation⁴⁷ of Ethiopia has a section on consumer protection issues and rights. The reading of the provisions of the proclamation, however, does not have an overt provision that covers the aspects of electronic commerce consumers. Albeit, it can be safely construed that the proclamation can *mutatis mutandis* apply in the electronic commerce consumer protection cases alike.

3.7. E-Commerce and Taxation

E-Commerce would definitely challenge the taxing regimes of nations. Some of the conceptual challenges thrown by e-Commerce are how to characterize income and the approach towards residence-based and source-based taxation approaches.⁴⁸ The difference between residence and source based taxation pose a challenge in the e-commerce. For instance, the Income tax proclamation of Ethiopia has the scope of application to residents of Ethiopia with respect to their worldwide income and to non-residents with respect to their Ethiopian source income.⁴⁹ Thus, characterization of the source of income in e-commerce especially in the case of cross boarder-e-commerce cases could be a daunting task to the tax collecting authorities.

3.8. E-Commerce and Privacy

Privacy – the control over one’s personal data – and security – protection from the attempted access to data by unauthorized others – are two critical problems for both e-commerce consumers and sites alike.⁵⁰ Everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone,

⁴⁶ *ibid*

⁴⁷ Trade Completion and Consumer protection proclamation, 2013, Proc No 813, Fed Neg Gaz., Year 20, No 28, Art 14

⁴⁸ Kirti and Namrata Agrawal, ‘Impact of E-commerce on Taxation’ 2 <<https://www.ripublication.com/irph/ijict-sph/ijictv4n/spl-16.pdf>> accessed 20th my 2019

⁴⁹ Federal Income Tax proclamation, 2016, Proc No 979, Fed Neg Gaz., Year 22 No. 104, Art, 7(1)&(2)

⁵⁰ Mark S. Ackerman and Donald T. Davis, J, ‘Privacy and Security Issues in E-Commerce’

telecommunications and electronic devices.⁵¹ Electronic commerce invariably involves communication of confidential data of participants in the ecosystem.

Public officials shall respect and protect the privacy and security rights.⁵² Consequent to this Ethiopia is moving to adopt the data protection law.⁵³ However, ahead of the data protection law, we do have piecemeal legislations that contain data protection matters. For instance, the freedom of mass media and access to information proclamation succinctly state that, the public relation officer shall refuse request for information if the requested information contains; a) trade secrets of a third party; b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would likely to cause harm to the commercial or financial interests of that third party; or information supplied in confidence by a third party the disclosure of which could reasonably be expected to put that third party at disadvantage in contractual or other negotiations; or to prejudice that third party in commercial competition.⁵⁴ Though the proclamation has relevant protective clauses to participants in e-commerce as well, its scope of application is limited to public funded institutions only and it will cover only G2C and G2B aspects of e-commerce.

3.9. E-commerce and Intellectual Property Rights

E-commerce and Intellectual Property regulations should reflect the forms of innovation developed by new economic activities and they assume the intervention of the law in order to control the intangible assets and to optimize their valorization.⁵⁵

⁵¹ FDRE Constitution (n 14), Art 26(2)

⁵² *ibid*, Art 26(3)

⁵³ The Draft data protection law of Ethiopia, 2merkato.com(n 4)

⁵⁴ Freedom of the Mass Media and Access to Information(n 5), Art 17(1)

⁵⁵ Goce Naumovski & Dimitri Chapkanov, ‘Convergence of Trademark Law and E-Commerce: Overview of US, EU and China Regulations on Trademarks and Domain Names’(2014) 8MIZAN LAW REVIEW, No.2 , 436

The intellectual property rights protection in e-commerce platform is highly related to the security system of e-commerce transaction. Information security and the system can be understood as the ability to withstand the computer system, with a degree of safety, accidental events or malicious actions that compromise the availability, authenticity, integrity and confidentiality of stored or transmitted and services offered by or accessible by these networks and systems. Security involves the following characteristics: authenticity, confidentiality, integrity, availability, access control, managing keys, non-repudiation, and security management.⁵⁶

3.10. E-commerce and Criminal aspects

Last but by no means is the least in e-commerce is the criminal aspect. To this end, in Ethiopia, Computer crimes are regulated under articles 710-711 of the Criminal Code. And Economic and commercial crimes such as attack on the other credit, unfair competition, and infringement of marks and designs are provided in the Code starting from Arts 716- 724. Re-affirming the vital role of information and communication technology in the economic development of the country, the government has enacted a computer crime law to prevent, control, investigate and prosecute computer crimes done against computer systems.⁵⁷

Conclusion

As e-commerce has a multitude of legal aspects in wide spectrum of matters such as contract formation, taxation, consumer protection, dispute settlement, intellectual property, privacy and criminal, it needs a prudent regulation and proper e-commerce law. Ethiopia has so far only enacted compartmentalized pieces of legislations that have relevance to e-commerce governance, yet she needs to have a comprehensive e-commerce law sooner to address all the legal aspects of it.

⁵⁶ *ibid*

⁵⁷ Computer Crime Proclamation (n 5), Preamble, second paragraph