Addis Ababa University

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Regulation of Electronic Contract under New Ethiopian Electronic Transaction Proclamation No. 1205/2020

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7/6/2021

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June 2021

Addis Ababa, Ethiopia

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A Thesis Submitted to the Addis Ababa University School of Graduate Studies in Partial Fulfillment of the Requirements for the Master's Degree of Law (LL.M) in Business Law

Advisor: - Zekarias Kenea (Associate Professor)

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(Approval Sheet)

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Declaration

I undersigned, hereby declare that this thesis entitled “Regulation of Electronic Contract under New Ethiopian Electronic Transaction Proclamation No. 1205/2020” is my original work and has never been presented in any other institution. The works of other person used in this thesis are duly acknowledged.

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Acknowledgement

My special thanks goes to Almighty God for helping me to ensure my endeavor. Next, I would like to express my deepest gratitude to my advisor Zekarias Kenea (Associate Professor) for his invaluable and constructive comment to shape this work. In addition, I would like to thank many individuals who directly and indirectly supported me to complete this thesis. My gratitude goes to my beloved mother Damitu Abdisa, my father Kumara Angare, my brother Merga Kumara. This work would not have been completed without the relentless support of my friends Fraol Dejene, Wakuma Daba, Firomsa Alemayehu, Girma Moges and Lalisa Aseffa.

Finally yet importantly, my awesome and beloved wife Chaltu Samuel Kentiba deserves thanks for encouraging and showing me her hospitality.

My special thanks goes to them.

Thank you!

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Abbreviations

B2A=Business to Administration
B2B= Business to Business
B2C=Business to Consumer
CC= Civil Code
CD ROM= Compact Disk Read Only Memory
CD=Compact Disk
EA= Electronic Agent
EC=European Council
E-Commerce= Electronic Commerce
E-Contract= Electronic Contract
EDI=Electronic Data Interchange
EESP= Ethiopian Electronic Signature Proclamation No.1072/2018
EETP=Ethiopian Electronic Transaction Proclamation No.1205/2020
eISSN= Electronic International Standard Serial Number
EPUB=Electronic Publication
E-Seal= Electronic Seal
E-Signature= Electronic Signature
E-Ticket=Electronic Ticket
EU=European Union
GUIDECII = General Usage for International Digitally Ensured Commerce (version II)
HTML= Hyper Text Markup Language
ICT= Information Communication Technology
IdM=Identity Management
INSA= Information Network Security Agency
IP= Internet Protocol
ISBN=International Standard Book Number
ISP=Internet Service Provider
ISSN= International Standard Serial Number
MP3/4=Megapixel3/4
PDF=Portable Document Format
SGML=Standard Generalized Markup Language
SMS= Short Message Service
SMTP=Simple Mail Transfer Protocol
TCP= Transmission Control Protocol
TSP = Trust Service Provider
UCRIdMTS= Use and Cross-border Recognition of Identity Management and Trust Services
UETA= Uniform Electronic Transaction Act
UNCITRAL=United Nations Commission on International Trade Law
UNCUECIC = United Nations Convention on the Use of Electronic Communications in International Contracts
WTO= World Trade Organization
WWW=World Wide Web
XML= Extensible Markup Language

Abstract

The use of electronic communications improves the efficiency of commercial activities. It plays a fundamental role in promoting trade and economic development by enhancing the opportunities to access markets beyond geographical barrier. Like any other transaction contract is indispensable in the process of electronic commercial transaction. Hence, the impact (i.e. positive and negative) of technology in the business inevitably extends to a contract. Recently Ethiopia has promulgated Electronic Transaction Proclamation No.1205/2020 that recognizes validity and enforceability of e-contract under the auspices of functional equivalence approach, which presupposes existence of equivalent conventional contract rules. As a result, the operation of e-contract rules depend on existence of equivalent conventional contract rules that defines the functions of written document on secondary position. However, now days a sophistication of ICT is quite beyond the functions of conventional contracts even previous technology. Thus, current electronic transaction law has to recognize unique nature of e-contract (i.e. ubiquity, distance, virtuality (immateriality), speed and the involvement of electronic agent (EA hereinafter) that is not contemplated in the conventional contract rules to effectively regulate it.

CHAPTER I
INTRODUCTION

1.1. Background of the study

Since the 1990s, e-commerce has grown exponentially around the world.[1] The use of electronics in business improves the efficiency of commercial activities at all levels by enhancing trade connections for previously remote communities in markets.[2] The recent development in information communications technology (ICT) has significantly changed lives and provided new opportunities for consumers and businesses.[3] Before the resurgence of e-commerce, transactions were carried out face-to-face in close proximity and, in exceptional cases, via the postal service, which is relatively slow and depends on the physical market place.[4] Now, revolutionary advances in communication technology have transformed the physical market into a virtual market in space. In the course of e-commerce, the creation of contractual relations between the parties to the transaction is indispensable due to the instrumentality of the contract. A contract is a vital component in conducting the exchange of goods and services for consideration in e-commerce because it is a means of communication in any transaction.[5]

This fact has brought a new form of contract, the so-called electronic contract (e-contracts hereinafter) with it. An E-contract is an electronically designed, deployed and executed agreement between individuals, persons, or persons or individuals and an EA using a network of computer programs.[6] This e-contract has posed new challenges to the pre-existing conventional contract law principles, meaning that the rules on instantaneous communications between the parties in a conventional contract are different from the rules on the hypertext system in electronic communications.[7] In e-contracts made on internet, fundamental principles of contract

1 World Economic Forum, 'The Global Governance of Online Consumer Protection and E-commerce Building Trust' (COM CH-1223, March 2019) available at http://www.weforum.org accessed on November 5/2019 p.4

2 United Nations Convention on the Use of Electronic Communications in International Contracts(2007), United Nations Publication(New York), available athttp://www.uncitral.org par.2 of preamble accessed on Nov.2/2019

3 United Nations Conference on Trade and Development, 'Consumer protection in electronic commerce' (Conference on Trade and Development, 3–4 July 2017(Geneva)) available at http://www.unctad.org accessed on November 1/2019 p.2

4Ibidapo-Obe Babatunde B. 'Online Consumer Protection In E-Commerce Transactions In Nigeria: An Analysis (LLM Thesis, University of Sussex 2011) available at< http://ssrn.com/abstract=2683927> accessed on November 1/2019

5 George Krzeczunowicz, Formation and Effects of Contract in Ethiopian, (Faculty of Law, Addis Ababa University1983) preface para.1

6 Shubhada Gholap, 'Electronic Contracts In India: An Overview'(Vol.6, Iss.8, 2018), IMPACT International Journal of Research in Humanities, Arts and Literature, p.251 available at < https://www.impactjournals.us> accessed on Nov.21/2019

7 Formation of Electronic Contracts: Contracts in the Context of Information Technology, p. 86 available at https://shodhganga.inflibnet.ac.in/bitstream accessed on Nov.21/2019

law continue to prevail. However, all of these principles can not be applied in the same way as in paper-based or oral agreements.[8]

Because conventional contract rules for the progress of the conclusion of a contract require a meeting of minds, competency to give legally sustainable consent, the involvement of two or more parties having a lawful and moral object, its proprietary nature (agreement for consideration) and form.[9] For example, the Civil Code of the Empire of Ethiopia (CC hereinafter) on Ethiopian basic contract law states that a valid contract is formed by the free consent of competent parties (capable) for a sufficiently defined, possible, and lawful object and in the prescribed form if clearly required by the law.[10] Furthermore, the terms of contracts are straightforward in offline transactions; parties could have the terms spelled out orally or in writing prior to entering into the contract, or they could be contained in an invoice or receipt.[11]

However, in electronic transactions (e.g. click-wrap, shrink-wrap and browse–wrap or web agreements for sale or licensing of software and other goods), the website terms and conditions are usually unilaterally imposed by the owner of the website in question and will not be negotiated and not physically signed by the other party.[12] Even in certain circumstances, terms and conditions of contracts are not disclosed until payment is carried out ('payment now terms later'[13] contract). In addition, in the case of the conclusion of e-contracts, sometimes the minds that meet are the minds of the programmed computer systems.[14] These features of the formation of e-contracts in the new technological age and electronic commerce have posed a challenge to essential elements of the contract when compared with a paper-based method of writing and signing.[15] Besides, e-contracts do not acknowledge geographical borders because internet transactions are conducted over a network, ignoring all traditional geographic boundaries.[16] Thus, it is problematic to easily allocate jurisdiction based on where and when the contract is actually made in cyberspace. To solve these problems, Ethiopia has promulgated Electronic

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[8] Shubhada Gholap at note 6, p. 251

9 M. Pragadeeswaran and Aswathy Rajan, Critical Study on Different Types of E-Contract with Special Reference to the Remedies Available on Breach(Volume 119 No. 17 2018), International Journal of Pure and Applied Mathematics, p.1739 available at < http://www.acadpubl.eu/hub/> accessed on Nov.21/2019

10 Civil Code of The Empire of Ethiopia(proclamation No. 165/1960)[Civil Code(1960) herein after], Negarit Gazette Extraordinary Issue No.2 of 1960, Addis Ababa , Ethiopia Art.1678

11 Ibidapo-Obe Babatunde B. (at note .4)

12 Snail S., A Comparative Review Of Legislative Reform Of Electronic Contract Formation In South Africa(LLM thesis , University of South Africa(2015) p.18 available at http://www.uir.unisa.ac.za/handle accessed on Nov. 10/2019

13 Bradley J. Freedman, 'Electronic Contracts Under Canadian Law—A Practical Guide' (Vol.28 No.1, 2000), Manitoba Law Journal p.24

14 M. Pragadeeswaran and Aswathy Rajan at note 9, p.1739

15 Snail S. at note 12, p.18

16 C Erasmus, Consumer Protection In International Electronic Contracts(LL.M thesis, North-West University(2011)) , p.15 available at< http://www.semanticscholar.org> accessed on Nov.20/2019

Transaction Proclamation No.1205/2020 (EETP hereinafter) (i.e. to regulate e-commerce and thereby to facilitate regulation of e-contracts), though its adequacy is questionable.[17]

The EETP, irrespective of its nomenclature, is promulgated for different economic, social and political purposes.[18] Economically, EETP is aimed at providing equal legal treatment to users of paper and computer-based information to facilitate the use of electronics in business by removing possible trade barriers. In addition, by allowing the country to be a part of the digital world, the government hopes to encourage citizens to participate in economic development. Moreover, the proclamation is also intended to solve other social and political problems by facilitating the deployment of e-governance to build effective, accountable and inclusive institutions at all levels.[19]

One of the core objectives of EETP is to create a more secure legal environment by affording equal treatment to users of paper-based and electronic data messages, thereby facilitating the use of electronic communication in business. Since its objective is to provide an enabling legal environment for e-commerce, it facilitates the formation of contracts through electronic communication.[20] Thus, it has also embraced the task of regulating e-contracts. Nevertheless, the operation of e-contract rules under this EETP presupposes the existence of equivalent conventional contract rules (i.e. the functional equivalence approach).[21] It does not make an effort to establish new legal rules that regulate strange issues of e-commerce, rather than seeking the definition and functions of paper-based documents in conventional contract rules.[22]

The functional equivalence approach is useful to avoid confusion regarding the validity and enforceability of e-contracts and to save legislative resources.[23] However, it is naturally impossible to use the functional-equivalent approach to put things under the ambit of conventional contract rules by equating new things with their non-existing counterparts.[24] Because the sophistication of ICT today far exceeds the functions of traditional contracts, even in previous technology.[25] Hence, in general, this paper aims at assessing the adequacy of EETP to regulate the formation of e-contracts and its impact on evidentiary value and place of contract in comparison with established conventional contract principles and other countries' e-contract rules.

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17 Electronic Transaction Proclamation No.1205/2020(EETP hereinafter), Federal Negarit Gazette of The Federal Democratic Republic of Ethiopia, 26th Year No.57, Addis Ababa, Ethiopia

18 Id, Recital paragraphs

19 Ibid

20 Id, Art.17

21 Id, Arts.7-17

22 Lyu Guomin & Zhou Shengmian, 'Functional-Equivalent Approach in UNCITRAL Electronic Commerce Legislation'(Vol.176, 2018), Advances in Social Science, Education and Humanities Research, Published by Atlantis Press, p.1544 available at (http://creativecommons.org/licenses/by-nc/4.0/) accessed on January 28, 2021

23 Ibid

24 Ibid

25 Ibid

1.2. Statement of the Problem

It is clear that the complexity of the technological aspects of e-contract formation differs significantly from traditional methods of contract formation, as it has introduced a new approach to the ways in which offers and acceptances are communicated.[26] This has caused a challenge to the regulatory capacity of the conventional contract law framework in relation to e-contracts.[27] Accordingly, to address the regulatory gaps of e-contracts, Ethiopia has promulgated EETP with a view to creating a secure legal environment that ensures online marketers are protected and thereby facilitates smooth electronic transactions equally with users of paper-based contracts [what we call functional equivalence].[28] EETP primarily aims at rendering legal equivalence between paper-based and e-contracts by facilitating the use of electronic communication in business transactions. However, there are a number of practical issues that call into question the legal effectiveness of e-contracts more than their functional equivalence. The regulation of e-contracts is more than functional equivalence with conventional/paper-based contracts where the capacity of EETP falls into a state of doubt to handle them effectively.

