

EMBRACING E-COMMERCE IN UGANDA: Prospects and Challenges

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Abstract

This paper makes an attempt at a rather wide area of the law. In that respect, it taps into the likely constraints that stand in the way of an effective conversion from the traditional (and in some instances, comfortable) ways of doing business to taking on a touch of modern technology in commercial transactions.

Some of the most affected areas concerning business practice that are likely to draw attention include issues such as: Regulation; the validity of data messages and regulation of business content; protection of consumers and protection of Intellectual Property rights.

The paper thus presents the aforementioned aspects as legal issues arising and, focusing on the perspective of Uganda as a developing country, it points out the challenges that come with embracing modern means of communication and information technology in keeping up with other key players in the global village.

In posing these challenges, the paper exposes the prospects and policies that can not be ignored by a growing economy like that of Uganda especially as a participant in International trade. It thus provides necessary eye-openers and makes an attempt at a few recommendations that can help provide a smoother transition from the traditional concepts of business to that of modern technology. The paper however also poses a few issues that need to be addressed as recommendations if e-commerce is to thrive comfortably within Uganda.

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Introduction

Since the advent of Independence in October of 1962, Uganda has experienced various regimes characterized by years of political turmoil. The weak economy evidenced by inflation, a weak currency and huge debts are largely attributed to the political instability that followed independence. However, since 1987 after the establishment of the Movement Government of President Museveni, ambitious reforms in the economic realm have been implemented with assistance from the International donor community, including the International Monetary Fund (I.M.F) and the World Bank. Privatization of the economy meant having less of government involvement in the commercial sector and putting more of the economy in the hands of individuals¹.

Presently, Uganda and its East African neighbours, particularly Kenya and Tanzania² have appreciated more the need to trade as one big village. This is part of the age of globalization where no man, society or nation is an island. The expansion of our environs has fostered new imaginations and curiosities leading to further exploitation of our natural resources with the aim of ensuring that each individual nation has a lot more to include in its trade with other nations. Barter trade is no more, but even so, the hunger for new innovations in trade and discovery of new markets have overtaken the traditional concepts of trade that overthrew the barter and are still the preferred methods in rural areas all over East Africa. Much as we talk of Electronic Commerce today, we have to ask ourselves whether we are one in understanding the concept and the benefits that go with it, or whether there are some challenges holding back some segments of society and thus hindering effective development in our East African Economies.

As East African neighbours, the challenges are the same all round. The inadequacy of an E-Commerce infrastructure is a great impediment to the growth of International trade particularly in the East African region. With every passing day, the constantly emerging markets³ portray the need and readiness to move faster to a higher level of regional integration. For instance, with new members joining the East African Community (Rwanda and Burundi), there is a stronger need for a legal and regulatory framework for E-Commerce within the region. This will be of great advantage to the members of the Community in forging a working policy within each Country that can effectively guide the member states in the practical aspects of International Commercial transactions. Such a working policy should give consideration to the local

¹ Such economic reforms are reaping positive fruits: Recently, the International Monetary Fund removed Uganda from the list of the most impoverished nations in the World (See IMF drops Uganda from the list of poorest, *The New Vision* newspaper October 28, 2005 Vol. 20 No. 258, at p.1).

² Focusing on the period before other members were invited to join the East African Community.

³ Such as COMESA - Common Market for Eastern and Southern Africa; East African Customs Union, etc

village communities that are not only computer illiterate but are also under privileged with regard to Educational development and yet contribute to the economy more especially through agricultural produce.

Appreciation of the concept of E-Commerce:

Electronic Commerce (simply referred to as E-Commerce) is essentially about doing business electronically through an electronic medium where electronic data is interchanged between parties through information intermediaries on an information technology network.

The Organization for Economic Corporation and Development (OECD) (2002) study⁴ defines Electronic Commerce (E-Commerce) as *"the sale or produce of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over computer mediated networks. The goods and services are ordered over those networks, but the payment and the ultimate delivery may be conducted on or off-line"*. In simple terms, it is *doing business electronically*.

E-Commerce can, in this respect, be considered under a narrow definition that focuses on E-Business. However, in appreciating the wider concept of E-Commerce, a broader definition is of essence:

It is the *"use of electronic networks to exchange information, products, services and payments for commercial and communication purposes between individuals (consumers) and businesses, between businesses themselves, between individuals themselves, within government or between the public and government, and last, between business and government"*⁵.

From the latter definition, it is evident that unlike E-Business, E-Commerce covers various aspects that stretch beyond simply purchasing goods and services electronically to other matters such as gathering and exchanging information (e.g on-line advertisements, e-mails, etc), negotiations and meetings (e.g on-line conference meetings), transactions and even after-sales.

