

Electronic Commerce in Cameroon: an Appraisal of legal Issues and Challenges¹

Abstract: Electronic Commerce has transformed the manner in which commercial transactions are handled out in today's modern society. Modern information and communication technology has led to the growth of virtual transactions where there is that ability of bringing the market place nearer to the buyer. Despite the fact that commercial transactions have been made easy through electronic commerce, it should be understood that electronic commerce has brought with it some legal and commercial difficulties that need to be carefully handled especially in a less developed country like Cameroon. In all commercial transactions there is the need for trust and confidence. That need for trust and confidence in electronic commerce transactions is very important since the transactions are of a virtual nature. For E-commerce to be carried out effectively, those involved must be confident that their transactions will be secured. This paper, examines the legal issues and challenges faced by e-commerce and how such issues can be surmounted.

Keywords: Information and Communication Technology, Electronic Commerce, Internet, Electronic Signatures, Electronic Transactions and Security, Reliability and Predictability.

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I. INTRODUCTION

One of the most innovating events towards the end of the last century was the wide acceptance and use of Electronic commerce.² The development of information and communication technology has increasingly led to the development of international commerce because of its "ability to shrink space and time, to bring people together without crossing long distance, to create new market places and to contribute to global economic growth."³ The major significance of electronic commerce therefore lies in the fact that it is a single world trading system which is facilitated by access through electronic means to goods and services from different parts of the world. Electronic Commerce has been described by some scholars as "so startling in its economic implications that it may reasonably be considered a watershed in the way we do business...an abrupt and irrevocable turning point, one that signals a shift in historical direction by changing the established manner of business practice and replacing them with a new paradigm."⁴ The positive effects of E-commerce have been highly welcomed by most countries the world over and Cameroon is not left out.⁵

The internet offers unlimited opportunities to transform the way business is carried out. Business organizations, institutions, governments and individuals use computer networks to share information and sell products across borders.⁶ Despite the numerous advantages brought along by E-commerce such as: easy negotiation of terms and conclusion of contracts electronically in the shortest possible time, a large platform of sellers that gives access to competitive prices and easy access to information, prices and delivery terms, E-commerce raises a number of legal issues and some legal uncertainties which may act as a barrier to E-

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² A. Goldstein & D.O'Connor, "E- Commerce for Development: Prospects and Policy Issues", OECD Development Center, at <http://www.oecd.org/dev>, accessed on the 20th November 2017.

³ I. Carr, "UNCITRAL and Electronic Commerce: A Light Touch on Harmonization, Hertfordshire Law Journal, (2003), 1 (1), pp 14-21, p 15.

⁴ Y. Zhao, *Dispute Resolution in Electronic Commerce*, Martinus Nijhoff, Leiden, U.K, 2005, p 2, quoting T. Siebel & P. House, *Cyber Rules, and Strategies for Excelling at E-Business*, 1999, p 1.

⁵ Cameroon in line with international developments adopted Law no 2010/021 of December 2010 governing E-commerce in Cameroon.

⁶ G. Friedman & R. Gellman, "An Information Superhighway "on Ramp" for Alternative dispute Resolution", 68 N.Y. St. Bus J, (1996) 38-39.

commerce.⁷ Emergence of any new technology raises serious issues for policy makers and other stake holders especially in the era of computer technology where it has been readily embraced and has a wide economic impact. The question that comes to mind is to what extent can e-commerce be regulated, so as to find a balance between the risks of the new technology and the opportunities created by it?

Security is of prime importance in electronic Commerce. For any contract to be valid there is the need for pre-contractual negotiations to take place such as offer, acceptance and contractual terms. In e-commerce, these are conveyed and stored electronically. The legal problems that are considered in e-commerce are that of authenticity and integrity of the information gotten from the internet when concluding contracts through electronic means. Questions such as:

“can the electronic medium be trusted? Does it originate from the real person with whom you are dealing with? Can the message be relied upon? How secure is it given that electronic documents can easily be frauded or manipulated? Is the message the same as the one sent from origin? What is the legal status of an electronic document? And can it be enforceable? Do electronic messages and electronic signatures meet the legal requirements of writing and signature and above all what is the legal status of an electronically signed message?”⁸

As such electronic commerce is faced with serious problems of confidentiality, the integrity of electronic signatures for the validity of transactions and enforceability of contracts. Public key cryptography has been invented with the aim of securing transactions in electronic commerce. Digital signatures and certificates have come up with the aim of authenticating information sent by internet. The need to address such legal issues is urgent. The work as such tries to find out the legal issues and challenges that come up with the practice of electronic commerce and how such issues and challenges can be handled to promote security and integrity in E-commerce in the Cameroonian context.

II. THE LAW ON E-COMMERCE IN CAMEROON

E-commerce is fast developing in the world and Cameroon in particular. With the aim of regulating and controlling this sector, the Cameroonian legislator brought out a law on electronic commerce that is in line with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.⁹ The modalities for the application of the Cameroonian law on electronic commerce were brought out by a Prime Ministerial Decree of 2011.¹⁰ E-Commerce is defined by the Cameroonian law regulating E-commerce “as an economic activity whereby a person effectuates or carries out through electronic means the supply of goods and services.”¹¹ This includes all commercial transactions based on electronic processing and transmission of data, including text, sound and images. It involves transactions over the internet, plus electronic funds transfer and electronic data interchange (EDI).¹² From the definition, it would be observed that Electronic

⁷ A. Davidson, *The Law of Electronic Commerce*, Cambridge University Press, New York, 2009, p 1

⁸ Ibid.

⁹ Law No.2010/021 of 21 December 2010; In 1996 UNCITRAL brought out a model law for online consumer and commercial protection. The model law was intended to provide national legislations with a model for internationally acceptable rules that would remove legal obstacles and create a more secure legal environment for electronic transactions. The model rules have had significant international acceptance, Cameroon not left out. On the 11 of October 2017, Cameroon acceded to the United Nations Convention on the use of Electronic communications in International Contracts 2005 and it was the 90th state to do so. It entered into force on the 1st of May 2018. www.uncitral.org. This one is built on the UNCITRAL model law on electronic commerce of 2005. It must be stated that model laws do not have the same legislative weight like a convention and states are free to adopt the law as it stands or base their law using the model law as it is.

