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THE LEGAL FRAMEWORK FOR ELECTRONIC CONTRACTS IN ETHIOPIA WITH SPECIAL EMPHASIS ON GENERAL CONTRACT LAW

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Declaration

I, the undersigned, declare that the thesis is my original work and has not been presented for a degree in any other university and that all sources of material used in the thesis have been dully acknowledged.

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Acronyms and abbreviations

CAs- Certification Authorities

Civil Code or Code or C.C.- Civil Code of the Empire of Ethiopia, 1960, Proclamation No. 165,
Negarit Gazeta, 9th year, No.2

Commission- European Commission

E-business- electronic business

ECD-Electronic Commerce Directive European commission 2000/31/EC

EC-European Commission

E-commerce- electronic commerce

E-communication/s- electronic communication/s

E-contract/s- electronic contract/s

E-contracting- electronic contracting

E-documents- electronic documents

E-Mail- electronic mail

E-notice- electronic notice

E-record/s- electronic record/s

E-Sign of US- Electronic Signatures in Global and National Commerce Act 2000 of US

E-signature/s- electronic signature/s

GUIDEC- General Usage for Internationally Digitally Ensured Commerce

ICC-International Chamber of Commerce

ICT- Information Communication Technologies

ISPs- Internet Service Providers

IT- Information Technologies

MLESig- UNCITRAL Model Law on Electronic Signatures of 2001

OECD- Organization for Economic Cooperation and Development

PECD- The European Commission Directive on Personal Data Protection (Directive 95/46/EC)

TTPs- Trusted Third Parties

UCITA- Uniform Computer Information Transactions Act of

UETA- Uniform Electronic Transactions Act 1999 of US

UK- United Kingdom

UN Convention (Convention)- United Nations Convention on the Use of Electronic Communications in International Contracts of 2007

UN- United Nations

UN/CEFACT- United Nations Centre for Trade Facilitation and Electronic Business

UNCITRAL E-commerce Model Law or Model Law- UNCITRAL Model Law on Electronic Commerce 1996

UNCITRAL- United Nations Commission for International Trade Law

US- United States

Abstract

Contracts are obviously the heart of any transaction. The way contracts are concluded and executed is affected by the societal level of industrial and technological developments. Modern electronic communications, especially Internet, are widely employed at any contract phase. But contract laws were legislated at the time when Internet communications were unknown. As a result, conventional contract laws exhibit legal gap to regulate modern electronic contracts. In the same fashion, the Ethiopian Civil Code isn't comprehensive enough to accommodate electronic contracts. Electronic contracts produce strange practices to the Civil Code on Contracts in General. Due to that, the validity of electronic contracts is still in question under the Code. Features of electronic contracts like consummation of consent, usage of automated agents, attribution of communications, input errors, time of contract completion, formality requirements, variation and notice delivery, privity of contract principle, admissibility and parole evidence rule of electronic records, aren't addressed by the Code.

Laws necessary to accompany wide usage of electronic contracts are not compatible with electronic communications in our country. Electronic contracts seek secure communication on the Internet highway but laws ensuring security of network communications are inadequate. Laws on consumer protection don't protect consumers of electronic contracting. Internet Service Providers are the gateways of electronic contracting, but their civil liability to users of their functions is still not updated. Electronic contracting makes the privacy of contracting parties unguaranteed. The existing privacy protection laws don't consider new privacy violation mechanisms over Internet communications. With this in mind, this work is meant to make a humble attempt at showing the legal gaps in the area and coming up with some points of recommendation for policy and law reform.

Introduction

Commercial transactions are facilitated mainly by the use of contracts. Generally contracts play an important economic role in any society. Perceiving the significant economic role of contracts, states at different times enact their respective contract laws. Our country does not isolate itself from the practice of enacting laws facilitating commerce. To back promises by legal sanctions, Ethiopia coded its general contract law within the Civil Code under title XII on Contracts in General. However, contracts are gradually influenced by the evolutionary development of communication technologies. Contemporarily communication technologies are employed as instruments in a contract process. Technologies offer new opportunities at every phase in modern contracts. As result of using electronic communication technologies, such contracts are label as electronic contracts. They are an instrument to electronic trading relationships between/among parties. At this time conventional contract laws are faced with new challenges. Electronic contracts can't be fully regulated by laws which were designed at the time when the Internet wasn't operational. Pressing by those new challenges, some international organizations and most countries opt for legislative steps. Unfortunately this is not the case in Ethiopia. In addition to that, electronic contracts in Ethiopia are impeded by laws which underpin wide usage of electronic contracts. With this in mind, this study will deal with the Legal Framework for Electronic Contracts in Ethiopia with Special Emphasis on General Contract Law. To examine the issues underlined under this study, it is allocated in to five chapters.

The first chapter is about proposal of the paper. Under this chapter, background of the problem and statement of the problem are detailed. It also covers scope, objectives, significance, research design and methodology, limitation and organization of the study. Chapter two will deal with general notion of electronic contracts. Under this chapter definition of electronic contracts, importance of electronic contracts, the need for legislative reconsideration of the existing laws and legislative developments in the area of electronic contracts will be discussed.

Chapter three is the main work of this study. The compatibility of the Ethiopian Civil Code on general contracts with electronic contracts is examined in detail. The status of validity of electronic contracts under the Code will be elucidated under this chapter. The compatibility of the new features of electronically declared consent such as consummation of consent, usage of automated agents, anonymity of electronic communications and input errors to the Code will be covered. Time of electronic contract formation is also another focus area. Formality requirements in the case of electronic contracts formation are subject of examination under this chapter. The soundness of loosening the privity of contract principle for network connected contracts will be deal in detail. Variation and notification of electronic contracts is another focus topic of this chapter. Finally, this chapter will discuss evidentiary value of electronic documents. Every discussion will be corroborated by sample legislative experience mainly from international organizations and some selected countries in the area of e-contracts. In each topic, interim recommendations will be proposed to our Civil Code.

The fourth chapter is devoted to explore the supporting laws in need of modification with the assumption of boosting electronic contracts. Security measures in electronic contracts are the first topic of this chapter. The position of Ethiopian Trade Practice and Consumers' Protection Proclamation No. 685/2010 on consumer electronic contracts will be deal under this chapter. This chapter also deals with the legal atmosphere of ISPs' civil liability in Ethiopia. This chapter finally examines the tactics of privacy violation and their effect on e-contracts in electronic communications, and the legal readiness in Ethiopia. Every discussion and recommendation under this chapter is also feed from foreign experiences.

Chapter five which is the final chapter of my study deals with conclusion and recommendations.

Chapter One
Proposal of the Paper

1.1. Background of the Problem

Our modern society relies on an economic system that is mainly based on the mechanism of contracts. Right now industrial and service society is changing to an even more modern information society.[1] Contemporary contract formation and execution coincidentally configured with those modern methods of information communication systems. Holistic features of those communication methods exert influence on the contract process. But on the other hand a legal system that was generated decades ago does not have the necessary basis to include modern ways of communication.[2] For example, conventional contract laws demonstrate an empirical legal lacuna to rule electronic contracts (hereinafter referred as e-contract/s or alternatively as online contract/s or Internet contract/s). Likewise, the Ethiopian Civil Code on Contracts in General (hereinafter referred to as Civil Code or Code or C.C.) lacks the competence to rule electronic contracts. Electronic contracts are also challenged by nonexistence or inadequacy of supporting laws such as laws ensuring security in electronic communications, consumer protection laws, laws regulating civil liability of Internet Service Providers (hereinafter referred as ISPs) and laws for protection of privacy in electronic communications. Noticing the fragility of conventional contract laws and other supporting laws to modern electronic contracting, international organizations and other countries opted for legislative reaction.

From the outset, contracts are concluded with prime anticipation of judicial enforcement when either of the parties is in default. Normally judicial enforcement is a derivative of

[1] Msc. Edlira Kalemi and Msc. Dorina Ndreka, <<The Impact of Information Technology in Electronic Contracting>>, Academic Journal of Interdisciplinary Studies, Vol 1,(2012), available at http://www.mcser.org/images/stories/AJIS-Journal/AJIS-Journa-Vol2-Nov2012/AJIS%20Journal_225%20Edlira%20Kalemi.pdf [accessed on 06/11/2012]
[2] Ibid.

legal recognition of actions. However, the phenomenal growth of electronic commerce (hereinafter referred as e-commerce or alternatively as Internet commerce or electronic business (e-business)) has raised significant concerns about the certainty of conducting business over Internet. Agreements concluded by electronic communications (hereinafter referred as e-communications or alternatively as Internet communications) create allusion on their legal validity and enforceability by conventional contract laws.[3] Uncertainties on legal enforceability of electronic contracts result from mismatch of the complexities surrounding them with conventional contract laws. That is why, e-commerce host countries as the foundation of their legislative reform, underscore clear legislative recognition by validating electronic contracts embodied in data messages. They don't only validate data messages, but also they substantiate it by comprehensive medication of their laws in light of e-contracts. Unfortunately, our Civil Code isn't still updated to uproot the uncertainties on validity of e-contracts.

The adoption of paperless electronic communications has raised new problems that include the use of non-traditional means to express offer and acceptance and the use of computers as intermediaries.[4] As a result, consummation of consent is very complex in e-contracts. The stage where parties concretely reach an agreement is indeterminable. Parties may enter in to contracts without having an intention to establish legal actions. Automated agents replace human will which is the fundamental element of consent. Parties establish the contract though they didn't have absolute certainty about identity of the person with whom they are contracting because of the non-face-to-face nature of the online communication. Electronic (input) errors couldn't be repudiated by availing principles of mistake ruled under the traditional contract laws. Furthermore, consent is complicated by the process of articulating contract terms. Definite determination of contract terms over internet communication is not as relatively simple as in face-to-face negotiations. Especially incorporation of terms caused controversy in web based

[3] United Nations (UN), Information and Communication Technology Policy and Legal Issues for Central Asia, Guide for ICT Policymakers, (2007), p12. available at http://www.unece.org/fileadmin/DAM/ceci/publications/ict.pdf [accessed on 21/01/2012]

[4] Lai Xu and Paul de Vrieze, E-contracting Challenges, available at http://www.adaptivity.nl/articles/E-contracting.pdf [accessed on o4/04/2012]

communications of contracting. The provisions under Contracts in General of our Code don't have a full-fledged response to the above articulated problems.

The usage of e-communications breeds complexity on the ascertainment of the precise time of contract formation. As per Art.1692 (1) of the Ethiopian Civil Code, contracts made between absent parties shall be deemed to be made at the time when acceptance was sent to the offeror. E-contracts are typical example of contracts between parties in absentia. According to this provision, the contract commences from the time of sending acceptance. It was designed based on the principle of Postal Acceptance Rule. But, currently it has limited application to all electronic contracting. Electronic mails (e-mails) and web-click-on agreements are the two types of electronic contracting (hereinafter can be referred as e-contracting). The above provision of the code is inapplicable to the latter method of e-contracting. This brings legal loophole under the Code. Furthermore, the conditions constitute sending and receipt in the digital world, aren't equivalent to the concept assumed by the Code.

Though form is an exception, if either statutorily provided or proposed by one of the parties, is anther challenge of e-contracts. Equivalency of electronic documents (hereinafter referred as e-document/s or alternatively as electronic records (e-records)) to paper documents is problematic due to the intangible nature of the former. Unlike paper documents, e-documents can be unnoticeably modified. Another formality issue is how electronic records are signed? What type of signature is acceptable? The signature issue of e-contracts is unanswered by old contract laws. E-documents and electronic signatures (hereinafter referred as e-signature/s) can not be solved by conventional contract of writing and signature. Thus, prompt legislative encounter to determine the status of e-documents and e-signatures is one pre-requisite of e-contracts.

Another associated problem in regard to form of e-contracts is notarization of e-documents by public authorities. Is it possible to establish a contract by e-communications when notarization is a vital formality requirement? The notarization requirement or other public policy ground is invoked to exclude some types of contracts

from being concluded by electronic communications by foreign e-commerce regimes. They stipulate either an exhaustive list or mechanisms of exclusion. Yet our Civil Code isn't updated to provide any guidance on how and what types of contracts are to be excluded from the ambit of electronic contracting.

In an e-contract, two types of actors can be defined, i.e., parties and mediators. Parties are actors that have listed rights and obligations within the contract. Mediators are actors that facilitate in the e-contract formation or enactment but their rights/obligations are not stated within the contract. Especially the fusion of contracting parties and mediators is noticed among Network contracts. Contemporarily network is conceived as web of connected contracts. Formation of one contract reasonably expects the existence of another contract over the web. The question that demands answer is; how are non-contracting parties bound by the contract or become part of the contract within the Network? How can the private law respond to such network connected contracts? This poses a dilemma on the compatibility of privity of contract principle to network contracts. The privity principle is firmly stipulated as per Art.1731 of the Ethiopian Civil Code, but its pragmatism to modern network connected contracts is questionable.

Confusion is also prevalent in the use of e-communications for contract variation and notice delivery. Can a notice be effectively given by electronic communications? Art.1773 (1) of the Code stipulates that; notice can be written or any other act denoting the creditor's intention to obtain performance of the contract. Especially the phrase, <<denoting creditor's intention to obtain performance>>, apparently favors the creditor because it permits to employ any means of notification. Rationally the means employed to notify must consider the opportunity of accessibility of the information (notice) by the debtor. The possibility of accessibility makes the feasibility of electronic notices (hereinafter referred as e-notice/s) in question for any contract. The debtor may defend that he hadn't accessed it. Does such defense efficiently work for electronic contracts? Our Civil Code is little help to this question. The same problem is happened on effectiveness of e-communications for variation of contracts particularly the accessibility of unilateral proposal to vary the contract. Electronic variation of contracts becomes

critical when silence amounts to acceptance in preexisting business relation as per Art.1684 of the Code.

Judicial enforcement in case of default seeds confidence on the parties who prospect to establish any contract. The success of a given litigation depends on the judicial weight given to the adduced evidence. However, e-documents bring controversy on the conditions of their admissibility and Parole Evidence Rule. The assessment of evidential weight given to electronic documents doesn't follow the same procedure as corresponding paper documents. Most e-commerce regimes prescribe new procedures of admissibility in regard to electronic documents. Our Civil Code is almost little help on the procedures of admissibility for e-documents though it prescribes the conditions of admissibility of written evidence as per Arts.2005 and the subsequent provisions. Adducing of original documents for contract actions during court litigation is the principle of Parole Evidence Rule. When a special document is stipulated, the original document must be adduced. In the absence of original documents an authenticated copy is warranted provided that certain conditions are fulfilled. Contrary reading of Arts.2011/14 of the Civil Code, impliedly confirm the Parole Evidence Rule. Both the two articles privileged original documents. The question that follows from this principle is how electronic documents comply with the originality requirement of Parole Evidence Rule? The same is confusion is buried under our Civil Code. Foreign jurisdictions contemplate the way originality is ascertained in e-documents in their respective e-commerce regimes.

Full operation of contract law is inconceivable without the support of other laws. Therefore, the remolding of conventional contract laws in congruence with modern e-contracts must be nurtured by the parallel modification of supporting laws. Internet communication is mainly frustrated from illegitimate interception. Authentication i.e. identity of communicator, confidentiality and integrity of Internet communications are compromised unless backed by security measures. Without any trust of the economic community in electronic contracts the new economy will not be able to unfold its full potential and the benefit for our society will stay behind the possibilities the new

technology is able to offer.[5] With a view of relieving security problems, e-contracts may be accompanied by electronic signatures. But all e-signatures couldn't certify security of communications. Digital signatures are proved the most security ensuring e-signatures yet their utilization need comprehensive policy and legal framework. The Information Network Security Agency Establishment Council of Ministers Regulation No.130/2006 is a good step forward to go parallel with emerging Internet security threats in Ethiopia. But mass customization of e-contracts couldn't realize unless Internet security is backed by licensed Certification Authorities (hereinafter referred as CAs) also called Trusted Third Party (hereinafter referred as TTP). Citification Authorities ensure secure Internet communications between parties by enabling transportation of encrypted messages and enabling the receiver to decrypt it on public communication networks by issuing digital signatures. Then laws on Internet security ensure the full operation of e-contracting. In our country we have no such CAs due to lack of legal and institutional organization that license them.

Creation of consumer confidence on e-contracts is another challenging issue. The unfitness of general contract laws to regulate consumer contracts pressured governments to enact special laws on consumer protection. The same hardship is happened by the introduction of e-contracts. The revisiting of conventional contracts laws in light of e-contracts must be supplemented by revisiting consumer protection laws since consumers' contract share significant part in a given market. Consumers of online contracts threaten by adverse issues which conventional consumer protection laws are unable to address. Compared to physical contracts, consumers of e-contracts are extended with a specification of information communicated during e-contracting and a specification of the activities required for its communication.[6] The Ethiopian Trade Practice and Consumers' Protection Proclamation No. 685/2010 doesn't fully protect consumers of online contracts. Whereas, foreign consumer protection jurisdictions reframe their consumer

[5] Regina Connolly, and Frank Bannister, <<*Consumer Trust in Electronic Commerce: Social & Technical Antecedents*>>, International Journal of Social and Human Sciences ,(2007), p.261. available a https://www.waset.org/journals/ijshs/v1/v1-49.pdf [accessed on 08/04/2012]

[6] Shmuel I. Becher and Tal Z. Zarsky, E-contract doctrine : Standard form contracting in the age of online user participation, (5/9/2008), p.360, available at http://www.mttlr.org/volfourteen/becher/zarsky.pdf [accessed on 13/01/2012]

protection mechanism in a way that include consumer contracts done over Internet communications.

Internet Service Providers play an important role in boosting e-contracts by providing gateway for contracting parties and digital goods. They are a channel of communication between/among parties. Even the definition of e-contract is a summation of contract concept and the role of ISPs. E-contracting is impossible without their existence. They are instrumental elements of e-contracts. Though they are decisive element of e-contracts, the civil liability for the damage they are held liable must be regulated without prejudice to criminal liability. Regulation of their liability is a sanctuary for e-contracts. However, designing their liability is a multifaceted policy agenda. The liability regulation of ISPs considers commercial value of the intermediaries on one hand and interest of victims on the other hand. For the stated reason, tort based liability is irreconcilable for the two interests because of its broad liability. Broad liability aggressively retards commercial value of ISPs. In order to reconcile the two interests, foreign Information Technology (hereinafter referred as IT) or e-commerce regimes frame their system of liability restrictively. But in our country, the only redress for the victim is available within the Civil Code under Extra-Contractual Liability. Our Telecommunications concern laws don't have any guidance on the civil liability of ISPs. Thus, we have no updated laws on civil liability of ISPs as most e-commerce jurisdictions done.

Communication over Internet brings novel activities of speculators through violating privacy of users. Inherently communication in e-contracts involves an exchange of information which some of them are personally important. To have functional equivalence of writing, originality and evidential weight in e-contracts, e-documents must remain accessible and reproducible to the parties. Both of them are possessed personal information of each other which may be abused at any time. Communication over Internet facilitates an easy collection and distribution of personal information. Privacy encroaching activities are implemented by using modern technologies. Collection of users' e-mail and other personal information becomes source of lucrative market by selling to marketers who are in search of customers for their products and services. There

are also other activities, which violate privacy of users, in the name of market over Internet. Regulation of such types of marketing should balance the interest of marketers and privacy infringement of victims. In our country, those privacy violations aren't governed by the existing laws on privacy protection. Foreign jurisdictions try to balance the two contesting interests by enacting laws on processing of personal data. Juridical persons become victims of such privacy violations because they don't benefit from the existing privacy protection laws. The conventional privacy protection laws endowed the right only to natural persons. Some foreign jurisdictions, typical example United Kingdom (UK), currently extend their privacy protection laws on personal data processing to juridical persons. Our privacy protection laws aren't corrected to consider those emerging privacy infringements of online communications.

To sum up, e-contracts are alternatives to the old methods of communication and storage of information in contracts. Contemporarily, their popularity is in a continual progress. But it is important to realize that the concept of e-contract has only a partial consonance with the concept of traditional contracts. If they are left unregulated, Internet transaction which becomes one of the engines in modern economy will be obviously retard. The deregulation at their embryonic stage can yield proliferated litigations and negatively affects e-commerce. The remolding of contracts laws in light of e-contracts must be also enriched by amendment of other laws. All the above articulated issues induced me to examine The Legal Framework for Electronic Contracts in Ethiopia with Special Emphasis on General Contract Law and to recommend solutions for the discovered legal lacunas.

1.2. Statement of the Problem

This study endeavors to solve the following questions:

- Do an introduction of electronic contracts demand reshuffling of the conventional contract laws and other laws?

- Does our general contract law ensure that electronically formed contracts are valid and enforceable?
- For consent expressed by electronic contracting, legal practitioners are frequently faced with the following questions: how is consent consummated? How are contract terms incorporated within the agreement? What is the value of consent declared through automated agents? How is a given message attributed to the purported originator? How can be input (electronic) errors repudiated? Therefore, does the current our contract law have a ready made solution to the above mentioned questions?
- How may be the time of contract formation definitely determined for contracts concluded over Internet communications?
- When written form is a precondition for the contract formation, how can be that formality requirement fulfilled in e-contracts? How is signature affixed in electronic contracts? How are electronic contracts notarized if notarization is a prerequisite for the formation of the contract?
- Is it possible to conclude any contract by electronic contracting?
- Does the network as connected contracts induce to revisit the conventional privity of contract of principle?
- How can be variation and notice accommodated in e-contracts?
- How can be electronic documents gain evidential weight in court litigation? Is the Parole Evidence Rule requirement compatible to electronic documents?
- Do the current laws of our country on Internet communications ensure secure e-communication?
- Does our law on consumer protection comprehensively protect consumers of electronic contracts?
- How is civil liability of Internet Service Providers regulated and framed?
- Do the current privacy protection laws of Ethiopia fit enough to apprehend privacy violation mechanisms over Internet communications in a multifaceted modern e-commerce?
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1.3. Scope of the Study

This study targets on e-contracts concluded over Internet communications. The main focus of this study revolves on the tile, The Legal Framework for Electronic Contracts in Ethiopia with Special Emphasis on General Contract Law. Its special emphasis is e-contracts in light of the Ethiopian Civil Code on the title Contracts in General. It examines the pragmatism of our general contract law to electronic contracts. It proposes interim solutions under each topic/issue to the Civil Code that can overcome the pitfalls of the general contract law in regulating e-contracts until general recommendations is portrayed in the final chapter. This study also explores security measures in e-contracts, protection of online consumer contracts, laws on civil liability of Internet Service Providers and finally privacy of communications in e-contracts that need side-by-side reconsideration in light of electronic contracts.

1.4. Objectives of the Study

Contracts are the heart of any transaction. Contracting aspects are stepping parallel to the progress of technology. Technology currently changes the way contracts are formed and executed. Yet laws aren't on equal step to technology. Therefore, analyzing electronic contracts in light of the Ethiopian general contract law is the main objective of this study. It inquires how formation and performance of e-contracts need due reconsideration of general contract provisions of our Civil Code. Furthermore, this study gives significant consideration to the reshuffling of other legislations which underpin the full operation of e-contracts in Ethiopia.

1.5. Significance of the Study

This study will endeavor to relieve the pitfalls of our general contract law and other laws in the area of electronic contracts. It elucidates ideas on the incompatibility of our contract law to e-contracts and hence recommends solutions to uproot the legal lacunas. This study mayn't be comprehensive enough to relieve the whole problems associated

with e-contracts. Thus, it paves a new door for further research in the country on those technologically aided e-contracts.

1.6. Research Design and Methodology

This research method will make use of both primary and secondary sources. The primary sources of this study include both domestic and foreign laws. The main primary domestic sources within this study include the Ethiopian Civil Code on general contract law and other laws. Secondary sources include books, journals, unpublished materials, reports and cyber sources.

1.7. Limitation of the Study

As a fresh study in the country, the primary constraint of this research is resources. Unlike the abundant wealth of foreign researches and literatures, the availability in our country is very scarce. The academic pursuit for electronic contracts is at an infant stage. In our country, both researches and literatures in the area of electronic contracts can't symmetrically counter to the foreign researches and literatures. Thus, this study will primarily suffer from domestic research and literature resources constraint. Cases and their judicial opinions play an appreciable role in legal research. But in our country cases aren't satisfactorily available in the area of e-contracts. Case scarcity is the second domestic constraint of this study.

1.8. Organization of the Study

This study is allocated in to five chapters. Chapter one is about proposal of the paper. Chapter two provides general notion to e-contracts. It includes definition, importance, the need for revisiting of laws, and the legislative progresses in the area of e-contracts. Chapter three is the main work of this study. It compares e-contract in light of the Ethiopian general contract law. The main topics are validity, formation, excluded transactions, privity of contract principle, electronic variation and notice delivery and the

evidentiary value of e-contracts. Chapter four is committed to discuss other legislations that can stimulate electronic contracts. Issues of security in e-contracts, consumer protection in the case of e-contracts, liability of Internet Service Providers and privacy of communications in e-contracting are discussed. Finally, chapter five is dedicated to conclusion and recommendations.

Chapter Two

General Notion to Electronic Contracts

2.1. Introduction

A contract is a product of judicially enforceable exchanged promises. Judicial enforceability is the immediate result of the legality of a contract. Electronic contract is a contract of enforceable promises formed or executed by electronic communications. E-contracts offer new opportunities to contracting parties and businesses. They offer comparative advantages of short-time contract formation, manageable contract and easily accessible customers.

Formation and execution of contracts by electronic communications yields unaccustomed practices to the conventional contract laws. Declaration of consent, time of contract formation, formality requirement, variation of contracts, delivery of notice, effect of electronic contracts, admissibility of electronic records and the principle of Parole Evidence Rule produce practices that can't be assumed by the existing our contract law. The introduction of e-contracts is not only hampered by inadequacy of the old contract laws, but also hindered by incompatibility of other laws. Laws such as on security of Internet communication, consumer protection, regulation of Internet Service Providers' liability and privacy protection laws demonstrate deficiency. Those new means of contract formation and execution are justified grounds for reshuffling conventional contract laws and other supportive laws. Worried by those new methods of e-contracts, both international organizations and countries intensify legislative steps to reshape laws with anticipation of accommodating the emerging contracting process. This chapter elucidates the above introduced issues.