⁴ Cited in - B. Oyelaran-Oyeyinka & Kaushalesh Lal: *Sectoral Pattern of E-business Adoption in Developing Countries*; Institute of New Technologies (INTECH) April 2004; at p. 7

⁵ Uganda Law Reform Commission: *A study report on Electronic Transactions Law*; Law Com Publications No. 10 of 2004

Networks operating through Information technology have thus become the major element in consumer transactions amongst other social services, especially in developed countries. It has been observed that in Least Developed Countries (LDCs), the most pressing problem they have is not the technology that comes with E-Commerce but the need to change their business culture and practices⁶. We have to thus bear in mind that this is a new phenomenon that has not yet been embraced by many both in the rural and urban sectors of Uganda and its neighbours.

Gains from E-Commerce

It is essential to venture into the benefits that accrue from taking up the practice of E-Commerce and putting aside traditional concepts of commerce.

- It boosts business incentive:

E-Commerce brings with it new innovations that can open up doors to employment opportunities; boost productivity through increased organized competition and market base, which inevitably also improves the product quality. It is noted that the Uganda Communications Commission, which *inter alia* regulates communication services in Uganda⁷, encourages competition amongst the service providers⁸. All these factors, merged into one, can boost the business incentive for engagement in E-Commerce.

- It exposes the beneficiaries to a wider market base.

Transacting over the Internet has obvious rewards in terms of exercising an easy and effective way of bringing the global consumer into the knowledge of goods and services available. More so, without a doubt, a country with adequate e-commerce regulations is a boost to investor confidence especially from foreign and local investors who would take this as a guarantee that there is a worthwhile enforcement mechanism for them to seek redress in the event that their business interests are not well taken care of. This ultimately leads to economic growth.

- Less third party involvement

E-Commerce provides the opportunity for consumers to interact directly with the suppliers or Manufacturers of the services or goods. There is normally no need to engage the services of a middleman or agent to run the transaction on behalf of the principle. Thus the co-ordination costs are also reduced.

⁶ United Nations Conference on Trade & Development (UNCTAD): E-Commerce and Development Report 2001 - Trends and Executive Summary; UN New York & Geneva, 2001 at p. 53

⁷ See Uganda Communications Act, Cap. 106, Laws of Uganda, 2000 ed. \$ Ibid note 7 supra, sec. 56

⁸ Ibid note 7 supra, sec. 56

– No room for complacency

Firms that engage in E-Commerce have an appreciation of the fact that they are operating in a global village in cyberspace as opposed to operating under a small village township where there is no competition. As such, they constantly conduct self evaluation in terms of their operation and to re-define their business operations. There is thus a closer relationship between businesses and the clientele.

– Simplifies business transactions

Though we are looking at Information technology which is viewed by some as a complication in itself, E-commerce has also been argued to provide simplicity in business transactions. It is stated that previously separated activities such as order processing, payments, and after sales services can be merged into a single process, hence lower costs for creating, moving, processing and managing documents.

Inevitably, this advantage is coupled with higher efficiency in the transactions due to fast and accurate processing of information. However, it should be noted that such benefits can only be effectively felt once the beneficiaries acquire the necessary Information and Communication Technology (ICT) skills.

In summing up the benefits of E-Commerce, there are presently efforts in developing a regional e-government strategy with a view of deepening the regional process by providing information to the citizens and prospective investors about the opportunities that exist within the region to improve their livelihoods and investments⁹. As such, a successful e-governance strategy would provide an appropriate environment for the expansion of electronic transactions and thus contribute to the expansion of trade¹⁰.

Challenges facing E-Commerce in Uganda

Uganda is among the least developed countries in the world that share more or less the same challenges as far as economic progress is concerned. It has been noted that the three principle areas that create a tension between the global market place and national jurisdictions are: Business Conduct (i.e Anti-trust and consumer protection); Tax Regimes (i.e tax treatment of domestic and cross-border transactions); and Information protection (including matters affecting on-line privacy and Intellectual

⁹ See Statement by the Deputy Co-ordinator, e-government initiative East African Community - Sarah Kagoda-Batuwa, at the opening of the regional Workshop on the Legal Aspects of E-Commerce on the 11th-15th December 2006, Nairobi, Sarova Stanley Hotel

¹⁰ C.Mann & D. Orejas: *Can NAFTA forge a Global Approach to Internet Governance?* Prepared under contract no. U5100-0-0206 on behalf of Industry Canada, Microeconomic Policy, November 14, 2001; at p.2

Property Rights)¹¹. This paper while addressing the same areas pays relatively little attention to cross-border tax implications due to the voluminous amount of information required in that field of the law alone. However, with regards to the embracing of E-Commerce policies, though falling short of the desired mark, the situation in Uganda is very encouraging indeed as portrayed below:

a) Regulation

The status of regulatory provisions concerning electronic transactions is wanting in many respects. Ever since Uganda adopted the National ICT (Information Communication Technology) Policy in 2003, there has not been significant legislative progress in the area. For instance, consideration was placed on the methods of access to information with the enactment of *The Access to Information Act*¹², which puts into effect article 41 of the 1995 Constitution of the Republic of Uganda. This article gives every Citizen a right of access to information in the possession of the State or its organs and agencies.

Other relevant laws cover the area of print and electronic media which are regulated by *The Uganda Communications Act*¹³, *The Electronic Media Act*¹⁴ and *The Press and Journalist Act*¹⁵.

