

ELECTRONIC CASH: TIME FOR A PARADIGM SHIFT IN E-COMMERCE LEGISLATION

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- Kenya Communications (Amendment) Act, 2008
- Kenya's boldest legislative intervention in ICT in over a decade
- Amended the Kenya Communications Act, 1998



Objective: to promote e-government and e-commerce by increasing

public confidence in electronic transactions;

- Gives legal recognition to the use of electronic records and electronic (digital) signatures;
- Creates new offences ICT offences (cyber-crimes);
- Admissibility of electronic records as evidence in court proceedings.

Clause 31



Provisions on electronic documents and digital signatures not to apply to:

- the creation or execution of a will;
- negotiable instruments;
- documents of title.
- Why the exemption?
- Documents for which the law requires the retention of an **original**.



- Negotiable instruments – cheques, promissory notes, bank notes – can they exist in electronic form?



- Definition of Electronic money

“Monetary value charged and stored on an electronic support, in the form of a smart card or incorporated into the memory of a computer” (Batalla 2001, p. 81).



European Union Directive on Electronic Money

“Monetary value as represented by a claim on the issuer which is:

- *stored on an electronic device;*
- *issued on receipt of funds of an amount not less in value than the monetary value issued;*
- *accepted as a means of payment by undertakings other than the issuer .*



Paradigm I – The Flintstones

- Paradigm I – Scanned bank notes?



- Problem: sending the scanned note does not transfer the value

Paradigm II – The Middle Ages



- Paradigm II – Credit/Debit Cards, e-token (stored value cashless systems)



- Problem: we have still retained the original bank note

Paradigm II The Matrix



- Paradigm III – Digital coins/notes (Digit-ALL)
- Digital coins', stored offline on smart cards or on user's hard disks
- Technological platform that offers secure electronic bank notes – unique and serially numbered; transfer without retention; tamper proof and capable of detecting alteration, replication or copying; and widely accepted as legal tender.

Canada, Hong Kong, Singapore, Kenya

- Appear to outlaw pre-existing industry practices based on stored value transfer systems (Paradigm II) - funds transfer by mobile phone (M-PESA, ZAP);
- Foreclose on possible future developments in electronic cash - denying industry the creative impetus to evolve electronic currency into Paradigm Three
- Ignores the guidelines to the enactment of UNCITRAL in its Model Law on Electronic Commerce (1996) – Functional Equivalent approach
- EU (UK) – Elaborate Regulation. USA – sees no need to regulate – allows novel technologies to flourish (Pay Pal)



Ministry of Finance statement on M-PESA Money
Transfer Service – Daily Nation, January 25 2009 p.
21:

“M-Pesa is an electronic money transfer product that enables users to store value on their mobile phone or mobile account in the form of electronic currency that can be used for multiple purposes including transfers to other users and conversion to and from cash”.

- Three references to the term “e-money”.

Finance Bill, 2009

Paperless Cheque clearing – Cheque Truncation

- Amendment to the Bills of Exchange Act
- **cheque truncation** defined as
 - “ a system of cheque clearing and settlement between banks based on electronic data or images or both electronic data and images, without the conventional physical exchange of instruments”.



THANK YOU



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