2.2. Definition of Electronic *Contracts*

Definition of general contracts is a material input for articulating e-contracts. A contract involves an exchange of judicially enforceable promises.[7] Legality of the contract is a precondition for judicial enforcement. Alternatively it can also be defined as a promise or set of promises which the law will enforce or an agreement giving rise to obligations which are enforced or recognized by law. The expression contract may be used to describe any or all of the following; a series of promises or acts themselves constituting the contract, the document(s) constituting or evidencing that series of promises or acts or their performance and the legal relations resulting from that series.[8]

The way they are communicated for either formation or performance produces change in the definition of e-contracts. The communication employed is also used in labeling them as e-contracts. Therefore, e-contracts can be described as contracts that have been formed or executed through the use of electronic communications over the Internet. Quite in a similar way the Electronic Commerce Act 2002 of England defines it, as a contract concluded wholly or partly by electronic communications or wholly or partly in an electronic form.[9] The act also as per Art.2 defines e-communications as means information is generated, communicated, processed, sent, received, recorded, stored or displayed by electronic means. Generally an e-contract is a contractual agreement represented as digital information and is the process of formatting and negotiating of contracts electronically, and also the monitoring of the contract performance over networks.[10]

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[7] Jeffrey Pittman, Cyberlaw & E-Commerce, (2005), available at http://myweb.astate.edu/pittman/, [Accessed on 12/08/2012]

[8] E- business and matters arising from some Commercial Law perspectives, p.3, available at http: http://www.babalakinandco.com/documents/e-business_and_mattersarising.pdf [accessed on 09/05/2012]

[9] Electronic Commerce Act of England, 2000, Art.2 (1), No.27.available at, http://www.irishstatutebook.ie/pdf/2000/en.act.2000.0027.pdf [accessed on 07/07/2012]

[10] Lai Xu and Paul de Vrieze, E-contracting Challenges**,** available at http://www.adaptivity.nl/articles/E-contracting.pdf [accessed on 04/04/2012]

E-contracts are an inseparable part of the forward march of electronic commerce.[11] Most e-commerce, like most commerce generally, involves the creation of contracts. Perhaps for this reason, many of the most significant developments in the law governing electronic commerce have concerned contract formation.[12] Thus, the definition of e-contract as it is the central manipulator of e-commerce can also be enriched from the definition of e-commerce. E-commerce is the use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals through a computer-mediated network.[13] It pertains to any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact.[14] From this definition, electronic contract is a contract mediated by electronic networks with parties in absentia. It is the computerized facilitation or automation of a contract.[15] In general, e-contracting is computer (usually Internet-based) aided with contractual aspects at any stage of the contract.[16] To sum up, definitions of e-contracting can be generally based on the use of Information Communication Technologies (hereinafter referred as ICT) for the contract representation and for the support of the contracting process over the Internet. New opportunities for companies in the contracting domain as a result of e-contract can be related to one (or more) of the three contract business processes, i.e. contract establishment, contract enactment and contract management.[17]

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[11] Julian Epstein, <<cleaning up a mess on the Web: a comparison of Federal and State Digital Signature Laws>>,
Legislation and Public Policy, vol. 5:491, (2002), p.493, available at https://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__journal_of_legislation_and_publ
ic_policy/documents/documents/ecm_pro_060660.pdf , [accessed on 12/10/2012}

[12] Gregory E. Maggs, <<*Regulating Electronic Commerce*>>, The American Journal of Comparative Law, Vol.50, p.670 , available at .http://www.jstor.org/page/info/about/policies/terms.jsp [accessed on 19/09/2012]

[13] Zorayda Ruth Andam, E-commerce and E-business, (May 2003), p.6, available at http://fcitr.kau.adu.sa pdf [accessed on 07/01/2012]

[14] Ibid

[15] S.C. Cheung et.al, A Three-Layer Framework for Cross-Organizational E-contract Enactment, available at http://citeseerx.ist.psu.edu pdf [accessed on 07/06/2012]

[16] Mark Reynolds, The Logic of E-contracting, available at http://130.203.133.150 [accessed on 10/09/2012]

[17] S. Angelov, P. Grefen, An Analysis of the B2B E-Contracting Domain Paradigms and Required Technology (30/10/2003), p.17, available at https://doc.novay.nl/dsweb/Get/Document-34933/ParadigmsTelin-TR.pdf [accessed on 21/02/212]

There are two main methods of e-contracting, each with their respective characteristics and each requiring to be treated separately. Most people are familiar with the first, i.e., electronic mail (hereinafter referred as e-mail/s). E-mail[18] is the digital equivalent of a letter. You type it out, sometimes attach things to it, address it and then send it to your desired recipient. The sender puts it in his outbox, the digital equivalent of a postbox, and this is then collected by his mail server, who forwards it to the recipient's mail server, who then deliver it to the recipient 's inbox, which may be seen as the equivalent of his letter-box. This process, although usually very quick, is not instantaneous. Just as in actual reality letters can be delayed or even lost in the post.[19] The second method of contracting is perhaps less familiar. This is the web-click-on method of contracting used on the World Wide Web. These contracts are formed using the link between server and client machines which is in place during data exchanges on the Web. The usual format of such a contract is that the webpage operator places an advert on its page called a web advertisement, offering a product or service for sale. On this webpage will be a hypertext order form which the customer will fill out. At the end of this form will be a button saying 'submit' or 'I Accept', or something similar. When the customer clicks this button, they submit their order to the Website operator. Like communications between a customer and a cashier in a shop, communications across the Web are instantaneous.[20]

[18] Article 2 of the E-Privacy Directive defined it as 'any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient. This entails that e-mail (understood as the SMTP-protocol) is included, no matter whether it is client-based or web-based (as eg Hotmail, Yahoo! Mail, and Gmail). However, it is of great importance whether the last part of the definition ('is collected by the recipient') is a requirement and should be understood in terms of »downloading« the messages. Even though this is not settled yet, it seems reasonable to expect that it is not a requirement that the electronic mail system should necessarily offer a way to download the mail, but rather provide an opportunity to read (collect). In that case other more proprietary electronic mail systems, such as those found in popular social media, must also be included in the definition and thus the scope of article 13. Jan Trzaskowski, <<*User-generated marketing – legal implications when word-of-mouth goes viral*,>> International Journal of Law and Information Technology,Vol.19, (2011), p.358-9, available at http://ijlit.oxfordjournals.org [accessed on 21/05/2012]

[19] Andrew D Murray, Entering into Contracts Electronically: The Real W.W.W, available at http://www.leginetcy.com/articles/Entering%20Into%20Contracts%20Electronically.pdf [accessed on 24/08/2012]

[20] Ibid

2.3. Importance of Electronic Contracts

The integration of Information and Communications Technology in business has revolutionized relationships within organizations and those between and among organizations and individuals.[21] The Internet is the world's fastest growing commercial market place. Estimates of its growth show unprecedented development.[22] Its introduction has radically transformed the way in which business is carried out. Traditional business retailing which requires shop space and sales staff is being supplanted by the website on the Internet. Purchases can be made in the comfort of homes and be delivered without the need to travel.[23] It makes goods and services available to consumers all over the world irrespective of distance. With the effect that today's consumers or businesses are able to have access to goods and services in the remotest parts of the world without having to see the sellers.[24] It has the ability to create a global digital economy.[25] Along the side of Internet commerce, contracts facilitate the market linkage of digital economy.

The involvement of IT in the contracting process is the obvious approach to deal with the outlined problems in traditional paper contracting. E-contract as heart of e-commerce has the potential to offer both businesses and consumers greater efficiencies, cost savings and choices in transactions.[26] E-contracting is mostly suitable for standard products and services. This fact is due to the high process automation required in each of the paradigms, which realizes the possibilities for customization of products and services.[27]

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[21] Andam, cited above at note 7, p.7
[22] Murray, cited above at note 13
[23] David Jacobson, Online Contracts: How to make E-commerce Work,(March 2006), p.1, available at http://www.djacobson.com/technology_business/jacobson_online_contracts_0603.pdf [accessed on 17/06/2012]
[24] TI Akomolede, <<*contemporary legal issues in electronic commerce in Nigeria*>>, P.E.R, Vol.11, (2008), p.3, available at http://www.nwu.ac.za/sites/default/files/images/2008x3x_Akomolede_art.pdf, [Accessed on 12/11/2012]
[25] Farhan AL-Farhan, The Impact of the UNCITRAL Model Law on international legal systems, Saudi Arabia information technology development from a legal perspective, (2002), p.15, available at http://www.cailaw.org/academy/magazine/uncitral.pdf, [Accessed on 23/01/2012]
[26] Angelove and Grefen, cited above at note 11, p.30
[27] Id., p.9

E-contracting aims at the automation of contract establishment and enactment.[28] In Strategic transformation and Information Technology of e-contracts, the following generic categories of values are identified, i.e., financial values, strategic values and stakeholder values.[29]

Traditional paper contract establishment and management require participation of people. Use of IT for automation of the contracting process can decrease the costs in traditional contracting by eliminating the human involvement (labour costs, travelling costs, human driven mistakes, etc.).[30] It has the ability to reduce the time span between ordering, delivery, invoicing and payment by using the Internet.[31]

Strategic values of e-contracts accomplish the external strategy of a company. They allow improvement of market positions and customer relationships.[32] E-contracting allows an important linkage between the contracting system and production (or service delivery) control system and between the contracting system and the management system to be established.[33] Nowadays, markets require mass customization of products and services. The new definition of success becomes the ability to accelerate production of an ever greater variety of customized products. E-contracting can answer this market demand by providing automatic contract customization for the exchange of limited amounts of specific products or services.[34] It serves different purposes at every e-contract stage, for example, in the contract execution/performance stage extra monitoring information can be provided by different messages over networks.[35] All the above enhance external strategy of the business.

Stakeholder values relate to the values that are introduced to the possible stakeholders (e.g., suppliers, customers) by the implementation of IT in the contracting process.

[28] Id., p.10
[29] Id. p.9
[30] Id., p.11
[31] Id.p.10
[32] Ibid.
[33] Id., p.11
[34] Id., P.12
[35] Xu and Vrieze, cited above at note 4

Improving the quality of the contract content and process is an issue that can be addressed by e-contracting. The contract content quality can be improved by checking for consistency of the contract terms and by providing support for the creation of contract clauses.[36]

To sum up, e-contracting is used to avoid errors, reuse content after closing and provide machine-processible document.[37] In fact, it is also argued that it is cheaper to negotiate and draft an agreement over the Internet than with pen and paper because electronic messages are; transmitted instantaneously, already in written form, easy to copy and distribute, cheap to store and reproduce and accessible via readily available hardware such as a computer and a modem thereby obviating the need for specialized equipment like a fax or a telex machine.[38]

2.4. The Need for Legislative Reconsideration of the Existing Laws

The introduction of the Internet and electronic contracting has revolutionized the way business is transacted around the world. Significant legal issues have arisen as a result of applying traditional legal principles to a paperless electronic environment.[39] Both contracting parties and practitioners are challenged by the birth of e-contracts. Compatibility of the old contract laws in administering the emerging e-contracts is subjected to controversial arguments. Some scholars view e-contracts quite peculiar that can't be addressed by traditional contract laws. Scholars, who are pro-traditional contract laws' capacity of administering e-contracts, debate that nothing novel is emerged by the birth of e-contracting therefore old contract laws are comprehensive enough to regulate them. But in reality, the fragility of conventional contract laws is noticed to address the

[36] Angelove and Grefen, cited above at note 11, p.11-2
[37] Xu and Vrieze, cited above at note 4
[38] Shawn Pompian, <<*Is the Statute of Frauds Ready for Electronic Contracting?*>>, Virginia Law Review, Vol.85, (Oct., 1999), p.1479-80, available at http://www.jstor.org/page/info/about/policies/terms.jsp [accessed on 05/01/2012]
[39] Ruth Orpwood, <<*Electronic Contracts: Where We.ve Come From, Where We Are, and Where We Should Be Going*>>, International In-house Counsel Journal, Vol.1, (2008), p.457, available at http://store.iicj.net/vol-1-no-3-spring-2008/ [accessed on 09/23/2012]

problems associated with e-contracts. This topic portrays the demand for new regulatory regimes.

Electronic communications become the most common method of contracting.[40] The ability to enter into and perform contracts online becomes the heart of on-line retailing (e-tailing) development.[41] Still the basic tool of e-commerce remains the contract. In order to support electronic transactions in a similar way as conventional transactions, electronic contracts are required, which perform the same function and meet the same requirements as conventional contracts.[42] Perhaps of greater importance is the question of laws and policies which we need to put in place?[43] The law of contracts has developed over centuries and should transform in order to keep pace with economic, political and technological developments.[44] New legislative initiatives needed to foster and accommodate an electronic world that is growing at an exponential rate.[45] The special natures of e-contracts have made some of the conventional law rules applicable to commercial contracts inapplicable to such contracts.[46] These new technologies of contracting do not fit neatly into the vision of the world underlying the conventional contract.[47] In response to recent and anticipated future growth in long-distance commerce using electronic media such as the Internet, some commentators have suggested that legal and economic institutions will have to change substantially in response to new technologies of trade, in the same way that they did in response to the major technological and organizational innovations of the 18th and 19th centuries.[48]

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[40] Andrew and Murray, cited above at note 13
[41] Lilian Edwards(editor), The New Legal Framework for E-Commerce in Europe, (2005), p.67-8
[42] Michael Gisler et.al, Legal Aspects of Electronic Contracts, Infrastructures for Dynamic Business-to-Business Service Outsourcing (IDSO'00), (5 - 6 June 2000) , available at http://citeseerx.ist.psu.edu [accessed on 20/10/2012]

[43] Jens Werner, <<E-commerce.co.uk – Local Rules in a Global net online business transactions and the applicability of traditional English contract law rules>>, International Journal of Communications Law and Policy, Issue 6, (2000/2001), p.1, available at http://www.ijclp.net/files/ijclp_web-doc_3-6-2001.pdf [accessed on 27/10/2012]
[44] Orpwood, cited above at note 33, p.456
[45] Id., p.464
[46] Akomolede, cited above at note 18
[47] Pompian, cited above at note 32, p.1449
[48] Avery Wiener Katz, Is Electronic Contracting Different? Contract Law in the Information Age, P.1, available at https://www.utexas.edu/law/academics/centers/clbe/wp/wp-content/uploads/centers/clbe/katz_is_electronic_contracting_different.pdf [accessed on 25/03/2012]

Internet users have long regarded themselves as being part of a fairly cohesive community because behavior in cyberspace has traditionally been based on a common understanding among its inhabitants about what is acceptable. Until recently, the only laws on the Internet were those that the users themselves created. Even today, rather than turning to a central authority for sanctions, Internet users employ the types of self-help measures common to small communities.[49] Commercial activities that take place within electronic networks may be to some degree regulated by norms embedded in the network technology itself; and those regulations may take a mandatory character and an end user's only choice is to comply with the norm or be excluded from access to a particular market because of strong network effects. The substance of the technical norm harmonizes with the contractual choices of the parties.[50] Rarely matches with the commercial law of most trading nations. The feasibility of self-help measures couldn't subsist without legal underpinning.

Specific methods of the Internet communication (or their characteristics) affect certain aspects of the contract process.[51] Some commentators advocate that technological evolution is immaterial for legal transformation. However, it is forgotten that technology is always mediated by social practice. How people use technology matters more than the technology itself.[52] The Internet technology imposes challenges on its users. The practical problems faced by users necessarily influence the applicable law. The legal problems created by the Internet are mainly due to its speed, dynamic changes, non-physical existence (no domicile) and the possibility of making any digitalized content almost instantaneously available to users around the globe.[53]

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[49] Pompian, cited above note at 32, p.1488

[50] Jane Kaufman Winn and Jens Haubold, Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective, p.25, available at http://www.law.washington.edu/Directory/docs/Winn/Electronic_Promises_Revised.pdf, [accessed on 14/07/2012]

[51] Eliza Mik, <<the Unimportance of being electronic or popular misconceptions about Internet contracting>>, International Journal of Law and Information Technology, Vol.19, (2011) p.328, available at http://ijlit.oxfordjournals.org/ [accessed on 03/01/2012]

[52] Id., p.329

[53] Farhan, cited above at note 19, p.27

E-commerce does not simply provide a new means of making contracts. In some situations, it also provides a new method of performance for certain products such as software, video, books; music and even newspapers and magazines no longer have to be physically delivered in hard copy format to the purchaser. Suppliers can instead send the products in digital form over the Internet.[54] Totally the new form of transaction is the licensing of the use of software which is delivered directly by downloading from the Internet.[55] However, contract law developed initially when most agreements were fashioned in face-to-face meetings between/among the parties. Details were discussed, arguments were made, negotiations continued and finally an agreement was reached in person and contracts were executed physically. Contemporarily the problem courts face is how to apply contract principles from prior times to problems based on current technology.[56] At least in some respects, the Internet environment is different from its real-space analogue.[57] All these undermine capacity of conventional contract laws to concur with e-contracts.

E-contracts produce a lot of questions in current legal practice. The crux of the problem lies on enforceability of contracts concluded by e-communications. The aggregate unique features of e-contracts clouded their validity and enforceability. The legal effect of an electronic record or an electronic signature is uncertain due to the lack of specific affirmative statutes recognizing equivalency of electronic signatures and records with written signatures and records.[58] These legal lacunas put the validity of e-contracts in paradox. Furthermore, e-contracts pose uncertainties like when is an order placed? When it is received or when it is accepted? When it enters a computer network or when it is drawn to the attention of a particular person designated as the recipient?[59] Where one or more of the parties are situate? How can be certainly ascertained originator of a

[54] Diane Rowland and Elizabeth Macdonald, Information Technology Law, (Second Edition, 2000), p.252
[55] Priscilla A. Walter, *UCITA: E*stablishing a legal infrastructure for e-commerce,(2000), p.1, available at http://www.drinkerbiddle.com/Templates/media/files/publications/2000/ucita-establishing-a-legal-infrastructure- for-e-commerce.pdf [accessed on 14/04/2012]
[56] Pittman, cited above at note 1
[57] Pompian, cited above at note 32, p.1492
[58] Epstein, cited above at note 5, p.494
[59] Jacobson, cited above at note 17,3

communication?[60] How does one determine at what stage the contract has been concluded and which set of e-communications constitute the final terms?[61] Currently, computers in a variety of capacities participate in the formation of contracts. At the other extreme, computers track inventory and automatically reorder goods from a supplier. Computers technically form the contracts based on the instructions programmed by their owners[62] however contracts concluded by automated agents provide ambiguity on viability of the contract.

Negotiations can almost as easily be conducted through electronic messages such as e-mail and perhaps even video conferencing. However, when all of the terms have been agreed upon, how do the parties indicate their agreement and intention to bind to these terms electronically? How can each party ensure that the other has the same understanding of the totality of the rights and obligations as he has? Perhaps more importantly, is there a mechanism to ensure that an instrument embodying the full and final terms can be obtained, reviewed and used as evidence in case of an eventual dispute?[63] How does one ensure that the electronically created document which one party has sent to another is not edited and revised? How do we prove that the terms of the contract which are negotiated through e-communications and finally agreed upon will not be adjusted when presented as evidence or for enforcement?[64]

In the speed-of-thought e-commerce and Information Technology, traditional rules governing contracts and transactions are often unclear or simply inapplicable. More and more commercial transactions relate to intangible products such as software or data, rather than to tangible products. As a result, there are no clear and uniform rules governing agreements for the licensing or sale of software, multimedia products or databases.[65] Declaration of agreements has evolved first to shrink-wrap licenses and,

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[60] Karen Mills, Effective Formation of Contracts by Electronic Means; Do We Need a Uniform Regulatory Regime?, p.2, available at http://www.arbitralwomen.org/files/publication/2307092552667.pdf [accessed on 03/02/2012] (paper)
[61] Id., p.11
[62] Pompian, cited above at note 32, p.1480
[63] Mills, cited above at note 54, p.21
[64] Ibid
[65] Walter, cited above at note 49

more recently, to click-wrap or browse-wrap agreements presented on your computer screen.[66] This has changed the way agreements are concluded in cyberspace.

The characteristic of Internet-based electronic commerce that underlies many of the policy issues to which it currently gives rise is its failure to create the level of trust that is normally found in face-to-face transactions. Particular concerns are matters such as privacy, security, authentication, and consumer protection.[67] The lack of consumer trust in secure electronic transaction compliance appears as a major barrier to a wider Internet and e-commerce adoption.[68] Part of the legal barriers is users need to be reassured about data protection law and its implementation as well as confidentiality of data.[69]

Internet is inherently the haven for illegal activities of hackers and other criminals. Secure Internet accomplishes integrity, authentication and confidentiality of communication. Particularly secure Internet devises a mechanism of authenticating identity of communicants. Internet security is primarily resolved through certificate issuing authorities. The authority accomplishes a lot of task. Lack of a Certification Authority (CA) is also a major impediment for the growth of e-commerce.[70] Thus, laws that give explicit recognition and establishments is the last option. Internet Service Providers establish the base for flowering of e-commerce. Thus, laws that regulate Liability of Network Service Providers have undeniable role in fostering e-commerce. Unless balanced liability regulation is laid, e-commerce is aggressively retarded. The growth of Internet-based commerce is also likely to depend on, among other things, the quality of the legal rules and enforcement in ensuring that transaction data is protected and secured from electronic misuse.[71]

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[66] Id., p.2

[67] Moira Patterson (Dr.), E-commerce Law,(21st June, 2001), available at http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN008643.pdf [accessed on 23/06/2012]

[68] INMARK, Analytical study on legal issues for e-business, vol.1, (16/05/2007), p.4 available at http://www.e-accelerator.net/lektorservice/files/D1-3-Analytical%20Study%20on%20legal%20issues%20for%20e-business.pdf [accessed on 19/06/2012]

[69] Ibid

[70] Ibid

[71] Farhan, cited above at note 19, p.7

To sum up, the birth of electronic commerce has pressured the need for vibrant and effective regulatory mechanisms, which would further strength the legal infrastructure crucial to the success of electronic contract and ultimately e-commerce. Responsive legislative measures to such emerging transactions are uncompromised option to policy makers and legal systems. To alleviate the above problems, countries and international organizations introduced new laws. The following topic shades a shallow view on the developments of new laws both at national and international level.

2.5. Legislative Developments in the Area of Electronic Contracts

Legislatures facing electronic commerce issues confront a basic question: do electronic transactions require a fundamental reform in this area of law or do the underlying principles and structures remain valid?[72] The increasing use of Information and Communication Technology as an effective business tool has prompted a number of international organizations and nations to investigate the legal consequences that may flow from using ICT as a medium to form contractual relationships.[73] Ultimately both investigations opt for legal transformation. The following are the sample and most popular legislative developments in the area of e-commerce. Fortunately the surrounding issues of e-contracts are gained an answer within those e-commerce regimes. Some of them are not legislation but model laws. But they influence laws of many countries and play pedagogical value in countries' legislative developments. Even some of the developments didn't produce model laws. Instead they provide recommendations and guidelines either at regional or global scale. In spite of that, they play indispensable role in the area of e-contracts, and e-commerce in general.

[72] Winn and Haubold, cited above at note 44, p.2-3

[73] Ed Dawson, et.al. Electronic Contract Administration – Legal and Security Issues, (13 June 2006), p.5, available at http://www.constructionovation.info/images/pdfs/PublicPresentations/Final_Literature_Review_22_November.pdf [accessed on 09/02/2012]

United Nations (hereinafter referred as UN) took pioneer movement in enacting e-commerce concerning regimes. Organs of UN like the General Assembly and the United Nations Commission for International Trade Law (hereinafter referred as UNCITRAL)[74] remarkably remembered for their intuitive devotion of introducing model laws in e-commerce and therein implicitly resolve the confusions surrounding e-contracts. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts.[75] UNCITRAL undertook the preparation of legal rules on the subject of e-commerce since 1992.[76] UNCITRAL's developments in the area of electronic transactions include the preparation of the following Model Laws and recommendations:

- ✓ UNCITRAL Recommendation on the Legal Value of Computer Records 1985. This is an input to the subsequent model laws.
- ✓ UNCITRAL Model Law on Electronic Commerce 1996 (hereinafter referred as UNCITRAL E-commerce Model Law) – This Model Law on Electronic Commerce could be viewed as the first stage in accommodating the law to the demands of electronic commerce.[77] This Model Law was designed to give national legislators a set of internationally acceptable rules to promote the use of electronic communications.
- ✓ UNCITRAL Model Law on Electronic Signatures of 2001(hereinafter referred as UNCITRAL MLESig) - offered to any and all states that may wish to adopt it.

UNCITRAL model laws establish rules and norms that validate and recognize contracts formed through electronic means. It also sets default rules for contract formation and

[74] UNCITRAL is the core legal body of the UN system in the field of international trade law. Its mandate is to remove legal obstacles to international trade by progressively modernizing and harmonizing trade law. CHONG Kah Wei and Joyce CHAO Suling, United Nations Convention on the use of electronic communications in International contracts – a new global standard (2006), p.117. available at http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/390/2006-18-SAcLJ-116-Chong.pdf [accessed on 25/06/2012]

[75] United Nations (UN), UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998 and Guide to Enactment(1998), p.20, available at http://www.cailaw.org/academy/magazine/uncitral.pdf, [accessed on 23/01/2012]

[76] Farhan, cited above at note 19, p.50

[77] Amelia H. Boss, Electronic contracting: legal problem or legal solution?, p.125-6, available at http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf. [accessed on 01/10/2012]

governance of electronic contract performance, defines the characteristics of a valid electronic writing and an original document, provides for the acceptability of electronic signatures for legal and commercial purposes, and supports the admission of computer evidence in courts and arbitration proceedings.[78]

On 23 November 2005 the General Assembly of the UN resolved to adopt a new Convention on the Use of Electronic Communications in International Contracts (hereinafter can be referred as UN Convention). It is a landmark legal instrument that sets a new global standard for electronic commerce legislation.[79] It facilitates the use of electronic communications in international contracting by providing for the functional equivalence of electronic communications, while preserving the principle of technological neutrality.[80] Art.1 (1) of the Convention limits its application to the use of electronic communications in connection with the formation or performance of a contract. The Convention builds upon the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures, but its provisions have been improved and updated to take into account technological developments since 1996, most notably, the growth of the Internet.[81]

The UNCITRAL Model Law on E-Commerce 1996 has influenced many States with respect to legislative drafting and proposals. Recent enactments and uniform laws now circulating in Canada and the US were heavily influenced by the Model Law. In the European Union, the Electronic Commerce Directive of 2000/31/EC (hereinafter referred as ECD of EC) and the Electronic Signatures Directive 1999/93/EC were also influenced greatly by the Model Law and Draft Rules.[82] Furthermore, it has now been enacted in (or influenced the development of) domestic legislation in a large number of countries including, for example, the United Kingdom, Australia, New Zealand, Singapore, China and Korea.[83] Although the UNCITRAL Model Law on Electronic Commerce is not

[78] Patterson (Dr.), cited above at note 61
[79] Wie and Suling cited above at note 68, p.116
[80] Id., p.119
[81] Ibid
[82] Farhan, cited above at note 19, p.52
[83] Dawson, et al, cited above at note 67, p.6-7

designed to create equally binding uniform rules throughout the world, it helps to harmonize legal standards with sensible supranational concepts. At the same time it leaves enough leeway for states to add rules that are specific or desired for their legal system and additionally it facilitates further law reform on a global level.[84]

European Commission (hereinafter referred as EC) has created a coherent regulatory framework for electronic commerce. European Parliament and Council of the European Union have passed several directives that impact upon the process of e-contracting in the European Union. This framework includes like the Electronic Commerce Directive 2000/31/EC, the Distance Contracts Directives 97/7 and the Community Framework for Electronic Signatures Directive 1999/93/EC. In addition, a number of horizontal directives[85] have been adopted, such as, Privacy and Intellectual Property Rights in Cyberspace.[86] Finally, several sectoral directives have been adopted. These include the Directives on Consumer Credit of 2008/48/EC, the Directive on Package Travel, Package Holidays and Package Tours, and the Timeshare Directive of 2008/122/EC.[87] Particularly, ECD covers contracting on-line, Internet service provider liability, consumer protection and online privacy including spam and cookies.[88] In essence, European Union Member States are bound to follow the objectives of the Directive on Electronic Signatures and the Directive on Electronic Commerce, but have the discretion to decide how and in what form the objectives are achieved when passing national legislation to give effect to them.[89] European experience on electronic contract related directives are the Electronic Commerce Directive and the Electronic Signatures Directive 1999.[90] The other directives also substantiate wide use of e-contracts.