However, the aforementioned laws do not effectively cover E-Commerce in its full context and there is a need to come up with more effective and precise laws.

In terms of regulating E-Commerce, the major complication is with regard to what needs to be regulated or how far the regulation should go. Electronic transactions should not only be viewed as transactions over the internet. They also affect electronic Banking services not associated with the internet (through Automated Teller Machines) as well as e-mobile transactions, to mention but a few. However, our focus is principally on the internet because it is the most outstanding communications platform over which goods and services are made available.

E-Commerce transactions through the internet have therefore been recognized by many countries as providing comparative advantages to the traditional trading operatives. For instance, the East African Community has moved for the fast tracking of a clear, internationally recognized and compatible legal and regulatory framework for

¹¹ Ibid

¹² No. 6 of 2005

¹³ Cap. 106, Laws of Uganda, 2000 Ed.

¹⁴ Cap. 104, *ibid*

¹⁵ Cap. 105, *ibid*

ecommerce to ensure that domestic laws can operate effectively across national borders.

The challenge that comes to light in this regard is as to how regulation is to be applied. The US law professor, Lawrence Lessig, in his book, *Code and Other Laws of Cyberspace* (1999) distinguishes four categories of regulation. These are: Law, norms, the market place and technology architecture. With the law, we are looking at both private law which focuses on contractual arrangements made between individuals, and public law which involves state prohibitions of certain activities. Issues pertaining to jurisdiction fall in this realm. Norms are also an important factor that calls for regulation in E-Commerce because norms regulate behaviour and as such need to follow certain principles where use of the internet is concerned. This is where issues such as spam or unsolicited mail and internet pornography come in. Thirdly, with the market place, regulation focuses on how services and goods can be placed and used over the internet medium. Lastly, with technology architecture, Professor Lessig is looking at what comprises E-Commerce systems. These include hardware elements (e.g servers and routers), software elements (e.g transaction platforms & web browser software), network elements (i.e wireless or wireline) and communication standards and protocols (e.g HTML and IP). Each of these elements has functionalities that have been designed into them, and the ways in which people use E-commerce systems is therefore determined, in part, by the functionalities that have been made available.

In Uganda, E-Commerce regulation is currently being addressed by a Task Force spearheaded by the Uganda Law Reform Commission and other stakeholders such as the Ministry of Information and Communication Technology¹⁶. They have so far come up with three Bills namely:

(a) The Electronic Transactions Bill

As reflected in the long title, this proposed law serves the purpose of providing for "the use, security, facilitation and regulation of electronic communications and transactions; and to encourage the use of e-government services and to provide for matters connected therewith."

¹⁶ See: Alexandra Nkonge, U.L.R.C.: *The Status of E-Laws in Uganda*; Report prepared for workshop on E-Legislation, 25th - 27th September, 2007, Nairobi, Kenya.

(b) The Computer Misuse Bill

This proposed law serves the purpose of providing "for the safety and security of electronic transactions and information systems; to prevent unlawful access, abuse or misuse of information systems including computers and to make provision for securing the conduct of electronic transactions in a trustworthy electronic environment and to provide for other related matters."

(c) The Electronic Signatures Bill

As per its long title, this proposed law is "to make provision for and to regulate the use of electronic signatures and to provide for other related matters."

These Bills, while still at the infant stage of the enactment process, need to be reconciled with the existing domestic and international legal structure as well as the needs of the market place so as to create a harmony and prevent future conflict. Nevertheless the progress in coming up with such bills reflects government's commitment towards boosting e-government strategies and policies as well as towards the development of the Information economy in Uganda. However, the fact that these Bills were prepared in 2003 provokes the question as to the length of time it is taking government to bring them to pass. The other rhetorical question is as to whether these Bills portray laws that will be effective in meeting the E-Commerce needs of the public by the time they are finally passed into law, especially considering the fact that technology is a fast paced growing machinery that evolves much faster than the law.

A more optimistic view of the Bills, however, is that they were drafted with regard to existing model laws on E-commerce and thus gave due consideration to international regulatory interests, more particularly the focus on harmonization of the laws affecting International trade. The Electronic Transactions Bill was drafted with considerations drawn from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996. Further considerations were drawn from similar legislations in jurisdictions such as South Africa, India, Singapore and Malaysia among others. The Electronic Signatures Bill is also based on the UNCITRAL Model law on Electronic Signatures.

The model laws do not have any binding force. They however portray a mutual understanding amongst states that incorporate their provisions within their domestic ecommerce legislation, of the need for corporation in protecting International trade. It should be noted however, that regardless of Uganda's consideration of the Model laws

as well as various legislations from other countries like South Africa and India, such jurisdictions are conversant of the need to constantly amend their e-commerce regulations as technology advances.