- From the outset, due to the nature of the internet, it is difficult to establish its compatibility with its equivalent conventional contract, particularly due to the challenges it poses to essential elements of contracts (i.e. identity, competency, consent (offer and acceptance), form and object).[29] Most of the time, e-commerce offers are made by anonymous traders in which the other contracting parties will face the problem of a lack of clear and sufficient information on the identity, authority/competency and location of the offerors, as well as goods and services, prices and guarantees.[30] That is, important information useful for the conclusion of a tenable contract can easily be concealed on the internet, or fraudsters assume false identities and operate from anywhere in the world where the counterpart is vulnerable to online deception and fraudulent activities.[31]
- Secondly, often e-transactions are carried out through automated computer program/s (called EA) which enables computers to initiate or respond to communication.[32] In this case, EA may not only automate transactions based on a predetermined program, but they

[26] Snail S. at note 12, p.18

[27] Neeta Pramod Ghadge, Study of Formation and Challenges of Electronic Commerce in Cyberspace, available at http://www.legalserviceindia.com , Accessed on August 3/2020, see also Gebrehiwot Entehawu Desta, Enforceability of electronic contracts in light of the Ethiopian General Contract Law: appraising the issues (2018) Available at https://www.tandfonline.com/doi/abs/10.1080/13600834.2018. Accessed on August 3/2020

[28] EETP at note 17, arts. 10-17

[29] Bradely J. Freedman at note 13, P.24

[30] United Nations Conference on Trade and Development, (Conference on Trade and Development, 3–4 July 2017) at note 3, p.2

[31] United Nations Conference on Trade and Development, Cyber laws and regulations for enhancing e-commerce: Case studies and lessons learned(TD/B/C.II/EM.5/2, 2015), Note by the UNCTAD secretariat, Geneva P.8

[32]A Varadharaj and Amrutha D K, 'E-Contracting Technique in Construction Project A Literature Review'(vol.05:Issue:11, 2018), International Research Journal of Engineering and Technology(IRJET), Pp.515-516 Available at **www.irjet.net** Accessed on September 24, 2020,

may also initiate new ideas and adapt themselves to the environment (Artificial Intelligence) where they conclude a contract to conduct transactions autonomously, depending on the sophistication of technology.[33]

- Thirdly, as a rule, a contract is the result of a meeting of minds (consensus ad idem) between legally capable persons to form the requisite intention (animus contrahendi) to carry out a juridical act.[34] Therefore, regarding the status, i.e. legal capacity and legal effectiveness of consent by EA, the position of the EETP is unknown.
- Fourthly, in principle, the terms and conditions of contracts are communicated through the exchange of oral discussion or paper-based writings bearing witness signatures (if any) by direct or indirect physical contacts between the parties before or at the time of the actual transaction.[35] However, in e-commerce, sometimes the terms and conditions of contracts are not disclosed to the buyer before payments are made or the cryptic notices are included with other links at the bottom of the website's front page and are not prominently displayed.[36] Furthermore, simply visiting a website may be construed as consenting to the terms and conditions (e.g., browse wrap).[37] Accordingly, the legal effectiveness of post-contractual hidden information regarding the parties' valuation or asymmetric information [receiving notice of the terms of an e-contract], means of receiving witness signatures and reliability are questionable in relation to the evidentiary purpose.
- The international aspect of e-contract under EETP to identify where the contract is actually made and then to allocate forum and applicable law in case dispute arises with regard to cross-border e-contract is unclear.

Briefly, from these points of view, this paper assesses whether or not the EETP has dealt with the aspect of the formation of an e-contract to effectively regulate it more than by seeking its compatibilities (functional equivalence) with conventional contracts.

1.3. The Research Questions

The study aims to deal with one primal question from which several individual questions can emanate. The fundamental question the study aims to explore and find an answer to is whether the EETP adequately and effectively regulates e-contracts from the point of formation and its impact on evidentiary value and place of contract. While the regulatory capacity of the Ethiopian EETP in relation to e-contracts is the basic question that this study explores, the study aims to respond to the following specific questions:

[33] Ibid

[34] Bradely J. Freedman at note 13, P.19

[35] Giuditta Cordero Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith'(Vol.7, Issue 1 (2007) Article 3, Global Jurist p.9 Available at< http://www.bepress.com/gj/vol7/iss1/art3> accessed on Nov. 29/2019

[36] Bradely J. Freedman at note 13, P.24

[37] Ibid

1. Do e-contract forms actually complement conventional contracts (i.e. written form)? If yes, how? If not, why not?
2. Does EETP adequately address the challenges that internet poses to essential elements of contracts in respect of e- contracts?
3. What is the effect of the electronic method of formation on the probative value of e-contracts?
4. Is the e-contract international dimension covered by the EETP to determine where a contract is actually made that facilitates the identification of the forum and the applicable law?

1.4. Objectives of the Research

1.4.1. General Objective

This paper is aimed at examining the position of EETP in relation to the regulation of e-contracts, particularly in emphasizing the formation and its impact on the evidentiary value and place of the contract.

1.4.2. Specific Objectives

The specific objectives of this research are to:

(i) Scrutinize the compatibility of e-contracts with the conventional contract framework (i.e. paper-based contracts).
(ii) Accentuate the challenges that the internet poses to essential elements of the contract (form (offer and acceptance), object, capacity (identity and authority) and consent (liability)) in respect of e-contracts in Ethiopia.
(iii) Analyze the issues of how a party receives notice of the terms of an e-contract and where and when an e-contract is actually made in cyberspace.
(iv) Examine and analyze the reliability and probative value of e-contract?
(v) In addition, explore whether the international aspects of e-contracts are addressed under EETP.

1.5. The Scope of the Study

The term regulation has a broad spectrum. Nevertheless, this research does not explore every aspect of the regulation of e-contracts in detail. Mainly, it focuses on examining the adequacy of the new EETP no.1205/2020 to regulate e-contract from the angle of its formation and its impact on evidentiary value and place of contract (i.e. as the place of formation is prerequisite to determining applicable law and forum, if any). Thus, this paper evaluates the formation of e-contracts as the other aspects of contracts depend on the healthy and valid source of obligation by comparing it with the conventional contract framework (i.e. paper-based contracts) to check the regulatory adequacy of EETP on e-contracts.

In addition, electronic transactions are conducted over a network, ignoring all traditional geographic boundaries, where the formation of e-contracts also does not acknowledge geographical borders. As a result, if an e-contract dispute arises, knowing [jurisdiction] the

location where the parties can take their case is a deciding factor. This issue is highlighted in addition to formation because the place of offer and acceptance in the formation of a contract plays an important role in determining jurisdiction. In terms of geographical scope, this research is limited to Ethiopian territory.

1.6. Significance of the Study

Considerable research has been done on the formation of electronic contracts and the use of e-signatures in different countries around the world. However, in Ethiopia, there is no ample and in-depth research that has been carried out on e-contracts. Hence, this research:

- It would open the door for other researchers to undertake further research on the subject.
- It could be an input for prospective policy makers.
- It may be used as an input for legal practitioners and advisors;
- It would be used by Ethiopian courts for the resolution of disputes arising from e-contracts.
- It would raise awareness among traders and consumers in general about the potential challenges of Ethiopian contract law in the regulation of contracts in cyberspace.

1.7. Research Methodology

The study employed doctrinal legal research methodology where a survey of literature will be undertaken to show the challenges and prospects of the law in relation to the regulation of e-contracts from the aspect of its formation and its impact on the evidentiary value and the place of contract. As a result, in order to respond to the inquiry, this research will use both primary and secondary sources. As a result, the primary sources to be studied include EETP, EESP No.1072/2018, National Payment System Proclamation No.718/2011, Telecom Fraud Offence Proclamation No.761/2012, Computer Crime Proclamation No. 958/2016, and parts of the Ethiopian Civil Code (proclamation No.165/1960). Moreover, some other relevant laws at the national and international level will be explored. Books, journals, commentaries, cases on issues, unpublished materials, reports, newspapers, pamphlets, and internet sources are examples of secondary sources that could be consulted in order to solve the problem at hand.

Generally, in this research, surveys of literature will be carried out based on comparative and evaluative analysis. The comparative perspective is employed where the law of foreign countries is utilized based on their experience of the regulation of e-contracts to show the legal gaps in the regulation of an e-contract from the angle of its formation, elements required to be included and the place of the contract. The evaluative aspect is principally emphasized in the analysis of the nature and features of an e-contract and its impact on the evidentiary value under the regulatory spectrum of the EETP.

1.8. Limitations

In order to conduct this research, the author came across financial, time and material constraints. The lack of cases on the problem, as well as the instability caused by COVID-19, account for more than half of the constraints.

1.9. Citation Style

The Oxford Standard for the Citation of Legal Authorities (OSCOLA style) has been followed throughout the work to address the full source of information, except for Ethiopian laws.

1.10. Outline of the Research

In order to accomplish the aims and objectives of this research, this study has been divided into the following five chapters.

Chapter I introduce proposal of the research; Chapter II discuss overview principles of Formation of Contracts, Basic concept of e-commerce and e-contract; Chapter III steer E-Contact Legal Regulatory Frameworks; Chapter IV set out Issues and Challenges of E-Contract and Chapter V forward Conclusions and Recommendation at the end.

CHAPTER II
2. Overview of E-Commerce and Formation of Contracts

2.1. Introduction

According to the facts, no one in this world is self-sufficient enough to live solely on his or her own products or services.[38] Thus, it is inevitable to make an exchange for gain (profit) or for consumption.[39] The conclusion of a contract between the parties is an undeniable fact in this exchange.[40] At least there is an agreement.[41] Commerce in the virtual world, it shares this characteristic because it involves the selling and buying of products and services.[42] Like business transactions in the physical world, e-commerce materializes through the instrumentality of e-contracts. Because any business transaction is conducted orally, by sign, conduct, in writing, or by the exchange of electronic data messages, that constitutes an agreement between two or more parties as defined by the applicable law.[43] The primary focus of this chapter is on the general principles of contract formation as well as the nature, types, and common features of e-contracts. Thus, it will now be necessary to have a brief overview of e-commerce.

2.2. Overview of E-Commerce

Because of the invention and evolution of various data communication devices, the use of electronic data messages in both business and personal environments has become more common over time.[44] The capacity to manage information and the flexibility of electronic data messages has been radically improved.[45] The data messages in early e--commerce mainly consisted of unlabeled data fields in a preliminarily agreed form.[46] Later, for the sake of flexibility, software developers and system integrators devised a new approach to message forms and their

[38] Hanoch Dagan & Michael Heller, The Choice Theory of Contracts (Introduction) (2017), Columbia Law & Economics Working Paper No.567; Columbia Public Law Research Paper No. 14-552, Cambridge University Press, p.1 Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2035 accessed on August 18/2020

[39] Ibid

[40] Richard Stone, *The Modern Law of Contract*(ISBN 1-85941-667-5, 5th edition), Cavendish Publishing Limited (2002), Great Britain, p.3 available at www.cavendishpublishing.com accessed on August 26/2020

[41] Ibid

[42]United Nations Conference on Trade and Development(3–4 July 2017(Geneva) at note 3, p.2

[43] Maryanka, 'Legal Validity of E-Contracts: A Paradigm Shift from Conventional Transaction to Digitization'(Vol.V Iss.1, June 2019 eISSN : 2581-6780), Mizoram University Journal of Humanities & Social Sciences (A Bi-Annual Refereed Journal) pp.55-56 available at http://mzuhssjournal.in/images/resources/v5n1/maryanka.pdf accessed on August 18, 2020

[44]Snail S., 'Electronic Contracts in South Africa – A Comparative Analysis'(2009(2), Journal of Information, Law & Technology (JILT), available at http://go.warwick.ac.uk/jilt/2008_2/snail accessed on Nov. 29/2019 p.4

[45] Lauri Railas, The Rise of the Lex Electronica and the International Sale of Goods: Facilitating electronic transactions involving documentary credit operations (ISBN 9 78 951-51 3693 0 PDF)(PhD Dissertation Faculty of Law of the University of Helsinki(2004)), pp.45-47available at http://www.helsinki.fi/oik/tdk accessed on August 18, 2020

[46] Ibid

distribution systems (i.e. the World Wide Web).[47] As a result, different sophisticated computer language systems encountered Hyper Text Markup Language (HTML), the format for Web documents derived from the Standard Generalized Markup Language (SGML), which resulted in the creation of the Extensible Markup Language (XML).[48]

This language (XML) has made significant advances in data messages through its ability to integrate data into a document form, as well as its power and flexibility to handle, interconnect, and converge business information from various sources, making it functionally operable for e-commerce and e-contracts.[49] The earlier formalistic communication used in EDI has been overtaken by XML, though EDI remains in use in some areas until now.[50] This interconnection has led to the establishment of 'Web services', which serve as a play field for providers to offer in electronic form and accept/commercially link one to another through a platform or a computer programme.[51] Thus, the internet system is being seen as a peak point for entering into several contracts within and outside the country simultaneously by exchange of offers and acceptance through means of electronic records.[52]

Therefore, what is e-commerce? There is no common definition of e-commerce**.** For instance, the Intergovernmental Group of Experts on Consumer Protection Law and Policy's second session (3–4 July 2017) defined e-commerce as "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders".[53] EETP has also defined e-commerce as the transaction of goods and services through the internet or other information networks.[54] Though they differ in content, they share the fact that transactions take place over a network in cyberspace. In the meantime, for the purpose of this paper, we are trying to define E-Commerce as the act of conducting business transactions in cyberspace with the help of a worldwide network of computer networks to facilitate the exchange and transmission of data.[55] E-commerce can be categorized into different types based on the parties to the transaction. Among these, we will roughly see the major types of e-commerce. These are e-commerce between businesses (B2B), businesses to consumers (B2C), business to administration (B2A) and administration to business (A2B).[56]

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[47] Ibid
[48] Ibid
[49] Ibid
[50] Ibid
[51] Ibid
[52] Shubhada Gholap at note 6, p.251
[53] United Nations Conference on Trade and Development(3–4 July 2017(Geneva) at note 3, p.2
[54] EETP at note 17, Article 2(12)
[55]Shubhada Gholap at note 6, p. 252
[56] P.K. Sinha and Vivek Mittal, *International Business*, published by Excel Books Private Limited(2012), New Delhi P.251

Business –to-Business (B2B) - this category of business transaction is the transaction carried out between different business organizations from manufacturers to retailers via electronic means.[57]

Business –to- Consumer (B2C) – this is the category of e-commerce that implicates flow of transaction is from trader to the person that buys for personal consumption purpose in the electronic transaction.[58]

Business-to-Administration (B2A) - In this kind of e-commerce, the dealing is between business and public administration or vice versa.[59]

In general, e-commerce refers to market transactions (the selling and buying of goods and services) conducted over the internet that involve immediate electronic transactions, on-the-spot service provision, or later delivery of physical goods.[60] A contract is an essential component in the middle of the transactions, where e-commerce is carried out using e-contracts.[61] Having this concept in mind lets, we see the general principles of contracts before embarking on the discussion of e-contracts first.