[84] Farhan, cited above at note 19, p.18
[85] A horizontal directive is EU legislation designed to cover all types of sectors. It is not designed to meet all the requirements of a particular sector. A horizontal directive complements specialized vertical sectoral legislation or a "vertical" directive. Sylvia Mercado Kierkegaard, E-Contract Formation: U.S. and EU Perspectives,(Feb. 14, 2007), available at :http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/396/vol3_no3_art12.pdf?sequence=1 [accessed on 27/05/2012]
[86] Ibid
[87] Ibid
[88] Edwards, cited above at note 35, p.5
[89] Dawson, et al, cited above at note 67, p.6
[90] Farhan, cited above at note 19, p.42

United Nations Economic Commission for Europe (UNECE) has developed the United Nations Centre for Trade Facilitation and Electronic Business (hereinafter referred as UN/CEFACT), with the principal focus of facilitating national and international transactions through the harmonization and simplification of procedures and processes. Among other things, UN/CEFACT has published a range of Trade Facilitation Recommendations, including a recommended electronic commerce agreement. The underlying purpose of the recommended agreement is to enable business to business electronic commercial transactions to be conducted in a manner that is legally sound.[91]

United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) has performed various investigations into the harmonization of e-commerce laws in the Asia and Pacific regions. In July 2004, it convened a Regional Expert Conference on the Harmonized Development of Legal and Regulatory Systems for Electronic Commerce in Asia and the Pacific – Current Challenges and Needs. One outcome of the conference has been the production of an information note outlining the general legal issues that may be encountered in electronic transactions.[92]

International Chamber of Commerce (hereinafter referred as ICC) has a number of different task forces, including task forces on jurisdiction and applicable law in electronic commerce and electronic contracting. The ICC has produced a number of publications in the area of electronic transactions, including the ICC e-Terms of 2004 which are very basic terms designed to increase the legal certainty of electronic contracts[93] and General Usage for Internationally Digitally Ensured Commerce (hereinafter referred as GUIDEC), a document intended to educate business on various techniques in electronic

[91] United Nations Economic Commission for Europe (UNECE), Recommendation Electronic Commerce Agreement (ECE/TRADE/257)(2000), available at http://www.unece.org/cefact/recommendations/rec31/rec31_ecetrd257e.pdf [accessed on 09/10/212]

[92] United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), E-Commerce Legal Issues (2005), available at http://unescap.org/tid/gateway/tisgway%5Fecom.pdf [accessed on 10/09/2012]

[93] International Chamber of Commerce, ICC e-Terms, (2004, available at http://www.iccwbo.org/policy/law/id279/index.html [accessed on 12/08/2012]

commerce and to set a general framework for the authentication of digital messages.[94] ICC through the ICC's GUIDEC and e-Terms is laying the basis for a uniform international standard of recognition and application of electronic contractual data. GUIDEC addresses protection of their integrity and e-Terms provides uniform language for implementation.[95]

Organization for Economic Cooperation and Development (hereinafter referred as OECD) has a Working Party on Information Security and Privacy that has investigated a range of issues relating to authentication and electronic signatures. Among other things, in 2005 the OECD published a report on the use of authentication across borders in OECD countries, examining the actual or potential barriers to the cross-border use of digital signatures as identified from survey responses provided by both government and the private sector in a number of OECD countries.[96] The Council of the OECD also adopted in 1997 Guidelines for Cryptography Policy. The aim of these Guidelines was mainly to facilitate electronic commerce by fostering trust in electronic signatures. The OECD was also in favor of a flexible legal framework allowing the user to choose between different methods of cryptography in an ongoing process of development of international standards according to the changes in technology (state of art). OECD recognized that cryptography for the protection of privacy and data security is an essential key to the confidence of users in information and communications infrastructures. Without this electronic confidence, economic development and world trade would be negatively affected. The Guidelines are no legal rules but policy recommendations primarily aimed at governments' future enactments in cryptography issues relating to electronic commerce.[97]

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[94] International Chamber of Commerce, GUIDEC II – General Usage for International Digitally Ensured Commerce, (2001), available at http://www.iccwbo.org/home/guidec/guidec_two/contents.asp [accessed on 05/08/2012]

[95] Reynolds, cited above at note 10, p.26

[96] Organization for Economic Co-operation and Development(OCED), Working Party on Information Security and Privacy, The Use of Authentication Across Borders in OECD Countries,(2005), available at http://www.oecd.org/dataoecd/1/10/35809749.pdf [accessed on 10/08/2012]

[97] Farhan, cited above at note 19.p.45

The Law Development Section of the Common wealth Secretariat has produced several Model Laws that deal with issues relevant to electronic transactions. More specifically, it has produced the following draft Model Laws:

- ✓ Draft Model Law on Electronic Transactions: This Model Law is designed largely to assist Common Wealth countries when domestically implementing UNCITRAL's Model Law on Electronic Commerce 1996.
- ✓ Draft Model Law on Electronic Evidence: This Model Law is intended to assist Common Wealth countries to develop appropriate legislation that caters for electronic evidence.[98]

The United States (hereinafter referred as US) is the individual nation which is at the front in devising e-business regulating laws. In US, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has developed two uniform state acts designed to bring legal certainty to electronic transactions.[99] In July 1999, the NCCUSL approved the Uniform Computer Information Transactions Act (hereinafter referred as UCITA) and the Uniform Electronic Transactions Act (hereinafter referred as UETA) as Model Laws to be adopted by the states.[100] UCITA is a proposed uniform state law governing transactions involving computer information such as the licensing of computer software or databases.[101] Unlike UCITA, UETA has proven to be popular. UETA does provide rules about the role of electronic transactions within the rules of contract law. Primarily, UETA does the following:

- ➢ Provides for the enforceability of contracts based in whole or part on electronic records, messages or media.
- ➢ Defines and validates electronic signatures. UETA does not specify the technology to be used for the electronic signatures.
- ➢ Provides that electronic records and messages satisfy the Statute of Frauds. Under the Statute of Frauds, state law sometimes requires that a contract be in

[98] Dawson, et al, cited above at note 67, p.6
[99] Kierkegaard, cited above at note 79
[100] Farhan, cited above at note 19, p.38
[101] David Syrowik, The Uniform Computer Information Transactions Act (UCITA) and Reverse Engineering, Michigan Bar Journal, (MARCH, 2003), p.31, available at http://www.brookskushman.com/Portals/0/NewsPDFs/13.pdf [accessed on 18/04/2012]

writing, signed by the party refusing enforcement.

- Promotes electronic recordkeeping.
- Provides for party authentication in electronic transactions.
- Provides for the enforceability of contracts based on the use of electronic agents.[102]

The US Congress also passed the Electronic Signatures in Global and National Commerce Act (hereinafter referred as E-Sign) on June 30, 2000.[103] It ensures certainty and predictability of electronic commerce by affording electronic signatures and electronic records the same legal status as written signatures and records.[104]

In addition to that, various countries also proclaim laws in the area of e-commerce and impliedly overcome issues of e-contracts. As the volume of electronic contracting continues to increase rapidly legislatures around the world are evaluating existing contract law doctrines in light of new business practices.[105] The following are sample legislative steps in the area of e-commerce by individual nations around the globe. Australia enacted uniform domestic legislation based on the UNCITRAL Model Law of e-commerce, in the form of the Electronic Transactions Act 1999 and mirror State legislation**.** Other countries also promptly modified their incompatible contract laws with the new emerging electronic business. UK enacted the Electronic Commerce Act, 2000, No.27. Singapore has also the E-commerce and Electronic Transactions Act of 1998. Philippines enacted Electronic Commerce Act No. 8792 of 1999 (An act providing for the recognition and use of electronic commercial and non-commercial transactions and documents, penalties for unlawful use thereof and for other purposes.). India enacted the Information Technology Act No. 21 of 2000. The Indian act provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as electronic commerce, which involve the use of alternatives to paper-based methods of communication and storage of

[102] Pittman, cited above note at 1.
[103] Ibid
[104] Epstein, cited above at note 5, p.491
[105] Winn and Haubold, cited above at note 44, p.1

information, to facilitate electronic filing of documents with the Government agencies and the act also intended to further the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

Chapter Three
Electronic Contracts in Light of the Ethiopian General Contract Law

3.1. Introduction

This chapter endeavors to explore electronic contracts in light of the General Contract Law under the Ethiopian Civil Code. The main areas of discussion are validity of e-contracts, issue of consent and articulation of terms in e-contracts, time of contract formation, effect of network connected contracts on the principle of privity of contract, excluded transactions, variation and notice in e-contracts and finally value of parole evidence rule in e-contracts.

As a general principle, all jurisdictions look towards the intention of the parties as prescribed by the provisions of their respective laws to determine whether and when the parties bound themselves to certain obligations to the other party or parties and what those obligations are.[106] But the use of electronic communications complicated manifestation of consent in modern electronic contracts. At the heart of e-contract is the need for parties to be able to form valid and legally binding contracts online. However, validity of electronic contracts is in question if the principles of traditional contract law are applied. Furthermore, another basic question in e-contracts is the functional equivalents of electronic records with paper documents.[107] Additionally, Internet communication does not consist of a face-to-face communication between the sender and receiver as in ordinary means of communication. The message is broken into chunks in the process of delivery. This raises an issue of the exact time of contract conclusion as it is critical for determination of the rights of the parties.[108] In responding to the above

[106]Karen Mills, Effective Formation of Contracts by Electronic Means; Do We Need a Uniform Regulatory Regime?, p.4-5, available at http://www.arbitralwomen.org/files/publication/2307092552667.pdf [accessed on 03/02/2012] (paper)
[107] Aashit Shah and Parveen Nagree, Legal issues in e-commerce, p.4, available at http://www.nishithdesai.com/Research-Papers/Legal_issues_ecom.pdf, [accessed on25/04/2012]
[108] Ibid

shaded questions, many debates arise how these traditional contract law principles will apply to modern forms of technology.[109]

Generally the questions that arise in evaluating the validity and enforceability of e-contracts which are entered electronically without the parties having direct personal contact, can, in lay parlance, be consolidated into the categories of who, when, where, what and why?[110] Particular importance is given to: who are the involved actors, what are the exchanged values, how parties reach at an agreement, when is the contract entered and where are the parties?[111] In responding to these questions, old contracts principles exhibit deficiency. The practices of evidencing used in traditional contracts are also incompatible to e-contracts. The method of communicating for variation and notice produces uncertainty in electronic contracts. Therefore, the consonance of the Ethiopian Civil Code on General Contracts with electronic contracts will be assessed based on the questions figured at the outset of this chapter.

3.2. Validity of Electronic Contracts

A major barrier to confidence in e-commerce is simply contracting parties often don't know whether they have entered into a legally binding contract.[112] Users are skeptic on the binding nature of electronic contracts in the commercial use of new media.[113] E-contracts are alleged for creating uncertainty on their validity and enforceability. Needless to say, viability of a given contract depends on its validity. It imprints relief on the mind of contracting parties because legal recognition is a prerequisite to have resort to

[109] Ed Dawson, et.al. Electronic Contract Administration – Legal and Security Issues, (13 June 2006), p.9, available at http://www.constructionovation.info/images/pdfs/PublicPresentations/Final_Literature_Review_22_November.pdf [accessed on 09/02/2012] (research)
[110] Mills, cited above at note 1, p.13
[111] S. Angelov, P. Grefen, An Analysis of the B2B E-Contracting Domain Paradigms and Required Technology (30/10/2003), p.25-6, available at https://doc.novay.nl/dsweb/Get/Document-34933/ParadigmsTelin-TR.pdf [accessed on 21/02/212]
[112] Lilian Edwards (editor), The New Legal Framework for E-Commerce in Europe, (2005), p.73
[113] Michael Gisler et.al, Legal Aspects of Electronic Contracts, (5 - 6 June 2000) available at http://citeseerx.ist.psu.edu [accessed on 20/10/2012]

litigation if the other party is in default. Legal validity and enforceability of electronic contracts is also a preliminary condition for furtherance of electronic commerce. However, parties purported to form contracts by electronic communications worried by the validity of their communications. Especially the unique features surrounding e-contracts undermine application of the principles of conventional contract laws. As a result, a legal gap is created. The legal lacuna can be statutorily avoided by declaring validity of data messages at the outset and ultimately remolding old contract laws along electronic communication methods.

Though complicated legal issues may arise during formation of contracts by electronic means, there is no overriding legal impediment to parties using electronic communications to form contractual relationships. As a general principle, the law does not require a binding contract to be established by any particular communication method. Accordingly, most contracts may be formed by any number of methods including, for example, by post, telex, facsimile or even orally.[114] E-communications can effectively form any contract. However, the devil camps in details of e-contracts. Some of their features which will be discussed under the following topics erode their straightforward validity. Even if no legal prohibition, their peculiar characteristics make their validity in question.

As per Art.1681 (1) of the Civil Code offer and acceptance can be declared orally or in writing or by signs normally in use or by conduct. It doesn't prescribe any method of communicating offer and acceptance. However, the major confusion in Ethiopia is legal recognition of data messages. Legal recognition of data messages contingent judicial admissibility. To uproot the allusion, the following regimes allocate provisions giving legal recognition for data messages (electronic records) and therein validate electronic contracts. Art.8 (1) of the UN Convention provides that a communication or a contract shall not be denied validity or enforceability solely because it is in the form of an electronic communication. In the same fashion Art. 11(1) of the UNCITRAL E-commerce Model Law validates e-contracts stating that where a data message is used in

[114] Dawson, et al, cited above note at 4, p.10-1

the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. Art. 9 of the ECD of the EC requires member states to ensure that electronic contracts are rendered valid and to remove any prohibition or restriction on the use of electronic contracts. In US, UETA plays a vital role in removing barriers to electronic commerce. It provides that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.[115] A number of other e-commerce laws as a preliminary condition of fostering e-commerce, gravitate to declare clear legal recognition of electronic communications and ultimately e-contracts.[116]

The above legislative reforms are also substantiated by judicial activism. Judges across different countries clearly rule enforceability of e-contracts. An example of where the courts have upheld a contract formed by electronic means is the decision in *Ford v La Forrest* [2001] QSC 261, where it was found that e-mails are capable of creating a binding contractual relationship.[117]

As repeatedly underlined, absence of legal recognition of electronic records is the core barrier of e-contracts. Recently in our country some laws were enacted to render validity of electronic records. The Customs Proclamation No.622/2009 according to Art.2 (18) recognizes documents presented electronically. The most relevant law is the National Payment System Proclamation No.718/2011 that validates electronic records pursuant to Art.21 (1) which its full statement is; where any law provides that information or any other matter shall be in writing, such requirement shall be deemed to have been satisfied

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[115] Sylvia Mercado Kierkegaard, E-Contract Formation: U.S. and EU Perspectives, (Feb. 14, 2007), available at: available at :http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/396/vol3_no3_art12.pdf?sequence=1 [accessed on 27/05/2012]

[116] Typical examples are: For the avoidance of doubt, it is declared that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record. Electronic Transactions Act of Singapore 1998, Art.6, available at http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan025623.pdf [accessed on 01/09/2012]. Information (including information incorporated by reference) shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise. Electronic Commerce Act of England, 2000, Art.9, No.27, available at http://www.irishstatutebook.ie/pdf/2000/en.act.2000.0027.pdf [accessed on 07/07/2012]

[117] Dawson, et al, cited above at note 4, p11

if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for subsequent reference. This is an appreciable introduction in our country. But its application is limited only to payment systems.[118] Other deficiency of the proclamation in extending its application to e-contracts is; it doesn't affirm all electronic records. The phrase, where any law provides that information or any other matter shall be in writing, limits validity of electronic records only to when the law dictates written form. The validity ruled by the above proclamation though an important step forward couldn't without any modification transposed to our Civil Code. Therefore, the best solution when we come to e-contracts in our country is, declaring legal validity to any communications embodied in electronic records irrespective of whether the law dictates written form or not. Thus, our Civil Code must be revisited to give validity for all electronic records (data messages) therein validate e-contracts.

3.3. Formation of Electronic Contracts

3.3.1. Consent

3.3.1.1. Consummation of Consent

Contracts are the end result of communications. Unquestionably, the Internet provides new means of communicating. New communication scenarios may challenge classic legal analysis due to an unprecedented combination of otherwise unfamiliar features.[119] Mark Lemley has commented; it is the concept of assent that gives contracts legitimacy and distinguishes them from private legislation. But in today's electronic environment, the requirement of assent has withered away.[120] Unlike face-to face negotiations, consent is complex in e-communications.

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[118] This Proclamation shall be applicable to all matters related to the national payment system. National Payment System Proclamation, 2011, Art.3, Proclamation No. 718, Federal Negarit Gazeta, 17th Year No. 84.

[119] Eliza Mik, <<*the Unimportance of being electronic or popular misconceptions about Internet contracting*>>, International Journal of Law and Information Technology, Vol. 19 No.4,(2011), p.326, available at http://ijlit.oxfordjournals.org/ [accessed on 03/01/2012)]

[120] Elizabeth Macdonald, <<*When is a contract formed by the browse-wrap process?*>>, International Journal of Law and Information Technology, Vol. 19, (2011), p.305, available at http://ijlit.oxfordjournals.org/ (accessed on 03/01/2012)

Contracts require evidence of a consensus in item or meeting of minds, achieved by a clear and unambiguous offer and an unqualified acceptance of that offer[121] to have viable contract. But in e-contracts definite determination of the conclusiveness of consensus in item is unmanageable due to non-face-to-face nature of the communication. Another cause of confusion is; a person can enter a contract without meaning to be bound by it. If this is the case, a valid contract may not exist as both parties must have an intention to create legal relations before a contract will be found to be in existence. In a business context generally, there is a presumption that the parties intended to create legal relations[122] but its extension to all contracts is unsound. The expression of assent and the incorporation of terms in web-based transactions also illustrate how analytical hurdles created by the emerging communication technologies are bypassed by reverting to technology-based solutions, new nomenclature and a distortion of contractual principles.[123] Parties can express their consent in e-contracts by two ways of electronic contracting; i.e. e-mails (electronic mails) contracts and web-click contracts.[124] Web-click agreements have alternatively nomenclatures like click-on agreements or web-click-on agreements or web-based agreements. Vendors engaged in electronic commerce by web-click-on agreements have attempted three somewhat controversial methods of obtaining the assent of Internet users. These methods go by the names of shrink-wrap, click-wrap, and browser-wrap. They all use different ways of presenting the contract terms to the Internet user.[125] The meaning of click-on agreement is a proposed electronic form agreement set up by one party so that the other contracting party (the user), can assent to the terms by clicking various icons or buttons or by typing specified words or phrases. The typical user may read the terms on a screen and use a keyboard, mouse or similar

[121] Andrew D Murray, Entering into Contracts Electronically: The Real W.W.W, available at http://www.leginetcy.com/articles/Entering%20Into%20Contracts%20Electronically.pdf [accessed on 24/08/2012]

[122] David Jacobson, Online Contracts: How to make E-commerce Work,(March 2006), p.6, available at http://www.djacobson.com/technology_business/jacobson_online_contracts_0603.pdf [accessed on 17/06/2012]

[123] Mik, cited above at note14, p335

[124] Jens Werner, <<E-commerce.co.uk – Local Rules in a Global net online business transactions and the applicability of traditional English contract law rules>>, International Journal of Communications Law and Policy, Issue 6, (2000/2001), p.1, available at http://www.ijclp.net/files/ijclp_web-doc_3-6-2001.pdf [accessed on 27/10/2012]

[125] Gregory E. Maggs, <<*Regulating Electronic Commerce*>>, The American Journal of Comparative Law, Vol.50, p.670 , available at .http://www.jstor.org/page/info/about/policies/terms.jsp [accessed on 19/09/2012]

device to scroll through or otherwise navigate the terms and make choices related to the contracting process.[126]

Shrink-wrap contract[127] is when the purchased product is received; it comes with additional terms and conditions in the packaging or in the accompanying documentation. A seller can bind a buyer to shrink-wrap terms in two situations. First, the seller may structure the transaction so that a sale is not complete until a buyer agrees to contractual terms sent with a product, whether or not the buyer paid in advance. Second, the seller may structure the transaction so that at the time the sale becomes complete the buyer at least knows that the product comes subject to some contractual terms, even if the buyer does not know exactly what those terms say.[128] Click-wrap is less controversial than shrink-wrap contracts. Click-wrap agreement[129] made at or before the time of purchase on a website. The purchaser is required to click <<I agree>> button before the transaction will continue, the installation will proceed or the user will gain access to the web site. After selecting a product to purchase, the Internet user sees the contract terms on the computer screen and cannot complete the purchase without clicking a box on the screen to indicate assent. In click-wrap contracts, users click through one or more steps that form the contract. When the user clicks-on a box on the screen a tick mark appears to indicate acceptance of the terms and conditions. The user would indicate his or her rejection by clicking cancel or closing the window.[130] In the case of browse-wrap transaction[131], the

[126] Amelia H. Boss, Electronic contracting: legal problem or legal solution?, p.144, available at http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf. [accessed on 01/10/2012]

[127] Arguments often arose with shrink-wrap agreements used by software companies because the terms and conditions of the license agreement contained on paper sealed under the packaging were not disclosed to the consumer until after the software had been purchased and the package opened. Making clear disclosure of all terms and conditions prior to completion of a sale transaction will help to avoid such disputes in the online environment (provided those terms and conditions have been carefully drafted). Jacobson, cited above at note17, p.7

[128] Maggs, cited above at note 20, P.672

[129] The purchasing party will click boxes indicating the item(s) it wishes to purchase, or the program it wishes to download, and usually another set of boxes to indicate method of payment and possibly delivery. Normally, it is only after the order and payment information have been provided on line, and confirmed by the selling party, that the purchasing party is provided with the standard terms and conditions, or possibly only a link thereto, with further dialogue boxes which the purchaser will click upon in order to indicate his/her agreement therewith, usually by clicking "I accept" or "I agree", or <<submit>> which then is supposed to consummate the transaction. supranote1, p.5. One can see that questions can easily arise as to exactly at which point a click wrap agreement is formed: exactly what constitutes an offer and what the acceptance. Id, p.6

[130] The Legal and Privacy Issues of Doing E-Business, p.1, available at

user will visit the pages of a website. Somewhere on the website terms and conditions are posted that purport to bind anyone who uses the website or its services.[132] When using this method, an Internet vendor gives the user the opportunity to look at the terms of the sale, but does not require the user to click-on anything to indicate assent to these terms. For example, the website may contain a button saying "click here for legal terms" which the purchaser may click or ignore.[133] A browse-wrap contract typically occurs when a website user is directed via a hyperlink to a contract contained on a separate webpage. With this type of contract, the user is not required to click-on an icon to indicate agreement to the terms and conditions.[134] In browse-wrap contracting, there are also situations where there is no definite <<I agree>> button for the website visitor to click. Rather, the website will state that a particular action on the site or use of site constitutes acceptance of its terms.[135]

All the above three types have also raised fundamental questions about assent. Terms and the process of incorporation gain particular importance in web-click transactions.[136] What types of conduct constitute assent to terms and conditions[137] is also complex issue. Furthermore, an issue may arise whether a person would be bound by the terms of a contract without even reading it or without being able to negotiate the terms.[138] Web-click-on transactions usually base on standard contract terms.[139] Internet contracting

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http://www.businessenterprisecentre.ca/uploads/Resource%20PDFs/Legal_and_Privacy_Issues_of_Doing_E- Business.pdf [accessed on 25/10/2012]

[131] This refers to some websites which require acceptance of its standard terms and conditions, normally the license an attendant restrictions on use and reproduction, from every user that signs on to its website, whether goods or services are available for purchase, or for free, thereon or for access to the information available on the site. Whether, and when, such terms and conditions are communicated to the prospective user and in what manner, if any, such user accepts such terms, is even more likely to give rise to differing views by courts of different jurisdictions. One US court has already found that where a website did not give sufficient notice of the terms of its license agreement the user was not bound to such agreement simply because it had downloaded the software offered. Mills, cited above at note1, p.6

[132] Boss, cited above at note 21, p126-7

[133] Id., p.130

[134] Cited above at note 25

[135] Macdonald, cited above at note 15, p.285-6

[136] Mik, cited above at note 14, p.336

[137] Boss, cited above at note 21, p.126-7

[138] Shah and Nagree, cited above at note 2

[139] Standard form contracts are, as the name implies, standardized agreements prepared by one party. These predefined agreements are offered to customers on a take-it-or-leave-it basis. Jeffrey Pittman, Cyberlaw & E-Commerce, (2005), available at http://myweb.astate.edu/pittman/, [Accessed on 12/08/2012]

relies heavily on standard form contracts. The Internet seller usually posts the contract terms on the website.[140] The usage of standard terms thus has given rise to different important question of on what conditions standard terms can be considered an agreed part of the contract.[141]

Normally the success of an incorporation procedure directly affects contract formation. This will be the case when the proposed terms prescribe the manner of assenting.[142] The question of whether individual clauses of the standard terms in click-on agreements are valid depends on whether the clauses have been accepted. Standard terms are only considered part of the contractual agreement, when the party accepting the standard term has had a chance to read the terms prior to the conclusion of the contract.[143]

Acceptance given by click-on agreements can establish the contract as far as there is an intention to be bound by the declared agreement. But the hardship as repeatedly stated is incorporation of contract terms. In regard to incorporation of terms in the case of web-click-on agreements, the Ethiopian Civil Code offers somewhat incomplete solution. Art.1679 of the Code prescribes that a contract shall depend on the consent of the parties who define the object of their undertakings and agree to be bound thereby. Contract terms form an integral part of a given contract's object therefore should be unambiguously defined. Pursuant to Art.1680 (1) of the Code, a contract shall be completed where the parties have expressed their agreement thereto. This requires parties to discuss contract terms and to affirm them by their agreement. Art.1680 (2) of the code also nullifies undeclared intended reservation or restriction by one of the parties. Both the above cited provisions of the Code mandate parties to deliberate and agree contract terms before completion of the contract. The more relevant provision with respect to web-clicks-on agreement is Art.1686 of the Civil Code, its full statement is, general terms of business applied by a party shall not bind the other party unless he knew and accepted them or

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[140] Ibid
[141] Casper Schmidt & Anders Christian Boisen, Benchmarking of existing national legal e-business practices, (19 September (2006), p.11, available at http://ec.europa.eu/enterprise/sectors/ict/files/denmark_en.pdf [accessed on 14/06/2012]
[142] Mik, cited above at note 14, p.343
[143] Id, p337

they were prescribed or approved by the authorities. All provisions of the Code require parties to agree to each term of the contract. But their concordance to e-contracts is challenging. Because parties are negotiating from distance without face-to-face conversation, then it is very difficult to say parties solidly reach an agreement on each term. UCITA of US introduces a sounding method of subscribing to standard terms of web-click-on agreements. UCITA under Sec.112 provides a click-on acceptance is binding as long as the offeree had an opportunity to review the offer terms before acceptance. Clicking on the last acceptance button is the point where agreement is reached but an opportunity to review terms must be provided before the acceptance button.[144] This is based on an objective criterion of an opportunity to review terms. It doesn't strictly stipulate absolute agreement to each term. It is the opportunity of reviewing that determines the assent. Our Civil Code is little help on the manner of incorporating contract terms of web-click-on agreements and its modification in this respect is necessary.