One major aspect, for instance, which deserves consideration in the regulation of any form of electronic interaction, is unsolicited electronic messages. Many subscribers are always forced to terminate their e-mail accounts because of the bulk of unsolicited messages that clog such email accounts. However, much as the Electronic Transactions Bill has provisions on Consumer Protection with a stipulation on 'Choice to Opt-out'¹⁷, it can be argued that this creates the impression that unsolicited messages are legal since they give the recipient an opportunity to opt-out after receiving the message. Borrowing from another legislation, *The Privacy and Electronic Communications Regulations 2003* of the United Kingdom stipulates that a business should first obtain an individual's prior consent before sending unsolicited direct marketing via e-mail or SMS (text) messages.

It is therefore envisaged that where Uganda continues to lag behind in creating substantial legislation over E-Commerce transactions, this will inevitably affect its international transactions especially with those jurisdictions that are more advanced in E-Commerce regulation. Foreign Investors can easily be discouraged from investing in a Country where their interests would not be legally addressed conveniently, more especially due to inadequate legislations that are not at par with the regulations under their own jurisdictions. It is argued that differing laws can reduce the likelihood of consumer redress from global internet trade¹⁸.

In our appreciation of the problem therefore, the creation of a regulatory framework for E-Commerce calls for a lot of political, socio-economic innovation, commonly termed as "an e-government strategy". The study and understanding of International legal transactions, merged with technology calls for the formulation of a suitable framework and strategy at regional and international levels for effectively meeting the challenges posed by management of technology, resources (i.e human and capital) and most importantly, implementation.

Nevertheless, it is not to be argued that the absence of an E-Commerce regulation can

¹⁷ Sec. 25

¹⁸ European Informatics Market (EURIM): *Electronic Commerce and the Law*, EURIM Briefing No. 15, May 1997

deter the implementation of E-Commerce strategies. These have been in existence for quite some time by virtue of business incentives put in place by a few entrepreneurs in the absence of regulation. However, effective economic development of LDCs requires government support and furthermore, a strong strategy in International trade within today's technological era requires a strong back-up support of necessary legislation on data security; network security which addresses Cyber crime, information systems and electronic transactions, Such ills in E-Commerce transactions can hardly be avoided. What is fundamental is to regulate them effectively.

b) Validity of data messages and the issue of electronic signatures

This is also another challenging factor in E-Commerce transactions. Data messages are a form of electronic messages exchanged through E-Commerce. Under the UNCITRAL (United Nations Commission on International Trade Law) Model Laws, a Data message has been defined as *"information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, Telegram, telex or telecopy."*

An obvious characteristic of E-Commerce transactions is that they are carried out at a distance where the supplier and the consumer are not necessarily in the same environment. This thus creates concerns in protection of the rights of those involved in the transactions; elements of trust and confidentiality; as well as speed in effecting such transactions.

All these are concerns that may not necessarily arise with the traditional paper-based contractual arrangements especially pertaining to the validity and enforceability of electronic transactions as well as the traditional rules that go with exchange of paper such as admissibility of documents before a judicial or quasi-judicial tribunal.

As early as 1985, the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations General Assembly called upon all governments to review legal requirements of a hand-written signature or other paper-based requirements for trade related documents so as to permit the use of electronic technologies.

In the same premise, UNCITRAL put together legal rules which were eventually adopted by the General Assembly in December 1996 to serve as a Model law on Electronic Commerce. The 1996 Model law was quite a successful springboard for the

establishment of E-Commerce legislations in a number of Countries¹⁹ and based on its success as well as based on the fact that this did not serve as an International legal instrument, in November 2005, the UNCITRAL Commission came up with the Convention on the Use of Electronic Communications in International Contracts.

On a practical note however, one major concern to do with electronic signatures in developing countries is the authentication of the person signing electronically. Web-click contracts, for instance, are characterized by a simple click of the Computer Mouse on the words "I AGREE/ACCEPT". Some contracting parties, however, would not be convinced that the click is a clear manifestation of acceptance. Furthermore, considering that a signature also serves the purpose of personal authentication of a document²⁰, it can be pondered as to whether web-click contracts have a proper identification mark of the person clicking the acceptance that would then bind him to the contract²¹.

Most developing Countries have been slow in making efforts towards coming up with domestic legislation on E-commerce. Uganda, for instance, is not yet even a signatory to the 2005 Convention. The Electronic Transactions Bill and the Electronic Signatures Bill, as aforementioned, were both based on the Model laws and not on the 2005 Convention. The absence of such laws coupled with the practice of modern technology within today's economy inevitably creates a dilemma. This is mainly felt in the Court room where more and more contractual disputes concern electronic evidence. In **Mansoor Nyera t/a Digital Tec vs Company Profiles Uganda Ltd**,²² the trial Magistrate was faced with deciding between the truthfulness of one witness' word against another where the defendants were not able to produce a computer diskette in Court which contained the relevant electronic evidence to back up their argument. One would assume that this reflects the Ugandan Court's readiness to admit electronic evidence.