2.3. General Principles of Contracts

In our daily activities, knowingly or unknowingly, we enter into an agreement.[62] However, not all agreements are contracts.[63]

What is contract? There is no universal definition of a contract.[64] There is quite diversity among different legal systems, scholars and disciplines.[65] In common law legal systems, for example, a contract is defined as an agreement involving the exchange of promises with the intent of establishing a legal relationship.[66] Whereas in the Civil Law legal system, a contract is an agreement between legally competent parties to give consent sustainable at law for a determined legal cause.[67] This divergence in definitions also extends to specific disciplines. For example, according to economists, a contract is an agreement through which the parties make reciprocal commitments in terms of their behavior in a bilateral coordination arrangement.[68] Whereas for

[57] Ibid & Shubhada Gholap at note 6, p.252
[58] Ibid
[59] Ibid
[60] Ibid
[61] Maryanka at note 43, p.59
[62] Richard Stone at note 40, p.3
[63] George Krzeczunowicz at note 5, p.14
[64] Sugata Bag, *Economic Analysis of Contract Law :Incomplete Contracts and Asymmetric Information*(ISBN 978-3-319-65268-9[eBook]), Springer International Publishing AG(2018), Switzerland p.3
[65] Ibid
[66] Emily Finch and Stefan Fafinski, Contract Law(ISBN: 978-1-292-08724-5 (PDF)), 5th edition, Pearson Education Limited (2017), United Kingdom, p.7 available at www.pearson.com/uk accessed on August 26/2020
[67] Sugata Bag at note 64, p.10
[68] Id, P.2

lawyers, a contract is an agreement giving rise to an obligation between legally competent persons and which is enforced or recognized by the law.[69] Likewise, in the Ethiopian CC, a contract is defined as an agreement whereby two or more people, between themselves, create, vary or extinguish obligations of a proprietary nature.[70] We are not going to deal with whether these definitions are right or wrong, rather than showing the dynamic nature of the contract definition. The term contract cannot be defined definitively. Richard Stone, for example, identified the dynamic nature of the definition of contract:

> *"We may have to accept that we will not find a straightforward answer to the question of what contract 'is'. Even finding an 'essential definition' (that is, identifying 'necessary and sufficient' elements) is more difficult than approaching it as a cluster concept (in which several elements are identified with the usage, but where no single set of these elements can be combined to represent the necessary and sufficient conditions for correct usage)."*[71]

Thus, different legal systems employ certain mechanisms to determine the validity of contracts rather than their definition. This is by providing certain legal requirements the contract needs to satisfy. In the common law legal system, offer and acceptance, consideration (as an object), capacity and intention to create legal relations are classical legal requirements for an agreement to be a valid contract.[72] However, the Civil Law legal system additionally requires formal requirements.[73] Like the civil law legal system, the Ethiopian CC has provided the prerequisites for the formation of a valid contract (i.e. capacity, consent, object {clarity + possibility + lawfulness} and formality requirements (if any).[74] These requirements filter out agreements that are capable of producing a legal effect (the so-called 'contracts') from those that are mere agreements.[75]

Thus, whether an agreement is a contract or not depends on fulfillment of the requirements provided by the law of contracts.[76] In fact, a contract is an interaction between two or more legally capable persons in which the parties make reciprocal commitments in terms of their bilateral coordination for lawful purposes.[77] Except where a mandatory provision of the law

[69] Allen and Overy, At a Glance Guide to Basic Principles of English Contract Law, Advocates for International Development p.3 available at www.a4id.org accessed on August 18/2020
[70] Civil Code(1960) at note 10, Art.1675
[71] Richard Stone at note 40, Pp.6-7
[72] Sugata Bag at note 64, p.9
[73] Ibid
[74] Civil Code(1960) at note 10, Art.1678
[75] Mulugeta M. Ayalew, Ethiopia in International Encyclopedia of Laws: Contracts (2010), Kluwer Law International, Netherland P.30 available at www.kluwerlaw.com accessed on November 2, 2020
[76] Id, p.31
[77] Sugata Bag at note 64, p.4

exists, an obligation is voluntarily assumed. Law of Contracts is called to strike balance[78] for four primal purposes.

First Cautionary – involves providing safety net to individuals from both their own rashness and the importuning of others.[79]

Second Evidentiary- justified by the desire to protect both the individual citizen and the courts from fabricated evidence and insufficient proof. [80]

Third Channeling- enable individuals to know the legal significance of their actions by marking off or labeling obligations that may be enforceable and the extent and kind of the legal obligation. [81]

Fourth Deterrence- informs types of transaction that are discouraged because they are felt to be of doubtful value to society in advance.[82]

Hence, it is contract law that sets the rules for exchanging individual claims and determines the extent to which society is able to enjoy the gains from trade to improve the welfare of both the parties and society.[83] Moreover, these requirements are dictated by societal needs to foster transactions, to enhance competition, to protect consumers, to ensure fairness, and to protect customs and morality.[84] Thus, these elements are the backbone of the contract to endow it with legal enforceability.

2.4. Formation of E-Contract

2.4.1 Definition

There are so many definitions of an e-contract. However, for the purposes of this paper, an e-contract is a type of contract formed through electronic means of communication between persons or physical persons and the EA or inter-EA that is set up to handle contract formation in the e-commerce process.[85] In our above discussion, we have seen the essential elements contracts are required to fulfill to form a valid contract. Nevertheless, whether the fulfillment of these elements of the contract could be applied in the formation of an e-contract is a contentious issue. Let us see the two major groups regarding the compatibility of e-contracts with conventional contracts.

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[78] Ibid

[79] Arthur Taylor Von Mehren, Contract (11 Dec. 2019), Encyclopedia Britannica, available https://www.britannica.com/topic/contract-law Accessed on February 2, 2021

[80] Ibid

[81] Ibid

[82] Ibid

[83] Sugata Bag at note 64, p.4

[84] Mulugeta M. Ayalew at note 75, p.31

[85] Shubhada Gholap at note 6, p.253

The first group contends that e-contracts are analogous to traditional contracts. Contracts can be concluded in a variety of ways (oral, written, conduct and sign, even through silence).Thus, electronic communication is also one means of communication. So long as it is a means of communication, it can not be a ground of departure that results in the segregation of e-contracts from other means of conventional contracting.[86] Further Mostafa Abbasi and Ali Zare say,

> "*The e-contracts don't have any difference from the traditional contracts according to subject and accuracy principally. Similar legal condition was considered for e-contract the same as contracts on papers and documents in the inclusion of these regulations in commercial transactions."*[87]

The only difference is that a traditional contract is written on paper or in another physical form, whereas an e-contract is written in electronic form.[88] Moreover, they argue that the current evolution of e-contracts is a matter of changes in degree rather than the type of contract and is accommodated by the existing contract regime.[89] No matter how, many of the issues that arise relating to how these conventional contract principles will apply to new forms of contract are questions still left unanswered by this group.

The second group claims that the essential elements of contract such as offer and acceptance, capacity, consent, object and form in the formation of conventional contract are as well cardinal for the formation of e-contract.[90] However, the formation of e-contracts over the internet differs significantly from the formation of traditional contracts in the physical world.[91] For instance, in the formation of an e-contract, it is the website or other computer program, which acts as the retailer and responds as per the consumer's actions.[92] Moreover, "*electronic contract constitutes a transaction executed in the electronic form which does not apply a written form of any kind except the electronic one and which is signed electronically*."[93] The E-contract is dependent on

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[86] Hu Zhe and Chen Fushen, Tricky Aspects of E-Contract(2015), King and Wood Mallesons, Shanghai, P.3 available at http://www.kwm.com/en/cn/people/hu-zhe accessed on August 23, 2020

[87] Mostafa Abbasi and Ali Zare, 'Electronic contracts in Iran law' (vol.4, iss.03, 2016), UCT Journal of Social Science and Humanities Research p.17 Available online at http://journals.researchub.org/*jsshr.vol4iss03pp17-21* accessed on August 18, 2020

[88] Formation of Electronic Contracts at note 7, p.83 and Petru Tărchilă and Mariana Nagy, Comparative Approach of The Electronic Contract And Classical Contract, In Teaching The Content Of The New Civil Code In Romania (2015) pp.464 – 468), Procedia - Social and Behavioral Sciences, p.466 Available at www.sciencedirect.com accessed on August 18, 2020

[89] Avery Wiener Katz, Is Electronic Contracting Different? Contract Law in the Information Age(2005), Columbia University School of Law P.1available at http://www.columbia.edu/~ak472/papers/Electronic%20Contracting.pdf accessed on September 24, 2020

[90] M. Pragadeeswaran and Aswathy Rajan at note 9, p.1734

[91] Ibid

[92] Ibid

[93] Tea Edisherashvili, 'Legal Regulation of Electronic Contract and General Review' (2016 /SPECIAL/ edition e - ISSN 1857- 7431), European Scientific Journal, P.52

the data message.[94] The programmed data message generated on the internet can not be equivalent to the conventional/paper-based document because they have different nature.[95] The rules of traditional contracts are typically expressed in language through face-to-face negotiation, reflecting concepts and practices that are difficult to apply to e-contracts.[96] As a result, comparing e-contracts to traditional contracts is pointless.[97] Let us test both arguments by typifying and reviewing their nature according to their mode of conclusion, as follows.

2.5. Nature of E-Contract

E-Commerce offers a massive alternative that accelerates market access and reduces transaction costs in national and international business value chains between distant originators and addressees.[98] Thus, e-commerce is boosting market transactions more than ever before, in terms of accessibility and efficiency. As it presents an alternative to participating in a market transaction, it also allows the conclusion of several contracts (between the originator and the addressee) in different ways.[99] Because it uses pre-structured terms, the e-contract is cost-effective and makes it possible to enter into contracts instantly.[100] There are a few processes available to form an e-contract.[101] An e-contract could be formed by completing the website form provided for obtaining goods or services offered by the seller on the website.[102] Inter alia, it can be formed by point-and-click agreements, where the addressee assents to terms and conditions by clicking an "I Accept/I Agree" icon/box on the computer screen.[103] An e-contract can also be concluded through notice and acceptance by conduct agreement, in which the mere use of a website constitutes the formation of a valid contract.[104] E-contracts may be classified into different types.[105] Among them, we will see the following four major types of e-contracts.

2.5.1. Electronic Data Interchange (EDI)

EDI is a direct automated data process from computer-to-computer or exchange of business information on a private network or the internet based on complete industry-specific pre-

[94] Lyu Guomin & Zhou Shengmian at note 22, p.1543
[95] Ibid
[96] Bradely J. Freedman at note 13, Pp.1-2
[97] MIK, Eliza, Mistaken Identity, Identity Theft and Problems of Remote Authentication in e-commerce (2012), Computer Law and Security Review: Research Collection School of Law, p.7 Available at: https://ink.library.smu.edu.sg/sol_research/1148 accessed on January 12, 2021
[98] United Nations Conference on Trade and Development(TD/B/C.II/EM.5/2, 2015) at note 31, P.3
[99] Ali Ahmed Al-Zubi, Affirmation Comparative Study between Traditional Contract and Electronic Contract (Vol.9, No.4, 2013, pp.158-167), Canadian Social Science, P.158Available at http://www.cscanada.net/index.php/css/article/view/j.css.1923669720130904.3678 accessed on September 24, 2020,
[100] M. Pragadeeswaran and Aswathy Rajan at note 9, pp.1734-1736
[101] Ibid
[102] Ibid
[103] Bradely J. Freedman at note 13, Pp.24-30
[104] Ibid
[105] Formation of Electronic Contracts at note 7, pp.129ff

structured standard formats agreed by the parties.[106] Trading partners exchange information directly through private networks or Internet connection services in the form they have agreed to use by using standard transmission protocols (like SMTP).[107] It is usually used in continuous B2B transactions, just-in/on-time inventory management and quick response retailing[108] in the closed marketplace.

The main characteristic of data messages in EDI is the fact that they are "structured and coded messages, which have the ability to be treated and transmitted automatically with high frequency, in comparison with other forms of data messages exchanged in the formation of contracts, like by e-mail".[109] EDI is utilized in closed marketplaces, which are industry-specific, where the partners connected to each other are known and the buyers are restricted to a defined set of sellers, and a seller is committed to selling only to a specified buyer or group of buyers.[110] EDI shares the characteristics of forming contracts in classic market structures other than automation.[111] Because contract formation in EDI is front-loaded, where the process is done manually for the last time to administer technical and legal details of the prospective contractual framework from the beginning.[112] Thus, trading partner agreements guide the ways in which the legal uncertainties and business risks associated with e-contracts can be addressed by the parties via preset contracts.[113]

2.5.2. Click-wrap (Point and Click) Contracts

A click-wrap contract is a contract where the terms and conditions are provided on the computer screen in a scrollable window next to blocks presenting the options: I Agree and I Don't Agree icons in the dialogue box.[114] Parties indicate their assent to the same, by way of clicking/typing on an 'I Agree', signing up, subscribing, creating an account icon to adhere to or decline the same by clicking the 'I Disagree' icon in the dialogue or simply closing the page.[115] The terms and conditions of the contract may be displayed or put behind the choice of the dialogue box. Despite the fact that it allows you to read the contract's text, there is no way for the other contracting party to negotiate or modify the terms of the contract other than accepting or rejecting it by clicking. The Click-wrap contract is a standard form of contract where the terms

[106] Kenneth W.Copeland and C. Jinshong Hwang, Electronic Data Interchange: Concepts and Effects, available at https://web.archive.org/web/20160103124500/https://www.isoc.org/inet97/proceedings/C5/C5_1.HTM accessed on December 28/ 2020
[107] Ibid
[108] Bradely J. Freedman at note 13, Pp.33-34
[109] Lauri Railas at note 45, p.98
[110] Id, pp.51-56
[111] Ibid
[112]Ibid
[113] Lauri Railas at note 45, p.51
[114] Id, p.27
[115] Formation of Electronic Contracts at note 7, pp.129ff

and conditions of contracts are unilaterally imposed by the owner of the website.[116] When an application is downloaded over the internet or when websites provide such choices, this typical contract comes into existence.[117] Let us look at the following example:

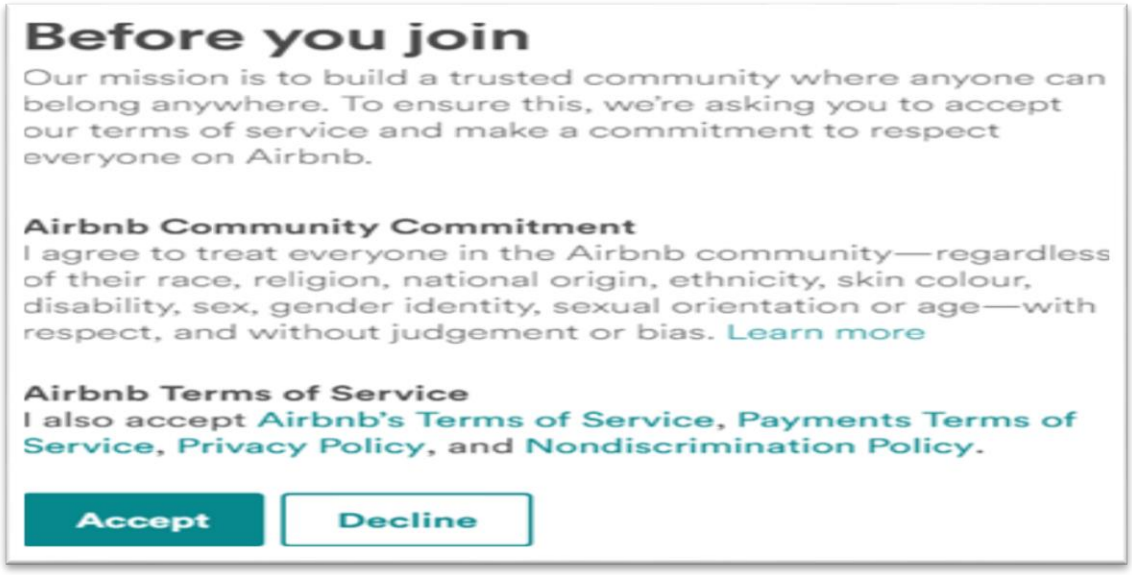

Figure 1 Example of Click-Wrap Agreement[118]

2.5.3. Shrink-wrap (Payment Now Terms Later) Contracts

Shrink-wrap contracts involve licensing of software on CD ROM, by mail and in stores or over the internet.[119] The license associated with the particular software, which holds the full terms and conditions of use, is printed on a CD ROM and is shrink-wrapped.[120] Then, the user assents to the software terms of use enclosed within the shrink-wrapped box by tearing and opening it.[121] To access the terms of the contract, you have to buy the product first (i.e. payment now, terms later).[122]

Sometimes, click-wrap and shrink-wrap agreements overlap, particularly in software licensing agreements.[123] In a click-wrap agreement, however, the user digitally agrees to the contract's

[116] Snail S. at note 44, p. 4
[117] Formation of Electronic Contracts at note 7, pp.129ff
[118] Ruby Mackenzie-Harris and Brad Vinning, Are online contracts enforceable? http://www.clarkekann.com.au/newsroom/are-online-contracts-enforceable last accessed on January 27, 2021
[119] Formation of Electronic Contracts at note 7, pp.129ff
[120] Ibid
[121] Ibid
[122] Bradely J. Freedman at note 13, P.25
[123] Megan, An Overview of Licenses: Shrink-Wrap vs. Click-Wrap vs. Browse-Wrap Licenses, https://odinlaw.com/overview-licenses-shrink-wrap-vs-click-wrap-vs-browse-wrap-licenses/ last accessed on January 26/2021

terms by clicking on the dot spot or on "I agree," which serves as an understanding of the terms of the underlying contract.[124] Whereas a shrink-wrap contract is associated with physical products (e.g. hardware and software), in which the terms of use in the license are operated on the user upon opening the box.[125] Nevertheless, in software licensing contracts, both (i.e. click-wrap and shrink-wrap) involve *payment now terms later*, a standard form of agreement where you access the terms of the license before paying and downloading them. On the other hand, payment could be taken as consenting to the terms of the contract.