Furthermore, special attention is given the way terms are incorporated in web-click-on agreements. The online world is particularly well-suited to the practice of incorporating terms by reference as it is quick and easy to insert hyperlinks into text. Businesses engaged in e-commerce want assurance that terms important to their transactions are indeed binding and enforceable between the parties. It is an assurance about knowing assent has been given to the terms. The Supreme Court of Canada recently contemplated the validity of introducing terms via hyperlink in the case of Dell Computer Corp. v. Union des consommateurs. In upholding the validity of this practice the court emphasized that the terms and conditions must be reasonably accessible and was of the opinion that a hyperlinked document meets that standard.[145] A group within the American Bar Association has come up with an analysis for insuring valid assent in such transactions, and suggests that a user validly and reliably assents to a web-click-on agreements if the conditions that the user is provided with adequate notice of the existence of the proposed

[144] Pittman, cited above at note 34

[145] Ruth Orpwood, <<*Electronic Contracts: Where We.ve Come From, Where We Are, and Where We Should Be Going*>>, International In-house Counsel Journal, Vol.1,(2008), p.461, available at http://store.iicj.net/vol-1-no-3-spring-2008/ [accessed on 09/23/2012]

terms; the user has a meaningful opportunity to review the terms; the user is provided with adequate notice that taking a specified action (which may be use of the web site) manifests assent to the terms and the user takes the action specified in the latter notice are satisfied.[146] Location of a notification of the basic formation information is also significant. The location on the webpage must be somewhere where the reasonable person would see it.[147] Clauses may be also incorporated into contracts from unsigned documents on the basis of reasonably sufficient notice. The notice does not have to contain the terms but can merely refer to where they can be found. The test is objective which is a question of fact and dependent upon such matters as the legibility and prominence of the relevant writing. One factor which has been seen as relevant to the test generally is whether the place where the notice is to be found is the type of place in which the reasonable person would expect to find a contractual term.[148] Courts can entertain the above mentioned objective factors in assessing they way terms are proposed for incorporation in web-click-on agreements.

Click-on agreements are not only challenging from the view of incorporation of contract terms, but they can be also concluded without having an intention to bind. To avoid such accidental contract some regimes propose third stage which is acknowledgment of acceptance by the offeror. Especially the limited expressiveness of clicks and the perceived risk of accidental assent have given rise to theories requiring an additional act of assent or enhancing the act itself. Moreover, effectiveness on receipt combined with an increased risk of non-delivery creates the need to confirm such receipt to protect the sender (i.e. offeree). Otherwise, the sender does not know whether his acceptance was received and cannot commence performance.[149] In addition to that, agreements formed over electronic media do present one fairly adverse complication. Many users do not take electronic communications seriously; the act of producing writing in itself may not impress the party of the seriousness of the event to a potential contract. In this context, writing may not have the cautionary effect it normally would have in traditional

[146] Boss, cited above at note 21, p.131-2
[147] Macdonald, cited above at note 15, p.297.
[148] Diane Rowland and Elizabeth Macdonald, Information Technology Law, (Second Edition, 2000), p.125-6
[149] Mik, cited above at note 14, 333

transactions.[150] Different methods of contract formation on the Internet also produce different types of evidence, varying from the totally unreliable to the unquestionably reliable. The button-clicking (I Accept) method of forming an agreement results in the cheapest, but least reliable evidence of a contract. To avoid potential confusion, one of the parties especially the offeror should send an e-mail confirming the existence of a contract and allowing the other party to perceive the arrangement.[151]

The third step of acknowledgment was highly debatable. Despite that, some regimes make it real. In most legal systems a contract is formed through the exchange of offers and acceptance. Yet Art.11 (1) of the ECD of EC is a brave attempt to define the moment at which an electronic contract is concluded.[43] It provides where a recipient, in accepting a service provider‘s offer, is required to give his consent through technological means, such as clicking on an icon, the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient‘s acceptance. As per the above provision, it completes the contract when the acknowledgment is received by the recipient of the offer. This requirement is impossible of derogation in consumer contracts. Pursuant to Art.11 (2) of the above cited directive, the acknowledgment requirement does not apply in contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.[152] It is premised on the assumption to give the party a second chance to check whether he/she might have ordered a product that he/she did not want.[153] If acknowledgment is not given by the offeror, the contract is not completed. According to the ECD of EC, a contract to buy a book from Amazon.co.uk would now look like this:

1st. View details on web page, i.e. Offer (from Amazon)

2nd. Send order to Amazon, i.e., Acceptance

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[150] Shawn Pompian, <<*Is the Statute of Frauds Ready for Electronic Contracting?*>>, Virginia Law Review, Vol. 85, (Oct., 1999), p.1487, available at http://www.jstor.org/page/info/about/policies/terms.jsp [accessed on 05/01/2012]

[151] Id, p.1492-3

[152] Kierkegaard, cited above at note 10

[153] Ibid

3rd. Receive Confirmation from Amazon, i.e. Acknowledgement of receipt of the recipient's acceptance.[154]

Unlike the ECD of EC, the Ethiopian Civil Code is barehanded to have solution to such incidentally concluded contracts. Inherently click-on agreements make persons vulnerable to incidental click-on contracts. The person who offers the web-based click-on agreements should acknowledge to the person who clicks on acceptance button. Thus, at this phase I recommend to our Civil Code, the third step i.e. acknowledgement of receipt of acceptance must be added for web-based click-on contracts to have validly consummated consent except the contract is concluded by e-mails or equivalent individual communications.

For better consummation of consent in e-contracts, necessary information must be conveyed to the recipient i.e. offeree. Such information facilitates smooth interaction between the contracting parties. The EC's E-commerce Directive pursuant to Art.10 (1) levels the playground between the contracting parties stating that in addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service i.e. the different technical steps to follow to conclude the contract; whether or not the concluded contract will be filed by the service provider and whether it will be accessible; the technical means for identifying and correcting input errors prior to the placing of the order; and the languages offered for the conclusion of the contract. Moreover, Art.10 (3) of the above mentioned directive, contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them. Application of this sub-article to contracts concluded by e-mails or equivalent individual communications is limited. It helps the offeree to know necessary information about the would-be contract before his consent is given. That information doesn't relate to the substance of the contract terms, rather it is a procedure used to give viable consent. Our

[154] Edwards, cited above at note 7, 77

Civil Code doesn't have any help on the prior information requirement. Such paradigms must be introduced to our Code. To sum up, our Code is unacquainted with how terms are referenced in web-based contracts, stage of agreement in web-based agreements and finally prior information requirement in web-based agreements. Therefore, its revision should consider the above shaded issues.

3.3.1.2. Consent Expressed through Automated Agents

Technology brings the substitution of human will by automated agents. Wooldridge and Jennings define an electronic agent as a hardware or software-based computer system that enjoys the following properties: autonomy i.e. capacity to act without the direct intervention of humans or others, the capacity to interact with agents or humans, the capacity to perceive their external environment and to respond to changes that are coming from it and the capacity to exhibit goal-directed behavior by taking the initiative.[155] As we can infer from the definition, automation involves removing people from various stages of a transaction.[156] In attempting to make a contract by e-mail or on the web, an individual's communication may be met by the purely programmed response of a computer without any immediate human knowledge or intervention.[157] As the Internet becomes more and more information intensive, automation technologies assist people in the elimination of many time-consuming activities.[158] Automated negotiation is especially important in the dynamic environments in which short-time contracts prevail. Such contracts have to be dynamically set to meet the short term needs of end-users' and service providers. An example of an automated message system would be the Amazon.com website, which accepts book purchases and online payment without any

[155] Kierkegaard, cited above at note 10

[156] Ian R. Kerr, <<*Bots, Babes and the Californication of Commerce*>>, University of Ottawa law & technology journal, (2004), p.288, available at http://www.google.com.et/#hl=am&tbo=d&site=&source=hp&q=Bots%2C+Babes+and+the+Californication+of+Commercepdf&oq=Bots%2C+Babes+and+the+Californication+of+Commercepdf&gs_l=hp.12...2754.10049.0.11161.49.11.0.0.0.4.2522.8330.4j2j6-1j1j2j1.11.0...0.0...1c.1j2.iA-av6MFXWo&bav=on.2,or.r_gc.r_pw.&bvm=bv.1355534169,d.Yms&fp=c53dbbc95f9afad3&bpcl=40096503&biw=1024&bih=629 [accessed on11/11/2012]

[157] Rowland and Macdonald, cited above at note 43, p.295

[158] Kier, cited above at note 51, p.297

human intervention.[159] In order to fully enjoy the benefits of automation, human and corporate traders need to be confident that the transactions generated by and through their computers are legally enforceable.[160] But contracts mediated by automated agents intensify the question of whether such interactions create valid contracts. Can it be said that they express the parties' intention?

There are arguments that advocate computer generated transactions no longer fit with the traditional paradigm of contract doctrine. Properly speaking, they are not the manifestation of a mutual concordance between two parties as to the existence, nature and scope of their rights and duties.[161] There are doctrinal difficulties associated with automated e-contracts formation. The first is pointed by Fridman, which says since a contract is an agreement between two or more persons, and involves the idea of consent; only those who have the power to give consent can contract.[162] The second critic is based on lack of capacity. Even if intelligent agents somehow achieved the status of person in law, it is not clear that every such device would be capable of entering into a contract. In other words, prior to giving legal effect to their agreements, the common law has traditionally required of all persons that they be capable of demonstrating a certain degree of intellectual capacity.[163] The third critic is based on consensus in item. The traditional view of contract includes not only an exchange of promises but also a mutual concordance between the parties as to the nature and scope of the rights and obligations that coincide with that exchange of promises. That is, the parties must be said to have formed an agreement with each other. The metaphor which has taken holds throughout the common law to describe this phenomenon is the idea of a consensus ad idem i.e. a meeting of minds.[164] These critics marginalized validity of contracts formed by automated agents. Despite such critics, automated agents are widely practiced as

[159] Marius Šaučiūnas and Albertas Čaplinskas, Automated e-Contract Negotiation in Web Service Environment: Trust Management Aspects, p.108, available at http://www.leidykla.eu/fileadmin/Informacijos_mokslai/2011- 56/108-118.pdf [accessed on 23/07/2012]
[160] Ian R. Kerr, Ensuring the Success of Contract Formation in Agent-Mediated Electronic Commerce, (2001) , p.184, available at http://iankerr.ca/wp-content/uploads/2011/08/kerr-agent-mediated.pdf [accessed on 18/10/2012]
[161] Kerr, cited above at note 51, p.290
[162] Kerr, cited above at note 55, p.188
[163] Id, p.189
[164] Id, p190

mediators of contract formation in e-commerce market. This indeed demands explicit legal recognition.

The mechanism in most jurisdictions through which electronic agents are able to create contracts is known as an attribution rule. In essence, the law deems a person's actions to include actions taken by human agents of the person, as well as actions taken by an electronic agent, i.e. the tool of the person. Thus any transaction entered into by an electronic agent will be attributed to the person using it. According to the attribution rule, when machines are involved, the requisite intention flows from the programming and use of the machine.[165] The idea that an automatically generated message can have legal effect because of the prior involvement of the relevant parties is embodied in the UNCITRAL Model Law on Electronic Commerce.[166] Art.13/2/b of the E-commerce Model Law recognizes data messages sent by automated means can establish valid contracts.

A number of other jurisdictions have either proposed or enacted legislation that deal with the use of autonomous electronic agents in electronic commerce. The UN Convention according to Art.12 states, a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract. The Working Group noted that in some legal systems, there is a requirement that a human will be applied in order for a contract to be formed. Therefore, Art.12 addresses this requirement of a will by recognizing the validity of actions carried out by automated message systems.[167] UCITA also contains provisions supporting the ability of electronic agents to make binding contracts.[168] Contracts created

[165] Kerr, cited above at note 51, p.294-5
[166] Rowland and Macdonald, cited above at note 43, p296
[167] Chong Kah Wei and Joyce Chao Suling, United Nations Convention on the use of electronic communications in International contracts – a new global standard (2006), p.117. available at http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/390/2006-18-SAcLJ-116-Chong.pdf [accessed on 25/06/2012]
[168] A person that uses an electronic agent that it has selected for making an authentication, performance, or agreement, including manifestation of assent, is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations. Uniform Computer Information Transactions Act of US,

by electronic agents are enforceable according to UETA Sect.14.[169] Canadian Uniform Electronic Commerce Act of 2003 under Art.21 recognizes such contracts in cases in which it can be established that such an electronic agent was in fact authorized by the party to enter into such contracts, for example, if a computer is programmed to make or accept offers in predetermined circumstances the intention of the programmer or user to create legal relations may be reasonably inferred.[170]

Our Civil Code seems ambiguously recognizes automated agents mediated contracts because it doesn't prescribe any means of contract conclusion. Art.1681 (1) of the Code conforms to the mentioned statement.[171] But the challenging one is the requirement of human will at each negotiation. Modern sophisticated automated agents are having outstanding quality in commercial bargaining even more than humans. That is the reason why the word agent is affixed though they are not agents in a legal understanding. This causes debates on validity of automated agent mediated contracts. Art.1679 of the Code conditions validity of a contract to parties defines each term and agree to be bound thereby. It makes validity of automated agents mediated contracts uncertain. The provision seems as human consent is necessary for completion of the contract. How parties define and agree to each term in automated agents is cumbersome. Even some online negotiated contracts may have very extended terms which require human intervention. To sum up, the Code's position is ambiguous in regard to validity of automated agents mediated contracts. The above mentioned sample foreign legislative

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Sec.107(d), available at http://www.steptoe.com/assets/attachments/2359.pdf [accessed on 03/05/2012]

[169] In an automated transaction, the following rules apply:
a. A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.
b. A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance. Uniform Electronic Transactions Act of US, 1999, Sec.14, available at http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf [accessed on 11/2/2012]

[170] Mills, cited above at note 1, p.15.

[171] Offer or acceptance may be made orally or in writing or by signs normally in use or by a conduct such that, in the circumstances of the case, there is no doubt as to the parties agreement. Civil Code of the Empire of Ethiopia, 1960, Art.1681(1), Proclamation No. 165, Negarit Gazeta, 9th year, No.2

reforms choose explicit declaration to avoid the confusion buried in conventional contract laws. Therefore, revision of the Civil Code to unambiguously declaring validity of automated agents mediated contracts is the best solution.

3.3.1.3. Attribution of Communications and Identification of Parties

Identity plays an important role in formation of contracts. One of the many criticisms of communication via the Internet is that it can be very impersonal. In the absence of face-to-face meetings,[172] parties lack full cognizance of the other contracting party's identity. In an electronic environment, some interesting litigation may potentially arise where, for example, a message has not been sent by the purported originator but by someone else with access to their systems and password.[173] How can parties of e-contracts assure these matters? Parties are not certain about identity of the person with whom they are communicating online to the prospective contract. With all the above dilemmas, it is unbelievable to say there is founded consent. Methods of imprinting confidence on the mind of contracting parties about source of messages and party's identity though aren't absolutely sure about identity of the person with whom they are exactly contracting are an instrumental stimulus of e-contracting. Methodologies must be installed that gives presumption about identity of the party and source of messages. A law should play an instrumental role in ensuring confidence on the contracting parties. In e-contracts, the ability to attribute a record to the originator is important since electronic transactions are normally carried out on a faceless basis. The system of attribution of messages to the originator certifies confidence in online (e-communications) environment. It provides non-repudiation of the message by the originator (sender).

[172] Pompian, cited above at note 45, p.1483
[173] Dawson, et al, cited above at note 4, p.16

Indeed, there are a number of ways to verify the identity of the sender of an electronic message.[174] Authentication eliminates the confusion about attribution of messages. Authentication means identifying the author of an electronic record (data origin authentication) and may also include authenticating that the person is who they say are (non-repudiation). Authentication is particularly an issue in relation to e-mail where it is necessary to prove that the e-mail was actually sent by the purported author. From an evidentiary point of view, authentication has dual purpose. It helps the recipient of the message to satisfy him or her that the message is originated from the sender. It also helps a judge to prove that the recipient of the message doesn't forge it.[175] E-records may be authenticated by either technical or non-technical means. Non-technical means involve proving by either direct or circumstantial evidence which the purported author of the message was in fact the author.[176] Leaving all matter of authentication to technical matter is unreasonable. The law must designate mechanisms of authentication.

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[174] Pompian, cited above at note 45, p.1484.

[175] McCullagh, A., Caelli, W. & Little, P., <<*Signature Stripping: A Digital Dilemma*>>, The Journal of Information, Law and Technology, Issue No1, (2001), p.8, available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_1/mccullagh/

[176] *E-mail may be authenticated by:*

• The testimony of the author of the e-mail or some other person who saw the e-mail composed and transmitted.

• The e-mail's contents and markers. For example an e-mail may contain facts known only to a particular person or the language patterns used may be peculiar to that individual.

• Other indicia of authenticity such as employee's notes, letterhead and the subject matter of the e-mail.

•Circumstantial evidence regarding access to the computer system at the relevant time may also assist in authentication. Such circumstantial evidence may be compiled from witnesses, video, building access systems, telephone records or latent forensic evidence. Other potential technical means of addressing authentication concerns include:

•user ID and password;

• digital signatures;

• security tokens;

• smart cards, and

• biometrics. Where a third party monitoring system records information about the identity of the sender and recipient of the message, that system provides strong evidence of the integrity and authenticity of electronic records. Dawson, et al, cited above at note 4, p-65-7

In addition to the technical means of authentication, some foreign jurisdictions come with means of authentication. Presumption of attribution is the mechanism underlined by these legislations. UETA addresses issue of attribution under Sec.9 (A) stating that an electronic record or electronic signature is attributable to a person if it was the act of the person. It also tries to corroborate the act of the person with conditions guarantying its security stating that the effect of an electronic record or electronic signature attributed to a person is determined from the context and surrounding circumstances at the time of its creation, execution or adoption, including the parties' agreement, if any, and as otherwise provided by law; under sub-section B. To resolve the attribution problem, the E-commerce and Electronic Transactions Act 1998 of Singapore provides circumstances when an addressee is entitled to regard an electronic record as being that of the originator. The Act under Art.13 attributes a record to an originator, if it was sent by the originator himself or sent by an authorized person or by an information system programmed by the originator or on his behalf. It also details systems used to ascertain security. Art.13 of the UNCITRAL E-commerce Model Law is intended to apply where there is a question as to whether a data message was really sent by the person who is indicated as being the originator. It provides details mechanisms to help the addressee to presume the message belongs to the originator.

In our Code, we have no legal assurance for e-contracts concluded without either being absolutely sure of or knowledge of the other contracting party’s identity. It doesn’t have the capacity to accommodate such problems of e-contracting. As stated earlier, legal attribution of massages to the originator relieve the problem. Thus, it should be revised to include the attribution mechanism of a data message to the originator thereby relieve the addressee’s suspicion about the source of data and identity of the originator.

3.3.1.4. Input Errors during Formation of Electronic Contracts

One reality of electronic communications is that people in a hurry frequently push the send button before they may actually authenticate correctness of the information they put. Many of us have undoubtedly been in the position of inadvertently entering information into online forms that is incorrect in everything from spelling to quantity to item.

Application of the conventional contract law of mistake to such situations is debatable.[177] Do input errors addressed under conventional contract principle of mistake?

Where a mistake has been made during the formation of an e-contract, the same legal principles will apply irrespective of whether the contract has been formed electronically or through paper based communications.[178] Fundamental principles of mistake don't change but what is changed is when input errors (electronic errors) are made. An electronic error is defined as an error in an electronic message created by a user using an information processing system if a reasonable method to detect and correct or avoid the error was not provided.[179] Inherently electronic communications take place quickly and can even be automated increase the risk that mistakes may be made which cannot readily be corrected before a recipient of a communication relies on the mistake. Accordingly, other jurisdictions have implemented provisions within their e-commerce legislations that address the issue of input errors in an electronic environment, with a particular focus on mistakes that take place when an individual makes an input error when dealing with the automated message system of another party.[180] Those regimes provided ex ante mechanisms of protecting to the party who makes input errors.

The increased possibility of error in an electronic environment has led to attempts in US to address such issues of error or mistake in new statutory language. Both UETA and the UCITA have adopted provisions that would allow some relief under the circumstances. The relief goes beyond that generally recognized by the common law. Both statutes follow a similar format and say that if an error has occurred in an electronic message, the aggrieved party (consumer or individual) may avoid the error if he or she promptly notifies the other person and takes reasonable measures to return the consideration received. The aggrieved party cannot take advantage of this right if there was a security system for protection of error in place, or if the aggrieved party benefited from (or used) the consideration supplied.[181] Both focus on individuals interacting with electronic (automated) agents, and not individuals interacting with individuals. The limitation is

[177] Boss, cited above at note 21, p.137
[178] Dawson, et al, cited above at note 4, p.17.
[179] Kierkegaard, cited above at note 10
[180] Dawson, et al, cited above at note 4, p.16
[181] Boss, cited above at note at 21, p.138

explained as follows; in a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous record.[182] The error correction provisions do not apply (and there is no electronic error) if the electronic system with which the consumer or individual is working provided a reasonable opportunity or method to correct or avoid the error.[183]

Art.11 (2) of the ECD of EC contemplates that member states shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order. It is not concerned with the substantive issues that arise in contract formation in relation to electronic mistakes rather to input errors. In the same fashion, Article 14(1) of the UN Convention gives a natural person, who had made an input error in an electronic communication exchanged with an automated message system, the right to withdraw the portion of the electronic communication in which the input error was made, if the automated message system did not provide the user with an opportunity to correct the input error, and if two other conditions are met. The first condition is that the natural person must notify the other party of the error as soon as possible after learning of the error. The second condition is that the natural person must not have used or received any material benefit or value from the goods or services received. This right of withdrawal provided in Art 14(1) is a very limited substantive right that does not exist for non-electronic transactions. Article 14(2) makes it clear that the general law governing

[182] Id, p.138

[183] For example, the electronic agent may be programmed to provide a confirmation screen to the individual setting forth all the information the individual initially approved. In theory, this rule provides an incentive to establish error-correction procedures in automated contracting systems by eliminating any possibility of an electronic error defense or claim.99 A reasonable procedure for correcting errors depends on the commercial context, including the extent to which the transaction entails immediate reactions. For example, in a transaction that occurs over several days, it may be reasonable to require verification of a bid or order before it is placed. During an online, real time auction, reconfirmation may not be possible. A reasonable procedure could require two separate confirmations that the bid should be entered or where the formatting allows correction, request that the con sum check and correct the bid before the "Bid Now" button is pressed. As elsewhere, the idea of a reasonable procedure here does not require use of the most effective procedure, special detection software or even the most reasonable. It requires that, all things taken into account, the procedure is commercially reasonable. Id, p.139

mistakes is preserved and unaffected save for the limited right of withdrawal created by Art 14(1).[184]

The above sample legislations teach us that parties shouldn't bound to unintended transactions as a result of input errors. Input errors are the byproducts of technology as a result of fast communication. It is sound to provide relief for victims of such contracts. Avoidance is the best relief to the party who made input errors. Moreover, service providers should provide easy system of correcting input errors to individuals. A party making input errors should with reasonable time communicate to repudiate the contract. Input errors are not covered under defective consent within our Civil Code. Consent is deficient when there is mistake to the nature or object of the contract (Art.1699 of C.C.), or mistake as to the person (Art.1700 of C.C.). A given contracting part may be mistaken due to fraud (Art.1704 of C.C.), false statements (Art.1705 of C.C.), duress (Art.1706 of C.C.), reverential fear (Art.1709 of C.C.) and unconscionable contract (Art.1710 of C.C.). But input errors are not fitted to any of the mistakes and causes of deficient consent within the Code. Thus, it is recommendable to reshape our contract laws in way that eliminates input errors committed when using e-communications for contract formation.

3.3.2. Time of Contract Completion

The timing of contract formation is another area where technological developments have had an impact on the law.[185] Determining the time of contract formations is necessary because it is attached with legal consequence. Unless declared by express terms of the agreement, fixing the time of e-contracts formation is very complex due to changes attributed to the communication technologies.

