HIPSSA Project

Support for Harmonization of the ICT Policies in Sub-Sahara Africa

MINISTRY OF INFORMATION AND COMMUNICATIONS TECHNOLOGY (MICT)

TRANSPOSITION OF SADC CYBERSECURITY MODEL LAWS INTO NATIONAL LAWS FOR NAMIBIA, 2013

The Use of Electronic Transactions & Communications Bill

Windhoek, 22 July 2013 .

ITU International Telecommunication Union
Committed to connecting the world

European Commission

Session II: Provisions in 2013 of Draft Bill

- **Chapter 1** –
  - Section 1: Definitions
  - Section 2: Objects of the Bill
  - Section3 : Interpretation
  - Section 4: Sphere of Application
- **Chapter 2** – Governance provisions
- **Chapter 3** - Legal recognition of data message
- **Chapter 4** – Legal effect of data messages

What are objects of Bill? I

- **Sect 2: Overall** – "to provide for the development, promotion and facilitation electronic transactions and related communications use"
- remove and prevent barriers to electronic transactions and related communications ;
- promote legal certainty and confidence in electronic transactions and communications; and

What are objects of Bill? I I

- promote e-government services and electronic commerce and communications with public and private bodies, institutions and citizens;
- develop a safe, secure and effective environment for the consumer, business and public agencies or bodies to conduct and use electronic transactions

What are objects of Bill? III

- promote the development of electronic transaction services responsive to the needs of online consumers;
- ensure that, in relation to the provision of electronic transactions services, the special needs of vulnerable groups and communities and persons with disabilities are duly taken into account;

What are objects of Bill? IV

- ensure compliance with accepted international technical standards in the provision and development of electronic transactions and related communications ; and
- ensure that the interest and image of the Republic are not compromised through the use of electronic transactions and communications
- **(other objects: Cybbercrime/DataP)**

Chapter 1 – Significant definitions 1

- "access" : in relation to any information system or data, means instruct, communicate with, store data in, retrieve data from, or otherwise make use of any of the resources of the computer system.
- "addressee": of a data message, means a party who is intended by the originator to receive the data message, but does not include a party acting as an intermediary in respect of that data message

Significant Definitions II:

- "data" means electronic representations of information in any form
- "data message" means data generated, sent, received or stored by electronic or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, mobile communications, such as SMS messages, audio and video recordings, telegram, telex or telecopy.
- CONSTANT REFERENCE WILL BE MADE to this term

Significant definitions III

- “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, other intangible form or similar capabilities
- “electronic communication” means communication by means of data messages;
- “electronic record” means a record generated, communicated, received or stored in the form of a data message in an information system

Advanced Electronic signature

- Signature duly recognised: dealt with in chapters 4,5 & 8 ; created and can be verified through the application of security procedures that ensures that an electronic signature:
  - Is unique to person using it;
  - Is Capable of identifying person;
  - Created under sole control of person;
  - Linked to e-communication manner if altered, alteration detectable and/or signature invalid
- We have a two-tier e-signature regime – discuss later

Definition: Electronic signature

- "electronic signature" means data, including an electronic sound, symbol or process, executed or adopted to identify a person and to indicate that person's approval or intention in respect of the information contained in a data message and which is attached to or logically associated with such data message. Illustrated: 3 examples

+27833761560
pistot@unisa.ac.za

Significant definitions IV

- "information system" means the facilities for generating, sending, receiving, storing or otherwise processing of data and data messages and includes a device or combination of devices, including input and output devices, and capable of being used in conjunction with external files, which contain computer programs, electronic instructions, input and output data, that performs logic, arithmetic, data storage, retrieval, communication control and/or other functions

Significant definitions V

- "originator" of a data message means a person or party by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person or party acting as an intermediary with respect to that data message;
- "public agency(-ies) or body(-ies)" – OMAs,/ SOEs/ Local Auth's / Reg. Counc's/ commissions
- "transaction" means an action or set of actions of either a commercial or non-commercial nature, including the provision of information and e-government services

Sect 3- (Scope of) interpretation I

- Any reference in this Act to law shall include reference to all sources of Namibia law, including statutes as well as common law and customary law, regulations or other subordinate legislation – unless specifically excluded

Sect 3 – (Scope of) interpretation II

- A general amendment provision:

  - An expression in a law, whether used as a noun or verb, including the terms "document", "record", "file". "submit", "lodge", "deliver", "issue", "publish", "write in", "print" or words or expressions of similar effect, must be interpreted so as to include..... a data message unless otherwise provided for in this Act

Sect 4: Sphere of application I

- (Will) apply in respect of any electronic transaction or data message used or intended to be used in relation to electr. transactions and communications
- (Exceptions) where, and if applicable, to the extent, it is excluded by this Act or by further notice in the Gazette.
- Nothing in this Act shall be construed as:-
- requiring any person to use or to accept data messages (not enforceable).....AND