¹⁰ Decree no.2011/1521/pm of 15 June 2011.

¹¹ Article 2 (6) on the General Provisions of Law No.2010/021 of 21 December 2010 on Electronic Commerce in Cameroon; The United Nations Conference on Trade and Development (UNCTAD) defines it as the sale or purchase of goods or services over computer mediated networks (broader meaning) or the internet (narrow meaning). It can be further defined as that kind of trade that takes place over the internet with a buyer visiting the seller’s website and it includes business to business (B2B) and Business to customer (B2C), customer to business (C2B) and customer to customer (C2C) trade.¹¹ No matter how the definition is coined, the common denominator is the virtual commercial transactions that takes place using computer mediums and internet.

¹² Article 2 (2) of Decree 2011/1521 of 15 June 2011 organizing the modalities for the application of law No.2010/021 of 21 December 2010; A. Davidson, *The Law of Electronic Commerce*, Cambridge University Press, New York, 2009, p 1; Electronic Data interchange (EDI) is often defined as “ the intercompany computer to computer communication of standard Transactions in a standard Format that permits the receiver to perform

commerce is not only limited to commercial transactions and consumption contracts that are habitually known but it includes supply of information online, communication and research tools that gives access and recuperates information from a communication network or a site that lodges information. Also, it would be noted that the definition here is different from the classic definition of commercial activity¹³ based on the fact that information technology distinguishes it from traditional commerce. The status of parties and its equivalence in electronic commerce is considered as Business to Business (B2B) and Business to Consumer (B2C) which is different from that of the normal commercial law.¹⁴ It would also be noted that not all activities concerning electronic commerce are based on financial gains as it is the case with normal commercial law.¹⁵

The law brings out the various obligations, restrictions, responsibilities of those involved in electronic commerce. The Decree of 2011 on the modalities of application of the law holds that “those involved in electronic commerce in Cameroon must give certain important information and such information has to be non-equivocal for easy access and must be permanent on the welcoming page of the website of the supplier of the goods and services needed and accessible at each stage of the transaction, with respect to the principles governing the protection of the minors”¹⁶ The law in order to guarantee transparency, guarantee and fluidity of electronic transactions that are equal or above 20.000frs holds that the professional has to make sure he conserves such transactions in writing for at least 10 years in order to guarantee access to the co-contractor in case need arises.¹⁷

As for electronic signature which is the main bone of contention in electronic commerce the Cameroonian legislator has defined it as the data in electronic form permitting to authenticate the issuer of the message and its integrity.¹⁸ For the means of creation of electronic signature the law holds that it is all the private equipment and software of asymmetric crypto system accredited by a competent authority, configured for the creation of electronic signatures.¹⁹ For the provisions for the verification of signature, it is all the public equipment and/or software of an asymmetric system accredited by a competent authority permitting the verification by a certifying authority of an electronic signature.²⁰ This definition has been inspired by the UNCITRAL Model Law on electronic commerce, which defines electronic signatures in its Article 2 subparagraph 2 “as data in electronic form, affixed to or logically associated with a data message, which may be used to ‘identify the signatory’ in relation to the data message, and to ‘indicate the signatory’s’ approval of the information contained in the data message.”²¹ It should be noted that this definition has been made broad so that it can encompass all existing or future electronic signature methods. The law on electronic commerce has taken cognizance of technological neutrality and as such accommodates all forms of electronic signatures from cryptographically based signatures, digital signatures, unencrypted codes or passwords to simply typing the authors name on an email message. This would fulfill the function of correctly identifying the author. This is feasible so long as the methods used are “as reliable as was appropriate for the purpose for which the data message was generated or communicated in the circumstances including any relevant agreement, they should be regarded as meeting the legal requirements.”²²

the intended Transaction. See I. Carr & P. Stone, *International Trade Law*, 5th ed. Routledge, London, U.K. 2014, p 103.

¹³ Article 3 of the OHADA Uniform Act on General Commercial Law defines commercial activity.

¹⁴ Article 2 of OHADA Uniform Act on General Commercial Law defines commercial operators as those who perform commercial transactions as their usual professional activity.

¹⁵ Article 2 (1) of Law No.2010/021 of 21 December 2010 defines commercial activity as “all production activity and supply of goods and services based on material or electronic means carried out by any physical or moral person conformingly to provisions in legislative, regulatory or conventional texts.”

¹⁶ Article 6, Decree no.2011/1521/pm of 15 June 2011.

¹⁷ Article 8, Ibid.

¹⁸ Article 2 (19), of the General Provisions of Law No.2010/021 of 21 December 2010.

¹⁹ « Ensemble d'équipement et /ou de logiciel privé de cryptage, homologués par une autorité compétente, configurés pour la création d'une signature électronique. » Article 2 (11), of the General Provisions of Law No.2010/021 of 21 December 2010.

²⁰ Dispositive de vérification de signature: ensemble d'équipement et/ou logiciels publics de cryptage homologués par une autorité compétente permettant la vérification par une autorité de certification d'une signature électronique, Article 2(12), of the General Provisions of Law No.2010/021 of 21 Décembre 2010.

²¹ UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International use of Electronic Authentication and Signature Methods*, United Nations Publication, Vienna, 2009, p15

²² Article 7 paragraph 1 b of the UNCITRAL Model Law on Electronic Commerce.