Acceptance of an offer completes formation of a contract. As far as position under the common law is concerned, acceptance takes effect upon three alternative rules i.e. the information rule[186] or upon receipt[187] or upon dispatch[188] of the acceptance. According to

[184] Wei and Suling, cited above at note 62, 127
[185] Orpwood, cited above at note 40, p.457
[186] The information rule under the common law requires the acceptance to be communicated. The requirement of notification as a general rule is reconcilable with the notion that a contract is founded on

the general rule, acceptance is only effective once it has been communicated to the offeror. However, when something other than simple face-to-face communication has been used between the parties, the question often arises is whether the rule should apply?[189] An exception to this general rule is known as the postal acceptance rule[190] which applied for contracts concluded between/among parties from distance. The postal rule states that if the post is used as medium of communication, acceptance is effective once posted, rather than when it is received. The rule is designed to remove uncertainty from the contract formation process. It provides the offeree with confidence, which an acceptance once posted will be effective, even if the postal system delays delivery of the acceptance beyond the offer date. It applies when you entrust your communication to a trusted third party.[191] Yet the postal acceptance rule is seen as an arbitrary rule of convenience, which unduly favors the offeree.[192] Through its application, a party may be bound by a contract without actual knowledge of its existence[193] provided that failure in communication is created. The doctrine that communication of acceptance must be complete for a contract to be deemed binding could be said to be one of the greatest competitors of the postal rule in terms of forming a binding contract.[194]

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an agreement. As explained in the following, the common law has made the acceptance effective upon the receipt rule in such a situation. Rokiah Kadir, Communication of Acceptance in an Electronic Age, (2012), p.715-6, available at http://www.aensiweb.com/anas/2012/715-722.pdf [accessed on 16/10/2012]

[187] Under certain circumstances, the receipt of the acceptance is quite adequate to constitute the point of the acceptance. Lord Wilberforce stated that "the time of the acceptance is to be determined on the basis of the intention of the parties, sound business practice and the decision where the risk should lie". *Brinkibon*'s case has been applied in *Schelde Delta Shipping BV v. Astarte Shipping Ltd* (1995) 2 Lloyd's Rep. 249, where it was held that if an acceptance is sent outside the normal business hours, the communication is not effective until the opening of business the next day. In this case the receipt rule was not adequate as the delay in reading the acceptance was not the fault of the offeror. Id, p.716

[188] This dispatch rule which was first established in *Adams v. Lindsell* (1818) 1 B & Ald 681, was meant to be applied to acceptance transmitted by letter and telegrams. Hence, where the offeror authorizes acceptance by post, acceptance may be communicated simply by posting a properly addressed letter of acceptance. The acceptance is effective when the letter is handed to the post office. Ibid.

[189] Rowland and Macdonald, cited above at note 43, p.300

[190] Dawson, et al, cited above at note 4, p.11

[191] Murray, cited above at note 16

[192] Ronan O'Brien, <<A*nalysis of the postal rule, the postal rule revisited*>>, Cork Online Law Review, (2007), p.154, available at http://corkonlinelawreview.com/editions/2007/COLR%202007%2013%20O%27Brien.pdf [accessed on 28/102012]

[193] Id, p.153

[194] Ibid.

Despite the above proposed criticisms, the postal rule is still operational. It is chosen as an appropriate guiding principle for distance contracts. Art.1692 (1) of our Civil Code is framed in compliance with postal rule of acceptance. Full statement of the provision is; a contract between absent parties shall be deemed to be made at the time when the acceptance was sent to the offeror. Nevertheless, application of this provision for all electronic communications in the case of e-contracts is compromised. There is also an issue of what qualifies sending in the digital world. The condition of sending in digital world is different from its corresponding physical world.

Contracts online can be concluded using e-mail and web-click-on communications, then the relevance of postal rule to both situations is deteriorated. Application of the postal acceptance rule in e-contracts is dependent on instantaneousness of the conversation. Having examined the basis of the development of the postal rule, the logical conclusion would be that e-mail acceptances do benefit from the postal rule. The reasons for this are twofold. First, e-mail is not instantaneous like the telephone, telex or fax. With all instantaneous methods of communication, the sender knows immediately whether their transmission has been successful. In e-mails you can ask for a delivery receipt, but this merely signals delivery to a mailbox not a user.[195] Secondly, e-mail is much more fragmented than a telephone call or a facsimile transmission. E-mail messages are split into packets and may be sent via several different routes. The sender has no guarantee that the packets will all arrive together or even that all the packets will arrive. As e-mail demonstrates many of the characteristics of ordinary mail, it is submitted that the postal rule can apply to e-mail acceptances.[196] Therefore, acceptance via the electronic mail is found to be effective by means of the dispatch rule which is derived from the postal rule.[197] Technically, e-mail is a non-instantaneous, delayed access and one-way method of communication.[198] The application of the dispatch rule to e-mail as a result of the

[195] Murray, cited above at note 16
[196] Ibid
[197] Kadir, cited above at note 81, p.718
[198] Mik, cited above at note 14, p.334

preceding analysis can only be supported if electronic mail has been the reasonable method to communicate the acceptance.[199]

Based on the postal acceptance rule, the above provision of the Civil Code can accommodate e-mails. But it is not full-fledged. To some extent e-mails differ from telex and fax, as it can be stored on a host computer which is external to the offeror. [200] The question that arises is; when is sending of e-mail acceptance become effective? The word sending stipulated by the above provision of the code is a little bit deficient in accommodating e-communications. It must be accompanied by conditions which qualify sending in e-communications. E-commerce laws replace the word sending by dispatch in the circumstances of electronic communications but no slight conceptual difference between the two words. What they introduce is the conditions of sanding in the digital world. Intending to overcome the problem around time of sending by electronic communication of acceptance, these regimes also contemplate the condition of sending. Paragraph (1) of Art.15 of the UNCITRAL E-commerce Model law defines the time of dispatch of a data message as the time when the data message enters an information system outside the control of the originator, which may be the information system of an intermediary or an information system of the addressee. The concept of dispatch refers to the commencement of the electronic transmission of the data message. A data message enters an information system at the time when it becomes available for processing within that information system.[201] A data message should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it.[202] The definition of information system is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of information system could be indicating a communications network and in other instances could include an electronic mailbox or even a

[199] Kadir, cited above at note 81, p.719
[200] Werner, cited above at note 19, p.7
[201] United Nations (UN), UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998 and Guide to Enactment(1998), p.39, available at http://www.cailaw.org/academy/magazine/uncitral.pdf, [accessed on 23/01/2012]
[202] Id, p.40

telecopier.[203] UETA as per Sec.15 (a) from paragraph 1-3 stipulates detail conditions of sending of data messages like proper addressing of the information system, capable of processing by that system and when it enters an information processing system outside the control of the originator or the person who sent the electronic record on behalf of the originator. Applying the doctrine of agency the host computer could be the agent of the principal (offeror) so that the acceptance would become effective at the moment it arrives at the host computer. This approach minimizes uncertainty because it obliges to check e-mails regularly.[204] If an offeror provides an offer with an e-mail address for purposes of correspondence, the acceptance by the offeree is effective when it first becomes accessible by the offeror.[205] Accessibility refers the possibility of processing the acceptance by the information system. Though, the word sending under Art.1692 (1) of our Civil Code matches to e-mails acceptance, the conditions of sending constitute in e-communications don't fully resolved by that provision. Therefore, the conditions constitute sending in e-communications demand revision of the Code.

Contracts concluded directly over the Web are becoming more commonplace. These HTML[206] based contracts use a different communications method from e-mail.[207] The World Wide Web exhibits the features of a method of instantaneous communication (interactive and real-time), the sender has almost immediate feedback and errors or faults are readily apparent. As a result the receipt rule will probably apply to web-based contracts.[208] A trusted third party is not involved in click-on acceptances. This can be attributed to a technical device, a self-checking mechanism called checksum[209]. This mechanism allows the receiving computer to check if the information sent are complete or if there is something missing. So the server knows immediately if there was a breakdown in communications just like an individual would recognize during a telephone

[203] Id, p.19
[204] Werner, cited above at note 19, p.7
[205] Brien, cited above at note 87
[206] It is mark up for World Wide Web used for creating documents on the World Wide Web. Encarta English dictionary
[207] Murray, cited above at note 16
[208] Rowland and Macdonald, cite above at note at 43, p.306-7
[209] Ibid

conversation. So the postal rule does not apply.[210] The main difference between click-on contracts and e-mail is that communications between web-click-on clients and servers, unlike e-mails, is instantaneous. The best way to imagine the transfer of data between the computers is to treat it as a telephone conversation just one between computers rather than two individuals. The sender of the acceptance is in position to be able to determine whether their message has been successfully received almost instantaneously. In click-on contracts to have effective acceptance, it must be received.[211] In addition to that, in such web-based e-contracting, sending (dispatch) doesn't complete the contract. Receipt of acceptance by the offeror must be acknowledged to the offeree. The receipt of acknowledgement by the offeree consummates the contract. Thus, the information/receipt rule fits the feature of the web as a two way communication system.[212] They are viewed as live communications, therefore receipt of acceptance and acknowledgment process formation of the contract. But what qualifies receipt in e-communications must be defined. Art 11(1) of the ECD of EC states the order and the acknowledgment of receipt are deemed to be received when the parties to whom they are addressed are able to access them. The UNCITRAL E-commerce Model Law pursuant to Art.15 (2) puts an alternative means of receipt for data messages which is more extensive than the ECD of EC. Both the above regimes stipulate the time when receipt occurs, though for convenience I put precisely.

The UN Convention more wisely than the UNCITRAL E-commerce Model Law, attempts to resolve the confusion on time of contract formation. It is because, many of the provisions in the Model Law on Electronic Commerce were premised on EDI technology, and these provisions do not fit well with the Internet and other more modern technologies.[213] As per Art.10 (2) of the Convention, the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes

[210] Werner, cited above at note 19, p.7
[211] Murray, cited above at note 16
[212] Kadir, cited above at note 81, p.720
[213] Wei and suing, cited above at note 62, p.134

capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address because from that time onwards it is ready for processing by the addressee. All the above regimes give us a clue on the time of receipt of data messages. There are differences either in expression or concepts among them. But what we can encapsulate from the comparison is; receipt in the electronic environment is different from the physical world therefore they stipulate new definition in light of data messages.

To sum up, the postal acceptance rule application may be influenced by the functionality of the technology used to communicate the acceptance of an offer, as this may influence an assessment of which party should ultimately bear the risk of non-receipt of the acceptance communication. Accordingly, differences in technology may mean that the postal acceptance rule will continue to be relevant for some forms of technology.[214] The above discussed sample foreign e-commerce regimes assumed the different time of contract formation in e-mails and web-based communications. When we come to Ethiopia, the Civil Code under Art.1692 doesn't fit to include both e-mail and click-on acceptance. The word sending is incomprehensive if we attempt to extend it to electronic sending. Furthermore, in our Civil Code there are situations where only receipt of the offer consummates the contract according to Art.1683 (1). According to this provision of the Code, the contract shall be completed upon receipt of the offer. But what constitutes receipt of the offer must be also inclusive to electronic communications provided that offer is proposed by e-communications.

Therefore, determining the point of dispatch (sending) and reception is necessary because both establishes contract for e-mails and web-based conversations respectively. It also eliminates the confusion when only receipt of offer is sufficient condition to establish the contract. Both the word receipt and sending in e-communications are different from the physical world. Viewing the unique features of the above two words, e-contracts host

[214] Kadir, cited above at note 81, p.718

legislations give definition for both receipt and dispatch because such terms can be properly used to fix time of contracts formation. The main ground of portraying definition within such legislations is with the assumption of applying dispatch rule for e-mails and receipt rule for web-based communications. They also impliedly solve the condition when only receipt of the offer is a preliminary condition to form valid contracts. Therefore, I would like to suggest that incomprehensiveness of our Civil Code in regard to time of e-contracting should be uprooted. Reconsideration of the Code should address the problem of sending and receipt in e-communications. It must also assume the different consummation of e-contracts in the case of e-mails and web-click-on agreements.

3.3.3. Formality Requirements

Formality requirement is not a precondition of contract formation according to the general contract principle. Yet what would follow if the law or parties dictates to that? Requirements such as writing or signature provide obstacles to efficient electronic contracting.[215] Do electronic documents and electronic signatures comply with the old contract principle of writing and signature respectively? This question is a usual confrontation to wide usage of e-contracts. The same problem is seen on the Civil Code when written form and signature is required.

There are four main reasons for making formal requirements to contracts: first, to serve as clear evidence of a transaction and its terms; secondly, to have a cautionary effect thereby deterring premature and hasty contracts; thirdly, as a channeling function and lastly as a device to protect the weaker parties to contracts.[216] This topic discusses congruency of the Code with e-documents and e-signatures.

[215] Rowland and Macdonald, cited above at note 43, p.308

[216] E- business and matters arising from some Commercial Law perspectives, p.4, available at http: http://www.babalakinandco.com/documents/e-business_and_mattersarising.pdf [accessed on 09/05/2012]

3.3.3.1. Written Requirement

Written requirement serves a lot of functions.[217] Concerning e-contracting the question arises is whether a digital document can fulfill the requirement of writing[218] under conventional contract laws. The virtual contract has been described a document of paradoxical nature without tangible form or nature but existing and considered real.[219] It was said that the electronic fulfillment of writing requirements might in some cases necessitate the development of new rules. This was due to many distinctions between data messages and paper-based documents, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen.[220]

Skeptic of incompatibility of their contract laws with new emerging technology some jurisdictions explicitly address the issue by proclaiming new regimes. But equating electronic records with paper written is not without reservation. It must be qualified by some substantive conditions. The following cited laws highlight the way electronic records are accepted as written records. The UNCITRAL E-commerce Model Law attempts to limits the barriers of e-contract through explicit recognition of electronic records as written instruments. Art.6 of the Model Law prescribes that; where the law requires information to be in writing, that requirement is met by a data message if the

[217] In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by the various kinds of 'writings' in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of 'writings': (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to provide that a document would be legible at all; (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalize the intent of the author of the 'writing' and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and subsequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a writing was required for validity purposes. Rowland and Macdonald, cited above at note 43, p.317

[218] Werner, cited above at note 19, p.2

[219] Cited above at note 111, p

[220] UN, cited above at note 96, p.13

information contained therein is accessible so as to be usable for subsequent reference.[221] It relies on a new approach, sometimes referred to as the functional equivalent approach, which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic commerce techniques.[222] The use of functionally equivalent language leaves the Model Law requirements broad enough to allow for new technologies and applications which can meet the traditional purposes of writing. This general framework approach is more conducive to broad international acceptance.[223] The purpose of Art.6 is not to establish a requirement that, in all instances, data messages should fulfill all conceivable functions of writing. It focuses on the basic notion of information being reproduced and read. That notion is expressed in terms of an objective criterion, namely that the data message must be accessible so as to be usable for subsequent reference. The use of the word accessible is meant to imply that information in the form of computer data should be retained. The word usable is not intended to cover only human use but also computer processing.[224] Art.9 (2) of the UN convention provides that a legal requirement for writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. The Convention in a verbatim manner transposes the Model Law's concept in giving validity for data messages as written instruments.

Art.9 (1) of ECD of the EC has circumlocutory deal with the problem of form. It provided that Member States should ensure that their legislation allows contracts to be concluded electronically. In particular it mandates Member States to ensure that the legal requirements applicable to the contractual process neither prevent the effective use of electronic contracts nor result in such contracts being deprived of electronic effect and validity on account of their having been made electronically. Thus, it has provided that e-documents should be deemed functionally equivalent to their paper counterparts fulfilling

[221] Farhan AL-Farhan, *The Impact of the UNCITRAL Model Law on international legal systems, Saudi Arabia information technology development from a legal perspective*, (2002), p.25, available at http://www.cailaw.org/academy/magazine/uncitral.pdf, [Accessed on 23/01/2012]
[222] UN, cited above at note 96, p.13
[223] Cited above at note 116, p.51
[224] Roland and Macdonald, cited above at note 43, p.317

the equivalence principle found in the UNCITRAL E-commerce Model Law.[225] Art.9 creates a functional equivalence for e-documents in both informal and formal contracts. It requires that anything which can be achieved through written documents must be in law achievable through e-documents.[226] The key function of the ECD is the equivalence function.[227]

When we see the position of our Civil Code's concordance to electronic documents, it seems quite exclusive to data messages. Art.1727 (1) states that a contract required to be in writing shall be signed by all parties. The Code's obvious incompatibility with data messages can be inferred from its Art.1728 (1) which says, any party bound by a contract shall affix his handwritten signature thereto. If a party can not write, he may affix his thumb-mark as per subart.2 of the above mentioned latter provision. Cumulative reading of both provisions refer only to written papers. Thus, e-documents are left in vacuum by our law. In our country there are recent legislative movements that give recognition to data messages as written instruments. Customs Proclamation No. 622/2009 took precedence to recognize electronic documents. Art. 2. (18) of the customs proclamation defined document as an invoice, form or written evidence presented physically or by electronic means…This proclamation certifies documents presented electronically. The National Payment System Proclamation No.718/2011 is an outstanding example for this case. Art.21 (1) of the proclamation states that where any law provides that information or any other matter shall be in writing, such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for subsequent reference. The latter proclamation is more comprehensive than the former proclamation in equating data messages with written papers. However, the Civil Code lags in recognizing data messages as written papers. Therefore, it should be revisit to validate electronic documents as written instruments considering the conditions prescribe both by domestic and foreign statutes.

[225] Edwards, cited above at note 7, p.74
[226] Id, p.79
[227] Equivalence is a commonly used method of integrating new systems or technologies into a developed legal system; one replaces the function of a specific document or rule with a replacement which is deemed to be functionally equivalent to it. Murray, cited above at note16

3.3.3.2. Signature Requirement

Under general law contractual principles, there is no particular requirement for a contract to be signed.[228] But what would be the value of e-signature if either the law or the contract dictates for signature? How can e-documents be signed? Do e-signatures comply with the signature stipulated under conventional contract laws? Conventionally signature is defined as the act of putting one's name at the end of an instrument to attest to its validity and may be written by hand, printed, stamped, type-written, engraved, photographed or cut from one instrument and attached to another.[229] In the preparation of the UNCITRAL E-commerce Model Law, the following functions of a signature were considered; i.e., to identify a person, to provide certainty as to the personal involvement of that person in the act of signing, to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions depending on the nature of the document that was signed. For example, a signature might attest the intent of a party to be bound by the content of a signed contract, the intent of a person to endorse authorship of a text and the intent of a person to associate itself with the content of a document written by someone else.[230]

Before considering the legal issues that arise in connection with the signing of an electronic contract, it is important to consider the various ways that a party may sign an electronic document.[231] Electronic signature and digital signature are two methods of signing of e-documents. The latter type of singing is typical form of electronic signature though it has more unique features from other types of e-signatures. The term electronic signature is usually used to describe signatures incorporated in a document by electronic or cryptographic means. UETA defines an electronic signature under Sect.2 as an electronic sound, symbol or process attached to or logically associated with a contract or other record and executed by a person with the intent to sign the record. Some examples of electronic signatures include the type-written name of a signatory, the pasting of a

[228] Dawson, et al, cited above at note 4, p.25.
[229] Cited above at note 111, p.2
[230] UN, cited above at note 96, P.26
[231] Dawson et al, cited above at note 4, p.25

scanned version of the signer's signature, clicking an <<I Accept>> button, the use of a user password, or using cryptographic technology such as digital signatures.[232] UNCITRAL Model Law on Electronic Signatures defines an Electronic Signature as data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.[233] The Ethiopian National Payment System Proclamation No.718/2011 as per Art.2 (11) defines electronic signature; as a data in an electronic form, affixed to or logically associated with, an electronic message, which may be used to guarantee the authenticity and identify the signatory in relation to the date message and to indicate the signatory's approval of the information contained in the data message. The proclamation doesn't significantly deviate from the UETA definition but it is almost verbatim transplantation of the MLESig. Its definition is technology neutral i.e. wide enough to include feature technologies of signing. It follows purpose-based method of definition. All the above definitions are conceptually similar. Electronic signatures can identify the person who has affixed the signature to the document and indicate the person's agreement to the content of the document in the same way as a handwritten signature serves.

The examples of electronic signatures highlighted above (other than digital signatures) are not able to assure both the sender's identity and the integrity of documents. However, an advantage of these types of signatures is that, in many cases, they are in human readable form and can be easily understood by humans.[234] To serve these functions, an electronic signature must be in a form capable of retention and capable of being accurately reproduced for later reference.[235] A digital signature which is the most secure type of electronic signature is based on Public Key cryptography. Cryptography provides a form of electronic signature, serve the purposes of identifying the sender of a message (authentication and non-repudiation) and also ensure that it has not been altered (ensuring

[232] Ibid
[233] UNCITRAL Model Law on Electronic Signatures With Guide to Enactment, 2001, Art.2 (a), available at http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf [accessed on 04/02/212]

[234] Dawson et al, cited above at note 4, p.25
[235] Cited above at note 111, p

its integrity). Cryptographically aided method of signing can also assure confidentiality of the signed document. Cryptography is a method of signing through the use of two keys; a private key and a public key[236] and can be either symmetric or asymmetric cryptosystem. Empirically asymmetric cryptosystem is more secure. An asymmetric cryptosystem is an electronic system which can be used to generate a secure key pair for electronic communications and transacting and which consists of a private key for creating an electronic signature and a corresponding public key for verifying the electronic signature.[237] The signature created by cryptography is digital signature. Digital signatures serve secure e-contracting.

Generally speaking, digital signatures are a form of cryptographic language which mathematically transforms an electronic message into a code which can only be identified by another person having a special access code. The recipient of the information will know that it is an authentic record when he applies to the record that has been signed off with the private key held by the originator, the public key of the originator that is publicly known. Where the two keys match, there is verification and authentication of the record. An electronic signature based on strong electronic identification can justifiably be considered stronger legal proof of an identified person's will to commit to a specific agreement (either on the person's own behalf or on behalf of a company or other legal entity represented by the person) than a traditional hand-written signature on a paper contract document.[238] Digital signatures are based on strong electronic identification using the cryptography system; therefore fulfill identification of the signer and an originator of e-communications. For detail discussion about digital signatures refer chapter four of this study.

The above paragraphs focus on features of e-signatures. The following paragraphs articulate comparative legal status of e-signatures. Electronic signatures are unrecognized

[236] Dawson et al, cited above at note 4, p.25
[237] Law Reform Commission, Documentary and Electronic Evidence, (December 2009), p.18, available at http://www.lawreform.ie/_fileupload/consultation%20papers/cpdocumentaryandelectronicevidence.pdf [accessed on 11/11/2012]
[238] The legal validity of electronic contracts and electronic signatures in Finland, p.1, available at http://www.company.signom.com/en/component/content/article/35-solution/71-legal-validity?format=pdf [accessed on 27/02/2012]

by the conventional contract laws because they were basically framed in light of paper based signatures. To avoid the confusion, both international organizations and nations encounter the difficulty by legislative measures. A large number of legislations have now implemented that enable an electronic signatures to satisfy laws that require signature as a precondition of formality requirement. Especially the international organizations are worthy of appreciation for taking remedial activities to relieve the uncertainty associated with signing of electronic documents. Significantly Art.9 (3) of the UN Convention contains a new rule for the electronic functional equivalent of a handwritten signature. Article 9(3)(*a*) of the convention contemplates a definition about functional equivalent of electronic signature; i.e., where a signature is a precondition it is fulfilled if a method is used to identify the party and to indicate that party's intention in respect of the information contained in the e-communication. The convention also focuses on the method used as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement or proven in fact to have fulfilled the functions described above, by itself or together with further evidence**.** The convention doesn't approve the method in all conditions; rather it focuses on secure methods of signing assuming electronic signatures are vulnerable to forgery.

UNCITRAL is chronologically ranked first in paving the door for validation of electronic signatures. Paragraph (1)(a) of Art.7 of the UNCITRAL E-commerce Model Law establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of a data message and confirms that the originator approved the content of that data message. It is based on the assumption of the functions of a signature in a paper-based environment. It focuses on two basic functions of a signature, namely to identify the author of a document and to confirm that the author approved the content of that document. The UNCITRAL Model Law in qualifying electronic signatures uses the phrase <<indicate that party's approval of the information contained>> instead of the analogous phrase of the convention which says <<indicate that party's intention>>. Except for this phrase, both

the UNCITRAL Model Law and the UN convention are identical in all perspectives.[239] MLESig according to Art.6 provides that; where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose of which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.[240]

The reliability of the signature method used is the crucial issue under all the above discussed regimes. However, they don't provide any guidance as to how the electronic signature may be created to meet the requirements. In the context of establishing that a particular signature method is reliable, they don't prescribe that any particular form of technology be used. This is a deliberate decision so that the legislation does not have to be amended to take into account technological changes and that it is more appropriate for the market to assess appropriate signature products for their particular purposes rather than have legislation specify acceptable technologies.[241] It has been suggested that the critical factors that may impact upon reliability is the ability of the signature method to authenticate the document, and to maintain the integrity of the document for later reference.[242]

Following the foot steps of the above international organizations, others either at regional level or country level took measures that ensure acceptance of electronic signatures. The EC proclaims a separate regime for signing of e-documents. The European Directive 1999/93/EC on a Community Framework for Electronic Signatures pursuant to Art.2 (2)[243] states conditions for valid signature. The E-Signature Directive of EU recognizes

[239] UN, cited above at note 96, p.27
[240] Mills, cited above at note 1, p.14
[241] Dawson, cited above at note 4, p.27
[242] Id, p.28
[243] The definition of advanced electronic signature contemplated in Article 2 of the above directive calls for the following features: uniquely linked to the signatory, capable of identifying the signatory; created using means that the signatory can maintain under his sole control and linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. In order for an advanced electronic signature to meet the legal requirements, it has to satisfy the criteria of Annexes I, II and III.). The Directive prescribes detail conditions for the admissibility of advanced electronic signatures. The European

the validity of two types of signatures; an electronic signature and an advanced electronic signature. The former should not be denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form. [244] The advanced signature qualifies only when it is based on a qualified certificate. The qualified certificate must also be based on a secure signature creation device.[245] The Community Framework for Electronic Signatures of EC sanctions that an advanced electronic signature must be treated as the equivalent of a traditional signature in its legal effect.[246] UETA takes a different approach to signature, i.e. one that is technology neutral. Unlike the EC Directive, UETA does not distinguish between different types of electronic signatures. Section 7(d) of UETA states, if a law requires a signature, an electronic signature satisfies the law.[247] Its purpose is to validate electronic signatures as equivalent to hand-writing signatures. In contrast, the EC's E-Signature Directive focuses on satisfying the criteria of non-repudiation, integrity, security and confidentiality of the signature based on the identification of the signatory and the certificate issued by the Certificate Providers.[248] The EC's Electronic Singnature Directive doesn't leave the assessment of signatures to market like UETA and the above two UN laws. Instead it focuses on sanctioned specified conditions; therefore neglects dynamism of technology.