More interestingly, in the High Court case of **Frank Katusiime & Rank Consult (U) Ltd v Glacoma Albrieux t/a Euromarkint S.R.L. & Anor**²³, Lady Justice Stella Arach

¹⁹ Singapore was the first country to enact electronic contracting legislation on the basis of the UNCITRAL Model law with the adoption of the Electronic Transactions Act in 1998

²⁰ See *Goodman vs. J. Eban Ltd (1950)* 1 Q.B 550

²¹ H. Nampandu: *Contract Law Aspects of Electronic Commercial Transactions*, pg 68 at p. 71; in The Uganda Living Law Journal (2003) Vol. 1 No., 1, June 2003; Uganda Law Reform Commission publication

²² *Mengo Civil Suit No. 403 of 2004*

²³ H.C.C.S No. 49 of 2002 (Unreported), cited by Justice G.W.M. Kiryabwire in: *The Legal Aspects of Electronic Commercial Transactions and Information Technology: Its relevance in Commercial Transactions in Uganda*; A paper presented at the 2007 Nkumba University Annual Law Conference and Lawyers Day

Amoko using the courts inherent powers under sec. 19 of the Judicature Act (Cap. 13, Laws of Uganda) and Order 5 rule 19 of the Civil Procedure Rules (S.I No. 71-1), allowed an application to serve a hearing notice on the defendants who were based in Italy, by way of Substituted Service and ordered that this, *inter alia*, be done through the known e-mail of the defendants. This service through an email address was breaking ground for e-procedure in the Ugandan Courts.

Next door to Uganda, Tanzania has made headway in addressing the problem. In the case of Trust **Bank Ltd vs Le-Marsh Enterprises Ltd, Joseph Mbui Magari, Lawrence Macharia Commercial Court Case** No.4/2000 (High court of Tanzania), Court ruled that Electronic evidence was admissible as best evidence. The Honourable Judge went on to state that the Court should not be ignorant of modern business methods and shut its eyes to mysteries of the computer (emphasis mine).

The Tanzanian Parliament promptly followed up that ruling by enacting the Electronic Evidence (Amendment) Act, No. 15 of 2007 which made provision for the admissibility of electronic evidence in Courts of law in Tanzania²⁴.

The Ugandan government ought to also ensure that we address this shortfall in the legal system. We not only lack the necessary laws for e-commerce but the Bills in place are based on the model laws and not the 2005 Convention. The UNCITRAL model law, on which the Electronic Signatures Bill is based, for instance, has been criticized because of its nature as simply a *model* which only stands to ensure that electronic commerce is not disadvantaged against manual commerce. It has also been criticized for providing inadequate answers to questions such as conflict resolution (what is the applicable law? Is there an arbitration procedure?); transfer of rights (Are Bills of Lading needed? How can they be electronic? Can there be a paperless Letter of Credit?); defining offer and acceptance where communication is electronic; and in general, the consideration of security, privacy, data protection and intellectual property rights in the context of electronic commerce.

c) Consumer protection

This is by far, electronic commerce's most challenging area. The arrival of modern forms of transacting business which include money transfers through mobile phones,

²⁴ Additional research on this matter obtained with kind permission from P. Arinaitwe: Admissibility of Electronic Evidence in Uganda: Is it authentic? - Unpublished.

transactions over the Internet, etc create the urgency for legal reform. Every commercial transaction has the potential of failing at one stage or another and this poses new risks for consumers. Issues of liability over breaches of contract and other matters often arise and E-Commerce transactions are no exception. In this vein, there are a number of issues worth considering:

Identity

The issue of Consumer protection over E-Commerce transactions raises a number of concerns. Firstly, it is difficult to ascertain the identity of the persons interacting on the

Internet. In the Traditional concept of commercial transactions, the identity of the Supplier is warranted by his physical presence, his local reputation and branding, as well as paper documentation. With more consumers getting accustomed to E-Commerce transactions, the position of identity is promoted by digital signatures.

Need for Information

Secondly, sufficient information is required by a Consumer before he can make an informed decision on a transaction over the Internet. For instance, the EU legislation on E-Commerce²⁵ contracts provides a list of information suppliers must disclose on their websites and on contracting with a consumer at a distance. Uganda should be able to draw pointers from such legislation in coming up with policy guidelines that will help build consumer confidence in transacting on line with a view of creating transparency and coming up with informed decisions as to which products the consumer would wish to buy.

jurisdiction

Thirdly, the issue of legal jurisdiction is also prominent. Which laws are to apply with transactions conducted over the internet where the parties are in different jurisdictions or countries? One logical argument would be for a universal standard of protection that affects all parties regardless of where they are based. However, this may conflict with the supplier's interests where it may be difficult for suppliers to comply with all the Consumer interests regulated by a standard law. This eventually is likely to create a lot of business uncertainty and would best be resolved by a degree of harmonization of consumer protection standards and the use of self-regulatory practices amongst

²⁵ Distance Selling Directive 97/7/EC and the E-Commerce Directive 2000/31/EC)

suppliers.

However and more importantly, the Organization for Economic Co-operation and Development (OECD), in recognizing that business-to-consumer cross-border transactions are subject to existing laws and jurisdictions, came up with *The Guidelines for Consumer Protection in the Context of Electronic Commerce*²⁶. On the basis of these guidelines, Uganda should reflect on the adequacy of its laws in meeting the prevalent challenges in Consumer protection over e-commerce transactions with a view of updating the law where it is found inadequate.