III. SCOPE OF THE LAW

Contract is the most privileged technique for economic exchange as such contract and electronic commerce is inevitable. The legislator has the important task of reconciling economic efficiency with contractual justice. This has to be done through the resolution of fundamental questions such as the formation of electronic commerce contracts and the plasticity of formalism attached to electronic commerce contracts through the notion of functional equivalence. The law is applicable to electronic commerce, electronic writings, electronic signatures, admissibility and evidentiary weight of data messages and formation and validity of contracts. Commercial activity has been defined in article 2(1) of the law and has to do with all commercial relationships be it contractual or not. It holds that commercial activity includes all production activity and exchange of goods and services exercised on the basis of supporting or electronic materials by all physical or moral persons conforming to the provision of texts having legislative, regulatory or conventional character regulating commerce.²³ Commercial relationships are said to include: any trade transaction for the supply or exchange of goods or services. The law has not mentioned anything about consumer transactions despite the fact that it has defined consumer in article 2 (8) of the General Provisions.²⁴ The fact that the law has defined who is a consumer may likely seem the law on e-commerce is also applicable to consumer transactions. This allegation is again confirmed in the decree fixing the modalities for the application of law no.2010/021 of 21 December 2010, where the word consumer is used throughout the text.²⁵

From the wordings of the law it will be realized that the law does not only apply to e-commerce in Cameroon but also extends to the international commerce.²⁶ The international element can be seen when the law states that the functional equivalence of certificates and signatures delivered by certification authorities (accredited authorities) from foreign countries have the same value like certificates delivered in Cameroon, if the accredited body is recognized by a mutual agreement of recognition concluded by the competent authority of the concerned states.²⁷ The recognition of certificates and signatures from a foreign country is not automatic but has to be done by a text.²⁸ The fact that article 40(1) has specified that electronic signatures from foreign jurisdiction can be recognised therefore means that the Cameroonian legislator has recognised the global nature of electronic commerce and the case to which businesses enter into the electronic market place.

Furthermore, the international element of electronic commerce can be seen in the Prime Ministerial Decree fixing the modalities for the exercise of electronic commerce where it provides that third parties carrying out electronic commerce who are out of Cameroon must precise the applicable law and get an acceptance from the addressee to whom the service is proposed.²⁹ However, the applicable law from another country must not put to question guarantees given to consumers following similar provisions in force in Cameroon.³⁰ However despite the fact that the law has brought out an international element, it is a national law and cannot regulate issues of international commerce.

The legislator has used the minimalistic approach, which is the recognition of all technologies for electronic signatures following a system of technological neutrality. It gives minimum legal status to all forms of signature.³¹ Electronic signatures are considered to be functional equivalent of hand written signatures, provided that technology employed is intended to serve certain specified functions and in addition meets certain technological neutral reliable requirements. The law provides for the identification of the signatory and to indicate the signatory's intent with respect to signed information and its integrity.³² Functional equivalence where the legal recognition of data messages are not discriminated upon based on their nature. Data message is information generated, sent, received or stored by electronic optical or similar means including but not limited

²³ Article 2 (1) of Law No.2010/021 of 21 December 2010.

²⁴ It defines the consumer as any physical or moral person who benefits from the supply of services or uses products of commerce to satisfy his needs or that of persons under him.

²⁵ See Prime Ministerial Decree No.2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010

²⁶ See Article 40 (1) of Law No.2010/021 of 21 December 2010.

²⁷ Ibid.

²⁸ Article 40 (2) of Law No.2010/021 of 21 December 2010.

²⁹ Article 3 (1), Decree No. 2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010

³⁰ Article 3 (2); Personal translation from French with emphasis added.

³¹ See Article 22 of Decree No. 2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010; Biometric, digital and password; See UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International use of Electronic Authentication and Signature Methods*, United Nations Publication, Vienna, 2009, p 36.

³² Article 22 of Decree No. 2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010 Same like article 7 of the UNCITRAL Model Law on Electronic Commerce.

to Electronic data Interchange (EDI) e-mail, telegram, telex or telecopy. The law holds that electronic writings have the same value in the area of proof provided the person sending the message can be duly identified.³³

The principle of party autonomy has been maintained in article 10 of the law.³⁴ Business prefer to agree on their own terms especially in international trade such as the language to be used, the means of payment, the dispute resolution mechanism and the applicable law. However a limitation to this rule is seen in the areas of writing, signature and presentation of originals and admissibility of evidence which are mandatory and reflect the decisions of public policy.³⁵ On the other hand, party autonomy would not be applicable to contracts that create the transfer of rights on immovable to the exception of rental rights; contracts for which the intervention of the courts, public authorities or professionals exercising public authority is needed; contracts of guarantee given by persons acting for reasons that are not in line with their professional or commercial activity; and contracts from family law or succession law.³⁶

From the above submission, it can be stated that e-commerce includes a cross section of services ranging from sale of goods, accountancy, legal services, insurance, medical services and even publicity etc.³⁷ Nationally, the law has a wide scope as it includes the use of technology in commercial activities that was not included in the law governing commercial activities in Cameroon and the OHADA Uniform act. It should be noted that unfortunately there is no international regulation of electronic commerce and as such the national regulation remains very narrow and limited.

IV. LEGAL ISSUES ON ELECTRONIC COMMERCE

The distance and immaterial nature in electronic commerce brings up certain legal issues that need to be considered. The legal issues are: the formation of an electronic contract; applicable law and competent jurisdiction; evidential issues and dispute resolution.

a) Formation of a Contract in Electronic Commerce

Contract is a necessary aspect in commerce because of the risk involved so parties need to make their transactions secure. As such it becomes necessary for each party to understand his obligations and duties, to know the parties they are dealing with, the goods and services to be supplied and the legal forum in the case of a dispute.³⁸ There is as such a need for certainty and stability in electronic commercial transactions. The Cameroonian Law³⁹ provides for functional equivalence to the traditional form and has to be treated equally by the law. In the area of formation and validity of contracts, the context has been adapted to the traditional rules relating to the formation of a contract. The principle is also the same where the traditional forms of offer,⁴⁰ acceptance, consideration, and illegality have all been considered in electronic commerce. Article 15 of the law on electronic commerce translates the principle of the validity of an electronic offer by stating that an electronic offer must make mention of the price, the characteristics of the product and the nature of the goods or services.⁴¹ This conditions are not applicable to contracts concluded through personal e-mails or through individual communications. Article 11 (1), imposes that contracts through electronic means should be accompanied by contractual or general conditions permitting the traceability of contract intended. Obligation of information has been reiterated in Article 11 (2). The exigency of this article is limited to contracts between professionals and consumers.⁴² However, the question is asked to know if such an exigency is necessary if the offer has to come from the consumer to the professional.⁴³

³³ Article 22 (1) Of Decree of 2011/1521, Fixing the Modalities for the Application of Law no.2010/021 of 21 December 2010.