Sect 4 : Sphere of application II

- prohibiting a person engaging in an electronic transaction from establishing reasonable requirements about the manner in which it will accept data messages**.....BUT**
- a person's agreement to use or accept data messages may be inferred from such person's conduct.
- Parties may agree to exclude the application of this Act between themselves (inter partes)....or derogate from or vary (such) by agreement

Sect 4: Sphere of application III

- This Act does not limit the operation of any law that expressly authorises, prohibits or regulates the use of data messages, including any requirement by or under a law for information to be posted or displayed in a specified manner, or for any information or document to be transmitted by a specified method.
- **(Note: many statutes in Namibia already contain provisions for e-filing / records and e-communications. Eg., FIA, VAT, POCA, Labour Act)**

Sect 4: Sphere of application IV

- The exceptions clause: Data messages and secure electronic signatures do not satisfy the requirements of writing and signatures i.r.o
  - **Immovable property transactions - alienation of land statute**
  - **Wills (testaments)**
  - **Bills of exchange**
  - **(Others to be assessed for exception)**

Provided that ……

Sect 4: Sphere of application V

- ITS FLEXIBILITY:
- Provided that where technology has advanced to such an extent, and access to it so widely available, or adequate procedures and practices have developed…
- the Minister may after consultation with the Cabinet, extend the application of this Act or a provision of this Act……
- for the purposes of trial of the technology and procedures, subject to such conditions as he or she may think fit.

Chapter 2 Governance of the Bill:I

- Section 5 : Minister's **functions / powers:**
  - determine regulations, directives and policies for the development, management, and facilitation of e-transact's/comm's
  - seek advice, consult, prepare, review and publish the national e-Governance Strategy (Note: e-strategy adopted by Cabinet in 2005)
  - co-ordinate information technology developments at national level; and
  - monitor and ensure compliance with this Act

Chapter 2 Governance of the Bill: II

- Sect 6: Minister to be served/ advised by Advisory body - the Electronic Information Systems Management Advisory Council (EISMAC)
- Then follows: standard governance provisions on its composition, alternate membership, qualification of membership, terms of office, filling of vacancies, remuneration, meetings procedures, secretariat functions, committees, disclosure of interest, etc

Sect 16 - Functions of the Council – I

- advise the Minister in relation to e-transact's:
  - any matter relating to the application and management of electronic transactions and communications and information systems standards and practises and, in relation thereto, issue(regulations?) (directives?) on best practices for the use thereof to the benefit of Namibia;
  - on matters related to the recognition of advanced electronic signatures;

Sect 16 – functions of Council - II

- ensure the compliance with international requirements including standard practices and protocols on the use of electronic transactions and communications;
- the further advancement of research and development …incl its convergence with other media, telecommunications and electronics in consort with provisions of the Communications Act ;
- recommend the commissioning of expert evaluations, conduct studies & **collection of data (check for Statistics Act conflicts?)**

Sect 16 – functions of Council - III

- adoption of regulations for the stability, protection and security of data systems and secure data bases, and on the rights of persons and parties to access to information held in such data formats;
- regulations to curtail the harmful practices and illegal content on the Internet and other information systems and data services
- compliance on complaints from online consumers, clients and persons or parties

Sect 16 – functions of Council - IV

- to encourage the optimum use of electronic transactions and communications in government, business and other sectors to improve efficiency, effectiveness and competitiveness;
- commissioning of expert evaluations, conduct studies and collection of data
- the stability, protection and security of data systems in Namibia
- acts as are necessary, incidental or conducive to the attainment of the objects of this Act.

Sect 16 – functions of Council - V

- In exercising functions the **jury is still out on:**
  - Regulations (but could it be by way of directives ?)
  - Can the Minister issue sanctions where there is non-compliance / And then to what extent?
  - Can the Minister's functions extend to security of data systems?
  - Can some or all of the functions be executed by CRAN 9on advice of Council) – as an amendment of the Communications Act 2008?

Chapter 3- Legal Recognition of data messages I

- **Section 18**: Data shall not be denied legal effect, validity or enforceability **solely on the ground** that it is in the form of a data message
- **Section 19**: Between the originator and the addressee of a data message, **a declaration of will, other statement or action** shall not be denied legal effect, validity or enforceability **solely on the grounds** that it is in the form of a data message.
- Note: CRITICAL EVIDENTIARY PROVISIONS

Chapter 4: Legal effect of data messages– e-writing: I

- Sect 20: Where a law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
- For the purposes of this section, it includes

  * making an application;

  *making or lodging a claim;

  *giving, sending or serving a notification, statement or declaration; * lodging a return; **or** making a request; etc