Forum and costs

Another concern is a question of where one goes to for redress in case of a cross-border breach of an e-contract. This is within the same realm with the problem of expenses involved in obtaining redress in a foreign jurisdiction. The consumer seeking such redress may not even have a clue about any existing alternative dispute mechanisms within the foreign jurisdiction which would have otherwise cut down on the expenses involved in exploring cross-border litigation. Parties that engage in on-line or electronic transactions should be encouraged to agree (at the onset of the transaction) on alternative dispute resolution (ADR) mechanisms as well as agree on the venue for such ADRs in the event that there is a breach of contract. This will not only provide a way out and avoid stalemates but will also act as a confidence boost for parties to engage in such e-transactions with the comfort of knowing what to do in case things go wrong.

The Uganda Commercial Court, a division of the High Court, introduced in 2003 as a pilot scheme, a programme on Court annexed Mediation which was run by the Centre for Arbitration and Dispute Resolution (CADER). Save for where cause was shown, it was mandatory to refer Cases filed in the Commercial Court for mediation before CADER out of which over 30% of such cases were successfully settled during the two year period of this programme. CADER's activities stagnated due to a lack of funding. However, plans are presently underway for re-introducing the programme and making it permanent. Mediation would therefore serve well as an online dispute resolution (ODR) mechanism considering that it has been well embraced on the ground. Through online mediation, the warring parties can appoint a neutral third party to interact with

²⁶ See: UNCTAD: Legal Aspects of E-Commerce Manual- *Consumer Protection and E-commerce*, November 2006 at p. 18

them on the Internet and help them solve their dispute.

Online security

Furthermore with regard to Consumer Protection is the issue of online security. This is an area of the law that concerns both the public sector and the private sector. There are a number of key issues for consideration under on-line security²⁷:

- The Security of electronic data and communications, which stretches to the integrity and authenticity of data, the appropriate management of data pertaining to individuals, the need for confidentiality in electronic communications, the availability of information systems and the protection of Intellectual property rights.
- The security of the communications software.
- The availability of mechanisms for the law enforcement bodies and governments to ensure compliance with the law and to ensure the economic, political and social development and stability.
- Existence of appropriate laws, policies and International co-operation and co-ordination frameworks that allow interaction with other countries in a manner that fosters the development of E-commerce at national, regional and international levels.

In the course of e-transactions, persons are bound to exchange sensitive information, especially pertaining to their financial status and account details. The notorious Nigerian 419 scam²⁸ has, for instance, embraced a number of victims world wide through fraudulent email messages. Though there could be a number of Penal Code provisions under which a charge may be leveled against a culprit in such a case, specific legislation is required for the abuse of online communication. As noted herein above, the Uganda Computer Misuse Bill of 2003 will go a great length in meeting such requirements.

Another Bill which is meant to curb threats to on-line security is the proposed Regulation of Interception of Communications Act. Its long title states that it is to "provide for the lawful interception and monitoring of certain communications in the course of their transmission through a telecommunication, postal or any other related service or system in Uganda; to provide for the establishment of a monitoring centre;

²⁷ UNCTAD: Legal Aspects of E-Commerce Manual: Module 8 - *Securing E-Commerce*; p.5

²⁸ This is based on a fraudulent email in which the recipient is tricked into revealing his or her bank account details with the promise of obtaining a large sum of money.

and to provide for any other related matters." This law which is still in draft form has however attracted a lot of criticism from the public as it essentially allows government security agents to gain access to private communications in the guise of addressing security concerns. This Bill is, as such, likely to remain on the drawing board for a while, as the controversies it carries are sorted out.

Consumer protection also carries with it the challenge of unsolicited commercial electronic messages as has already been mentioned above. It has been said that such "*multitudinous electronic mailings demand the disk space and drain the processing power of the (recipient's) computer equipment*"²⁹. The solution to this also lies in legislative measures against unsolicited mail or spam (as it is commonly referred to). It has however been argued that we should not rush to legislate or use court to discourage such tendencies as this would inhibit "free speech" or substantially reduce freedom of communications over the internet³⁰.

A number of Countries have enacted domestic legislations to address this problem guided by the UNCITRAL Model law. Canada, for instance, has the *Personal Information Protection and Electronic Documents Act* and, closer to home, South Africa has the *Electronic Communications and Transactions Act*. Uganda's progress in this field was with the drafting of the Electronic Transactions Bill (mentioned supra). Regardless of whether this Bill meets all the present requirements that fall within this field on e-commerce, it still provides a comfortable basis from which stakeholders can be able to develop a more reliable piece of legislature. The need to balance the rights, obligations and deterrents stipulated in the proposed laws therefore, will go a long way in supporting the effective growth of e-commerce in Uganda.