For example, let us see the installation of the following software licensing agreement form.

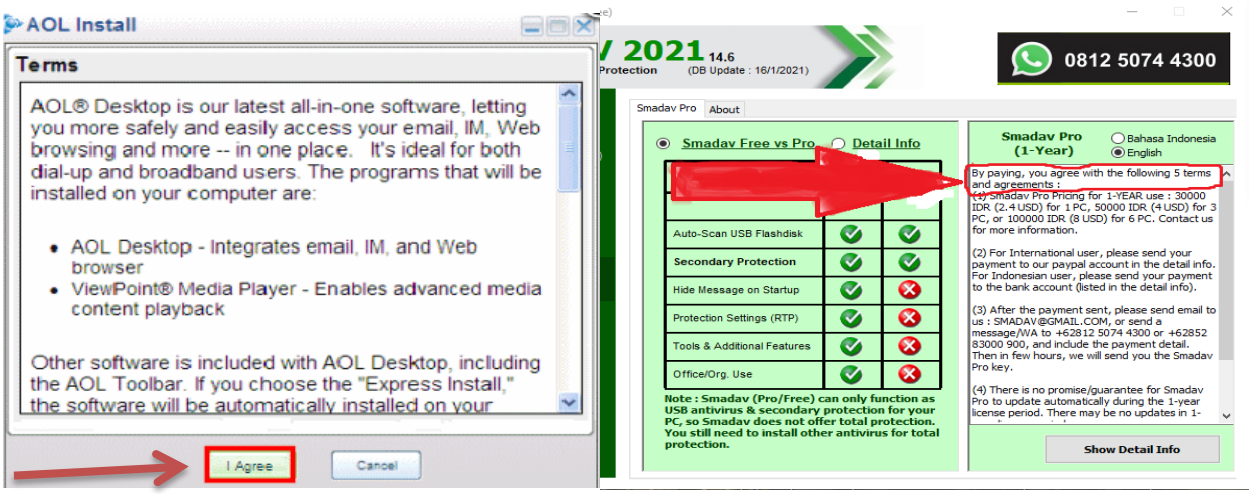

Figure 2 Example of Shrink-Wrap Contract[126]

In the past, shrink-wrap was commonly used for software shrink-wrapped in physical boxes, but as the digital market grows, shrink-wrap license contracts are declining and being replaced by click-wrap.[127] Nowadays, the most common type of contract is the click-wrap contract, which includes the licensing software contract.

2.5.4. Browse/Web –wrap (Notice and Acceptance by Conduct) Contracts

A browse-wrap contract is presented by posting a notice on the website pages (e.g., continuous use of a website constitutes acceptance of the terms and conditions of the website) or by other electronic communications that link to the actual text of the contract.[128] Hence, the conduct of the user (i.e. just visiting the site) constitutes acceptance of the terms and conditions contained therein.[129] Alternatively, in browse-wrap contracts, internet users will find a 'terms or

[124] Ibid
[125] Ibid
[126] https://wikispaces.psu.edu/display/IST432TEAM13/Clickwrap+Agreements on Tuesday, January 26, 2021; And https://www.smadav.net/?page=beli&lang=en last accessed on January 27, 2021.
[127] Megan at note 123
[128] Bradely J. Freedman at note 13, P.30
[129] Formation of Electronic Contracts at note 7, pp.129ff

conditions' hyperlink somewhere on web pages that proposes to sell goods and services.[130] General principles of contract assert that conspicuous notice to the other contracting party of certain unequivocal conduct constitutes acceptance.[131] However, the notices in the browse wrap contract are frequently cryptic and not prominently displayed, or the contract terms are insufficient to create an effective contractual relationship.[132] For example, Kirillova *e'tal* have depicted the problem with it as follows:

> *"… a user goes to an information site to read certain information, but on the first page he sees only part of the information he is interested in and the "Read more" label. When one clicks on this link, they find out that, it turns out they ordered some product. However, the rules of the site (hidden on one of the unobvious pages) indicate that the site is not an information resource, but an online store."*[133]

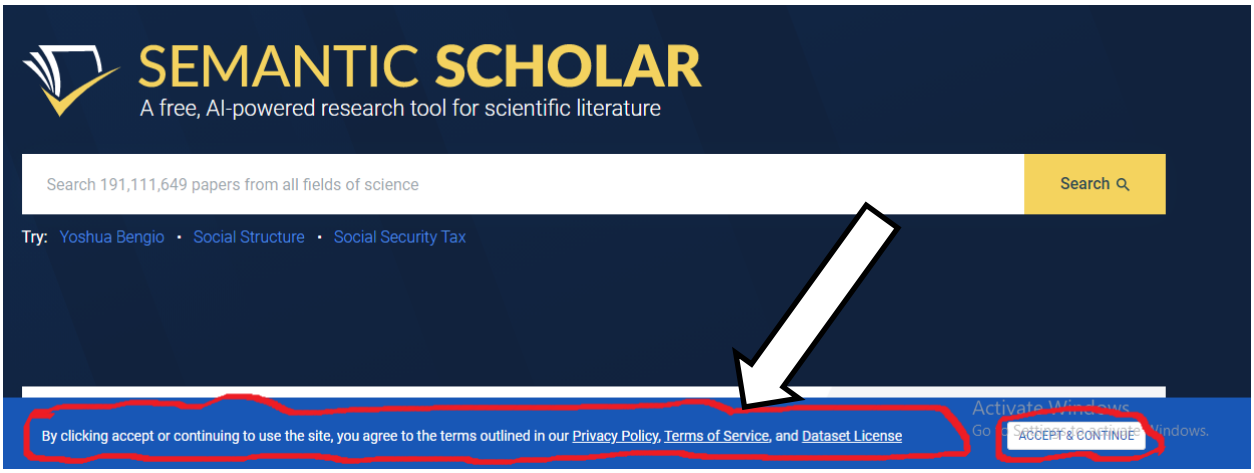

Figure 3 Example of Browse-Wrap Contract [134]

Overtly, it seems as if it provides an opportunity to read the full terms of the contract, but it pops up to purchase a channel deceptively. As a result, in the majority of such e-contracts, the contract terms are not disclosed in order to negotiate with the other parties.

2.6. Unique Features of E-Contracts

In the physical world, parties come together to determine their mutual rights and duties by negotiation to share balanced benefits, except in certain circumstances where the terms and conditions of contracts are unilaterally prepared in advance and other parties are called to adhere

[130] Ibid
[131] Civil Code(1960) at note 10, Art.1689 cum.1681(1)
[132] Bradely J. Freedman at note 13, P.30
[133] Elena Anatolyevna Kirillova, *e'tal*, Legal status, classification, and features of electronic contracts (ISSN 0719-4706 Vol. 7 Núm. ESPECIAL, 2020), REVISTA INCLUSIONES–Licencia Internacional, P.330 available at: https://www.researchgate.net/publication/344885032 accessed on January 28, 2021
[134] http://www.semanticscholar.org on January 28, 2021

(e.g. insurance contracts).[135] The parties negotiate depending on the available alternatives and the opportunity to uphold a meaningful balance between both sides.[136] However, in e-contracts, the materialization of such opportunities is doubtful. Because:

First- In an e-contract, the parties (originator and addressee) are physically distant from each other and can not negotiate at arm's length.[137] It is dependent on the "virtual existence of the parties."[138] This characteristic of e-contract poses uncertainty of identity, capacity, authority contract and authenticity of contractual communication.[139] It is difficult to know with whom we are contracting. That may expose online marketers to fraudsters. However, there may be a technical way to address the challenge, particularly by accessing the IP address, which is a universally unique network address of a device that the user is using from somewhere else in the world. However, the same IP address can be used by multiple computers on the internet, which escalates the issue of the anonymity of the contract's identity and location.[140] In addition, fraudsters may use internet technology and operate from anywhere in the world by assuming false identities.[141]

Second An e-contract is cordially dependent on the standard form (adhesive) contract in which a party owning the website/program unilaterally prepares the terms and conditions of contracts in advance and the other party is simply called up to accept or reject it entirely without free discussion.[142] Even it is never disclosed to the other party up until he makes payment or disclosed in inconspicuous way.[143] Furthermore, the interaction is between the website or computer program, and the customer has no way to negotiate beyond simply agreeing by pressing a single key or clicking the dotted option.[144] Due to this fact, scholars usually say

> "*E-Contracts are contracts attracting principles of* ***Uberrimae fidei*** *(utmost good faith) in which the contracting parties are not dealing at arm's length but one party is entirely*

[135] Elena Anatolyevna Kirillova, *e'tal,* at note 133, P.330

[136] Barnhizer D.B., Inequality of bargaining power, Legal Studies Research Paper Series Research Paper No. 02-01, p.32 as cited in K. Cseres, Competition and contract law (2016), Alphen aan den Rijn, Kluwer Law International, p.7

[137] Haitham N.Nasr and Ahmed Tarek, The Legal Truth of E-Contract(2015), Youssry Saleh and Partners, available at https://www.mondaq.com/contracts-and-commercial-law/403896/the-legal-truth-of-econtracts last accessed on January 29, 2021

[138] Ibid

[139] Bradely J. Freedman at note 13, P.17

[140] Electronics Guide4u, Computer Network – Addressing (Port, Logical, Specific and Physical Address Basic Overview), available at Addressing (Port ,Logical ,Specific and Physical Address) in TCP/IP Model (electronicsguide4u.com) accessed on January 28, 2021

[141] Bradely J. Freedman at note 13, P.18

[142] Id, p.22 and M. Pragadeeswaran and Aswathy Rajan at note 9, p.1734

[143] Snail S. at note 44, p. 4

[144] M. Pragadeeswaran and Aswathy Rajan at note 9, p.1733

dependent upon the information supplied by the other party and other party simply expresses his willingness to contract."[145]

Moreover, in this cyberspace commercial communication, the essence of meeting of the mind is never contemplated in effect and is trapped in the web of confusion.[146] Hence, despite the wide range of recognition for different forms of expressing one's intent to be contractually bound by electronic means, uncertainty still exists in general regarding accentuation mechanisms of intent to conclude the contract by clicking on the dot spot. It is hardly possible to ascertain the intention of parties to create legal relationship in circumstances that a click on an icon (e.g. use of website) constitutes acceptance.

Third, it is instantaneous (so quick). In particular, the last three types of e-contract (click-wrap, shrink-wrap and browse-wrap) use a sequence of digital data that enables high-speed transmission of information and even, in certain cases, automated (via the medium of EA and the internet automatic retail site) response.[147] Since it is so quick, one party relies on the information supplied by the other party's contract. Errors are often difficult to control and harder to rectify.[148] These characteristics of e-contract expose to greater risk of mistake and jeopardize the acceptor's merit of balance due to reliance on it before correction.[149] For example look at the following text taken from Microsoft license agreement *"……..we may charge you up to the amount you have approved, and we will notify you in advance of any change in the amount to be charged for recurring subscription Services. We may bill you at the same time for more than one of your prior billing periods for amounts that haven't previously been processed."*[150] On the other hand, sometimes a person may unconsciously enter into a contract with detriment to his/her benefits instantly by striking a single key or enter into a contract while he/she is rejected in normal circumstances.[151] In such circumstances, it is hard to establish legally sustainable consent. For example, look at the following figure.

[145] Shubhada Gholap at note 6, p.253

[146] Snail S. at note 12, p.1

[147] Jennifer E. Hill, 'The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods'(Vol.2, Iss.1, 2003),Northwestern Journal of Technology and Intellectual Property, P.5 available at https://scholarlycommons.law.northwestern.edu/njtip/vol2/iss1/1 accessed on August 18, 2020

[148] Ibid

[149] Ibid

[150] Microsoft Corporation, Microsoft Services Agreement: Software License: Payment Terms (August 30, 2019), available at http://go.microsoft.com/fwlink/p/?linkid=618281 accessed on 1/1/2020. No need of user's agreement to current service charge increment simply notifying and charging at same time.