³⁴ Article 10 of law no.2010/021 of 21 December 2010.

³⁵ I. Carr, P. Stone, *International Trade Law*, 5th ed., Routledge, London, U.K., 2014, p 106.

³⁶ Article 10 of law no.2010/021 of 21 December 2010.

³⁷ Section 3 (1) Of law NO 2010/021 of 21 December 2010.

³⁸ A. Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p 25.

³⁹ Article 22 (1), Decree no.2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010 and article 7 of the UNCITRAL Model Law on Electronic Commerce.

⁴⁰ Article 2 (2) of the Avant project of the Uniform Act on Contract law provides that a "proposal to conclude a contract constitutes an offer if it is sufficiently precise and if indicates the will of the author to be linked to the contract in case of acceptance. Translation by author with some emphasis.

⁴¹ Law no.2010/021 of 21 December 2010.

⁴² Article 11 (3), Ibid.

⁴³ Article 1 of the UNCITRAL model law of 1996 on electronic commerce deals with general concepts applicable to any kind of information in the form of a data message used in commercial activities. Rather than interpret contractual issues specifically, there is a need for broad interpretation so as to include matters arising from all relationships involving commercial transactions whether contractual or not. Its provisions in article 5 of

The validity of a contract and its proof is practically neutralized by the consecration of functional equivalence of electronic writing and paper writing. But there are circumstances that mails will not be considered in the formation of certain contracts which needs special formalism generally justified by considerations of general interest. Legislation requires that such contracts must be in writing or evidenced in writing.⁴⁴ The aim is to help protect people and their property against fraud and sharp practices. This is by legislating that certain types of contract could not be enforced unless there was written evidence of its existence and of its terms.⁴⁵ The reason is that electronic message can be admitted for proof on the same title like written messages on the basis that the person from whom the message is coming from can be identified. This is to avoid fraud of the parties dealing in electronic commerce. Another pre-condition is that of guaranteeing the integrity of the message by proving the message received is the same as the message sent and that it has not been tampered with.⁴⁶

The technology neutral approach allows the provision to apply to a broad range of circumstances as much as possible.⁴⁷ The law holds that the information would be readily accessible so as to be usable for subsequent reference.⁴⁸ The words accessible, legible and intelligible to be consulted later on are equivalent to ink and paper writing because it is typically accessible for subsequent reference. Thus, it would be reasonable to expect that electronic mail which is stored when created and by the recipient on receipt, would be accessible for subsequent reference. However there are circumstances like that of a chat room where electronic exchanges are used without expectation that the communications will be stored. Such a use would not be in line with the provisions in article 22 (2) of Prime Ministerial Decree of 2011. With instant messaging, exchange appears on each party's computer screen and disappears after the session ends. Hence, the information would be unavailable for subsequent reference. However, it is possible to copy and paste the exchange to a regular computer file, log the conversation or use a screenshot or screen capture. If parties agree to the use of such methods then the information would be readily accessible.

Another condition for the validity of electronic contracts is that of signatures. This is because any legislation that requires writing also requires a signature from the author of the message.⁴⁹ The two basic functions of signature as brought out by the UNCITRAL Model Law on electronic commerce are to identify the author of the document and to confirm the author approved of the document.⁵⁰ It does not deal specifically with the integrity of the document itself. Other alternative methods may be used for the authentication of the identity in relation to electronic communication information. In Cameroon the law simply states that communications have to be secured by authentication certificates and electronic signatures the same as in public administrations to be spelt out by a particular text.⁵¹ The particular text has not been brought out as yet as such posing a big problem in the area of authentication of electronic contracts thus taking electronic commerce backwards.

b) Applicable Law and the Competent Jurisdiction

The issue of applicable law and jurisdiction are very crucial in e-commerce since transactions most often go across national boundaries. According to L.E. Gilles (2008), *"When a consumer contract is entered into between parties across borders by electronic means and a dispute arises between the parties, the effective application of certain and predictable jurisdiction and choice of law rules to determine which jurisdiction will hear the dispute and what law will be applicable is crucial."*⁵² The question is which court assumes jurisdiction in resolving a dispute arising from a contract between the parties, in view of the fact that parties may be residing in

the model law are intended to affect contract formation and performance. It provides that "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." Data message is used as a technological neutral term according to article 2 of the UNCITRAL Model Law

⁴⁴See Article 10 of law no.2010/021 of 21 December 2010 on Electronic Commerce (Sale of Land, Tenement, Contracts which the law requires the intervention of the courts or public authorities, Contracts from family law and succession law issues).

⁴⁵ Ibid.

⁴⁶ Article 11 (1), imposes through electronic means should be accompanied by contractual conditions or general permitting the traceability of contract intended. Obligation of information is reiterated in Article 11 (2).

⁴⁷ A. Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p 37.

⁴⁸ Article 22 (2), of Prime Ministerial Decree no.2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010.

⁴⁹ A. Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p 39.

⁵⁰ Official Guide of the Enactment of UNCITRAL Model Law on Electronic Commerce.

⁵¹ Article 35 (1) (2), Law no.2010/021 of 21 December 2010.

⁵² L.E. Gilles, *Electronic Commerce and International Private Law: A study of Electronic Consumer Contracts*, Ashgate Publishing Limited, Hampshire, U.K, 2008, p 3

different jurisdiction with different legal systems. This is to improve on the certainty, fairness of juridical protection for consumers who contracted with foreign sellers by electronic means.