As we consider protection of various parties involved in electronic transactions, we should not lose out on the general perspective which is, that building fortresses around consumer rights and liabilities should not blind us from the reality that commerce worldwide has progressed to technological levels that are not going to go away. Sensitization of all key players is therefore essential as it will help business persons to understand the new areas of practice involved in Information and Communication Technology. Government organs should also be mindful of and be

²⁹ Holding by Graham, District Judge in *CompuServe, Inc. vs Cyber Promotions, Inc.* United States District Court, Southern District of Ohio, 1997. 962 F. Supp. 1015

³⁰ P. Samuelson: *Unsolicited Communications as Trespass?*; in Communications of the ACM; October 2003/Vol. 46, No. 10 at p. 19

exposed to such technological developments since policy issues arise from such institutions and provide guidance in the drafting of laws to that effect.

As much as the concept of '*Buyer beware*' should not be shelved as a commercial law concept, more work on statute reform is necessary, particularly in trading disciplines associated with the Internet and the protection of market interests. The law should also provide satisfactory provisions on issues of privacy, security, rights and payment across borders.

d) Intellectual Property Rights

The emergence of the Internet has greatly increased the efficient flow of information including the exchange of Intellectual Property Rights related information. However, Uganda is yet to fully implement most of the provisions underlying the International LP treaties to which it is a signatory. In the past few years efforts have been made to put in place an adequate LP enforcement system particularly in the legislative field³¹.

E-Commerce has a strong co-existence with various forms of Intellectual property rights such as Patents, Trademarks and Copyrights. Therefore as the various stakeholders in Uganda continue to work upon reforms in its Intellectual property rights laws particularly to bring them in line with the agreements underlying the World Trade Organization (W.T.O)³², an even more pressing challenge has surfaced with regards to making the new IPR laws consistent with the demands of e-commerce. It is already evident that the '*One size fits all*' belief in Intellectual Property law design can not work effectively in third world countries. Therefore the placement of Intellectual property law principles on a common front for all W.T.O members is itself a long road to take. Nevertheless, there are a few particular challenging areas that are also worthy of mention:

Trademarks vis-d-vis Domain names

A Trademark, simply defined, is a feature used in relation to goods for the purpose of indicating a connection in the course of trade between the goods and a person holding proprietorship over the mark³³. A Trademark is thus an indicator of source that shows

³¹ A new law on Copyrights, to wit., *The Copyright and Neighbouring Rights Act* was enacted in 2006 and a bill has been drafted on Trademarks known as the *Trademarks and Service Marks Bill*. Other Bills on various Intellectual Property Rights have been prepared by the Uganda Law Reform Commission but are yet to go through Parliament approval.

³² Such as the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)

³³ See Sec. 1(1), Trademarks Act, Cap. 217, Laws of Uganda, 2000 Ed.

where the goods come from. The same can be said of Domain names. These are names given to company or personal web sites which point to the site's address on the web³⁴.

Essentially, domain names are also indicators of source. The question thus posed is: *Does a trademark owner have an overriding right to claim a domain name that is identical to the trademark?* Considering that there is only one domain name that is available for a given name or phrase, there are individuals that take advantage of the lacuna in the law by registering and thus, taking ownership of domain names that are considered to be of *value* with a view of selling them to the business that runs such a name and probably has a trademark to it. This is called Cybersquatting.

Cybersquatters have been characterized as "individuals [who] attempt to profit from the Internet by reserving and later reselling or licensing domain names_ back to the companies that spent millions of dollars developing the goodwill of the trademark."³⁵ Cybersquatters all over the world will therefore continue to carry out their activities for as long as it takes due to the absence of any enforcement mechanism to address their practice which is otherwise considered as "blackmail".

Copyright and the digital age

Copyright refers to the protection of the expression of an idea, "its embodiment or fixation in some form"³⁶. Copyright law therefore gives an author or creator of a work a diversified bundle of exclusive rights over his or her work for a limited but rather lengthy period of time.

The Copyright and Neighbouring Rights Act³⁷ is the newest of Ugandan legislations on Intellectual property Rights having been enacted in 2006. It was enacted to bring Uganda's domestic law on Copyright into conformity with the standard requirements of the World Trade Organization. Amongst other works listed, this law provides for the protection of computer programmes and electronic data banks and other accompanying materials³⁸. This is a significant development in Uganda's Intellectual Property law.

³⁴ For example: www.divinegarmets.co.ug.

³⁵ John D. Mercer: *Cybersquatting: Blackmail on the Information Superhighway*; in Boston University Journal of Science and Technology law, June 1, 2000

³⁶ Anthony Murphy: *Queen Anne and Anarchists: Can Copyright survive in the Digital Age?* " Oxford IP Research Centre Seminar, Tuesday 26 February 2002

³⁷ Act No. 19 of 2006

³⁸ Section 5 (1)(e).

However, it is virtually difficult (though not impossible) to protect online content of copyrighted work or worse still, follow up on a breach of copyright over the net. A site user could, for example, post a poem or the lyrics to a song he claims to have authored or written, when this was actually written by someone else who has not authorized the posting and is probably not aware of it.

We should also take note of the fact that there is a vital difference that separates computer programs from all the rest³⁹. While text, sounds, graphics, etc. are generally *passive* in nature, programs by contrast, are essentially *active*. It is therefore debatable as to whether computer programs can be protected under copyright law. For instance, it is argued that some aspects of software cannot be copyrighted such as methods of operation (e.g Menu commands) unless they contain highly individual or artistic elements.