[151] Bradely J. Freedman at note 13, P.20

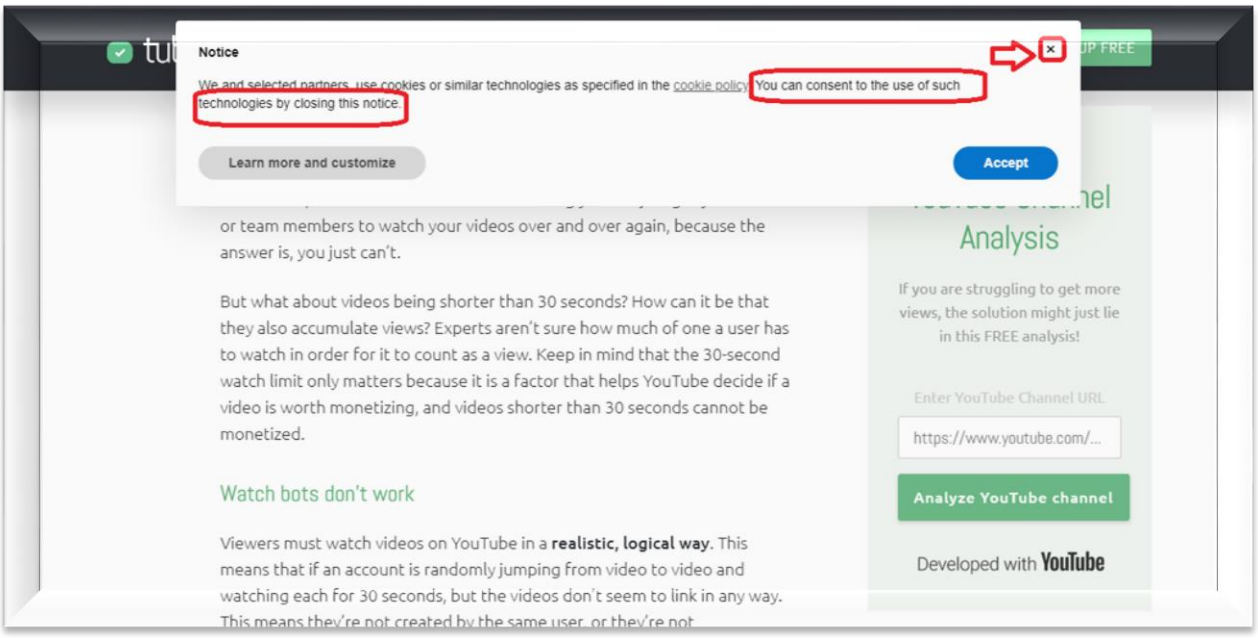

Figure 4 Example of unobvious consenting system[152]

Furthermore, unlike their formation, most e-contracts are difficult to cancel due to the lack of a similar rollback option.[153] This feature of e-contracts puts at stake the principle of *consensus ad idem* in general contracts, which is the basis for assuming a voluntary mutual obligation.

Fourth, ubiquity- The E-contract does not recognize physical geographical boundaries.[154] E-contracts are made through a network in cyberspace.[155] Many commercial environments use large-scale public networks of computers (World Wide Web), networks that have made ubiquitous character of e-contracts.[156] As a result, it mingles different legal cultures around the world, making it difficult to determine the forum and the applicable law.[157] This demonstrates that unless the law provides a default rule or the parties arrange it through a private regulatory agreement, it is a significant challenge. For instance, a transaction that is lawful within the territory of one party may be illegal for the other party.[158]

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[152] www.tubics.com accessed on 15-02-2021

[153] Bradely J. Freedman at note 13, P.12

[154] C Erasmus at note 15, p.15

[155] Id, p.5

[156] International Chamber of Commerce, General Usage for International Digitally Ensured Commerce (version II)(2001)(herein after 'GUIDECII'), Published by International Chamber of Commerce, P.11 available at www.iccwbo.org accessed on January 18, 2021

[157] Lauri Railas at note 45, p.516

[158] Ayyappan Palanissamy, 'Legal Issues in E-Commerce and E-Contracting – An Overview of Initiatives in Malaysia'(Vol.3, No.2, 2013), International Journal of E-Education, E-Business, E-Management and E-Learning, P.174

To summarize, e-contracts appear conceptually similar to traditional (paper-based) commercial contracts.[159] For example, the requirement of essential elements such as offer and acceptance in online contract formation is as essential as it is for the formation of a conventional contract.[160] However, though there are some similarities, the nature of an e-contract is quite different from conventional contracts.[161] The e-contract has a unique nature that has not been contemplated in conventional contract rules, which results in enormous uncertainty in the national and international regulation of electronic transactions.

Accordingly, international organizations and the national governments of different countries in the world (including Ethiopia) are marching to promulgate e-transaction laws. These e-transaction laws also stretch to embrace the concept of validating and shaping e-contracts in line with conventional contracts, through the instrumentality of functional equivalence/non-discriminatory, technology neutrality and party autonomy principles.

[159] M. Pragadeeswaran and Aswathy Rajan at note 9, p.1730
[160] Id p.1734
[161] Lyu Guomin & Zhou Shengmian at note 22, p.1543

CHAPTER III
3. E-Contract Legal Regulatory Frameworks

3.1. Introduction

In our previous discussion, we have seen how the unique nature of e-contracts creates uncertainty in national and international e-commerce, where traditional contract-based law is ineffective or, in some cases, silent in the face of new technology.[162] In response to this lacuna, international and regional organizations and the governments of various countries have called for the drafting of internationally recognized uniform electronic transaction legislation.[163] Therefore, internationally, the UNCITRAL Model Law on Electronic Commerce as adopted in 1998 ("UNCITRAL Model Law" herein), the United Nations Convention on the Use of Electronic Communications in International Contracts (2007) and others, have come into existence. Regionally, the European Union, the Association of Southeast Asian Nations, and others have taken action on e-commerce regulation. Certain elements of these e-transaction laws were intended to put e-contract equivalent positions into conventional contract. Nevertheless, most e-transaction laws' entire regulatory inception relies upon three fundamental principles (i.e. functional equivalence, technology neutrality and party autonomy), including EETP.

3.2. Practice of Regulating of E-Contracts at International Level

3.2.1 Basic Principles

E-commerce has been the focus of increased legislative efforts around the world[164] including Ethiopia. However, almost all of these e-transaction laws have common intersection points (i.e. technology neutrality, party autonomy and functional equivalence)[165] principles followed by legislators to regulate contractual relations between parties in e-commerce.

A) Technology Neutrality

E-transaction laws do not refer to any specific technical means of transmission or storage of information.[166] It employs generic terms (such as e-contract) to avoid the difficulty of conceiving the form of legislation that is required by other traditional commerce-based laws.[167] I In addition,

[162] Jennifer E. Hill at note 147, p.6
[163] Snail S. at note 12, p.20
[164] Thomas J. Smedinghoff, 'The Legal Challenges of Implementing Electronic Transactions' (Vol.41 #1, 2008), Uniform Commercial Code Law Journal P.6 available at: http://ssrn.com/abstract=1275108 accessed on September 24, 2020
[165] Id, pp.8-10
[166] Renaud Sorieul *e'tal,* 'Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law (UNCITRAL)'(Vol.35, No.1, 2001), The International Lawyer, P.111 available at https://core.ac.uk/download/pdf/216909726.pdf accessed on February 4, 2021
[167] Ibid

it has its own underlying policy reasons.[168] Technology is flexible because it evolves with time.[169] Therefore, it is hardly possible to guarantee security against fraud and errors in transmission based on laws that are confined to particular techniques of communication.[170] Thus, e-transaction laws deliberately hesitate to associate specific means of communication with specific legal consequences.

B) Party Autonomy

"Feel what you need to feel and then let it go. Do not let it to consume you!" Dhiman

Parties are at liberty to arrange their contractual framework in their e-transactions from different angles by agreement.[171] The parties are free to accept or reject the formation of a contract through electronic means.[172] The party's agreement to accept or reject electronic communication may be inferred from the party's conduct (impliedly) or expressly by other separate contracts, like that of EDI.[173] However, explicit acceptance of the separate agreement is not desirable because it is raised as one major barrier to e-transactions.[174]

Nevertheless, this implied acceptance must not expose to risky means of communication that imperil the merit of the parties and lawful purpose of transaction.[175] Thus, parties are free to reject, accept, or arrange the conclusion of a contract via electronic communication by their own agreement, considering their merit balance.

C) Functional Equivalence

This principle is the backbone of every e-transaction law and the other principles. To achieve equal legal consequences, functional equivalence involves putting e-contracts in the same position with paper documents[176] by referring to functions and legal circumstances known in the paper document environment (like writing, signature, retention and originality).[177] Based on the functions of paper documents, it gives data messages the same legal effect as paper documents.[178] As argued in various literature, this arose as a result of the unpredictability of

[168] Thomas J. Smedinghoff at note 164, P.8-10
[169] Ibid
[170] Ibid
[171] Ibid
[172] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5^{bis} as adopted in 1998(ISBN 92-1-133607-4, 1999), United Nations Publications , New York, art.4 available at https://www.uncitral.un.org accessed on January 2, 2021; United Nations Commission on International Trade Law, United Nations Convention on the Use of Electronic Communications in International Contracts(2007)(UNCUECIC(2007), herein after), New York, art.3
[173] Id, art.8(1)
[174] Ibid
[175] Ibid
[176] Lyu Guomin & Zhou Shengmian at note 22, p.1544
[177] Renaud Sorieul *e'tal* at note 166, p.111
[178] Lyu Guomin & Zhou Shengmian at note 22, p.1544

technological advancement and the simplification of legislation.[179] Is it, however, feasible to establish a comprehensive regulatory framework for e-contracts? Let us see detail of functional equivalence as follows.

3.3. Main Factors of Functional Equivalence

E-contract law is frequently incorporated into e-transaction laws. For instance, the UNCITRAL model law starts by affording equivalent legal validity and enforcement to information in data messages and paper documents.[180] Even the provision of the UNCITRAL model law in its current modification recognized the legal validity of information not contained in the primary data message but referred to the other terms contained on the outside of the data message via a hyperlink.[181] The goals of these laws are to ensure that an e-contract has the same legal validity as a conventional contract and to achieve the same level of legal certainty in e-transactions. They are, on the other hand, aimed at removing legal barriers from traditional contracts.

In the same fashion, EETP no.1205/2020 has been promulgated with the aim of establishing rules and norms that validate and recognize contracts that are formed through electronic means. There is no visible difference between the conventions (i.e. UNCITRAL model law and UNCUECIC (2007)). The characterization of writing, originality, acceptance of electronic offers, signatures for functional equivalence and the admissibility of electronic evidence in judicial proceedings are almost verbatim copies of the conventions.[182] As a result, the EETP framework is based on establishing functional equivalence for paper-based documents.[183] Accordingly, information in the data message will not be denied legal effect or enforceability solely because it is in an electronic format.[184]

Thus, in order to avoid repetition of the same word, we directly proceed to the discussion of regulatory aspects of e-contracts under the Ethiopian e-transaction law by showing differences (if any).

3.4. Aspect of Regulation of E-Contract under Ethiopian E-Transaction law

EETP gives equal legal effect to data messages based on their capacity to serve the functions of corresponding paper documents through the instrumentality of a functional equivalent

[179] Ibid

[180] (UNCUECIC(2007) at note 172, art.8(1), UNCITRAL Model Law at note 172, art.5 and 11 and Council Directive 2000/31/EC of The European Parliament and of The Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (EC Directive(2000/31/EC)herein after))[2000], OJL 178/1 art.9(1) available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002L0058 accessed on December 1, 2020

[181] UNCITRAL Model Law at note 172, Art.5*bis*

[182] EETP at note 17, art.7-17

[183]Id, art.7

[184] Ibid

approach.[185] Particularly it is emphasized on defining the character of data message in relation to the functions of paper-based document in the conventional contract to remove potential trade barrier due to the formality.

i) Writing

Writing is a graphic depicted on a tangible material (e.g., paper, wood) capable of conveying information recorded by retaining it for future reference.[186] Electronic records, on the other hand, are a collection of digital data that can be stored, transmitted, and reproduced in a human-perceivable format on intangible media.[187] It is immaterial.[188] As per the international e-transaction laws, this written form requirement of an e-contract is met if the information contained in the data message is accessible and capable of subsequent reference.[189] Moreover, accessibility is assessed against the ability of information to be readable, interpretable, and usable for later human and computer processing for a relatively long time in an unalterable manner.[190] These international instruments provide general guidelines for national legislators where more things are expected of national legislators. However, the same statement is provided under art.8 of the EETP with simple character differences without making any necessary specifications. For example, the term "accessibility" and "retention capacity" are not defined in this proclamation.[191] Thus, the component of accessibility and retainability of information in data messages is not clear enough to determine when it is accessible and retainable. It must at the very least indicate circumstances (such as readability and interpretability) that direct legislators' intentions for interpretation.

For example, since it is written in Latin letters, someone may have the ability to read the English language, but this does not guarantee an understanding of its meaning. On the other hand, if the originator sends information in the form of EPUB and the addressee has only software that reads PDF, the requirement of accessibility is unachievable because the content of the information is not disclosed to the receiver. Thus, the program necessary to render such information readable should be retained.[192]

Regarding the writing requirement of e-contract, UETA (2000) of the USA and EC Directive (2000/31/EC) provided more detail, especially on retaining for subsequent use. For example, in the US, information is not capable of retention if the sender/originator inhibits the ability of the

[185] Lyu Guomin & Zhou Shengmian at note 22, p.1544
[186] Uniform Electronic Transactions Act 1999, National Conference of Commissioners on Uniform State Laws(In Denver, Colorado July 23 – 30, 1999), comment on section 2, p.8 para.4
[187] Ibid
[188] Ibid
[189] UNCUECIC(2007) at note 172, Art.9(2) and UNCITRAL model law at note 172, Art.6
[190] UNCUECIC(2007) at note 172, [Article-By-Article Remarks] p.51 and UNCITRAL model law at note 172, [Article-By-Article Remarks] p.36
[191] EETP at note 17, Art.8
[192] Bradely J. Freedman at note 13, P.38

recipient/addressee to print or store in an electronic record or not capable of being reproduced for later use by all parties/for a person authorized to retain it at the time of receipt.[193] In addition, under UETA, during offer and acceptance, information is received when it enters the designated processing system of the recipient or is used for the purposes of business and the information is in a form capable of being processed by that system. [194] This has double purposes. First, it enables the parties to understand their terms of contracts (i.e. accessibility). Second, it is useful for evidentiary purposes. Moreover, the EC Directive does include the obligation to inform which languages are offered for the conclusion of a contract.[195] As a result, the EC Directive and UETA provide clear standards for assessing the accessibility of data information. In EETP, there is no clear standard to determine whether information is accessible.

ii) Originality

The aim of the originality requirement is to guarantee the integrity of the document and its content.[196] In E-Transaction law, this originality requirement is satisfied if the integrity of information in the data message is reliable and unalterable from the first time it is generated to its final form and capable of (being available and being displayed to the addressee).[197] This means originality is measured depending on integrity and reliability. Accordingly, integrity is assessed based on whether the information has remained complete and unaltered and the reliability is evaluated in light of the purpose of the generated information.[198] EETP has employed the same approach in the same terms.[199] There is no objective standard to measure the integrity and reliability of information in the data message. They are judged based on generic subjective criteria of completeness, inalterability and the purpose of the information.[200]