The validity of electronic signatures is also corroborated by judicial activism. The only Australian decision that has considered the effectiveness of an electronic signature under Australia's electronic transactions legislation is the decision in Faulks v Cameron (2004) 32 Fam LR 417. This decision involved e-mails that ended with the type-written words 'Regards Angus' and 'Regards Angus Cameron'. The court had to determine whether the

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Directive on a Community Framework for Electronic Signatures, 1999, Directive 93/ED pursuant to Art.2 (2), available at https://www.law.kuleuven.be/icri/publications/58The%20European%20Directive%201999.pdf [accessed on 25/10/2012]

[244] Farhan, cited above at note 116, p.43

[245] Kierkegaard, cited above at note10

[246] Jane Kaufman Winn and Jens Haubold, Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective, p.30, available at http://www.law.washington.edu/Directory/docs/Winn/Electronic_Promises_Revised.pdf, [accessed on 14/07/2012]

[247] Kierkegaard, cited above at note 10

[248] Ibid

e-mails were signed. With surprisingly little analysis, it was held that the e-mails had been signed. The printed signature on the defendant's e-mails identifies him and indicates his approval of the information communicated, that the method was reliable as was appropriate and that the plaintiff consented to the method.[249] A type-written name at the bottom of an e-mail and even the header of an e-mail with the name of the sender may be a sufficient signature to satisfy a requirement for an agreement to be signed.[250]

The above sample comparison of both legislative reform and judicial activism provide undeniable input when we return to the position of our law. They convey ample statutory samples for revisiting of our law. All principally approve electronic signatures though follow different expressions. As stated above, electronic signatures are unrecognized by our general contract law. Concise restatement of subarts.1 and 2 of Art.1728 of the Civil Code stipulate handwritten signatures or thumb-mark respectively. They are inapplicable to electronic signatures. Though inapplicable to ordinary contracts, the National Payment System Proclamation No. 718/2011 validates admissibility of electronic signatures according to Art.23 (3).[251] The proclamation prescribes qualification mechanism of electronic signatures under its definition part of Art.2 (11). The electronic signatures stipulated by the proclamation can be easily extends to the Civil Code. Therefore, the Code should be revised to give functional equivalence of electronic signatures as corresponding hand-written signatures.

3.4. Excluded Contracts from Electronic Contracting

In spite of the fact that different legislations stipulate for functional equivalence of electronic writings and signatures, for various reasons some contracts are excluded from being concluded electronically. Strict formality requirement associated with public policy is the main ground of exclusion. For example, some contracts require a higher standard of

[249] Dawson, et al, cited above at note 4, p.26
[250] Id., p.28
[251] Payment instructions, messages and funds transfers that are initiated, processed or executed through electronic means including electronic signatures shall be admissible as prima facie evidence of the matters or transactions carried out. Cited above at note 13, Art.23(3).

execution. Under many laws, for example, and those of civil law jurisdictions in particular, certain contracts must be taken as notarial deeds thereupon being entitled to official status or force of law. The notion of uniqueness of originality is particularly relevant for some documents to avoid feature change and mischief. These might include contracts for the sale of land, registered seagoing vessels, establishment of companies and the creation of certain security interests over property, etc... The contracting parties to such deeds must appear before a notary public, which in some jurisdictions must read out to them the text of the deed and certify their acknowledgement that those are the terms to which they have agreed and such a deed is then executed in the presence of the notary.[252] Considering their public policy surrounding such contracts, different e-commerce laws prescribe either an exhaustive list of the excluded contracts or guidance on the system of exclusion. The following are sample examples.

The UETA of US, is restricted its applications in certain types of contracts such as transfers of rights in real estate; contracts by law requiring the involvement of courts, public authorities or professions exercising public authority; contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession and contracts governed by family law or by the law of succession; as per Sec.3. This undoubtedly makes sense, as the capacity for mischief and irreparable damage is greater in contracts of these natures.[253] Aware of the sensitivity attached to some formal documents the Commission of Europe suggested national governments be allowed to exclude certain contracts from the equivalence principle. [254] Excluded contracts listed in Art.9 (2) of the ECD of EC are: contracts that create or transfer rights in real estate, except for rental rights; contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession; and contracts governed by family law or by the law of succession. As per Subart.3 of the above article, it sanctions member states to notify to the commission for any change they introduce to the excluded

[252] Mills, cited above at note 1, p.16
[253] Cited above at note 111, p. 8
[254] Edwards, cited above note 7, p.74-5

transactions.[255] Thus, it permits derogation from the excluded transactions. In comparison to the ECD of EC, the exemption stipulated by UETA is broader and extensive[256]

Art.2 of the UN Convention lists three categories of contracts excluded from the scope of the Convention. We shall deal only with those exclusions which may be relevant to our topic. Among them are negotiable instruments. It does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money; due to the difficulty in creating an electronic equivalent of paper-based negotiability. However, it is noted that the Convention does apply to letters of credit and bank guarantees, which are not covered by the third excluded category.[257] The Electronic Transactions Act 1998 of Singapore as per Art.4 excludes creation or execution of a will, negotiable instruments, declarations of trusts or power of attorney, contracts for sale or other disposition of immovable property, conveyance or transfer of any immovable property and any document of title.

The above comparison of various legislations noted the various types of excluded contracts. There is both divergence and convergence on the excluded transactions among them, yet the convergence outweighs the divergence. Needless to say, our Civil Code is remote to e-contracting. It doesn't give any indication on the excluded contracts from subject of electronic contracting. Liberalizing conclusion of all contracts by e-communications may have detrimental effect. Therefore, installing methods of exclusion or list of exclusions is a timely matter. At this phase I have an ambivalent to recommend an exhaustive list of the types of excluded transactions. This seeks deep and continued research. Nevertheless, any one should alert that liberalizing all transactions to be conducted by Internet communication may be destructive. The legislative reconsideration of the Code along e-contracts, should consider the excluded contracts from being contracted by e-communications.

[255] Ibid, p.80
[256] Kierkegaard, cited above at note 10
[257] Wei and Suling, cited above at note 62, p.122

3.5. Application of the Privity of Contract Principle on Network Connected Contracts

The age-old contract principle is, once a contract is concluded it has the force of law and effective between the contracting parties only. In reality, a contract or its performance can affect a third party. However, the doctrine of privity means that, as a general rule, a contract can't confer rights or impose obligations arising under it on any person except the parties to it.[258] The law of contract, however, should give effect to the reasonable expectations of contracting parties.[259] The privity principle of contracts is incorporated under Art.1731 of the Ethiopian Civil Code. The frequently asked questions is, how can be the principle apply to network connected contracts where inherently multiple parties may involve in a given contract. Performance may be supported by non-contracting parties such as network operators. Network connected contracts are an example of e-contracts, but have more complex features than any ordinary e-contract. Network contracting is concluded with anticipation of the holistic network operation. The quest for the appropriate legal regulation of networks that are normally concluded in the form of bilateral contracts, but at the same time give effect to multilateral (legal) effects[260] induces practitioners and legislatures to scrutinize the feasibility of privity of contract principle widely practiced in conventional contracts. This topic adduces how interconnection is established within network connected contracts without direct contractual relationship; and how it induces to relax the privity of contract principle. Ultimately, this topic examines the propriety of the above cited provision of our Civil Code.

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[258] The Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties, (Item 1 of the Sixth Programme of Law Reform), p.6, available at http://lawcommission.justice.gov.uk/docs/lc242_privity_of_contract_for_the_benefit_of_third_parties.pdf [accessed on 27/11/2012]

[259] Id, p.1

[260] Hugh Collins (editor) and Michelle Everson (translator), <<*Networks as Connected Contracts*>>, The Modern Law Review, (2012), p.456-7, available at http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2012.00910.x/pdf [accessed on 24/09/2012]

A network contract may have interrelated dependencies within the activities as well as between activities and clauses.[261] The activities may be carried out by different parties from different organizations and require varied services. This is especially the case where commercial transactions involve intermediaries' participation.[262] Internet intermediaries are part of the Internet economy and include mediators that link e-commerce buyers and sellers, companies that provide web content, companies that provide market places in which e-commerce transactions can occur.[263] Therefore, they are endowed with a potential to shape any bilateral contracts within the network. The notion of an agreement between the parties has to be interpreted as covering not only bilateral or multilateral agreements concluded between parties, but also agreements involving intermediaries such as network operators (e.g., third-party service agreements). Agreements may incorporate system rules, i.e., administrative and technical rules and procedures to be applied when communicating data messages.[264] This proves how interconnection is built among network transactions.

The ambiguity about privity of contract in the case of Internet (network) contracts generates from uncertainty of the network regulation. Network concept is an emerging idea based on modern concept of contracts which demands relaxation of the privity of contract principle. Network contract features the following scenarios. The unity of the traditional contract is dissolved into a multiplicity of separate contracting worlds; therefore, the binding force of contracting needs to be reformulated from an interpersonal to an interdiscursive relation.[265] Contract is no longer the consensual exchanged relation of two legal subjects to which the judge grants legal force. One and the same contract appears as the simultaneous expression of different and divergent rationalities, and the

[261] Anushree Khandekar et.al, A Methodology and Toolkit for Deploying Contract Documents as E-contracts, available at http://crpit.com/confpapers/CRPITV83Khandekar.pdf accessed on 06/08/212]

[262] Moira Patterson (Dr.), E-commerce Law, (21st June, 2001), http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN008643.pdf [accessed on 23/06/2012]

[263] Zorayda Ruth Andam, E-commerce and E-business, (May 2003), p.5, available at http://fcitr.kau.adu.sa pdf [accessed on 07/01/2012]

[264] UN, cited above at note 96, p.28.

[265] Gunther Teubner (author), Iain L. Fraser (transalator), 2006, In the Blind Spot: The Hybridization of Contracting, p.1, available at https://user.uni-frankfurt.de/fb/fb01/l_Personal/em_profs/teubner/dokumente/VERTRAG_eng_TheoreticalInquiries.pdf [accessed on 23/11/2012]

old two-person relation of contract is metamorphosed into a poly-contexture relation, which though consensual, is impersonal.[266] A single contract is always already a multiplicity of differing processes, structures and operations.[267] The contract's unity disappears in the black hole of compatibilities, synchronizations, resonances and co-evolutionary processes. Its contents, dynamics, decisions, binding energies are scattered over the closed systems involved.[268]

Although private law is supposed to support private autonomy, it comes empty-handed when asked to deal with networks. The law's answer exhausts itself in the concept of bilateral contracts.[269] Net (network) relations create commitments and social bonds out of cooperative actions which connect recursively with each other.[270] The network expectations arise from bilateral contracts, linking a certain number of actors beyond the explicit contractual substance of these bilateral contracts. Traditional contract law is blind to these kinds of expectations because of the dominance of the principle of privity, which forbids any reference to external expectations other than those of the parties of the bilateral contract.[271]

Network (internet) contracts experiment mutual dependency. A network is described as a collection of nodes and the link between them.[272] The most famous and most ambiguous definition of the Internet is that it is a network of networks.[273] It is like properties of arrangements such as those normally concluded in the form of bilateral contracts, but at

[266] Id., p.1-2
[267] Id., p.4
[268] Id., p.2
[269] Gunther Teubner (author), Morag Goodwin, et al, (translators), <<*the law of the network society*>>, German law Journal, Vol.10, p.398, available at http://www.germanlawjournal.com/pdfs/Vol10No04/PDF_Vol_10_No_04_395-416_SI_Articles_Teubner.pdf [accessed on 20/08/2012]
[270] Id., p.401
[271] Marc Amstutz and Gunther Teubner (editors), Networks Legal Issues of Multilateral Co-operation, (2009), preface ix
[272] Maciej Konrad Borowicz, <<*Beyond Contracts and Organizations*>>, European Journal of Legal Studies, Vol.4, Issue 2 (Autumn/Winter 2011), p.272, available at http://www.ejls.eu/9/120UK.pdf [accessed on 11/09/2012]
[273] Koka Chedia, Models of Internet Regulation, (March 29,2010), p.1, available at http://www.etd.ceu.hu/2010/chedia_koka.pdf [accessed on 22/11/2012]

the same time give rise to multilateral legal effects.[274] Without a centre, without leadership, without a unified management, and without one single authorized representation, the network acts exclusively through its many individual nodes which do not cease to be collective actors themselves. They operate simultaneously in their own name and in the name of the network.[275] In contractual networks, a heteronymous private order superimposes its demands on autonomous bilateral contracts. The reference of one contract to another entails the inclusive acceptance by the contractual partners of a foreign private order. Each bilateral contract must submit to a coherent overall system that needs to be respected.[276] The specificity of network lies in the fact that a contract observes its environment in a particular manner. The contractual systems observe another contractual system rather than the market, adapting its internal norms accordingly.[277] Cooperation between the relevant actors is essential because the Internet experience arises not from the efforts of any single actor, but rather through their collective contributions.

Networks as connected contracts as defined by Teubner exhibit three characteristics, i.e. multi-dimensionality, network purpose and economic unity. First of all, the multi-dimensionality of these kinds of networks is typical, characterized by reciprocal references to each other in bilateral contracts. This multi-dimensionality can find its expression in the performance program and/or in the execution of the contract. When, for example, a bank transfer is completed, usually at least five participants can be joined together. The transfer of an amount of money is therefore effected through a stringing together of different mutual contractual relationships. These contracts regularly bear relation to each other.[278] Above and beyond multi-dimensionality; connected contracts require a so-called network purpose, i.e. a reference in their contents to the common project of the contractual association. With a bank transfer, the network purpose can be seen in that the participants want to convey the cashless transfer of a given sum from the

[274] Borowicz, cited above at note 167, p.273.
[275] Teubner (author) and Goodwin, et al (translators), cited above at note 164, p. 409-10
[276] Amstutz and Teubner (editors),cited above at note 166, p.15
[277] Chedia, cited above at note 168, p.275.
[278] Amstutz and Teubner (editors), cited above at note 166, p.108

account of the transferring party to the account of the receiver of the transfer.[279] Finally connected contracts should encourage an economic unity. In this regard, Teubner understands a legally relevant and closely cooperative relationship between the participants in the connection. It can be assumed that in a bank transfer there is the presence of such a cooperative relationship.[280] To crystallize, a genuine connected network contract emerges, when mutual references within the bilateral contracts to one another, a substantive relationship with the connected contract's common project and a legally effective and close cooperative relationship between associated members are present.[281]

The difficult question faced here is; whether legal obligations can be established at all among network participants who are not contractually bound to one another.[282] Legal doctrine limits liability to claims originating in bilateral contractual relations.[283] However, the logic of network demands that network members who are not tied together by means of bilateral contracts are liable to each other; particularly, where they violate the collective interest of the network.[284] Private law has undergone a set of promising developments towards the bindingness of networks without contract that one should forcefully pursue.[285] In German law, the notion of Vertragsverbund (connected contracts) has been developed a doctrine that is ripe for further evolution in the network sphere. To quote a doctrinal authority from Germany, the notion of connected contracts is used to describe any plurality of contracts which refer to each other within either bilateral or multilateral relationships, whose interconnection gives rise to direct legal effects (of a genetic, functional or conditional nature), whether these simply result in the effect of one contract to the other (or others), or whether one can also observe mutual effects.[286] Following the 2002 reform of the German law of obligations, the newly created § 311 of III BGB establishes a contractual obligation without contract and the new § 358 of III

[279] Ibid
[280] Ibid
[281] Borowicz, cited above at note 167, p.275.
[282] Amstutz and Teubner (editors), cited above at note 166, p.27.
[283] Teubner (author) and Goodwin, et al (translators), cited above at note 164, p.412
[284] Id., p.412-3
[285] Id., p.402
[286] Amstutz and Teubner (editors), cited above at note 166, p.15

BGB stipulates spontaneously connected contracts as well as. These rules can altogether be seen as legislative traces of recognizing networks without contract.[287]

Therefore, anyone tackling contractual networks will quickly find that this phenomenon can't be grasped using traditional doctrine. The deeper reason for this lies in an emergent phenomenon; contractual networks allow new orders of expectations to arise from bilateral contracts, linking several, sometimes many, actors, who selectively interact with each other (as, for instance, in franchising or in inter-bank payment systems). Conventional law of contract is blind to these new expectations. One appropriate response is to assign these emergent orders of expectations to a higher-order constitution. By higher-order constitution means that a new (and thus also emergent) legal order is developed from the rules of contract law that apply to the individual contracts that constitute the contractual network.[288] This emerging contract law will consider the network interconnection; and thus will relax the conventional privity of contract principle.

When we scrutinize the appropriateness of our general contract law, it doesn't respond to network connected contracts. Art.1731 demonstrates fragility of the Civil Code for network connected contracts. Subart.1 of the provision stipulates that, the provisions of a contract lawfully formed shall be binding on the parties as though they were law. Subart.2 of the same provision which states, the contents of the contract shall be determined by the parties subject to the mandatory provisions of the law; further tights the privity of contract principle. The Code firmly underlines the privity of contract principle. Especially the latter sub-provision totally neglects the usual reference of one bilateral contract to another contract in the case of Internet (network) contracts. The interconnection (dependencies) of operation among Internet participants persuades them to refer other contracts within the network. Existence of one contract is either explicitly or tacitly configured to other contracts. Thus, I would like to suggest that the principle of

[287] Teubner (author) and Goodwin, et al (translators), cited above at note 164, p.403
[288] Amstutz and Teubner (editors), cited above at note 166, p.309

privity of contract contemplated by our Civil Code should be revisited along network connected contracts.

3.6. Variation and Notification of Electronic Contracts

E-contracts may involve continued and successive communications either with the view of performing or managing the contract. Communications between parties may have the value of either variation or notice to the contract. At that phase, parties may face legal uncertainties on an effective variation of the e-contract and the validity of electronic notices.[289] The risk for contracting parties is increased because e-mail traffic passing between them may give rise either to an effective variation or notification of the contract. This risk is moreover aggravated when parties engage in regular e-mail or other e-communications in the day-to-day administration of their contracts. For parties who do wish to be bound by their e-communications, it will be important to include appropriate provisions in the contract setting out the status of electronic communications[290] to avoid the undesired consequence of the communication

A party, who concludes a contract by e-communications, unless agreed otherwise, binds himself to subsequent communications delivered by the communication channel employed to conclude the contract. E-contracts may require that, with a single click, parties conduct business completely online. This means not only that the contract is consummated in electronic format, but also that all subsequent and related communications and notices will be provided electronically.[291] UETA is largely silent with respect to this problem, allowing with a single click-on consent to all-cyber relationships, provided there is manifest assent to do so, regardless of whether the party

[289] Dawson, et al, cited above at note 4, p.31
[290] Id. p.33
[291] Julian Epstein, <<cleaning up a mess on the Web: a comparison of Federal and State Digital Signature Laws>>, Legislation and Public Policy, vol. 5:491, (2002), p.491, available at https://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__journal_of_legislation_and_publ ic_policy/documents/documents/ecm_pro_060660.pdf , [accessed on 12/10/2012]

expressly understands the difficulties that may be inherent in future communications under the contract.[292]

When we analyze variation of an e-contract, it can be varied by electronic communications unless parties agree to the contrary. Art.1722 of the Civil Code slightly confirms to the above principle stating that a contract made in a special form shall be varied by the same form. When written form is stipulated either by law or the contract, variation of the contract must be in written form. As stated earlier in this paper, electronic records have functional equivalence with paper writings. A question may arise whether contracts made in paper writing can be varied by data messages due to functional equivalent approach of data messages with paper writings. The problem may be pressing, when silence to the offer amounts to acceptance in the case of preexisting business relation as stipulated under Art.1684 of the Civil Code. The sounding one is, contracts concluded by non-electronic means shouldn't be varied by electronic communications because a party may be bound to contracts he never aware. If the contracting parties stipulate in advance, it is reasonable. E-communications particularly e-mails are inaccessible because the party mayn't always open his e-mail. In addition to that, the party mayn't have accessibility to e-communications. Conversely, for e-contracts, proposal to vary the contract can be effectively given by electronic communications, unless there is contrary agreement between the parties. In electronic contracts, the contracting party is presumed as impliedly assents to subsequent communications to be given by e-communications.

One of the main issues that would need to be considered is whether from the conduct of the parties and the surrounding circumstances, the parties have impliedly consented to notices being given by electronic communications.[293] If the contract is absolutely silent as to communications under the contract, it is possible that the general law contractual principles may recognize the validity of a notice that has been delivered by electronic means.[294] Nevertheless, this general contractual principle yields uncertainty on the effect of a notice to inform the debtor. A given notice shouldn't only emphasize the creditors'

[292] Id, p.500
[293] Dawson, et al, cited above at note 4, p.33
[294] Ibid

intention to demand performance but should also effectively notify the debtor. If we stick to the general contractual principle which validates any means of notification used by the creditor, its magnitude of notification to the debtor may be neglected. Thus, any notice should be assessed on its reasonableness of effectively informing the debtor, if parties didn't determine the means of notification in advance. This makes validity of electronic notices to any contract in question. In non-legal sense, to avoid the legal uncertainties about the status of electronic notices, e-contracts should contain clear provisions setting out the parties' agreement as to how valid notices may be given under the contract.[295] Instead of following non-legal solution, it is preferable to search legal solution.

Pursuant to Art.1772 of the Civil Code, nonperformance is invoked after having placed the other party in default by notice. Art.1773(1) of the Code fixes the form of notice stating that, notice shall be by written demand or by any other act denoting the creditor's intention to obtain performance of the contract. However, feasibility of e-notices to all contracts must be scrutinized. The above provision unduly favors the creditor to employ any means of notice delivery. For contracts concluded by non-electronic means, employing delivery of notice by e-communication may jeopardize the debtor because he mayn't be aware it. To avoid the confusion, the E-Sign of US conditioned electronic notices for advance determination by the parties within their contract provision. It requires a specific and electronic consent process, before an electronic notice may replace a legally required written notice in section 101(c).[296] According to the Act, unless provided by the parties' agreement, electronic notice is improper for contracts concluded by non-electronic means, whereas in e-contracts it is applicable, otherwise the parties agree to the contrary. For contracts concluded by e-communications, unless the contrary is proved from agreement of the parties, notice can be effectively given by e-communications. The party by forming the preliminary contract by e-communication, also impliedly assumes delivery of notices through it. Therefore, our Civil Code should be updated to address such uncertainties.

[295] Id., p.34
[296] Kierkegaard, cited above at note 10

3.7. Evidentiary Value of Electronic Documents

Documentary evidence is an essential element in nearly all litigations.[297] A person trying to enforce their rights under an agreement proves its existence by procuring documents. In the online (electronic) environment this may be difficult as there is often no hard copy in existence and contract conditions may be altered over time.[298] Evidence in the case of electronic environment is adduced by procuring electronic records (electronic documentary evidence). Electronic documentary evidence is any information captured, generated or maintained in databases, operational systems, applications, programs and computer-generated models which extrapolate outcomes, electronic and voice mail messages and even instructions held inertly within a computer memory bank.[299] The evidential value of e-documents to e-contracts raises controversy on their admissibility and the value of Parole Evidence Rule.

Admissibility of e-records is not as smooth as in paper documents. Paper writing, by its very nature, is tangible and generally is not subjected to inadvertent change. Intentional change of paper documents requires forgery and specialized skills. All parties generally have access to copies which can be used to prove the terms of an agreement in court.[300] By contrast, there are endless ways in which e-records can be corrupted. Alterations are often impossible to detect, and the incentives to commit fraud increase if one party is aware that the other party to a contract cannot access the document or has in some way inadvertently corrupted it. For example, an electronic mortgage may be designed so that a new contemporaneous date is placed on it every time it is accessed. In the event that one party's records are altered, the electronic record can no longer prove its own contents, and the critical question becomes how easily that party can access original records or those of adverse parties, if necessary, to prove the terms of a contract.[301]

[297] Commission, cited above at note 132, p.1
[298] Jacobson, cited above at note 17, p.11.
[299] Commission, cited above at note 132, p.8
[300] Epstein, cited above at note 186, p.504
[301] Ibid

Different methods of contract formation on the Internet often produce different types of evidence varying from the totally unreliable to the unquestionably reliable.[302] Based on the record they produce, there are two types of e-contracting. In the first type of e-contracting, the parties exchange messages of some sort and each party has some reliable electronic record of the exchange. Prototypical transactions of this sort include Electronic Data Interchange (EDI) contracts, deals concluded by an exchange of e-mail and orders placed through a World Wide Web page that are confirmed by e-mail. Either party can detect and object to any mistakes because each has a copy of the agreement. Transactions under this heading are almost identical to paper transactions because they leave behind an audit trail that the parties and other observers can review. In this situation, it can reduce the probability of litigation by providing each party with a summary of rights and obligations.[303] In the second type of e-contracting, one party unilaterally states the terms of the agreement and the other party may accept or reject the terms by performing some action such as clicking on a button. The most common example of such an agreement can be found on World Wide Web sites that display a screen detailing the terms and conditions of access to a particular page. In order to access the site, a user must assent to the terms by clicking on the words <<I Accept>>. When this occurs, there is generally no actual record of the transaction.[304] This scenario, akin to a unilateral contract in which a user signifies acceptance by her conduct, presents a number of legal complications. Only the site's owner can have a record of the user's acceptance (by monitoring access to the site) and there is no way to confirm the identity of the person who actually clicked the button. In addition, the terms of the agreement displayed are entirely under the control of the website owner and changes to the terms may be difficult to track. The parties may not be able to turn to the records of a button-click by a certain computer or to the Web page itself for an accessible, reliable record of the rights and obligations of the parties.[305] The latter one produces difficulty for the evidential admission of electronic documents.

[302] Pompian, cited above at note 45, p.1492-3
[303] Id., p.1480
[304] Id., p.1481
[305] Ibid.

Electronic evidence is useful when it has some way to identify the parties involved, can be examined by a court and is difficult to forge or alter.[306] Yet, one important proviso remains; electronic records can only be as reliable as the system that transmits and stores them. In the event of litigation, courts must investigate the security devices and procedures to ensure that the signed writing offered as evidence of a contract accurately reflects the parties' agreement.[307] Electronic evidence, like its paper analogue, is most effective when a third party be it a court or a potential trading partner can observe its creation and verify its authenticity.[308] In determining the relevance of electronic documentary evidence it may be necessary to show that the document is what it purports to be and represents the information which it is suggested as doing.[309] E-records become statutorily admissible in litigations by introduction of new e-commerce regimes. The regimes also stipulate the conditions of admissibility for electronic documents. The following are typical examples which contemplate admissibility of electronic records.