The Cameroonian Law on electronic commerce holds that persons carrying out electronic commerce and domiciled in a country shall have to precise the applicable law and obtain an accord of the consumer of the electronic service.⁵³ The fact that the accord of the consumer is needed means that party autonomy has been maintained in the area of choice of jurisdiction and applicable law. In relation to internet contracts, the rule is that jurisdiction is determined by reference to the place or country where the contract was performed, where there are many jurisdictions, the relevant jurisdiction where the dispute arises. The place of domicile may also determine the court where the parties can take action.⁵⁴

Another important issue in e-commerce is that of choice of law applicable to disputes arising from commerce over the internet. Some scholars have described the problem as “the question of choice of law is particularly difficult in the case of international computer networks because of dispersed location and rapid movement of data. As such several connecting factors could occur in an electronic manner that may involve elements of legal novelty.”⁵⁵

Freedom of contract is also an important established principle in international trade and parties to an internet contract can therefore agree on terms and conditions of contract including the choice of laws to govern the transactions. However, this is easier in contracts that are not standard form contracts, where the parties have contracted outside the provisions of the law by agreeing on the applicable law to govern their transaction, the complexities of the applicable law entirely avoided, and thus is the most plausible approach in commercial transaction over the internet.⁵⁶ The twin problem of jurisdiction and applicable law makes dispute resolution difficult in electronic commerce. The Cameroonian law has not mentioned anything on choice of law when it comes to choice of law despite that the law talks of international trade. It would be opined that choice of law rule and jurisdiction be harmonized for those involved in electronic commerce transactions to sue in their areas of domicile. This will go a long way to address the ambiguities in determining jurisdiction and applicable law and will limit party autonomy to select forum in electronic contracts.

c) Evidential Issues in Electronic Commerce

Under normal circumstances, courts have to establish facts before determining rights and imposing orders. Evidence came into place to see into the just basis of making of such determinations. Evidence needs to be reliable and the best that is available.⁵⁷ Electronic commerce is also faced with evidential issues especially in relation to the proof of transactions carried out over the internet. Before the law of 2010/012 and 2010/021 of 21 December 2010, the evidential value of electronic writing had very little effect and could only be accepted in exceptional cases. In commercial fields according to article 5 of the OHADA Uniform act on General Commercial Law prove can be brought by every means including electronic writing but it should be noted that this rule is applicable only to businesses in what is termed commercial acts concluded in the exercise of the profession. The rules relating to documentary evidence came up when documents were originally made meticulously by hand.⁵⁸ E-Commerce Transactions are paperless transactions made through magnetic materials such as tapes or disks. This is contrary to paper based transactions that are embodied in permanent form and usually authenticated by signatures and the law can treat such documents circumspectly, appreciating the real possibility of transcription error or worse deliberate and undetectable alteration. It is difficult for such paper base to be altered without an alteration on the face of the document. In the context of electronic commerce, information fed into computer and posted on the website of sellers and suppliers of goods and services, when retrieved from the web, would only be copies of such information and at best would be hearsay evidence. The law of evidence both in civil and criminal matters is still applied in the old form which is based on handwritten signatures and in paper form. The application of this rule to electronic commercial transactions would surely

⁵³ Article 3 (1) of Decree No.2011/1521/pm of 15 June 2011 Fixing the Modalities for the Application of Law No. 2010/021 of 21 December 2010 Regulating Electronic Commerce in Cameroon.

⁵⁴ Ibid.

⁵⁵ OECD Explanatory Memorandum and Guidelines on the protection of Privacy and transborder flows of personal data, 1980, quoted in Gringas and Nabaror, laws of the Internet p 45.

⁵⁶ Ibid.

⁵⁷ A. Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p 296.

⁵⁸ As such electronic writing was neither considered as a means of proof which made it difficult for electronic transactions which were becoming a normal business practice. Such weakness of proof in electronic writing, parties could conclude separate conventions on proof. But the evidentiary weight of such conventions had to be vigorously controlled by the judges which at times ended up with contractual disequilibrium on the obligations of the parties who had very little mastery of the internet. As such an adaptation of the law of proof became a necessity giving the role it plays in legal acts.

pose problems of how electronic information can be retained to be used as potential evidence in legal proceedings. Electronic documents falling within the ambit of the law of 2010 on electronic commerce are subjected to the same rules of evidence as paper documents.⁵⁹

The Cameroonian legislator has filled this gap of proof of electronic writings in an implicit rather than in an express manner by consecrating the validity of electronic writings to the validity of legal acts. It can be interpreted logically that the efficiency of electronic document is evident when writing can serve as an element of the validity of the legal act. The legislator did not see the necessity to bring it out in an express manner. Article 13 al 2 relates to electronic writing meanwhile article 14 treats the conservation of electronic writing.⁶⁰ This is to say all forms of evidence can be accepted such as: emails, digital photographs, electronic banking records, and logs, word processing documents, records of internet use and database electronic files, subject to appropriate levels of verification and integrity, any electronic record can be admitted in evidence if properly conserved. All commercial parties have to retain documents in the form in which the documents are issued or presented, electronic or otherwise and not doing this risks bringing up admissibility problems should such documents be needed in court. By aligning electronic documents with the same evidentiary rules as paper documents, it could be said that the law makers were more reactive than proactive in developing evidentiary rules specifically to electronic commerce. Maintaining electronic documents for ten years is not a very easy task. This is because the machines can get bad, material can mistakenly be deleted and virus can attack the material.

Another problem of submitting electronic material to courts as evidence is that of hard copies and printouts of electronic records when the original mails or information have been deleted or cleared out to maintain computer space. Print outs are considered as inferior copies⁶¹ given the secondary evidence rule. Hearsay or secondary evidence is most often not accepted by the courts. This prohibition to use hearsay and secondary evidence might leave out some relevant evidence based on the fact that it is untested and unreliable.⁶² This because hearsay evidence besides not being on oath is not good as evidence because the party against whom it is sought, is not given the opportunity to counter it.⁶³ If this rule of secondary evidence is applied to electronic documents, it would be quite unsatisfactory. To remedy such a situation the rule of Subpoena of documents can be used where a notice to produce is not respected. In such an instance, a copy may be admitted as evidence if the party served with the notice to produce fails to produce the original. Most often this exception is used in the case of lost documents, where production of the original is impossible. Also, applying this rule to electronic commerce would be dangerous.