From the outset, due to the nature of electronic communication, data messages sent to the recipient are always copied, since the original message is left with the originator.[201] Hence, the originality of electronic records presents challenges to the requirement of originality because it is easy to be automatically copied in the process of transmission [202] where the original and copy of the data message are indistinguishable.[203] Because electronic data is immaterial, unlike paper

[193] Uniform Electronic Transactions Act (2000-152, s. 1.), NC General Statutes , Chapter 66 Article 40, section § 66-317 available at https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_66/Article_40.pdf accessed on December 1, 2020 and EC Directive (2000/31/EC) at note 177, Article 10(1/d/ &3)
[194] Uniform Electronic Transactions Act (2000-152, s. 1.), section 66-325a.(2)
[195] EC Directive (2000/31/EC) at note180, art.10(1(d)
[196] Civil Code(1960) at note 10, Art.2003, 1728cum. 2005- 2008 and 2011-2014
[197] UNCITRAL Model Law at note 172, Art.8 and UNCUECIC(2007) at note 172, art.9(4)
[198] Ibid
[199] EETP at note 17, Art.12
[200] Ibid
[201] Bradely J. Freedman at note 13, P.45
[202] Ibid
[203] (UNCUECIC (2007) [Article-By-Article Remarks] p.51 and UNCITRAL model law [Article-By-Article Remarks] p.36

documents, deletion/erasure or insertion into the data message is physically invisible.[204] This problem emanates from the nature of electronic communication. Moreover, Ethiopian contract law stipulates contract in written form is primarily proved by the production of original or authenticated copy of the document that holds the terms of that particular contract (i.e. best evidence rule).[205] However, EETP has not specifically indicated whether the originality of a printout of an electronic record or in a digital format is considered. Thus, both the originality of the printout of an electronic record or digital format is considered and the principle of best evidence rule is no longer in e-contract.

iii) Signature

The other factor of functional equivalence is the signature. The signature is the marking of a document by the author's name, distinctive symbol or letter written in their own hand or by a thumb-mark or rubber stamp to show the document is prepared under his/her authority or by him/herself.[206] The signature serves three primary functions: identity verification, evidence of intent to be bound, and acknowledgment of the legal consequences that may result from the act of signing.[207] The signature is an effective method of authentication.[208] *"Existence of appropriate intent is critical to qualifying as a signature."*[209]

Accordingly, as per UNCITRAL Model Law art.7 and UNCUECIC (2007) art.9(3) when the law requires certain documents should bear the signature of parties, an e-signature meets the requirement if *it is able to signify identity and intention of the signer and reliable for purported purpose of communication*.[210] Thus, e-signature also represents the notions of evidencing identity, intent of the parties to approve the terms of contract and bound thereby based on the reliability of e-signatures' creating methods.[211] In addition, authentication of documents by handwritten signature can be achieved in electronic data messages by e-signature under the auspices of functional equivalence.

EETP has also adopted the same approach as UNCUECIC (2007) and the UNCITRAL Model Law. Therefore, in Ethiopia, e-signature fulfills the functions of a signature whenever it is able to signify identity and intention of the signer and reliable for purported purpose of

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[204] Ibid

[205] Civil Code(1960) at note 10, arts.2003 and 2005-2015

[206] Christopher Reed, 'Legally Binding Electronic Documents: Digital Signatures and Authentication' (Vol.35, No.1, 2001), Centre for Commercial Law Studies, Queen Mary University of London, p.92

[207] United Nations Commission on International Trade Law, Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods(ISBN 978-92-1-133663-4, 2009 (UNCITRAL PCEC ISBN 978-92-1-133663-4, 2009 hereinafter)) , United Nations Publication, Vienna , p.1

[208] Authentication and Registration of Documents' Proclamation No.922/2015, Federal Negarit Gazette of The Federal Democratic Republic of Ethiopia (22nd Year No.39, 2016), Addis Ababa, Ethiopia , Art.2(2)

[209] Thomas J. Smedinghoff at note 164, P.18

[210] UNCITRAL Model Law at note 172, Art.7 and UNCUECIC(2007) at note 172, art.9(3)

[211] UNCITRAL model law [Article-By-Article Remarks] p.36-45 and (UNCUECIC (2007) [Article-By-Article Remarks] p.51

communication.[212] Reliability is measured based on the purpose of an e-signature, agreement to that effect (if any), its exclusive linkage to the signatory, detectability of any alteration, fully under control of the signatory at the time of signing and freely affixed and by any other legal means.[213] However, is an e-signature by itself sufficient to establish the identity of the signer? It is hardly possible to say all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment.[214] Because the e-signature itself needs other authentication mechanisms to serve such a purpose more than the provided standards. Moreover, most of the standards provided for the reliability test of e-signatures are ex-post determinations of reliability.[215] These techniques are dependent on the strength of third parties (i.e. TSP) (e.g., public-key cryptography that generates private-key infrastructure is under the control of the TSP).[216] Thus, the reliability of this signature depends on the trustworthiness of the TSP who issues certificate [217] of verification. According to EETP and EESP No.1072/2018, in addition to indicating approval of the contract terms, the signature has the function of identity tracing as a standard practice.[218] Nevertheless, sometimes it is hardly possible to trace the identity of the contracting parties based on an e-signature certificate for two reasons. First signature is not a mandatory requirement in all contracts. It is exceptionally provided for certain specified contracts. Hence, in case substantive law does not provide certain document/s is a bearer of signature, it is not mandatory under EETP. Second, the content of the certificate for e-signature can be issued depending on the false information submitted by the subscribers.

iv) Retention

Paper-based records are kept for a years by the parties or trusted third parties (e.g., a notary and an individual chosen by the parties) to be used later for evidencing the existence of a contract or accounting purposes.[219] Accordingly, in an electronic environment, pursuant to the principle of functional equivalence, retention can be performed if information contained in a data message is accessible for subsequent use, presented in a format that accurately demonstrates its first origination, destination and its time.[220] Whereas, on the other hand, UNCUECIC (2007) has

[212] EETP at note 17, Art.9 and Electronic Signature Proclamation(EESP hereinafter) No.1072/2018, Federal Negarit Gazette of The Federal Democratic Republic of Ethiopia (24th Year No.25, 16th February , 2018), Addis Ababa, Art.6

[213] Ibid

[214] (UNCUECIC (2007) [Article-By-Article Remarks] p.51 and UNCITRAL model law [Article-By-Article Remarks] p.36-45

[215] EETP at note 17, Art.9(2)

[216] (UNCUECIC (2007) [Article-By-Article Remarks] p.51 and UNCITRAL model law [Article-By-Article Remarks] p.36-45

[217] EESP at note 212, Art.2(2)

[218] Id, art.6(2/c)

[219] United Nations Economic Commission for Europe, Information and Communication Technology Policy and Legal Issues for Central Asia: Guide for ICT policy Makers (ISBN: 978-92-1-116974-4, 2007), United Nations Publications, Geneva P.17

[220] UNCITRAL Model Law at note 172, Art.10

ignored the retention requirement, as it is not related to formation and performance of the contract.[221] It is justified as it closely related to rules of evidence and administrative requirements rather than formation and performance of contract[222] setting aside the effect of form of contract on evidence during resolution of disputes. The question is if the law has provided such a requirement for certain paper-based documents, how functional equivalence can be met in the e-contract (e.g. administrative contract in Ethiopia). On the other hand, EETP has set the same standards required to fulfill to determine the retention of information but it has never considered possible options for the fate of victim like that of art.2014 of CC in case the information is lost or damaged for obsolesce or any other reason.

[221] (UNCUECIC (2007) [Article-By-Article Remarks] p.16
[222] Ibid

CHAPTER IV
4. Regulatory Issues and Challenges in E-Contract

4.1. Introduction

In general, the conditions stipulated for e-contract under EETP are pointed at searching functions of conventional contracts (i.e. paper-based document) to constitute legal equivalence.[223] However, it should be noted that, notwithstanding the framework's general principle of equivalence, there are specific questions that must be addressed in law in the sense of validating the authenticity of documents transmitted in easily editable formats.[224]

4.2. Legal Requirements of Contracts

Previously, we have seen the conventional contract requirements that have to be met to make a legally valid contract. These are capacity, consent, object and form. EETP has adopted the functional equivalence approach[225] that search for functions of paper-based contracts, to declare validity and enforceability of e-contract. Most provisions of EETP are devoted to the formality requirement based on functions of written documents in other substantive laws rather than defining the particular element specific to e-contract. This creates the challenge of curbing the problems that stem from the nature of e-contracts. For instance, EETP under art.7 stipulates that information in a data message is legally valid irrespective of its form and has equal legal consequence with conventional documents.[226]

However, if one or both parties are not in a position to calculate their respective costs and benefits and any other legal consequences that emanate from their act, there is little reason to think that the outcome will be efficient.[227] Because of the nature of the internet, important information can easily be camouflaged or manipulated. In relation to this, Katz depicts that "*as evidenced in the laboratory experiments by psychologists, economists, and arguably, some market evidences, suggests that people often systematically ignore certain types of information, or use heuristics information, which bias the merit of the other party."*[228]

This indicates that one or more parties may conceal important information intentionally to get undue benefits illicitly.

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[223] EETP at note 17, art.7-17and preamble para.1

[224] ITU, Harmonization of ICT Policies, Legislation and Regulatory Procedures in the Caribbean, Electronic Transactions: Assessment Report(2011), HIPCAR Model Policy Guidelines and Legislative Texts, p.13 available at www.itu.int/ITU-D/projects/ITU_EC_ACP/hipcar/index.html accessed on May10/2021

[225] EETP at note 17, preambular statements

[226] Id, art.7

[227] Avery Wiener Katz at note 89, P.9

[228] Ibid

A) Legal Capacity - On e-commerce websites and platforms, there is no reliable mechanism to assure who is behind the devices at the other end of the electronic route, and whether or not s/he or it is legally capable. However, in EETP, except in consumer protection law, there is no law, which obliges the disclosure of the identity of seller and buyer.[229] To determine someone's capacity, at least we must first determine who that person is. To this effect, art.41 (2) of the EETP mandates that operators of e-commerce platforms obtain the identity, contact information, and administrative licenses of e-commerce operators, as well as verify and register them.[230] This is fascinating, but e-commerce operators are not subject to a similar duty of transparency to customers.

In defining the parties' identity in online commercial contracts, UNCITRAL Working Group IV has put in a lot of effort with the Draft of Use and Cross-border Recognition of Identity Management and Trust Services (A/CN.9/WG.IV/WP.162, 2020), which is currently undergoing comment and correction from various governments and organizations. According to this draft of UCRIdMTS, the IdM service provider has the obligation to receive the updated details of subscribers (i.e. both parties) to carry out the identity proofing and verification duty.[231] This IdM service provider is not necessarily a public authority. It may be a private business organization engaged in collecting, verifying, and validating to define and confirm the identity of a person within a particular context.[232] The concept of identity management scheme is likely to be included in art.41 (2). However, there is no specific stipulation about the IdM system in Ethiopia except the certificate of e-signature.

In reality, we do not imply that knowing the identity of the other party guarantees knowing their capacity to contract, but it can make it easier to determine their capacity and authority to contract.

B) Electronic Agent- the other challenge of capacity is related to EA. EA is a computer program that has the capacity to perform certain tasks on behalf of the user.[233] A contract can be formed between a human being and an EA or inter-EA.[234] EA have the ability to adjust themselves to the environment through their sensors and arrange market flexibility based on their sophistication to

[229] EETP at note 17, art.28
[230] Id, art.41(2)
[231] United Nations Commission on International Trade Law Working Group IV (Electronic Commerce) Sixtieth session, Draft Provisions on the Use and Cross-border Recognition of Identity Management and Trust Services(A/CN.9/WG.IV/WP.162, 2020), New York, 6–9 April 2020, United Nations, available at https://undocs.org/en/A/CN.9/WG.IV/WP.162 accessed on March 12, 2021, art.6
identity proofing is the process by which sufficient item of information or data associated with person is collected, verified, and validated to define and confirm the identity of a person within a particular context(Art.1(d and j))
[232] Id, Art.3 and 5
[233]Anthony J. Bellia, 'Contracting With Electronic Agents'(Vol.50, 2001), Emory Law Journal, pp.1051-1052 Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/101 accessed on March 22, 2021
[234] Uniform Electronic Transaction Act 66/2000, Senate Bill 1266, art.40, section 66-308.13, General Assembly of North Carolina, available at https://www.ncleg.gov/BillLookup/1999/S1266 accessed on March 22, 2021

the extent of negotiating on the terms of contracts without direct human intervention.[235] These features of EA have brought novel questions to the law of contracts in relation to its status (i.e. whether it has legal personality or mere instrument).

Accordingly, there are two contesting arguments.[236] The first argument dictates that we have to confer some degree of legal personality on EA and thereby regulate it by the law of agency.[237] Whereas the second argument claims that it must be treated as mere communication, an instrument operated under the control of its owner/operator.[238] As it can be understood from art.19 (1/c) and 20 (1/a), EETP has adopted the second argument, which claims EA must be treated as mere tools of communication.[239] The EETP has determined who is responsible for compensating damage caused by the actions of EAs (if any).[240] Thus, whether it is between inter-EA or individuals with EA, it is attributed to the originator/addressee.

Articles 19 (1/c) and 20 (1/a) of the EETP,[241] on the other hand, have not taken into account the ability of EAs where they may act beyond the operator's instruction.[242] For instance, in relation to this circumstance in the US, whether an individual was not aware of or reviewed the actions of an EA contract formed by interactions of EA or individuals with EA legally attributed to the originator.[243] This means that once an EA is used in a market transaction, the operator/owner is strictly liable for the EA's actions, whether or not he was aware of them. Nonetheless, EETP does not provide such possible solutions like that of the US, which results in a challenge in rendering decisions whenever the operator claims s/he is not ordered or is unaware of the action of the EA, which is initiated and executed by it.

C) Consent - Commonly, meeting of the minds or *consensus ad idem* between legally capable persons to form the requisite intention or *animus contrahendi* to enter into legal relations is a cardinal principle of contract law.[244] However, EAs do not have the legal capacity to produce contractual intentions because they are neither juridical nor physical persons.[245] This may trap the validity of contracts formed through EAs in the state of uncertainty.[246] UETA has recognized

[235] Anthony J. Bellia at note 233, pp.1051-1052
[236] A Varadharaj and Amrutha D K at note 32, Pp.515-516
[237] Ibid
[238] Ibid
[239] EETP at note 17, art.19(1/c) and 20(1/a)
[240] Ibid
[241] Ibid
[242] Bradely J. Freedman at note 13, P.19
[243] Uniform Electronic Transaction Act 66/2000 at note 234, Art.40, sect.66-308.13
[244] Bradely J. Freedman at note 13, P.19
[245] Ibid
[246] Ibid

the contract formed through the interaction of EAs in generic term "…individual was not aware of or reviewed the actions of EAs contract formed …"[247] this means it is a mere instrument.