The purpose of Art.9 of the UNCITRAL E-commerce Model Law is to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value. Its Art.9 (1) states that in any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence. But admissibility of data messages is not without limitation. Subart.2 of the same provision puts conditions for admissibility of data messages. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified and to any other relevant factor. Specifically, E-Sign of US Sec.101 (e) provides that the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all

[306] Id., p.1483
[307] Id., p.1487
[308] Id., p.1492-3
[309] Cited above at note 132, p.25

parties or persons who are entitled to retain the contract or other record. This ensures that the contracting party should have access to original electronic documents.[310]

Both the above regimes underline that the information must remain accessible and the method used for storing information must be reliable for maintaining the integrity of the document.[311] To sum up, the weight given to electronic evidence is dependant upon the security and management of the electronic storage system. Weight given to electronic evidence considers the following circumstances concurrently:

- How can the integrity of electronic records be proven given the belief that they can be altered without trace or that data may have been corrupted due to a computer or software malfunction?
- How can the authenticity of the origin of electronic records be proved? In other words, how can it be shown that an electronic record has not emanated from a fraudulent source?
- How may the time of dispatch and receipt of an electronic communication be proved?
- How can the correct operation of hardware and software be proved?
- How can errors in electronic records be detected?
- If a printed version of an electronic record is admitted as evidence will it have less weight than the electronic record itself would have had?
- How may the chain of custody of evidentiary documents be proved?[312]

As stated at the earlier of this study, the Civil Code doesn't recognize e-records since its framework is based on paper documents. Arts.2005 and the subsequent provisions of the Code contemplate the procedure of admitting written evidences. When the word written is used within the Code, it refers to paper writing as we can comprehend either directly or by contrary reading of its different provisions. The cumulative reading of Arts.1727/8 of the Civil Code refer to paper documents. Thus, Arts.2005 and the subsequent provisions about admissibility of written evidence of the Code are framed along paper documents or

[310] Epstein, cited above at note 186, p.505
[311] Dawson, cited above at note 4, p.75
[312] Id., p.55

some other tangible documents. Deep analysis of the Code is empty-hand in providing any guidance on the procedure of admitting e-documents. In reality, admissibility of e-records doesn't follow the same procedure as paper correspondence. The manner of admissibility for e-records isn't equivalent with recognition of their validity. Recognition of their validity is a preliminary condition for their admissibility. The manner of admissibility of e-documents demands statutory prescriptions as most e-commerce legislation done. Art.23 of the National Payment System Proclamation No.718/2001 rules admissibility of electronic evidence.[313] It may be an instructive to our Civil Code. But what is forgotten by the proclamation is; it doesn't convey any guidance they way electronic evidence are admitted as most e-commerce regimes prescribe. Therefore, our Code should be revised to clearly rule admissibility and the procedure of giving evidential weight to electronic documents.

The other prevalent issue is the value of Parole Evidence Rule in electronic contracts. The fundamental principle of the common law is that the best evidence i.e. the original document must be offered to the court in order to satisfy the requirements of evidential rules.[314] The Best Evidence Rule is also commonly referred to as the Original Document Rule.[315] A copy would only be admissible if the original was unavailable and if it is authenticated.[316] The most important question posed by the best evidence rule in the digital environment is, whether it is practicable to tender the original document in court, and which version of an electronic record is the original document?[317]

If original were defined as a medium on which information was fixed for the first time, it would be impossible to speak of original data messages, since the addressee of a data

[313] 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. Subart.3 of the above proclamation also provides, payment instructions, messages and funds transfers that are initiated, processed or executed through electronic means including electronic signatures shall be admissible as prima facie evidence of the matters or transactions carried out. Cited above at note at13, Art.23(1).
[314] Commission, cited above at note 132, p.28
[315] Id., p.30
[316] Dawson, cited above at note 4, p.52
[317] Ibid

message would always receive a copy thereof.[318] In the context of electronic records, the question of what is an original record for the purposes of the Best Evidence Rule is not as clear cut as it is with corresponding paper equivalents.[319] The need to retain the Best Evidence Rule for e-contracts has been critically questioned in several jurisdictions. It has been argued that its failure to make allowances for modern technological advancements as well as the dramatic shifts in the manner in which we now collate, generate and store data have reduced the impact of Best Evidence Rule.[320]

The best evidence rule may still be an issue where a print out is sought to be admitted in evidence where there is an original e-record.[321] The meta-data[322] that is associated with an electronic record is likely to be considered part of the document and therefore should be produced as part of the documentary evidence. The copy stored on the recipient's computer may well include additional information such as the time of dispatch and receipt. If the print out of the electronic record does not include the meta-data it may be of less evidentiary value. In the United States, in Armstrong v Executive Office of the President 810 F. Supp 335, it was held that where the court had ordered the preservation of e-mail communications, the order was not complied with by the preservation of print outs of the e-mails alone. The electronic versions of the e-mails contained much information that would not show up on the printed form, including the date of transmission, the date of receipt, detailed list of recipients and linkages between messages sent and replies received. Davidson (1999) argues that as a result of such differences between the electronic records and the print out, greater weight should be given to the electronic records. It is therefore essential that electronic copies of documents be kept

[318] Rowland and Macdonald, cited above at note 43, p.318.
[319] Commission, cited above at note 132, p.30
[320] Ibid
[321] Dawson, et al, cited above at note 4, p.52
[322] (Meta-data is the data about data and involves examining the electronic trail documenting the provenance and chain of custody from inception to end-document. Meta-data is visible throughout the electronic document and provides a wealth of knowledge. It may include the user's name or initials or the name of a company, the name or assignations of the computer on which the file was created, the network server or hard disk where the file has been recorded or saved as well as other file properties. It may also contain summary information about the provenance of the electronic document including the time of creation or transmission of the document or equally the time and date of any modifications made. It is an amalgam of information buried within the electronic record of the document and can track the development of a document from inception to transmission far more rigorously than the trail of a paper document may be identified. Commission, cited above at note 132, p.19

rather than parties merely relying on print outs of documents as records.[323] Where a print out of an e-mail is sought to be introduced as evidence, the best evidence rule may well apply. If the print out does not include all relevant information such as the meta-data associated with the e-mail, it may not be admissible as evidence. The weight given to the printout may be reduced if the print out does not include all of the information that is accessible from the electronic record. The integrity of an e-mail may also be questioned.[324]

Considering the incompatibility of modern electronic records with the principle of best evidence rule, e-commerce legislations and model laws introduce a system of loosing the best evidence rule. The following legislations are typical example in loosing the best evidence rule of e-records. Particularly the model laws of UNCITRAL deserve appreciation for portraying explicit legislative resolution to eliminate the problems of Parole Evidence Rule for e-contracts. The notion of original in Art.8 of the Model Law is useful since in practice many disputes relate to the question of originality of documents and in e-commerce the requirement of presentation of originals constitutes one of the main obstacles that it attempts to remove. Art.8 emphasizes the importance of the integrity of the information for its originality and capable of displaying when information is required. It sets out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement…[325] It ensures originality by other accompanying factors like integrity. The UN convention provides a new rule for the electronic functional equivalent of an original document. Article 9(4) of the convention provides that a legal requirement for an original is met by an electronic communication. But there is no straightforward acceptance as original. The two subparagraphs of the article conditioned originality of data messages with the following qualities, i.e. if there exists a reliable assurance as to the integrity of the information it

[323] Dawson, cited above at note 4, p.62
[324] Id., p.68
[325] Rowland and Macdonald, cited above at note 43, p.318

contains from the time when it was first generated in its final form,…; and where it is required that the information it contains be made available, that such information is capable of being displayed to the person to whom it is to be made available.[326] UETA as per Sec.8 (b) requires that originality is fulfilled, if the records accurately reflect the information set forth in the record after it was first generated in its final form as an electronic record or otherwise and remains accessible for latter reference. E-Sign of US validates records if they meet the requirements of accurately reflecting the information set forth in the contract and accessible; as required by section 101(d).[327] All the above mentioned regimes solve the issue of originality either overtly or by implication through stating admissibility criteria.

Arts.2011 and 2014 of the Civil Code stipulate the way copies of original documents are admitted. Generally contrary reading of both articles privileged original documents. But information in e-contracts is embodied in data messages which are not fixed in a permanent unchanged material. Furthermore, transmission of data massages from one computer to another computer is always copy of the original. Therefore, it is very difficult to say that a given data message is the original document. E-commerce legislations give guidance on the manner of fulfilling originality in data messages. Our Civil Code which framed in light of ascertaining originality in paper contracts hardly fits to data messages. Art.23 (2) of the National Payment System Proclamation No.718/2011 stipulates the original functional equivalents of e-records. Its full messages is; photographic images such as film, microfilm, microfiche or computer images of original documents such as cheques, securities, certificates of deposits, account ledgers, government securities or other payment instruments shall be admissible as prima facie evidence of the matters or transactions of the original instrument. Beyond contemplating original functional equivalence of e-records, the proclamation doesn't provide any full-fledged guidance how originality in e-records can be fulfilled. Thus, it is incomplete source to the Code. Therefore, the requirements of originality for electronic documents must be introduced by revising our Civil Code considering wide practices.

[326] Wei and Suling, cited above at note 62,p.130
[327] Epstein, cited above at note 187, p.510

Furthermore, the statutory relaxation along admissibility and Parole Evidence Rule of e-documents must be accompanied by widening the word document used in conventional contact laws. Modern concept of documents must be revisited to include e-records thereby the admissibility and parole evidence rule problem gains an answer. The concept of document must also be updated in a unified legislative framework to accommodate electronically generated information capable of presentation in a permanent legible form. This would serve to bridge the definitional gap between manually executed and electronically produced documentary records capable of being admitted as evidence in legal proceedings.[328] The English Criminal Justice Act 2003 conforms to current non-prescriptive forms of definition and describes a document very succinctly as anything in which information of any description is recorded.[329] In light of changing nature, the concept of a document is as anything in which information of any description is recorded. This definition of document is to be understood as combining electronic, automated as well as hard copy traditional documents and that this definition would apply to both civil and criminal proceedings.[330] A technology-neutral approach should be adapted to the greatest extent possible, so that the term documentary evidence should, in general, apply to traditional paper-based documents and to e-documents. Technological-neutrality would mean that there would be no fundamental differences in the law of evidence between traditional documentary evidence and electronic evidence, and that there would be no evidential preference applied to any particular technology or mechanical device in adducing documentary evidence.[331] The base of measurement is the expected information form the document rather than focusing on the solid figure of the document. Every court should either admit or disqualify e-documents basing on the expected information from the document with out prejudice to integrity and authentication of the document. Then, the concepts of document within the existing our laws must be revisit to incorporate e-documents.

[328] Commission, cited above at note 132, p.8
[329] Id., p.12
[330] Id., p.15
[331] Id., p.1-2

Chapter Four

Other Areas of Legislative Reforms

4.1. Introduction

Contract law hardly functions without the support of other laws. Its integrated operation is nurtured by the role of other laws. Therefore, revisiting contract law in light of electronic contracts must be paralleled by revisiting those supporting laws. The discourse of e-contracts in the preceding chapters demonstrates a number of complexities that can't be lonely encounter by remolding conventional contract law. Some issues go out of the ambit of contract law, yet their existence directly affects e-contracts. Such complexities must be deal under other laws. This chapter focuses on some of the regimes that need parallel considerations along e-contracts. Security measure in e-contracts, protection of online (electronic) consumer contracts, civil liability of Internet Service Providers and privacy of communications in e-contacts are detailed under this chapter.

4.2. Security Measures in Electronic Contracts

Digitization creates opportunities for the content of messages and databases to be extracted, changed and recreated in a way that makes the resulting new material unrecognizable as a derivative of the old form from which it was taken.[332] E-contracting parties could be unlikely to use the Internet on a routine basis for commerce unless they have confidence that their communications and data are safe from unauthorized access or modification.[333] For this to occur on publicly available communication networks, it requires more advanced measures of security.[334] A security policy determines who will

[332] E- business and matters arising from some Commercial Law perspectives, p.3, available at http: http://www.babalakinandco.com/documents/e-business_and_mattersarising.pdf [accessed on 09/05/2012]
[333] Moira Patterson (Dr.), E-commerce Law,(21st June, 2001), available at http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN008643.pdf [accessed on 23/06/2012]
[334] A report from the Swedish Cabinet Office Reference Group for Cryptographic Issues, Cryptography Policy: Possible Courses of Action for Sweden, (October 1997), p.5, available at http://www.signelec.com/content/download/suede_cryptography_policy_97.pdf [accessed on 14/02/2012]

have access to the data and whether or not he has a right to alter the data.[335] Internet security is one of the key determinants of electronic transactions.

In an ordinary business, signatures serve a lot of functions such as identifying the party, proving intention of the singer to be bound by the signed document and to avoid forge. That is the main rationality why the law or the concerned parties dictate for affixing of signatures. Electronic signatures are used to sign e-contracts. They are recognized as equivalents of handwritten signatures by many e-commerce regimes, provided that certain conditions are fulfilled. Under chapter three of this study, the writer of this thesis also firmly advocated for acceptance of e-signatures in our country. E-signatures are presumed to ensure identity of the signer (authentication), intention to bind (non-repudiation) and avoiding cheating (integrity). To implement the functions of e-signatures, the method of signing must be secure because they are communicated over Internet highways where messages are easily vulnerable to intervention by unauthorized parties. E-signatures can be in a variety of forms. But digital signature is the most secure method of e-signature. Digital signatures, with its two key systems would make it more difficult for anyone intending to cheat.[336] However, its utilization in a given country is not complete by reframing contract laws along e-contracts; rather reforming laws on security of Internet communication offer the best solution.

Digital signatures are usually the product of encryption technologies. Encryption is expected to be one of the most commonly used security measures to protect documents and messages in public and private communication networks. Examples of such measures are that documents and messages are transported within the public networks with so-called digital signatures attached and content of the messages is encrypted.[337] Encryption

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[335] Ed Dawson, et.al. Electronic Contract Administration – Legal and Security Issues, (13 June 2006), p.8, available at

http://www.constructionovation.info/images/pdfs/PublicPresentations/Final_Literature_Review_22_November.pdf

[accessed on 28/12/2012] (research)

[336] Aashit Shah and Parveen Nagree, Legal issues in e-commerce, p.17, available at http://www.nishithdesai.com/Research-Papers/Legal_issues_ecom.pdf, [accessed on25/04/2012]

[337] Group, cited above at note 3, p.5

is based on cryptography system. Therefore, the policy on cryptography system directly affects commercial utilization of digital signatures.

Cryptography means the discipline which embodies principles, means, and methods for transformation of data in order to hide its information content, establish its authenticity, prevent its undetected modification, prevent its repudiation, and/or prevent its unauthorized use.[338] Cryptography is principally used to;

- ✓ Securely establish the identity of the receiver and sender of electronic documents and messages (authentication) together with the protection of the data and messages against corruption (data and message integrity protection)
- ✓ Protect the content in a document or message against unauthorized access (protection of confidentiality).[339]

The enactment of the Regulation No.130/2006 for the establishment of Network Security Agency is an impressive introduction in Ethiopia. The agency is endowed with a power to provide research based capacity building support to various security agencies and institutions on cryptology as per Art.6 (4) of the regulation. Furthermore, Art.6 (6) of the regulation authorizes it to ensure the enforcement of national information security standards through national cryptology research, design and development and technology transfer. This is very interesting to have national cryptology policy because cryptology enhances secure Internet communications through the usage of digital signatures. But its operation for full utilization in private business like e-contracts is immature. The absence of certification service providers to the operation of cryptography system is the main reason. Cryptography involves the service of certification service providers who will issue a certificate verifying the identity of the party.[340] Particular importance with the evolution of cryptography is the development of trusted certification services that support digital signatures and permit users to verify the identity of persons with whom they are

[338] OECD, Cryptography Policy, the Guidelines and the Issues,(1998), p.12, available at http://www.oecd-ilibrary.org/docserver/download/9398011e.pdf?expires=1355908045&id=id&accname=oid015002&checksum=ED__16F0AC3CCA1D120D7A4BCCB9A6F01F, [accessed on 06/07/2012]
[339] Group, cited above at note 3, p.6
[340] Id, 8, p.24

communicating over the Internet. Those trusted third party certification service providers verify identity of parties by issuing a digital certificate i.e. digital signature.[341]

Under the Public Key Infrastructure (PKI) of cryptography, you generate a private key and a public key as two parts of a key pair. The holder of the private key uses his key to encrypt a message (sign it) and sends it to the other person who uses his public key to decrypt the message but cannot use it to encrypt the message. The owner of the private key need not worry about sharing his public key with someone else while keeping his private key secure and unpublished.[342] The public key and private key are certified by a third party, both parties trust. This party called TTP (Trusted Third Party) or CA (Certification Authority).[343] The credibility of TTP is usually guaranteed because it is licensed or something similar. The public keys can be presented in such a way that it is evident that a certain key belongs to a certain person (apparatus, function, system, etc.). Such certified public keys can then simply be distributed and made accessible through easily accessible media, for example through public catalogue systems.[344]
Inherently cryptography technology is under tight government regulation. Governmental tight regulation on the usage of cryptography is justified because it affects a number of laws and regulations that govern communications and economic activity in a society; such as, the right to access public documents, protection of personal integrity, book-keeping and accounting, companies act, tax legislation, legislation of financial transactions, search warrants and legal intercepts, the control of the dissemination of advanced cryptographic technology and secure payment on Internet. [345] As a result, the usage of cryptography can't be leave to market determination. Proper policy and legal systems are preconditions of its utilization in a given country.

In order to facilitate the development of e-commerce an initial set of rules should be developed for both the usage of digital signatures and the regulations of those institutions

[341] OCED, cited above at note 7
[342] Petterson, cited above at note 2, p.5
[343] Group, cited above at note 3, p.16
[344] Id, p. 15
[345] Id, p.11

that are responsible for the issue of digital signature key certificates.[346] To ensure that transactions are secure on Internet, governments have to provide comprehensive framework on: reliable digital signatures, general duties relating to digital signatures, duties of certification authorities which can be banks or insurance companies, regulation of certification authorities and repositories and liability of network service providers.[347] For example, the Electronic Transactions Act 1998 of Singapore prescribes on secure electronic records and signatures, the effect of digital signatures, general duties relating to digital signatures, duties of Certification Authorities, regulation of CAs and others issues to ensure secure communications.

In our country, another law concerning security of electronic communications is the Ethiopian Information and Communication Technology Development Authority Establishment Proclamation No. 360/2003. The proclamation concerns to security of communication under Art.6 (4) which authorizes the authority to issue standards necessary for the collection, preservation, aggregation, analysis and dissemination of information as well as for ascertaining the security and reliability, and follow up its implementation. It empowers the authority to design standards of secure communications. But still there is no law in our country that guides the method of establishment for CAs. Certifications Authorities are the main instruments in maintaining security of e-communication. Most secure communication standards confirm their role as security gatekeepers in digital communications. Internet security measures play an important role to facilitate e-contracts. Digital signatures are the most secure form of e-signatures, and then can promote e-contracts. Nevertheless, the infrastructure for usage of digital signatures isn't in place in our country. Therefore, we have to have comprehensive nation cryptography policy and legal framework to facilitate electronic contracts accompanied by digital signatures.

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[346] Id, p.3-4

[347] Farhan AL-Farhan, The Impact of the UNCITRAL Model Law on international legal systems, Saudi Arabia information technology development from a legal perspective, (2002), p.15-6, available at http://www.cailaw.org/academy/magazine/uncitral.pdf, [Accessed on 23/01/2012]

4.3. Consumer Protection in Electronic Contracts

Consumer transaction shares significant part in any commerce. Contract is at the heart of consumer transactions. Contracts are generally regulated by our Civil Code under title XII, Contracts in General. Art.1676 (1) of the Code states that, the general provisions of this title shall apply to contracts regardless of the nature thereof and the parties thereto. It extends application of the general provisions to all contracts. But there is reservation of its applications to special provisions of certain contracts according to subart.2 of the above provision. If we apply the first sub-article, consumer contracts are bound by general provisions of our contract law. However, consumers are viewed as weak parties in their dealings with businesses. For their weak position, they are worthy of special protection. For the stated reason, countries proclaim special consumer protection laws. Ethiopia enacted the Trade Practice and Consumer Protection Proclamation No.680/2010 as a special law to protect consumers. Therefore, special provisions of the proclamation concerning consumer contracts prevail over the Code's provisions pursuant to Art.1676 (2) of the Code. The question that arises at this level is, if we revised the Civil Code in light of e-contracts without parallel revision of the proclamation, which one would apply to online consumer contracts? It is the provisions of the Civil Code that have to apply to such contracts as far as there is no special law concerning electronic consumer contracts. Yet provisions of the Code would be insufficient to online consumer contracts because they are too general. Moreover, as the provisions of the Code are on general contracts, they can't protect consumers' special need. Therefore, the best solution is revising our special consumer protection law along e-contracts, instead of relying on the Code's general provisions.

The central question in this discussion is; do e-contracts in reality pose new problems to consumers and then demand remolding of consumer protection laws? In the technology age, the qualities of old consumer protection laws are criticized by consumer protection activists. Consumer advocates worry that those consumers who consent to substituting specific writings with electronic communications might be opening themselves up to

unexpected burdens and risks.[348] The online environment raises consumer concerns about the merchant's identity, use of technology in completing transactions and their ability to seek redress across borders. It can also make it easier for wrongdoers to defraud consumers or misuse personal information. These issues represent new and difficult challenges for businesses, governments and consumers seeking to apply traditional consumer protection methods to the online environment.[349] One essential element for creating the right environment for trust and confidence in e-commerce is consumer protection.

As far as the consumer's consent is concerned, it must be obtained electronically and has to be expressed in a way that reasonably demonstrates that the consumer is able to access the information in the electronic form. The consumer's consent must be re-obtained, if there is any change in the hardware or software requirements needed to access or retain electronic records or if the change will create a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent.[350] In their relations with customers, businesses should provide consumers with measures that provide an opportunity for review before entering into a transaction. Consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security mechanisms should afford.[351] Perceiving these strange problems to consumers of online contracts, some countries opt for legislative response. These statutory rights of the consumer are impossible of waiver by prior agreements. The following are typical examples.

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[348] Julian Epstein, <<cleaning up a mess on the Web: a comparison of Federal and State Digital Signature Laws>>, Legislation and Public Policy, vol. 5:491, (2002), p.491, available at https://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__journal_of_legislation_and_public_policy/documents/documents/ecm_pro_060660.pdf , [accessed on 12/10/2012]

[349] Amelia H. Boss, Electronic contracting: legal problem or legal solution?, p.132, available at http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf. [accessed on 01/10/2012]

[350] Sylvia Mercado Kierkegaard, E-Contract Formation: U.S. and EU Perspectives, (Feb. 14, 2007), available at: available at :http://digital.law.washington.edu/dspace law/bitstream/handle/1773.1/396/vol3_no3_art12.pdf?sequence=1 [accessed on 27/05/2012]

[351] Andam, cited above at note 2, p132-3

Canada prepared the Canadian Code of Practice for Consumer Protection in Electronic Commerce. The purpose of the Canadian Code[352] is to establish benchmarks for good business practices for merchants conducting commercial activities with consumers online. These general principles have seen various broad acceptances worldwide.[353] The Code contains information on the following matters: information provision, language, contract formation and fulfillment, online privacy, security of payment and personal information, complaint handling and dispute resolution, unsolicited e-mail and communication with children.[354] Among the principles embodied under the Canadian code, the fourth and fifth principles relate to principles of fair information. They require that the collection of personal information shall be limited to that which is necessary for the purposes identified by the organization and that personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law.[355] To comply with Canadian Internet consumer protection law, Internet business-to-consumer suppliers should use a multistep ordering process, i.e. consumers click through an order verification screen that provides them with an opportunity to correct errors they may have made in the ordering process; and a screen that presents all prescribed information regarding the proposed transaction and an opportunity to download and print the information before the transaction is completed.[356]

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[352] The Canadian Code of Practice for Consumer Protection in Electronic Commerce was endorsed by federal, provincial and territorial Ministers responsible for consumer affairs in January 2004. It is available http://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_e.pdf/$FILE/EcommPrinciples2003_e.pdf [accessed on 25/11/2012]

[353] Ian R. Kerr, <<*Bots, Babes and the Californication of Commerce*>>, University of Ottawa law & technology journal, (2004), available at http://www.google.com.et/#hl=am&tbo=d&site=&source=hp&q=Bots%2C+Babes+and+the+Californication+of+Commercepdf&oq=Bots%2C+Babes+and+the+Californication+of+Commercepdf&gs_l=hp.12...2754.10049.0.11161.49.11.0.0.0.4.2522.8330.4j2j6-1j1j2j1.11.0...0.0...1c.1j2.iA-av6MFXWo&bav=on.2,or.r_gc.r_pw.&bvm=bv.1355534169,d.Yms&fp=c53dbbc95f9afad3&bpcl=40096503&biw=1024&bih=629 [accessed on11/11/2012]

[354] The Legal and Privacy Issues of Doing E-Business, p.6, available at http://www.businessenterprisecentre.ca/uploads/Resource%20PDFs/Legal_and_Privacy_Issues_of_Doing_E-usiness.pdf [accessed on 25/10/2012]

[355] Id.

[356] Cited above at note 25, p.7

The ECD of EC affords consumers some protections which are also impossible of waiver by prior agreements. Art.11 of the directive imposes an additional duty upon any e-business to send an acknowledgment of receipt of acceptance upon a communication sent by the consumer.[357] This is based on the assumption that consumers may form contracts inadvertently. The consumer gains second chance to check his legal action and protects him from unintentionally concluded contracts. Article 10 of this directive was also a general provision designed to provide consumer protection and to boost consumer confidence.[358] It stipulates extensive prior information requirements to the consumer before completion of the contract. Prior information requirements refer to information that must be provided by a service provider prior an order being placed by the recipient of the service. The Service Provider must provide information on the different technical steps that a consumer must follow to conclude a contract, whether the contract will be filed by the service provider and whether it will be accessible, the technical means for identifying and correcting input errors prior to the placing of the order, and the languages offered for the conclusion of the contract. Contracts and general conditions must be made available in a way that would allow the consumer to store and reproduce them. The contractual terms should appear on the screen before making any purchase.[359] Electronic consumers are particularly dependent on appropriate information being provided, because such information acts as a substitute for the real-life touch-and-feel that during offline transactions. Consumers within EC member states also offered with comprehensive protection by the Distance Contract Directive.[360] Consumers in Denmark are not bound

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[357] Jane Kaufman Winn and Jens Haubold, Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective, p.11-2, available at http://www.law.washington.edu/Directory/docs/Winn/Electronic_Promises_Revised.pdf, [accessed on 14/07/2012]

[358] Lilian Edwards(editor), The New Legal Framework for E-Commerce in Europe, (2005), p.75

[359] kierkegaard, cited above at note 19

[360] Distance contract is as any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded." The following compose the prior information requirements in the Distance Contracting Directives: (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs, where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of withdrawal . . . (g) the cost of using the means of distance communication . . . (h) the period for which the offer or the price remains valid; (i) where appropriate, the minimum duration of the contract

by unfair clauses that are not highlighted even though they have clicked on the confirmation button. Unclear clauses are as interpreted against the author.[361]

Electronic Signatures in Global and National Commerce Act of US under Sec.101 (b) takes a far more aggressive approach to consumer protection in numerous ways. E-Sign specifies that consent to e-records is valid only if the consumer, prior to consenting, is provided with a clear and conspicuous statement informing the consumer of her rights to written records, her rights to withdraw consent for electronic substitution, which specific records she is waiving rights to receive paper copies, how to withdraw her consent for electronic communications, how to obtain paper copies and what fees may be charged, what hardware and software requirements may be needed to access information.[362] Furthermore, in the event that such requirements change, E-Sign ensures that a consumer is guaranteed with updated notices, provided necessary information as to where the software or hardware may be acquired, and afforded the right to withdraw consent to further electronic communications without penalty.[363]

All the above experiences demonstrate the strict protection afford to consumers of online contracts. The areas of protection afforded by the above regimes are associated with inconvenience faced during electronic conclusion of contracts by consumers. Those inconveniences aren't addressed by conventional consumer protection laws. The Trade Practice and Consumer Protection Proclamation No.680/2010 is the recent law concerning consumers. Yet it is not updated for contracts concluded by consumers of online contracts. Provisions of the proclamation from Art.22 to Art.30 don't provide any solution to the inconvenience consumers could suffer from online contracts. Updating our

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in the case of contracts for the supply of products or services to be performed permanently or recurrently. The requirement that contract terms and general conditions be provided to the recipient in a manner that allows him to store and reproduce them still applies. European Distance Selling Directive, May 1997, Art.4, Directive No.7, available at http://www.cis.strath.ac.uk/cis/research/publications/papers/strath_cis_publication_238.pdf, [accessed on 21/05/2012]

[361] Casper Schmidt & Anders Christian Boisen, Benchmarking of existing national legal e-business practices, (19 September 2006), p.13, available at http://ec.europa.eu/enterprise/sectors/ict/files/denmark_en.pdf, [accessed on 20,02/2012]

[362] kierkegaard, cited above at note 19

[363] Id. p

consumer protection law in compliance with consumers of online contracts is one precondition of readiness for e-contracts.