Another area of evidence is the debate as to which version is original and which a copy is. About a minimum of eight copies of an electronic message comes to play from creation to receipt. The question then is, is it that created by the sender or that received by the recipient. There is actually no case law in Cameroon in line with evidence in electronic commerce and as such the problem of determination still prevails. The United Nations Commission on International trade Law (UNCITRAL) model law 1996⁶⁴ on Electronic Commerce includes a provision that deals with admissibility and evidential weight of data messages which is meant to include information generated, sent, received or stored by electronic, optical or similar means including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.⁶⁵ Article 9 goes ahead to provide that the rules of evidence must not deny the admissibility of a data message in evidence on the sole ground that it is a data message, nor where the data message is the best evidence available, on grounds that it is not the original form.⁶⁶

⁵⁹ Article 13 (2) relative to writing and signature and article 14 on the conservation of electronic documents of law no.2010/021 of 21 December 2010..

⁶⁰ Article 13 (1), « Lorsqu'un écrit est exigé pour la validité d'un acte juridique, il peut être établi et conservé sous forme électronique dans les conditions prévues aux articles 1317 et suivants du Code civil, relatifs à la preuve littérale ». Article 14 states « Lorsque le contrat est conclu par voie électronique et qu'il porte sur une somme égale ou supérieure à, un montant fixé par voie réglementaire, le contractant professionnel assure la conservation de l'écrit qui le constate pendant un délai déterminé également par voie réglementaire et en garantit à tout moment l'accès à son cocontractant si celui-ci en fait la demande. »

⁶¹ Printouts are considered inferior copies because they do not contain the date of transmission, the date of receipt, the detail list of recipients and linkages between messages sent and replies received.

⁶² A. Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p 298.

⁶³ *Mbuta A. William & Anor v Kontchou Ernest trading under the name of Auyerge, suit no.46/2004 CASWP*, unreported. A gendarmerie report tendered for evidence was attacked on appeal for allegedly being hearsay because the gendarme who made it was not called up at trial.

⁶⁴ UNCITRAL website: www.uncitral.org/pdf/english/texts/electcom/05-89450ebookpdf.

⁶⁵ Article 2, UNCITRAL Model Law on Electronic Commerce 1996.

⁶⁶ Article 9 (2) provides that information in the form of data message shall be given due evidential weight.

The model law holds that in assessing the evidential weight of a data message, regard has to be on the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified and any other relevant factor.⁶⁷ It would be stated that although this is an important provision to the prove of evidence in electronic commerce, the Cameroonian Law on Electronic Commerce did not integrate it into the provisions of its law on electronic commerce 2010 which is regrettable since proof of evidence plays an important role in the determination of justice.

d) Dispute Resolution

With more and more business being conducted through electronic commerce, dispute arising from misunderstanding, conflicting interest or malicious actions are inevitable.⁶⁸ A product or service purchased through the internet may have some hidden vices, may not be delivered and may be judged by the consumer as unsatisfactory and not meeting the requirements of fitness for purpose or may not be of merchantable quality. The difficulty of obtaining satisfactory redress may render recourse illusory. This difficulty is because of the distance that separates the two parties, the different legal frameworks, the cost and complexity of legal actions. As such dispute in E-Commerce are broad in scale both in quantity and complexity.⁶⁹ To guarantee the long term effects of e-commerce, there is the need for an effective dispute resolution mechanism.

Dispute resolution is a means of guaranteeing the minimal order and stability necessary for viable social cohesion. Electronic commerce as a new means of transaction is different in many ways from traditional business and therefore requires a new legal approach. The nature of electronic commerce questions the adaptability of the traditional litigation system and alternative dispute resolution used in commercial disputes to e-commerce. Although it is possible for these old systems to be used in e-commerce, it would be opined that there is the necessity to develop new dispute resolution tools that would accommodate electronic commerce. While preserving the traditional function of resolving disputes, new information and communication technology should be made available to those mechanisms.

As new information and communication technology is widely used in commercial activities, it should likewise be made use of by mechanisms formulated to supervise such activities; the court mechanism and alternative dispute mechanisms should be reformulated to introduce the use of internet in dispute resolution.⁷⁰ It would be held that the Cameroonian courts should step up the use of computers in general and internet facilities in particular in the area of dispute resolution so as to be up to date with the era of e-commerce. The internet has fundamentally changed social and economic life, the legal field needs to follow suit and adopt new policies in dispute resolution. Development should be made to accommodate technological improvements or else outdated theories might likely obstruct the smooth functioning of dispute resolution. The Cameroonian legislator has recognized the recent developments in commercial transactions and brought out a law on electronic commerce. As such there is the need to develop a parallel dispute resolution system with modern technological developments in Cameroonian courts. If not the law would be a simple window dressing.

V. CHALLENGES TO ELECTRONIC COMMERCE

a) Reliability and Security of Electronic Signature

Signature is any name or symbol used by a party with the intention of constituting it his signature.⁷¹ A document needs to be signed by a particular person so as to confirm its authenticity. Signature has been the main method a person uses as a means of proof of identity and material expression of intent and execution of a

⁶⁷ Article 9 (2), UNCITRAL Model Law on Electronic Commerce 1996.

⁶⁸ UNCITRAL Report on the work of its 29th session, U.N. General Assembly Official Records Supplement, No.17 (A) 15/17, Annex 1; See also J.Y. Gliniecki&C.G.Ogada, "The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce", 13, N.Y. Int'l L. & Bus, (1992) 117.

⁶⁹Y.Zhao, *Dispute Resolution in Electronic Commerce*, MartinusNijhoff, Leiden, U.K., 2005, p 7

⁷⁰ The present legal remedies in the context of online transactions are not the most effective means of redress because of the nature of long-distance transactions and jurisdiction problems. Moreover, as consumer transactions generally involve a small amount of money, it is unrealistic to oblige disputing parties to submit large filing fees for arbitration. With the present mechanisms, a case could be prolonged for a year or longer, a ridiculous stretch of time for a dispute over several dollars. Thus, only when it is demonstrated that disputes can be heard more quickly and disposed of more effectively with the use of the Internet that the net effect will achieve consumer trust in real consumer protection. See, Y Zhao, *Dispute Resolution in Electronic Commerce*, MartinusNijhoff, Leiden, U.K., 2005, p 38.