Both UETA and EETP have the same position. Maybe this position is in support of the principle of *consensus id idem* in the contract is with only human beings where every actions of EA are attributed to the operator.[248] However, EETP lacks clarity on the point where EA acts autonomously incognizance of the user. Even under EETP, there is no definition of EAs though it is utilized in the body of the proclamation.[249] Thus, the validity of a contract formed in inter-EAs' interaction or EA with a physical person is under question, as it is not clear as to which legal provisions regulate it. In particular, these challenges are escalated whenever signature and witness attestation is required by the law in contract concluded by EA.

4.3. Limitation to Freedom of Contract

We have seen that most e-contracts are adhesive where the vendor prepares a contract beforehand and a buyer is called upon to sign on dotted lines to agree to the terms where the latter does not have much say.[250] The freedom of the party to negotiate and determine the term of the contract on his/her side is limited in e-contracts.[251] In Ethiopian contract law, the contracting parties have to bargain on their respective intentions expressly that underlie the formation of a contract.[252] Moreover, they are free to use any form available except in case there is a mandatory law or agreement for adherence to certain forms (e.g. insurance and administrative contract).[253]

This is useful for two reasons. First lawfully formed contract binds the parties as the law.[254] Therefore, except the circumstances provided by law,[255] the party has to clearly consent, to all the terms of the contract to be bound by his/her words. Second, whenever interpretation is required, the court may not depart from clear terms of contract to search for common intention of contracting parties.[256] Thus, they have to clearly communicate and define the terms of the contract at the time of formation of the contract. Nevertheless, there is no such opportunity is available to parties in e-contracts in which contracting parties are forced to adhere to the terms of contracts prepared beforehand without their free involvement.[257] Even in most e-contracts, terms of contracts either are disclosed after payment or are never disclosed to the other contracting

[247] Uniform Electronic Transaction Act 66/2000 at note 234, Art.40, sect.66-308.13
[248] Lyu Guomin & Zhou Shengmian at note 22, p.1544
[249] EETP at note 17, Art.19(1/c), 20(1/a) and 22(3)
[250] Shubhada Gholap at note 6, p.254
[251] Id, p. 255
[252] Civil Code(1960) at note 10, art.1679-1687 and 1713
[253] Id, art.1719-1727
[254] Id, art.1731
[255] Id, art.1682-1686
[256] Id, art.1733
[257] Bradley J. Freedman at note 13, p.24-33

party.[258] This has limited the freedom to contract. Again, the EETP did not bring great improvement regarding essential elements of contracts need to satisfy more than declaring their legal validity for functional equivalence.

4.4. Admissibility and Probative Value of Electronic Data Message

One of the primary functions of formality requirement in a contract is evidencing the existence of the contract and its terms.[259] In conventional contracts (i.e. paper based), this evidentiary purpose can be performed by requiring it to be in writing, signature, witness attestation or certification of the notary.[260] Thus, in the spirit of e-transaction laws including EETP, this function of paper document should be extended to the information in data message under the guise of functional equivalence.[261] Moreover, this evidentiary weight of data message is tendered based on the reliability and integrity of the manner in which the information was generated, stored or communicated, maintained, originator identification, and any other relevant factor.[262]

The measuring standard of evidentiary weight is reliability. However, there is no provision, which demonstrates what elements are needed to be reliable. As a result, we must refer to the circumstances specified for the writing, originality, and retainability requirements. Nonetheless, the issue of obscurity of accessibility, reliability, and integrity in the criterion to equate data message with paper document has a significant impact here.

On the other hand, during commercial communication, when information is delivered from an originator to the addressee information system or to the intermediary transmission systems, the majority of evidentiary information is stored in the intermediary transmission system, which is relevant evidence to prove certain facts.[263] As a result, evidentiary information may be inaccessible to one or more parties or is difficult to present because it is stored on an intermediary transmission system (out of possession of the parties). Even in most e-contracts, terms of contracts may be unavailable from the outset to the other parties (e.g. browse wrap).

In order to solve such problems, the EC Directive (2000/31/EC) mandated service providers to give information like technical steps to conclude a contract, whether or not the contract will be filed by the service provider and accessible, technical means to identify and correct input errors before placing order and language offered for formation.[264] Further, it provides that contract terms and general conditions provided to the recipients shall be available in a way that allows

[258] Ibid
[259] Lon L. Fuller, Consideration and Form (Vol.41, No.5 (May, 1941), pp.799-824), Columbia Law Review, Columbia Law Review Association, Inc. available at https://www.jstor.org/stable/1117840 accessed on 16 Mar 2021 06:34:11 UTC P.800
[260] Ibid
[261] EETP at note 17, Art.13
[262] Ibid and UNCITRAL Model Law at note 172, Art.9(2)
[263] (UNCUECIC (2007) [Article-By-Article Remarks] p.16
[264] EC Directive 2000/31/EC at note 180, art.10(1)

him/her to store and reproduce them.[265] In this context, service provider refers to all operators of business websites and platforms to engage in commercial activities, including telecom.[266] This is facile for availability of evidentiary information. However, neither the EC Directive (2000/31/EC) nor EETP have provided possible solutions in case information is lost due to obsolesce or damaged in any other manner.[267] This has a potential influence on the evidentiary value of information in electronic data messages.

4.4.1. Authentication

On the one hand, the evidence that is presented to a court must be authenticated to assure proof of what the proponent has claimed.[268] Because as digital technology to exchange electronic documents in the form of data messages proliferates, collaterally, there is a proliferation of technological ways in which documents can be corrupted or forged.[269] Thus, the significance of authentication is worthy of consideration to establish the reliability and integrity of a document. Authentication can be made by different methods (signature, witness, affixing seals and affidavits).[270]

4.4.2. E-Signature

We have seen a signature in the above discussion as it is valid based on its reliability for the purported purpose of message and its method to identify a signatory and his/her approval of information in the data message.[271] Moreover, the reliability of the method is measured depending on the means of creating a link between signature and signatory, control of the signatory on the signature and detectability of alteration probably made to the signature.[272] This standard of reliability test under the EETP and EESP No.1072/2018 is not clear and needs reconsideration. In fact, the means of creating an e-signature can not be owned by an individual signatory (arts.12 and 2 (3) of EESP no.1072/2018). Because e-signature is created using the signatory's private key generated by TSP through a mathematical algorithm.[273] This means, by its very nature, it works with the involvement of an external third party (TSP).

A TSP is a natural or legal person who provides the service of creation, verification, preservation and validation of e-signatures, stamp/seal, website authentication, delivery and certificates

[265] Id, art.10(3)

[266] Directive (EU) 2015/1535 The European Parliament and of The Council of 9 September 2015on laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) [2015], OJL 241/1 art,1(1/b) available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002L0058 accessed on March 18, 2021

[267] Paul R. Rice, Electronic Evidence: Law and Practice (ISBN 1-59031-346-1, 2005), American Bar Association P.222 available at http://www.ababooks.org accessed on March 17, 2021

[268] Ibid

[269] Ibid

[270] Authentication and Registration of Documents' Proclamation No. 922/2015 at note 208, Art.2(2)

[271] EETP at note 17, Art.9 and EESP at note 212, Art.6

[272] Ibid

[273] How do electronic signature works? Available at www.docusign.com accessed on March 31, 2021.

related to the services for remuneration.[274] This definition indicates that the TSP themselves are traders and the service is delivered based on the contract formed between the subscriber and the service provider. If TSP is going to establish the reliability of other e-contracts, how do we establish the reliability of the contract with TSP itself? Accordingly, the draft of UCRIdMTS is developing a comprehensive standard of reliability test.[275] It has plainly empowered the authority to designate the reliable test (i.e. authenticating the contract between the TSP and subscriber). Moreover, it is mandated to publish a list of designated trust services, including details of the TSP.[276] Thus, determining the reliability of information is expected from the authorized organ.[277] EESP No.1072/2018 employed the term certificate provider.[278] Accordingly, certificate provider means a legal person duly authorized or recognized to issue digital certificates, provide encryption service, and time stamp service thereby to authenticate.[279] The definition of this certificate provider is conceptually similar to TSP under Regulation (EU) No 910/2014. Hence, TSPs are e-commerce operators who are licensed to engage in commercialization of trust.[280] They attest to the validity of e-signature or seal by issuing a certificate that logically associates the profile of the signatory submitted (including name or pseudo name of that person) to the TSPs by the subscriber.[281]

EESP No.1072/2018 does recognize the validity of e-signature to authenticate electronic data messages but it did not contemplate the authenticity of the contract between trust service provider and subscriber.[282] If there is a dispute on the contract between the TSPs and subscribers, the authenticity of data messages will be affected. INSA is mandated to issue licenses and supervise activities of certificate providers, issue working procedures and standards that TSPs shall follow to create reliable mechanisms to establish accuracy and genuineness of information supplied by the subscriber.[283] However, until now there has been no regulation, directive,

[274] Regulation (EU) No 910/2014 of The European Parliament and of The Council of 23 July 2014 on electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC, OJL 257/73 art.3(16 and 19) available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910 accessed on March 25, 2021

[275] Draft of Use and Cross-border Recognition of Identity Management and Trust Services (A/CN.9/WG.IV/WP.162, 2020) at note 228, Art.10, 23 and 24

[276] Ibid

[277] Ibid

[278] EESP at note 212, Art.2(3)

[279] Id, Art.2(3) and 22

[280] Id, Art.15(1/d) and European Telecommunications Standards Institute, Electronic Signatures and Infrastructures (ESI); General Policy Requirements for Trust Service Providers supporting Electronic Signatures(ETSI EN 319 401 V1.1.1 (2013-01)), p.7 available at http://www.etsi.org accessed on March 27, 2021

[281] Institut Luxembourgeois de la Normalisation, de l'Accréditation, de la Sécurité et qualité des produits et services, Trust Services Under The eIDAS Regulation(Version 1.0, June 2018), Pp.18-19 available at https://portail-qualite.public.lu/content/dam/qualite/publications/confiance-numerique/trustservices-under-eIDAS.pdf accessed on March 26, 2021

[282] Id, art.10

[283] Id, Art.30 and 22

guideline and standards provided by INSA to that effect. Perhaps it may be embraced in the generic term monitoring and supervising activities of certificate provider. Beyond this extension, it is not clear whether INSA authenticates the contract between subscriber and certificate provider.

According to the EU, an e-signature is presumed to be authentic whenever generated by a qualified TSP who is granted the qualified status by the supervisory body based on preset criterion to provide qualified trust services.[284] For that matter, EESP No.1072/2018 stipulates the presumption of authenticity of electronic messages signed with a reliable e-signature method.[285] However, there is no distinction between qualified and unqualified certificate providers in our case that requires due care from where this presumption stems. Thus, mere recognition and validation of e-signature can not satisfy the purpose of e-signature because it prejudices the reliability and evidentiary value of data message.

4.4.3. E-Seal

In addition to signatures, documents could also be authenticated by affixing seals to them.[286] Accordingly, EETP and EESP No.1072/2018 have recognized e-seal whenever this requirement is provided by law.[287] Thus, an e-signature signed as per the requirement provided under EESP No.1072/2018 is valid as seal and can be produced as evidence.[288] This stark provision seems not to have considered the significance of the seal. The Seal serves as evidence that the document was officially issued by a legal person, ensuring certainty of the document's origin and integrity and the signatory is an authorized agent of the undertaking.[289] E-seal is data in electronic form, which is logically associated with other data in electronic form to ensure its origin and integrity officially.[290] Moreover, Regulation (EU) No.910/2014 stipulates that an e-seal is created by a legal person with its name, and registration number (if any) as stated in the official records.[291] Accordingly, Regulation (EU) No.910/2014 provides, as a qualified e-signature from the authorized representative of the legal person should be equally acceptable when a transaction requires a qualified e-seal from a legal person.[292] 'Qualified e-signatures' means an advanced e-signatures that is created by a qualified e-signatures creation device, and which is based on a qualified certificate for e-signatures.[293] This distinction between qualified and unqualified e-signatures is based on the capability of devices to provide confidentiality, practicality, detection of forgery and unauthorized use, structural stability of the signed data, managing e-signature

[284] Regulation (EU) No 910/2014 at note 274, Art.35 and 38 cum 3(15 and 20)
[285] EESP at note 212, Art.7
[286] Authentication and Registration of Documents' Proclamation No. 922/2015 at note 208, Art.2(2)
[287] EETP at note 17, Art.10
[288] Ibid
[289] Regulation (EU) No 910/2014 at note 274, Recital para.59
[290] Id, art.3(25)
[291] Id, art.3(24) and annex III, para. 2
[292] Id, recital para.58
[293] Id, art.3(25)

creation data on behalf of signatory, and security for duplicated datasets.[294] In Ethiopia, there is no such distinction of e-signatures status. There is no difference between the e-signature of an ordinary person and a seal. It is difficult to distinguish the signature in an official capacity from that of an individual person. This causes confusion between the signatures signed by physical persons individually and for legal persons officially, which will open the way for the manipulation of official capacity and evidence.

4.4.4. Witness

Documents can also be authenticated by witness attestation.[295] Accordingly, the EETP has recognized that witness attestation can be adduced in the proof of e-contract.[296] The e-signature of a witness in line with the requirement under art.9 of EETP that affixed to a data message fulfills the requirement of the law whenever required.[297] How does this function be carried out in e-contract? In conventional contract witnesses, note the contract term has been established between the parties and attest it by signing on the document.[298] In e-commerce communication, the parties can be anywhere in the world and there is no opportunity like in the conventional contract to physically witness the contractual negotiation and agreement of the parties. Everybody interacts with his/her own computer (i.e. seller, buyer and witness). Moreover, it is humanly impossible for a person to be in different places at the same time. Regarding these circumstances in the US, witness testimony in e-evidence can be admitted based on three foundational principles.[299] Let us roughly see those principles. First, a witness needs only to be a person with sufficient knowledge to attest to the authenticity of the electronic records.[300] That means a witness must describe how the records were created and maintained.[301] Second, a witness must be able to demonstrate the records or data compilation were kept according to the regular practice of that business activity to ensure reliability of record.[302] Third, the witness of the proponent may testify the underlying source of information and the method or circumstances of preparation must be trustworthy.[303] These principles are developed from interpretation of rule 803 (6) of the Federal Evidence Rule of the US.[304] However, in our country, we do not have such comprehensive evidence rules from where such rules could be derived. Thus, it needs close

[294] Id, Annex II
[295] Civil Code(1960) at note 10, art.1730
[296] EETP at note 17, Art.11
[297] Ibid
[298] Civil Code(1960) at note 10, art.1730
[299] Leah V. Romano, 'VI. Electronic Evidence and the Federal Rules' (Vol.38:1745, 2005), Loyola of Los Angeles Law Review Pp.1773-1779 Available at: https://digitalcommons.lmu.edu/llr/vol38/iss4/6 accessed on March 27, 2021
[300] Ibid
[301] Ibid
[302] Ibid
[303] Ibid
[304] Ibid

attention to prescribe circumstances in which witness testimony may be admitted to prove e-contracts.