Furthermore, because of the wide exposure and broad distribution of copyrighted works offered by Cyberspace, this has made copyright infringement through the Internet much easier and less costly. Greater computer processing power and storage capacity, as well as the proliferation of file-sharing on peer-to-peer networks, have facilitated the unauthorized use of creative works without the authorization or licensing from the owner⁴⁰. Uganda, like any other country, is therefore faced with an urgent need to formulate a system of laws that define and protect Intellectual property as well as fit within the electronic environment in a manner that promotes e-commerce.

The position of "fair use" of copyright works over the Internet is also hard to exercise. Copyright holders would like to protect and at the same time market their works over the Internet. However, where such works could be easily accessed for educational purposes while in hard copy format, it is difficult for license holders or academicians to access the same over the Internet without computer hackers or misusers taking advantage of the "fair use" principle to also gain access to the copyright works. Finding a middle ground between fostering the protection of the Copyright as well as allowing the license holders and academicians to be the only ones deriving a benefit from such protected work is proving to be a great challenge.

³⁹ Creative Expression: *An Introduction to Copyright and Related Rights for small and medium - sized enterprises*; Intellectual property for Business Series, No. 4, WIPO, at p. 9

⁴⁰ Copyright Issues in Digital Media, August 2004; Chpt One: The Current Copyright Debate

Patents and E-commerce

A Patent is an exclusive right granted by the State for an invention that is new, involves an inventive step and is capable of industrial application⁴¹. The key criteria for awarding a patent are that of novelty, inventive step and industrial application. Ugandan law on Patent protection, to wit., the *Patents Act*⁴², is rather old, having commenced in 1993. It is therefore yet to go through the necessary changes that will make it conform to the requirements of modern technology.

The Ugandan study report on the merging of Patent law with that of Electronic Transactions⁴³ states to the effect that patented information in digital form is much more easily manipulated and adapted than traditional forms of information and the changes are much harder to detect.

Interestingly however, it is also argued that patenting of software is a slow poison that would essentially destroy e-commerce business ventures⁴⁴. It is stated, in this regard, that the grant of a patent confers great value on the business that has developed the idea, thus creating incentives for E-Commerce-related innovation and attracting financial investments. In a broad perspective, a patent in Cyberspace could monopolize virtually all forms of electronic transactions which are related to the transfer of digital information. This would eventually present a barrier to the growth of E-Commerce. The creation of such monopolies would thus prevent potential competitors from coming on board as well as hamper the consumer base hence repulsing people from exploiting the E-Commerce market.

It is therefore more convenient for the potential Patent holders relying on cyberspace to choose business methods in line with efficacy, compatibility and attractiveness, rather than basing on the traditional patent characteristics that attract monopolization on a wide forum such as Cyberspace.

Recommendations and issues to ponder:

- 1) ICT development in Uganda is advancing at a favourably good pace though the laws are yet to follow suit. As the East African Community works on forging greater ties In International Trade, considerations have to be placed on how the

⁴¹ *Inventing the Future: An Introduction to Patents for small and medium-sized enterprises*; Intellectual property for Business Series, No. 3, WIPO, at p. 3

⁴² Cap. 216, Laws of Uganda, 2000 Ed.

⁴³ Note 5 supra at p. 85

⁴⁴ UNCTAD: Train for Trade - ICT & E-Business; Legal Aspects of E-commerce Manual; Module 4 - Intellectual Property Considerations in E-Commerce, Nov. 2006 at p. 26

member states can improve on their domestic commercial transactions within the environ of ecommerce.

- 2) Basing on the fact that Uganda is mainly an Agro-based economy with such resources coming from the rural areas, there is a need to find a way of addressing the concerns of the rural based contributors to Economic growth in the region, particularly with the emergence of electronic means of transacting business internationally. For instance, the Uganda Government's establishment and support of Computer training programmes in rural primary and secondary schools with a view of boosting computer literacy and Internet connection in rural areas is an encouraging initiative.
- 3) Developed Countries have made great strides in the development of e-commerce policies. For Uganda, as a developing economy and a market target, there is a need for harmony with other countries in terms of market practises and regulations pertaining to such practises.

Conclusion

Business and consumer transactions require trust, expedience, security and privacy. Electronic Commerce conveniently offers all these and yet at the same time, takes them all away through computer misuse by individuals or corporations. Much as the information highway is progressing at a fast pace through technology, the challenge is upon the Government of Uganda to come up with policies that address technological developments leaving an open door to the ever changing innovations in E-commerce. Matters such as on-line communication; On-line dispute resolutions, privacy and data protection, as well as efficient enforcement mechanisms would help create a sound e-commerce base in Uganda and thus attract foreign businesses to this jurisdiction. Government agencies also need to work hand in hand with the private sector in forging ways forward that can help both parties tackle the emerging challenges in doing business and investing in the country. International Coordination and cooperation is also imperative in ensuring a successful establishment of an E-commerce legal regime in Uganda.

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