⁷¹ UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International use of Electronic Authentication and Signature Methods*, United Nations, Vienna, 2009, p 2.

document. Signatures on a document indicate the provenance of the document and the intention of the signatory with regard to the document.⁷² Signatures in the paper based environment perform three functions: that of identification; evidentiary function which provides certainty as to the personal involvement of the person who has signed; and it associates the signatory with the content of the document.⁷³

Electronic signatures have taken a functional equivalence of hand written signatures⁷⁴ i.e. to identify the person, provide certainty as to the involvement of that person in the act of signing, to associate the person with the content of the document depending on the nature of the document, they also identify other users to attest to the intent of a party to be bound by the content of signed contract, the intent of a person to endorse authorship. Article 7 paragraph 1 of the UNCITRAL model law on electronic commerce holds that:

“Where the law requires a signature of a person, that requirement is met in relation to a data message if:“(a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and“(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.”

The Cameroonian law on electronic Commerce defines electronic signature as a signature obtained by an algorithm of asymmetric figures, permitting to authenticate the issuer of a message and to verify its integrity.⁷⁵ This definition is inline with that of article 2 of the UNCITRAL Model law on Electronic Signatures adopted on the 5th of July 2001 which talks of data in an electronic form that is logically associated with a data message which may be used to identify the signatory in relation to the data message and the approval of the information. The Cameroonian legislator by using this method has made it open ended and does not actually promote any specific technology. This means that electronic signatures could take any form: could be a digital signature, a digitized image of hand written signature or it may be based on biometrics such as finger prints or iris scan. The security of the electronic signature would therefore vary depending on the type of electronic signature. No matter how the term electronic signature is used, it simply is a method used to identify a person and to indicate that person’s approval.

Electronic signatures are meant to provide a level of security to ensure that the electronic message is from the purported sender and is unaltered. The level of security will depend on parties and upon factors such as commercial and legal risk. Parties’ involved in transactions in the internet need to frequently authenticate the message and verify the identity of the sender. Electronic signatures are supposed to meet the requirements of reliability in the light of the required circumstances. Offers done by electronic commerce i.e. linked with the supply of goods and services have to be accompanied by contractual conditions which are applicable in a way that permits their conservation and reproduction.⁷⁶ Without any prejudice to the condition of validity mentioned in such offers, this engages the liability of their authors so long as they remain accessible inline with their circumstances including their doings.⁷⁷ Electronic signatures may take digitize forms, digital form or public key encryption. The Security of each varies. Digitized signatures are simply hand written signatures that are scanned into a computer and then placed electronically into an electronic document to give the appearance of a traditional signature. The level of security here to an extent is low. As for digital signatures, they are attached to specific data such as email, computer file or web page. Although often used as a signature in the real sense, the expression digital signature is misleading in that it is in the form of a digital certificate. It is the transformation of an electronic record using an asymmetric cryptonyms and a hash function such that a person having the initial untransformed electronic record and signers public key can accurately determine if the private key corresponds to the public key or whether the electronic document has been altered since transmission. This is intended to bring greater legal certainty and reliability to the use of electronic signatures.

For the security and authentication of information of certificates and electronic signatures Article 35(1) of the law on Electronic Commerce 2010 holds that the use of such signatures by a physical or moral person will be fixed by the particular text. At this level there is yet no particular text in existence which leaves the security

⁷²A. Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p 74.

⁷³ UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International use of Electronic Authentication and Signature Methods*, United Nations, Vienna, 2009, p 2.

⁷⁴ Functional equivalence means the functions performed by writing, signature and original with a view of seeing whether these functions could be fulfilled through e-commerce technics. Writing is accessible to all and has a high degree of permanence and also provides evidence to courts and administrative authorities. See I. Carr, *International Trade Law*, 4thed, Routledge-Cavendish, London, U.K., 2010, P109.

⁷⁵ Article 2 of the General Provisions on the Law on Electronic Commerce 2010.

⁷⁶ Article 11 (1) of Law of 2010 on Electronic Commerce in Cameroon.

⁷⁷ This is in line with article 6(1) of the UNCITRAL rules of 1996.

of electronic signatures open. At this stage it can be said that electronic commerce in Cameroon is at a nascent state and still effective. One way of resolving uncertainty with electronic signatures would be to follow up the electronic document with a paper document. However, the paper document defeats the advantage of speed, efficiency and economic benefits that are linked to electronic commerce.

b) Uncertainty in Determination of the Liability of the Parties

There are three parties that are involved in the use and creation of electronic signature: the signatory, who is the holder of the signature creation device;⁷⁸ the third party who is known as the certificate service provider and who plays an important role in adding integrity to the electronic signature by issuing certificates that confirm the link between, the signatory and the signature creation data;⁷⁹ and the party who relies on the electronic signature. In electronic commerce there is the need for a high degree of reliability and security in the issue and maintenance of digital certificates and infrastructure and when it is not respected it might lead to a defective issue or maintenance. When this happens there is the need to hold the responsible party liable. The parties here have the duty of care to store all the information and signatures in a secured manner. The law in its article 36 and 37 imposes responsibilities on all the three persons involved in the use and creation of electronic signatures which have legal effects. The responsibilities are that: they have to take minimal precautions fixed by the various texts and have to avoid all illegitimate use of personal equipment relating to his signatures; must see into the truth of all information that they have declared to the authority. Be assured of the truth of information that is declared to all persons to whom he has asked to make his signature.⁸⁰ In the case of violation of the above rules the holder of the signature will be responsible for the prejudice caused to somebody. The signatory, as the holder of the signature creation data that creates signatures that have legal effect, is expected to keep it under control and take reasonable care to avoid its unauthorised use.

When an electronic signature creation data has been compromised, the signatory has an obligation to inform by means provided by the certification service provide or use reasonable efforts to inform those who are likely to rely on the electronic signature. He is also to ensure that material representation made by him that are relevant to acquire a certificate are accurate and complete, during the life time of the certificate. The life cycle of the certificate normally has to run from the application to the revocation or expiry of the certificate.