4.5. Place of Contract

Time and places are important components for effective enforcement of rights and obligations under the contract.[305] Although it is in the form of data message offer and acceptance is inevitable in the case of e-contract where instantaneous communication is carried out between absent parties (inter absentees).[306] Regarding determination of time of offer and acceptance in the course of communication, there are two forerunner theories (i.e. theory of dispatch and reception).[307] In instantaneous communication, a contract becomes effective at the time of reception as a rule.[308] In non-instantaneous communications, the time when a letter of acceptance is dispatched is taken as the effective time of contract (i.e. postal acceptance rule) for smooth trade flow.[309]

However, in the case of e-contract, parties are absent but the communication is instant across the world over a network. UNCUECIC (2007) and UNCITRAL Model Law have adopted dispatch and reception approaches to determine the place and time of acceptance. Thus, to determine at what point of time the consequence of obligation starts to run, information is considered as dispatched when it leaves the information system under control of the originator or /his/her representative and if the originator and addressee are using the same information system, information is taken as dispatched at the time it is received.[310] Moreover, the time of receipt is when the information is capable of being retrieved at the designated address of the addressee or when the addressee becomes aware of a message has been sent to that undesignated address.[311] When is information capable of being retrieved? UNCUECIC (2007) has employed presumption on the ground whether it has arrived at the addressee's electronic address.[312] Once information reaches the addressee's electronic address, information is presumed to be capable of being retrieved by the addressee. Nevertheless, it is still unclear how we determine whether information arrived at the addressee's electronic address.

[305] Civil Procedure Code of The Empire of Ethiopia (Decree No.52 /1965), Negarit Gazeta - Extraordinary Issue No.3 Of 1965, Addis Ababa, Ethiopia Art.24(1)
[306] Azmat Ali, Regulation Of E-Commerce In India With Special Reference To Electronic Contract(PhD Dissertation Faculty of Law Aligarh Muslim University (2015)), India, P.245 available at https://core.ac.uk/download/pdf/144527187.pdf accessed on March 28, 2021
[307] Ibid
[308] Civil Code(1960) at note 10, art.1692
[309] Ibid
[310] UNCUECIC(2007) at note 172, art.10(1)
[311] Id, Art.10(2)
[312] Ibid

Regarding the place of dispatch, due consideration is given to the business place of originator if indicated by the parties or habitual residence for a physical person.[313] We have seen that in e-transaction necessary information can be easily concealed, including the place of business. Thus, it depends on the trustworthiness of the parties to disclose their accurate information about their identity. Moreover, e-commerce communication does not acknowledge geographical boundaries because it is ubiquitous. Thus, how do we determine the place of business or habitual residence of the originator? UNCUECIC (2007) under art.6 has provided certain mechanisms to establish the location of the parties. These are *(a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.*[314] This does not mean it is a very reliable mechanism because a human being is mobile in nature and may use different devices at different places within a few minutes or conceal the identity of equipment s/he is using. Moreover, the place of business or residence of the user may be different from the location of the devices used to form the contract. However, it provides an alternative way out to establish the place of contract to uphold the victims' rights.

For example, 'X' who is a trader in Tanzania has made an offer by using his palmtop computer/computer in the internet café at 7:30AM morning while he is passing through Ethiopia to 'Y', a Nigerian national who is in Kenya for a time being Later, both took flight to somewhere else at 3:00PM.

In such a case, it is difficult to attach the place of contract to either Ethiopia or Kenya based on equipment and technology supporting an information system used by a party in connection with the formation of a contract. Because the place indicated by the IP address is neither a business place nor the habitual residence of the parties. Thus, if the parties have not disclosed their identity and place of business, this technical approach is not reliable because it can be easily manipulated. From the outset, the primary aim of UNCUECIC (2007) and UNCITRAL Model Law was to remove legal barriers by offering a set of internationally acceptable rules to national legislators. Therefore, not too much specificity is expected and it does not constitute positive law because it is not an international treaty.

EETP has adopted the same approach to determine the time and the place where a contract was made.[315] As per EETP, information is dispatched when it leaves the information system under control of the originator or his/her representative and is received at the place of business or habitual residence of the addressee.[316] However, if the originator and addressee are using the same information system, EETP has not provided a specific time when information is taken as dispatched and received. It is understandable that e-contracts are concluded in the cyberspace

[313] Id, Arts.10(3) cum.6
[314] Id, Art.6(4)
[315] EETP at note 17, Art.21
[316] Ibid

and transnational sphere. For this reason, how do we determine the place of business or residence of the parties whenever the parties fail to indicate in their contract?

E-signature is not mandatory as it depends on the corresponding conventional contracts' formality requirement by the substantive law (i.e. written). If the contract is required to bear signature by the substantive laws, perhaps TSP while providing the certificate may disclose the full identity profile, which would be helpful to distinguish the address of the parties.[317] However, if there is no such requirement of affixing signature to the contract how do we establish address and personal information of the parties? EETP has not provided solution. Even in case the business place or residences of parties could be ascertained, they may exist in different countries, which cause problem of choice of forum and applicable law. Parties are free to determine the place of forum in case dispute arises by their agreement where two or more courts have jurisdiction.[318] If parties from different jurisdictions fail to prescribe by their agreement to where they would take their case whenever a dispute arises, it becomes a matter of law to solve the problem. Nevertheless, Ethiopia did not develop rules of Private International law until now. EETP also does not consider the transnational nature of e-contracts.

As a result, the question of choice of forum (court) and applicable law when dispute arises on e-contract between Ethiopians and nationals of other states is still persistent. EETP has stipulated that it is applicable to the contract with a consumer irrespective of the legal system applicable.[319] In relation to the contract with parties other than consumers, the proclamation says nothing. The implication of this particular provision is to render more protection to consumers. However, is it possible to extend to other online marketers other than consumers? This does not bring positive effect because first it does not complement the very purpose of the proclamation (i.e. removal of trade barrier). Even this interpretation may be beyond the intention of the legislature. Second, it breeds forum shopping. Thus, in case parties failed to determine in their agreement, the problem of forum shopping and conflict of laws will be inevitable. Because, e-contract is beyond geographical barriers and there is no uniformity among each country's own domestic laws on jurisdiction and determination of the applicable law.[320] Therefore, it is important to consider the international aspect of electronic transactions to determine the jurisdiction of courts and applicable law relating to e-contract.

[317] EESP at note 212, Art.32 and 33
[318] Civil Procedure Code (1965) at note 302, Art.24(1)
[319] EETP at note 17, Art.32
[320] C Erasmus at note 15, p.1

CHAPTER V
Conclusions and Recommendations

5.1. Conclusions

Based on the reviewed literature and analysis made regarding the regulation of formation of e-contract under EETP, the conclusions and findings derived from them are presented as follows.

The E-contract has its own unique features, which are difficult to be regulated by the application of conventional contract rules. These are; first parties are not dealing at arm's length where they depend on the virtual existence of each other even anonymously. Second, most e-contracts are adhesive contracts, which provide no opportunity to negotiate on the terms of the contract rather than giving assent by single key strike. The terms of the contract are not disclosed or displayed conspicuously to the other party (e.g. browse wrap contract). Third, it is so quick. Since its formation is concluded within a few minutes on the internet instantly or can be formed by an automated message system, often it does not provide the opportunity to correct error. Thus, it leads to the conclusion of an unanticipated contract that negatively affects the merit balance of the parties. Fourth, it is ubiquitous. Commercial communication over the internet is not limited by the geographical barrier. Anyone in this world can access the market place in cyberspace by using digital devices (e.g. mobile, personal computers).

Therefore, e-contract has unique features, which inhibit the rules of conventional contracts to regulate effectively.

In fact, parties can create a fair way-out environment by self-regulatory mechanism (i.e. their agreement to that effect). However, if parties fail to arrange in their agreement, the law has to be operated to strike balance by filling the contractual gap. Accordingly, international and regional organizations (e.g. UNCITRAL, WTO, and EU) and governments of different countries are marching to provide a regulatory legal framework. The promulgation of EETP also shares this common reason.

The main principles of electronic transaction laws (including EETP) that are mandated to regulate e-contract are party autonomy, technology neutrality and functional equivalence. Among these three principles, functional equivalence takes the lion's share in formulating the regulatory framework for electronic transactions by testing it against the functions of a corresponding paper-based document. The functional equivalence approach presupposes the existence of a corresponding paper-based document to declare legal validity and enforceability of an e-contract based on fulfillment of functions of the written document.

Accordingly, EETP attempted to provide the criteria (i.e. accessibility, integrity and reliability) used to determine whether an electronic data message is capable of achieving the functions of writing, originality, retention, and signature requirements whenever prescribed by the law.

However, these terms are not defined under the EETP. From the context of the wording of the proclamation, accessibility refers to the availability of the terms of contract for evidentiary purposes (later reference). Accessibility is also a prerequisite for the retainability and originality of information in the data message.

Nevertheless, the EETP has set aside the concept of accessibility from the angle of contractual terms between the parties. For example, if the language of contractual communication is not familiar to one of the parties or terms of contract are not available, however, the data message is accessible for the later reference; the object of accessibility is unachievable. It is hardly possible to determine originality as well.

The other yardstick employed to measure the function of electronic data message in relation to paper-based document is the integrity of information. For instance, the originality of electronic data messages is measured based on accessibility and integrity. In turn, integrity needs other measuring circumstances. As per EETP, art.12 (2) the integrity of information in electronic data message is assessed based on completeness, inalterability, purpose of generating that information and any other relevant circumstances. However, it is unclear what elements are deemed to be considered to detect incompleteness and inalterability.

Finally, reliability also assesses whether the functions of a paper document could be fulfilled in electronic data message (e.g. signature and evidence). Moreover, the reliability of the information in the electronic data message is assessed depending on the means of creating a signature is being under exclusive control of the signatory at the time of signing, affixing signature voluntarily and detectability of any alteration (art.9 of EETP). However, in fact, the means of creating an e-signature can not be owned by an individual signatory (arts.12 and 2 (3) of EESP no.1072/2018). Because of its very nature, e-signature can not be exclusively under control of the signatory where its functionality depends on the functionality of TSP. This means indirectly the reliability of information depends on the reliability of TSP.

The other point is the lack of a comprehensive identity management system and authentication. Assurance of identity facilitates assurance of legal competency, consent effectiveness and liability. The identity of the contracting party is verified by the content of the certificate provided to the signatory based on information submitted by subscribers during subscription (art.33 of EESP no.1072/2018). However, the reliability of the content of the certificate is doubtful because false information can be submitted to TSP. This will affect the integrity of the data message.

In addition, a legal person can enter into a contract in its firm name. It has a separate identity as a physical person and the identity and official approval of this legal person can be identified by its seal like signature of a physical person. However, under EETP, the seal is not distinguished from an individual person's signature (art.10 of EETP).

EETP has recognized witness attestation to prove the contract. Nevertheless, there is no difference in how signatures of contracting parties and witnesses are received. Thus, how the significance of mere signature of a witness is considered in the proof of e-contract is the question left unresponded by EETP. Its functionality on the contract formed by the interaction of EAs and EA with physical people is also an unresolved issue.

The EETP has recognized the legality of offer and acceptance by EA in general and more by attributing to the action of EA as the action of originator or addressee (arts.7, 19 (1/c) and 20 (1/a) of EETP). Nevertheless, based on the sophistication of technology, EA can initiate new idea/respond beyond the addressee or originator order. The legal competency of EA and legal effectiveness of contract made independently by the initiation of EA is under question.

The significance of determining the place of contract is facilitating for determining forum and applicable laws in case dispute arises. In Ethiopia, for instance, if any dispute in relation to a contract arises, the case may be taken to court at the place of formation or execution (art.24 (1) of the Civil Procedure Code). In e-contract offer is dispatched at the business or habitual residence of the offeror and acceptance is made at the business place or habitual residence place of the recipient (art.21 (3) of EETP). EETP does not identify whether the place of contract is at the place of dispatch or reception or both. Thus, if these places of dispatch or reception lie in different sovereign state jurisdictions, it breeds the problem of determining forum and applicable law to the contract, which challenges enforceability of rights and duties in the contract.

5.2. Recommendations

Based on the findings of the research, the following recommendations are forwarded:

- Nowadays, the sophistication of ICT is beyond the functions of conventional contracts even previous technology. Thus;
  - EETP has to recognize a certain unique nature of e-contract that is not contemplated in the conventional contract rules (e.g. involvement of EA).
  - The contracts by EAs deserve better legal coverage.
    - The legal status of EA needs to be clearly determined (i.e. whether mere instrument of communication or status of artificial personality).
    - The definition of EA should be included.
    - The effects of consent given by EAs beyond the instruction of the operator have to be properly regulated.
    - The applicability and effectiveness of e-signature and the circumstances in which witness attestation may be adduced in prove of contract whenever a contract is formed with the involvement of EA needs clear legal provision.

- Knowing the identity of the other contracting party is decisive to knowing legal competency and facilitates assigning liability. The only mechanism to establish the identity of contracting parties is e-signature (i.e. based on the personal information of subscriber submitted to TSP). Nevertheless, not all e-contracts should be considered as the bearer of signature because not all conventional contracts bear signature where establishing the identity of the parties is difficult. Even subscribers can submit fake personal information at the time of subscription.
    - Therefore, to establish the identity of the contracting parties' comprehensive identity management system needs to be introduced into the Ethiopian law.
    - The identity of a legal person should be established distinctively from an individual person's signature. The E-seal should be distinguished from an individual person's signature.
    - There must be a clear standard to establish the legal significance of witness signature to authenticate data message (Like USA Federal Evidence Rule).
    - The contract between TSP and subscriber needs to be regulated specifically for the authentication purpose.
    - There must be a mechanism to authenticate the accuracy of submitted subscribers' personal information and the law has to indicate personal information needs to be submitted particularly.
- The functional equivalence of electronic data messages with paper-based contracts is measured depending on accessibility, integrity and reliability. However, the circumstances provided for these criteria are not stipulated in clear language.
    - There must be a clear standard to measure reliability of data message and capacity to achieve desired goals of contract law (i.e. cautionary, evidentiary, channeling and deterrence).
    - In relation to accessibility, the capability of information to be processed by senders and receivers' information processing system, language of communication to form contract, conspicuous disclosure of contract terms to the counter party and opening the opportunity to negotiate should be legally considered.
    - Regarding the integrity of data message, there should be alternative way out and legal remedy whenever information is lost or irreparably damaged due to obsolesce or any other cause.
- The international aspect of e-contract needs clear stipulation of law on the applicable law and forum.

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