4.4. Regulating Liability of Network (Internet) Service Providers

Internet (Network) Service Providers (ISPs) are those who provide some additional services that facilitate a transaction between end users, e.g. identifying one of the parties, providing search facilities, providing portal services and giving access to large amounts of both in-house and third party produced content. Providers of what might be seen as pure telecommunications services, like mobile phone companies, also became deeply involved in both the content business and in providing value added services such as locational data handling.[364] ISPs function as intermediaries of Internet (electronic) communications. The main functions of an intermediary are receiving, transmitting or storing data messages on behalf of another person. Additional value-added services may be performed by network operators and other intermediaries, such as formatting, translating, recording, authenticating, certifying and preserving data messages and providing security services to electronic transactions.[365] The Ethiopian Information and Communication Technology Development Authority Establishment Proclamation No. 360/2003 according to Art.2(5) defines information and communication technology as technologies and systems supporting the collection, processing, analysis, dissemination, access and preservation of data or information. It expresses the activities of ISPs though the phrase information and commutation technology is used instead of Internet Service Providers. Thus, the role of Internet Service Providers is articulated in Ethiopia. Despite its definition, inadequacy of the proclamation will be discussed herein bellow.

ISPs can also perform the function of either connection or content delivery. Connection providers refer to those providing access, connection and infrastructure services of enabling internet access and the transmission of data. The term content providers refer to

[364] Cited above at note 27, p.94

[365] United Nations (UN), UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998 and Guide to Enactment(1998), p.19, available at http://www.cailaw.org/academy/magazine/uncitral.pdf, [accessed on 23/01/2012]

those who make different services or content available to the generality of users irrespective of whether these are provided by them or not. Their function also impacts the level of regulation. Content providers have a potentially global reach; on the contrary, those who provide services or connectivity to end users within a certain territory will usually be subject to the legal and geographical restrictions of such territory. A logical consequence of this is that connection service providers must abide by the laws of the territory in which they operate, whereas content providers will be subject to the rules of any territory where their content is accessible.[366]

Liability of content providers may arise due to various activities inter alia due to hyperlinking[367] (inserting a clickable link to another site) and framing (incorporating another website into a frame or window appearing within a webpage on the linking site).[368] They can post products and services of others and can be used to connect producers and users. Intermediary liability occurs when governments or private litigants can hold intermediaries liable for unlawful or harmful content created by users of those services.

The importance of regulating civil liability of ISPs drives from the concept of e-contracts. E-contract is a contract concluded wholly or partly by means of e-communications. Various definitions conceptualize e-communications equivalent to the concept of ISPs. The E-commerce Act of England as per Art.2 (1) defines e-communications as a means information is communicated or intended to be communicated…that is generated, communicated, processed, sent, received, recorded, stored or displayed by electronic means or in electronic form. This is similar to the definition given by our proclamation.

[366] Claudio Ruiz Gallardo and J. Carlos Lara Gálvez, Liability of Internet Service Providers (ISPs) and the exercise of freedom of expression in Latin America, p.3, available at http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/02Liability_Internet_Service_Providers_exercise_freedom_expression_Latin_America_Ruiz_Gallardo_Lara_Galvez. pdf [accessed on 12/10/2012]

[367] Hyperlinks and search engines are information location tools. Information location tools are one of the core elements of the internet and of modern electronic communication networks. They serve a social need, as they facilitate internet use. Gerald Spindler (Prof, Dr.) et al, , Study on the Liability of Internet Intermediaries, (November 12th, 2007), p.17, available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf [accessed on 08/05/2012]

[368] Shah and Nagree, cited above at note 5, p.12

Art.4 (f) of the UN Convention defines information system as a system for generating, sending, receiving, storing or otherwise processing data messages. All definitions refer the functions of ISPs though follow different language. ISPs facilitate the basic function of communication in the formation and execution of e-contracts. The word e-communication doesn't only refer mere transportation of information; it also includes other functions of ISPs as the above regimes attempt to list. They are the gateways of e-contracting. Regulating their liability is, therefore, an important task. The topic focuses on the methodology of designing for civil liability of ISPs.

Internet users should not be disadvantaged due to opaque and invidious practices by their current Internet Service Provider (ISP).[369] The obvious starting point when exploring intermediaries liability is to note that the Internet isn't a unique medium where no content author or provider can, in general, publish or distribute material on the Net without the aid of an Internet access and content providers. [370] As a result, ISPs by virtue of their role as gatekeepers to the Internet, have long felt themselves to be sitting on a liability time-bomb.[371] Their liability enhances e-contracts as safe place of business and provides legal certainty to business and citizens. Framing the liability of ISPs' is both an engineering and business challenge. Harsh liability regime aggressively retards the function of ISPs. Due to fear of liability, they may opt to resign form their service. The fear is also intensified because they mayn't have knowledge for any information they publicize or provide access. The other extreme, which is total exemption, has destructive effect. Balancing those contesting interests is a public policy issue. The following paragraphs highlight few legislative practices on the mechanism they follow to frame their regimes; and may be instructive to our country.

Articles 12–15 of the ECD of EC introduced throughout Europe a relatively sophisticated regime dealing with the liability of intermediaries. The ISPs' liability under ECD covers not only the traditional ISP sector, but also a much wider range of actors who are

[369] Christopher T. Marsden, << *Network Neutrality and Internet Service Provider Liability Regulation: Are the Wise Monkeys of Cyberspace Becoming Stupid?* >>, Global Policy, Volume 2, (January 2011), p.53, available at *hawk.ethz.ch/**service**engine/Files/ISN/126036/.../en/53-64.pdf [accessed on15/11/2012]*
[370] Edwards, cited above at note 27, p.94
[371] Id. , p101

involved in selling goods or services on-line (e.g., e-commerce sites such as Amazon and E-bay) and offering on-line information or search tools for revenue (e.g., Google, LexisNexis or WestLaw).[372] But liability is not unlimited under the directive. Intermediaries are not subject to liability for their customers' content, so long as, they have no actual or constructive knowledge of that content.[373] It also prescribes detail systems used to narrow (limit) the liability of ISPs. According to Sec.79 of the Indian Information Technology Act of 2000, No.21; no person providing any service as a network service provider shall be liable for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. Both the ECD of EC and the Indian Information Technology Act limit the degree of liability to the level of knowledge. They don't contemplate straightforward liability for policy reasons. In framing the liability of ISPs, they try to balance the contesting challenges.

Limitation of liability is currently the most prevalent approach. This roughly takes the view namely that ISPs will generally be unable to control all content they host or give access to; on the other hand it also recognizes that the gift of total immunity should be balanced against other policy factors such as the need to protect victims and the public interest at large.[374] Any system of liability for Internet service providers either created by law or legal doctrine should in the first place refrain from treating providers subject to strict liability to prevent them from policing the content that is transmitted through their networks. A more adequate system of civil liability for service providers should be based on widely accepted principles in cases where there has been inexcusable negligence or intent.[375]

Proclamation No. 360/2003, deals with regulation of communication technologies. Internet Service Providers are regulated under this proclamation as can be inferred from

[372] Id, p.94-5
[373] Id., p.54
[374] Id. p.107
[375] Spindler, cited above at note 37, p.36.

its definition under Art.2 (5). The authority's powers and duties are stated in a very general expression under Art.6. Yet it fails to frame the system to establish liability of Internet service providers. But ICT regulating laws in some countries frame how liability is regulated and established. Best example is the above cited Indian IT Act. Furthermore, Council of Ministers Regulations No. 47/1999 on Telecommunication Services enumerates telecommunication service licenses under Art.2(2) of para (j) as public switched telecommunication service license, cellular mobile service license, internet service license and data communication service license. Therefore, Internet Service Providers license is acquired as per this proclamation. Though this is the most appropriate law to regulate Internet communications in Ethiopia, it also fails to frame the base of ISPs' civil liability.

Tort based liability is the only available redress to victims of ISPs in our country. But tort liability is deficient to regulate liability of Internet intermediaries. If we apply tort liability, the frontier of liability is very broad, because victims may substantiate their claim based on either fault or strict liability. Tort based liability comparatively offers wide opportunities to the victim to establish liability of the intermediary. As a result, tort based liability of ISPs is found irreconcilable of the two interests. It doesn't consider the unique feature of ISPs. That is why foreign jurisdictions introduce new mechanisms on the liability of ISPs. Therefore, the methodology used to base liability of ISPs must be considered in our country.

4.5. Privacy of Communications in Electronic Contracts

Privacy is the ability of an individual to control the terms under which their personal information is acquired and used.[376] The confidentiality of electronic records may be compromised during communication or retention. The use of digital systems allows data capture at a much larger rate and scope than previously. E-commerce sites could potentially collect an immense amount of data about personal preferences, shopping patterns, patterns of information search and use, and the like about consumers, especially

[376] Mark S. Ackerman and Donald T. Davis, Privacy and Security Issues in E-Commerce, available athttp://econ.ucsb.edu/~doug/245a/Papers/ECommerce%20Privacy.pdf, [accessed on 23/08/2012]

if aggregated across sites. Not only it is easier than ever to collect the data, it is also much easier to search these data.[377] Information about users can be easily collected, integrated and analyzed from different sources through the use of network, database, data warehouse and data mining technologies.[378] Therefore, privacy concerns were a critical reason why people do not go online or provide false information.[379]

Electronic contracting simplifies the extraction of information from users because information may be exchanged between contracting parties. In addition to that, e-commerce regimes demand the retention and remaining accessible of e-documents to have written value, originality and evidentiary weight. This provides an opportunity to have recorded information. The necessity of retaining and remaining accessibility of e-documents, where information is recorded, may be abused by the person in possession of the information for further commercial purpose. Privacy of communicators in the case of e-contracts is not only in danger by the contracting parties, but it is also threatened by intermediaries. This is another threat of e-contracts. Laws protecting privacy and processing of personal information in the electronic environment play a vital role in stimulating e-contracts. The law must play a fundamental and irreplaceable role in protecting personal data.

To conduct business and provide valuable services, it is often necessary to collect information from customers. But a system of reasonable privacy policy and sound practices to protect personal information and to enhance customer confidence must be adopted.[380] This is based on balancing an individual's right to the privacy of personal information with the need of organizations to collect, use or disclose personal information for legitimate business purposes.[381] Yet businesses are economically

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[377] ibid

[378] Milena Head and Yufei Yuan, Privacy Protection in Electronic Commerce: A Theoretical Framework, (2001), p.1, available at http://www.business.mcmaster.ca/is/head/Articles/Privacy%20Protection%20in%20Electronic%20Commerce_A%20Theoretical%20Framework.pdf [accessed on 10/102012]

[379] Ackerman and Davis, cited above at note 47

[380] The Legal and Privacy Issues of Doing E-Business, p.1. available at http://www.ontariocanada.com/ontcan/1medt/smallbiz/sb_downloads/ebiz_legal_privacy_en.pdf [accessed on 12/11/2012]

[381] Ibid.

motivated to collect and use large amounts of personal information because personal details are acquiring enormous financial value. They are the new currency of the digital economy. The Internet is a new and expanding medium, where companies say they need information on people to target their products, build their business models and plan their marketing campaigns.[382] This accelerated the rush for collection of information by businesses. A company can use that data in any way, including selling the data to third parties for subsequent reuse.[383] Use of e-communications for the sake of contracts may be also other means of extracting personal information.

Some of the important privacy concerns over Internet communications for the sake of market include: dissemination of sensitive and confidential records of individuals and organizations; sending spam (unsolicited) e-mails; and tracking activities of consumers by using web cookies. It can be the acquisition, storage, selling and use of private information without the awareness and/or consent of the subject. The problem is aggravated when it is made without consent and awareness of the victim.[384] Some web technologies such as cookies ease privacy infringement. Cookies are messages given to a Web browser by a Web server. The main purpose of a cookie is to identify users and to save information about how people use the site. This provides a basis for improving the website to better meet customer needs.[385]

In Europe, the European Community has taken aggressive legislative steps toward safeguarding privacy rights with respect to personal data processing. It has established a Directive on Personal Data Protection (Directive 95/46/EC) that grants the following rights: the right to know the source of personal data processing and the purposes of such processing; the right to access own personal data; the right to rectify inaccuracies in own personal data; the right to disallow the use of own personal data (for example, in direct marketing). In addition to the European Union, Asia, Canada, and other regions have embraced stronger government legislation to protect privacy in cyberspace. For example,

[382] Ackerman and Davis, cited above at note 45, p.6
[383] Ibid.
[384] Shah and Nagree, cited above at note 5, p.7
[385] Cited above at note 49, P.15

Canada's Personal Information Protection and Electronic Documents Act came into force on January 1, 2001. The act will help to meet the protection standards set by the European Union by establishing clear rules that govern the collection, use and disclosure of personal information in the private sector. According to the Canada's act collection of personal information must be; collected for identifiable purposes and with consent, used and disclosed for the limited purpose for which it was collected, accurate, accessible for inspection and correction, and safeguarded. The Federal Trade Commission of US has outlined a federal privacy policy that would require Web sites to inform customers of their information practices (notice), offer choices on how their information is used (choice), provide access to stored information (access), and sufficiently protect their information (security).[386]

The European Community protects privacy in online communications from spammers, locational and traffic data. The Privacy and Electronic Communications Directive 2002/63 (hereinafter referred as PECD) of European Community pursuant to Art.13 (1) require prior consent to the use of personal data to send junk electronic mail.[387] It also provides an exception which prior consent is not required if the details of the recipient were previously obtained in the context of a sale of a product or service, so long as, the recipient is given a clear, simple and free opportunity to opt-out of receiving spam each time a new communication is sent, and the goods or services were similar to those now being marketed.[388] The most novel parts of the PECD relate to control of locational and traffic data, where their use by service providers might have negative impacts on consumer privacy. Locational data[389] broadly refers to information that reveals the whereabouts of the user of a mobile phone or similar telecommunications device whose location can be traced and shared. It can also include information as to when a particular user was using a mobile phone at a particular location. It can be shared with or sold by the company originally collecting the data to third parties who wish to provide services to

[386] Ackerman and Davis, cited above at note 45, p.7
[387] Edwards, cited above at note 17, p.46
[388] Id, p.47
[389] Locational data is technically defined solely as 'any data processed in an electronic communications network indicating the geographic location of the terminal equipment of the user of a public electronic communications service'. Id. 29, p.64.

users. Typically, the third party service providers would use the locational data to provide the user with either information or the actual goods or services from the physically nearest relevant outlet.[390] United Kingdom (UK) proclaimed Data Protection Act of 1998. UK regulation is significant in going some small way towards extending the protection of Data Protection law to juristic persons as well as living individuals.[391]

The above discussion reveals new mechanisms of invading personal data in e-communications. They are done for market search. They may erroneously seem compatible to free market therefore legal interception of such activities may be feel by free market advocators as retarding market function. But in reality, even if they are made with market anticipation, their detail implementation contravenes privacy protecting laws. The above mentioned jurisdictions considering the sophistication of such violating mechanisms to fit with conventional privacy protection laws, they enact new specialized laws; and they also try to reconcile market practices and privacy. Yet in our country still we are relaying on the exiting hardly competent laws of privacy protection. We couldn't subsist long in the time of e-commerce by those laws. It is recommendable to reconfigure our privacy protecting laws with the features of e-communications.

[390] Id. P.59-60
[391] Id, p.55

Chapter Five

Conclusion and Recommendations

5.1. Conclusion

The target of this study is all about the Legal Framework for Electronic Contracts in Ethiopia with Special Emphasis on the Ethiopian General Contract Law. What make e-contracts peculiar from the general contract law; is the basic question of this topic. The introduction of e-commerce has radically transformed the way in which business is carried out. Electronic communications now become instruments of contract conclusion and execution. Such communication systems produce new features on the contract perspective and therefore conventional contract laws are found insufficient to respond to those peculiarities. Despite legal irresponsiveness, e-contracts continued as epicenters of the modern e-commerce. They bring comparative advantages of financial benefits, strategic values and stake holder values to online contracting parties and businesses in general. But legal reaction is not as fast as technology progresses.

Formation and execution of contracts by e-communications breed alien features to the conventional contract laws. Significant legal issues have arisen as a result of applying traditional legal principles to a non face-to-face and paperless electronic environment. The special nature of e-contracts make most of the existing rules on commercial contracts inapplicable to them.

Validity and enforceability of e-contracts imprint frustration on contracting parties because data messages are not like those practices widely accustomed by conventional contract laws. E-contracts didn't exist when these laws were adopted. The embodiment of e-contracts in data massages is main crux of their validity. The aggregate unique features of e-contracts make their validity and enforceability uncertain. To eliminate the confusion, foreign jurisdictions enact laws that explicitly validate and enforce e-contracts. Same problem is faced by the Ethiopian contract law. Though the Ethiopian general contract law doesn't prohibit formation of contracts through online communications, the

whole uncertainties surrounding online contracts make them invalid and unenforceable by our Code.

E-contracts cause novel problems on consent which is the backbone of any contract. Our Code is weak to accommodate all the following issues associated with consent given in electronic contracts. Achievement of full consent is complicated because terms are communicated online and it is very difficult to say that parties are agreed to each term of the contract. Especially in web-based communications, incorporation of terms bring litigious problems. Even consent is more of complicated because parties may enter in to obligation without intending to conclude contract. Such unintentional contracts are frequently experienced in wed-based communications. Our Code is little help on the manner of incorporating terms and the stage of contract completion for online web-click-on contracts. In modern automated contracts human will is substituted by automated agents. Validity of such automated negotiated contracts where human will is replaced by inanimate objects causes uncertainty on validity of the contract. Online communications are made anonymously. The non-face-to-face nature of the communication couldn't ensure to know the exact identity of the person with whom the party is purported to communicate. Despite parties' anonymity contract can be effectively formed. Most e-commerce legislations prescribe systems of attribution of communications thereby used to know identity of the originator of communication. But our Code doesn't have such mechanism. Electronic communications bring input-errors. Input-errors in e-contract can't be accommodated by the types and causes of mistake stipulated by our general contract law.

For contracts concluded between parties in absentee i.e. distance contracts, the time when acceptance is sending completes the contract as per Art.1692 (1) of the Civil Code. It is framed on the basis of postal acceptance rule. But the straightforward application of postal acceptance rule to all e-communications is impossible. E-mail communications are bound by the postal acceptance rule whereas web-based communications are treated like living conversation then application of postal acceptance rule on the assumption of distance contracts for the latter types of method of e-contracting is impossible. In addition to that, in web-based (click-on agreements) contracts, it is receipt of acknowledgment by

the offeree that completes the contract. Furthermore, the word sending and receipt in e-contracts haven't identical conception like the physical world. That is why modern e-commerce legislations define dispatch (sending) and receipt with speculation of different time of contract formation for e-mails and web based conversations. The definition also eliminates the possible misunderstanding on the time when a given electronic message is send or received. Thus, the time of contract conclusion stipulated in our Code is unfit to e-contracts.

Form is an exception in every contract formation. When either statutorily or unilaterally imposed form is preconditioned, the incompatibility of our laws comes in to surface. The writing and signature stipulated by the Code are farmed on the basis of paper writing. Apparently Art.1728 of the Code prescribes handwritten or thumb-mark signatures must be affixed to the contract required being in writing. This clearly excludes the emerging electronic records and electronic signatures. Due to pubic policy ground of high formality requirement, foreign e-commerce legislations banned certain contracts from being concluded over internet negotiation. Yet our Code is bare hand to give any guidance on the excluded transactions.

Validity of electronically communicated variation and notification of contracts is another cause of complexity in e-contracts. Still there is a debate on the validity of the above mentioned issues to all contracts. The debate presupposes the opportunity of accessibility and awareness of the electronic message by the addressee. Some regimes subject their application for contracts not concluded by internet communications to the prior agreement of the parties. But for contracts concluded by internet communications, unless the parties agree to the contrary, electronic variation of contracts and electronic notices can be validly given. The preliminary electronic formation of the contract validates any subsequent electronic communications. Our Civil Code is of little help to such electronic communications.

Network contracts are challenging to the conventional contract law principle of contract privity. Our Civil Code firmly confirms the privity of contracts under Art.1731. The privity principle was designed at the time when network contracts weren't existed. Network contracts are based on concordance and synchronizations. Bilateral contracts in

networks entered with reasonable expectation of the holistic multilateral connected networks. Inducing by such interwoven feature of the netwrok, some countries relax the long practiced principle of contract privity. German took an outstanding step in relaxing privity of contracts principle. Our Civil Code is inadequate to accommodate network connected contracts because the privity principle is still as it was coded at the time when network connected contracts were unexpected.

Adducing electronic records in court litigation is also another unsettled problem. Admissibility of electronic records and parole evidence rule are prevalently confusing. Though validity of data messages and equating of electronic records with corresponding paper writing are preliminary conditions, both don't straightforwardly give for judicial acceptance in the manner paper records are adduced. There are conditions which qualify the judicial admissibility of electronic records. Most e-commerce legislations prescribe the conditions of admissibility for electronic records. But our Civil Code doesn't produce any guidance on conditions of admissibility for electronic records as it guides evidentiary value of paper writings as per Art.2005 and the subsequent provisions. The parole evidence rule which dictates parties to produce the original written contract is impossible for electronic records. Arts.2011 and 2014 of the Civil Code stipulate the way copies of original documents are admitted. Generally both articles privileged original documents. But documents in e-contracts are embodied in data messages which are not fixed in a permanent unchanged material. Furthermore, transmission of data massages from one computer to another computer is always copy of the original. Therefore, it is very difficult to say that a given data message is the original massage. E-commerce legislations give guidance on the manner of fulfilling originality in data messages. Our Civil Code which framed in light of ascertaining originality in paper contracts hardly fits to data messages.

Electronic signatures are used as means of authenticating the document. However, digitization creates opportunities for the content of electronic messages to be extracted, changed and recreated in ways that make the resulting new material unrecognizable as a derivative of the old form from which it was taken. Digital signatures through encryption ensure secure online communication. Encryption supported by Public Key infrastructure

plays significant role in securing communication in e-contracts. Full operation of encryption is backed by licensed Trusted Third Parties (TTP) also called Certification Authorities (CA) which their formation is demand legislative action. Licensed Certification Authorities issues digital signatures as certificate to persons in need of it. In our country we have no laws used to govern CAs then digital signatures which are the most secure measures in e-communications are dysfunctional.

E-contracts shake the current law on consumer protection. Consumers are challenged by new problems due to the advent of e-contracting. Unless the legalization of e-contracts by general contract law is paralleled by consumer protection law, obviously consumers would suffer a lot. In our country, consumers of e-contracts aren't fully protected by the current consumer protection laws. The Trade Practice and Consumer Protection Proclamation No.680/2010 doesn't fully shield consumers of online contracts.

Internet service providers (ISPs) are an instrument of electronic contract formation and execution. Framing of internet intermediaries' liability is a big policy matter. The commercial role of intermediaries and the interest of users are two extreme interests. Those countries who frame regulation on civil liability of ISPs, try to balance the two extremes. In our country the Civil Code on extra-contractual liability may be invoked by victims to establish liability of ISPs. But tort liability makes ISPs prone to almost broad liability. Tort liability of ISPs exhibits deficiency in those countries who frame special regimes on liability. But in our country, we have no special laws on civil liability of ISPs. This lack of laws may subject ISPs to unlimited liability.

The privacy problem in e-contracts is intensified because e-documents to have written and evidentiary value in court litigation must be retained and remain accessible. This makes privacy of persons susceptible of undue utilization for commercial and non-commercial purposes. Modern communication methods and fine methods of data collecting technologies over the internet make it simple for collecting lot of information and latter use it for commercial purpose. Such market practices hide their violating activities in the name of market search. Illegality of such activities remains vague under Ethiopian laws. Furthermore, the privacy rule under our laws is endowed only to physical persons. Juridical persons which are main actors in Internet market are without any legal

protection. To sum up, privacy ensuring laws in Ethiopia aren't updated to appreciate the privacy violating activities conducted over network communications by market speculators.

5.2. Recommendations

Based on the findings of this paper, the writer would like to propose the following recommendations.

1. **Recommendations to our Civil Code on General Contracts:** This study mainly focuses on the Ethiopian Civil Code on General Contracts. Therefore, to update it with the emerging communication technology aided contracts, I suggest the following recommendations to our Civil Code. The recommendations are all about what the revision should consider.
    - Our Civil Code should explicitly declare validity and enforceability of e-contracts.
    - It should fully consider the consummation of consent in the two types of e-contracting.
    - It should declare validity of contracts concluded through automated agents.
    - The procedure of attributing communication to the originator must be considered by the Code.
    - It should prescribe repudiation of input (electronic) errors.
    - The time of contract formation must be framed in a way that assumes both e-mails and web-based communications. In addition to that, time of dispatch and receipt of electronic communications must be articulated.
    - It must stipulate conditions on the functional equivalence of e-records and e-signatures with corresponding paper writing and signature.
    - It should provide list of exclusions or the system of excluding transactions from being concluded over internet communications.
    - The privity of contracts principle should consider conditions of network connected contracts.

- The way electronic contracts are varied and noticed effectively must be considered.
- It should stipulate the conditions of admissibility and originality for electronic documents.

2. **Recommendation to security issues:** Laws concerning the wide utilization of digital signatures must be installed in our country.
3. **Recommendation to consumer protection:** Our consumer protection law should be updated in way that answers the demand of consumers of electronic contract.
4. **Recommendation in relation to liability of ISPs:** Our country should update its laws concerned with civil liability of Internet Service Providers.
5. **Recommendations in relation to privacy problems:** Our privacy protecting laws must be revised to consider the emerging privacy infringement systems in electronic contracting.

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