The certificate service provider also has obligations to respect where the electronic signature used has a legal effect: Adhere to representation made in its policies and practices; Exercise reasonable care to ensure accuracy of information included in the certificate during its life cycle, include information such as the identity of the certificate service provided, limitation of the value for which the signature creation data may be used; make available to the relying party information that would be relevant to a particular certificate; ensure availability of a notification system to the signatory which the signatory can use where the signature creation data has been comprised; Use trustworthy systems and human resources in conducting his service.⁸¹ The relying party has the obligation to verify the reliability of an electronic signature and where it is supported by a certificate he has to take “reasonable steps to verify the validity, suspension or revocation of the certificate and observe any limitations with respect to the certificate. The contractual liability of the electronic supplier of goods and services is automatically engaged in the case of non-execution of his obligations.⁸² The electronic supplier of goods and services can also be held liable for negligence.⁸³

However, it should be noted that holding any of the parties liable in electronic commerce is not an easy task as it is in theory. Firstly, there is the problem of evidential uncertainty due to the nature of electronic signatures. Electronic signature technology cannot make a distinction between authorised electronic signatures. Meanwhile forged hand written signature can easily be distinguished from genuine signatures if there is meticulous control and expertise. Secondly, another difficulty of holding one of the liable parties in electronic commerce is based on the fact that the parties can be held liable either in negligence or in contract. In the case where action is taken under the law of negligence, there is uncertainty based on the fact if the relationship is sufficiently proximate that one party would owe the other a duty of care especially when it comes to economic loss since it is uncertain, unsatisfactory and still developing with no governing rule that can provide guidance as to the outcome of particular facts. It is difficult to understand if the certification authority would owe a duty of care to the relying party. Actions in contract will also pose problems of breach of a contract because of the lack

⁷⁸ Article 35 of law No.2010/021 of 21 December 2010 on Electronic Commerce in Cameroon.

⁷⁹ Article 36 Ibid.

⁸⁰ Ibid.

⁸¹ Art 35 of law no.2010/021 of 21 December 2010 on Electronic Commerce in Cameroon.

⁸² Article 26 (1), of Decree no.2011/1521 of 15 June 2011 on the modalities for the application of law No. 201/021 of 21 December 2010 on Electronic Commerce.

⁸³ Article 26 (2), Ibid.

of a contractual link between the signatory who is the subscriber and the relying party. Lastly, the application of the law on electronic commerce is not very clear as there is yet no precedence to this regard.

It would be recommended that since the law provides in its article 40 (2) that a new law will provide directions on the creation and exercise of the duties of certification authorities, that the law should bring solutions to the uncertainties of the liability of the parties.

c) Cross border recognition of certificates

In electronic commerce reliability is of the essence in the determination of the legal effectiveness of an electronic document. This is because reliability may vary from one jurisdiction to the other. Cameroon has taken the position of equivalence by stating in its article 40(1) of the law of 2010 that certificates and signatures delivered by a certification body established in a foreign country has the same values like those delivered by a certification authority in Cameroon. Despite that law holds that such certificates are recognised by an accord of mutual understanding concluded by the competent authorities of the concerned states, it has gone further to state that the conditions for legal recognitions of electronic certificates and signatures from foreign countries would be brought out by a specific text.⁸⁴ The specific text has not yet been brought out thus limiting the effectiveness of this provision.

Furthermore, the provision in article 40 (1) of law of 2010 is based on the fact that reliability requirements for electronic signatures may vary from jurisdiction to jurisdiction. As such certificates issued out of Cameroon would be legally effective if they offer a substantial level of reliability and if they are coming from a recognised certification body and if such a country has a mutual understanding with Cameroon. As such countries that do not have a mutual understanding with Cameroon; their certificates would not be recognised which again creates an obstacle since electronic business is not only done with countries that have a mutual understanding with Cameroon. There is the need to enlarge the scope of application of electronic certificates so that most countries can be included and people carrying out business with countries that do not have a legal understanding would have a legal basis for their actions. The principle of party autonomy is well recognised in international trade, so too should it be extended to electronic certificates so that parties should be free to agree on the use of certain types of certificates and electronic signatures for their cross border commerce. However, parties must understand that such freedom has to be curtailed by mandatory provisions.⁸⁵

Finally, it would be submitted that the text of application for the recognition of electronic certificates be adopted so as to avoid the various ambiguities linked with electronic certificates from other jurisdictions.

VI. CONCLUSION

Electronic commerce is fast developing and it is for Cameroonians to take advantage of the modern information and communication technology offered them to facilitate their commercial activities. However, they must bear in mind that there are problems of reliability, certainty and predictability. For an effective infrastructure for securing electronic commerce, there is the need for a concerted and comprehensive development of various factors such as laws, policies, self-regulation, technical standards and law enforcement. The law on electronic commerce in line with the UNCITRAL model law has tried to address some legal issues concerning electronic commerce and most pertinently the recognition of the functional equivalent of signatures and the cross border electronic certificates. However, it will be opined that much still has to be done in regulating electronic commerce especially in the area of the determination of liability of the parties to an electronic contract, the legal recognition of electronic signatures and even the proof of electronic signatures and cross border certificates. This law need to be made effective by putting in place a sure system of recognition of electronic signature and an easy procedure for holding parties liable.

Furthermore, it can be opined that many have gone into E-commerce without understanding the legal implications. There is therefore the need for people to be educated and trained in the area of e-commerce so that they should not be scammed especially when it is being carried out at the international level because international trade transactions involve heavy sums of money. The law makers have made a step in adopting a law on electronic commerce despite some gaps such as those of special laws of application that are still lacking. It is now time for the judicial authorities to play their role by applying the law and for those involved in electronic commerce to take care of their affairs. It is their duty to be versed with the contractual terms and conditions before entering into an electronic contract. The judicial system for handling claims in electronic commerce needs to be overhauled so as to meet up with the challenges of the modern technology especially that of electronic commerce.

⁸⁴ Article 40 (2), Law No.2010/021 of 21 December 2010 on Electronic Commerce in Cameroon.

⁸⁵ Art 39, Law of 2010/021 of 21 December 2010 states that «Autorité de certification doit tenir un registre électronique des certificats à la disposition des utilisateurs »

The Cameroonian legislator has maintained the international aspect of electronic commerce in its law, however, this is a national law, and it would be inadequate to cope with the regulation of e-commerce which is global in character. There is a need for international cooperation to limit fraud in e-commerce because of the cross border nature of international commerce.

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