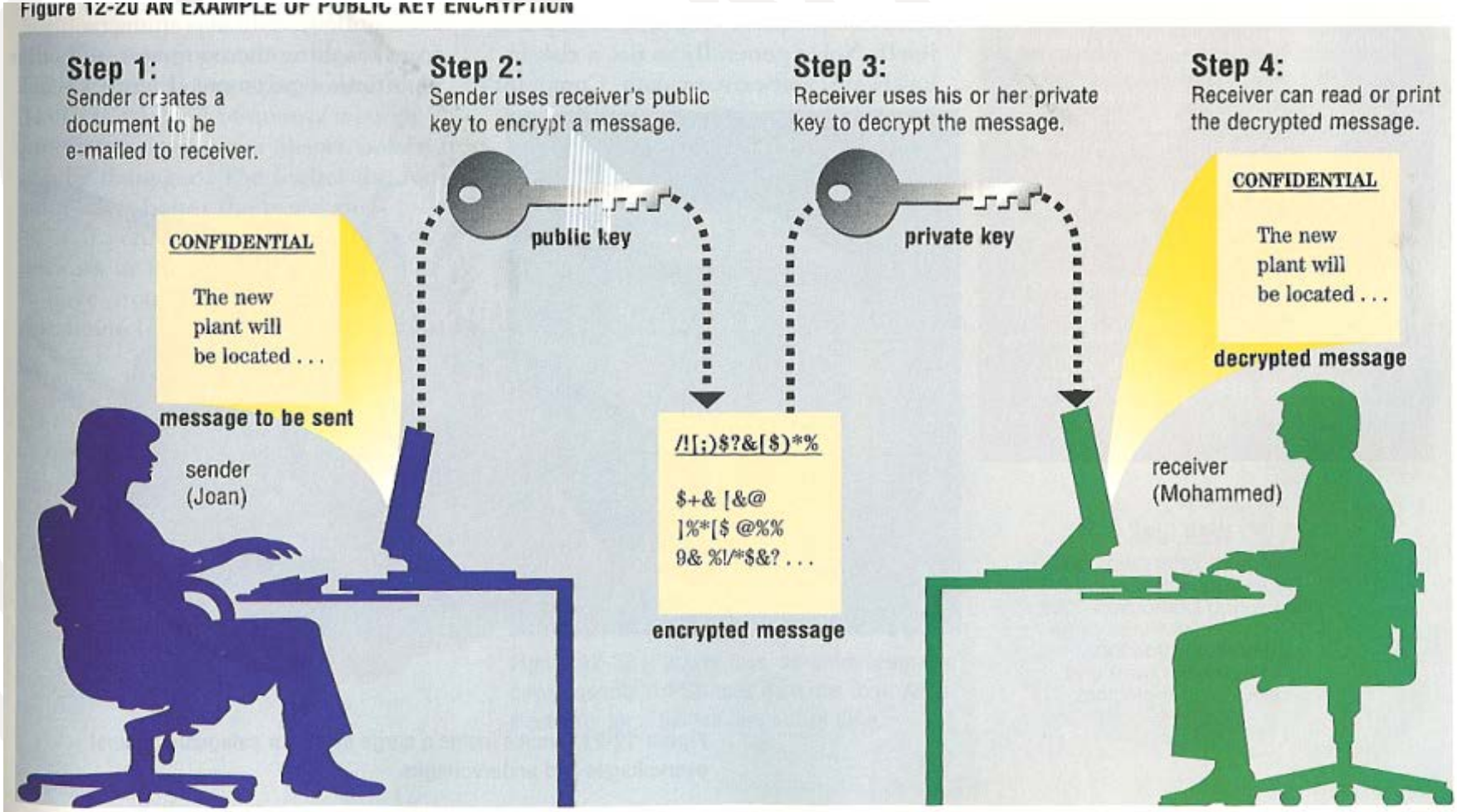
Chapter 4: Legal effect of data messages : 1

- **Sect 21- e-signatures (*vide* defn.)** - If a law requires the signature of a person, an advanced electronic signature will be deemed to be valid, (provided it is accredited in terms of Chapter 8)
  - Applies if – it can identify the person & the person's approval
  - Method used is reliable
  - Can be obligatory, or describes the consequences if absent.

  Repeat NOTE: two-tier e-signature regime – 'ordinary' & advanced (or "secure")

Secure E- SIGNATURE sect 21: II

- Law requires: chapter 4, 5 & 8 9 – Prof Tana to illustrate further during training session(s) on application of advanced signature regime



Chapter 4: Legal effect of data messages : -e-signature : III

- Where an electronic signature is not required by the parties to an electronic transaction an expression of intent or other statement is not without legal force and effect merely on the grounds that- (a) it is in the form of a data message; or (b) it is not evidenced by an electronic signature, but is evidenced by other means from which such person's intent or other statement can be inferred. (**eg Emails!)**
- **Reminder:** The provisions in this section – not applicable to exceptions set out in the law

Chapter 4: Legal effect of data messages – e-signature: IV

- Where law requires a signature, statement or document to be **notarised, acknowledged, verified or made under oath** that requirement is met if the advanced electronic signature of the person authorised to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message.
- **-Ditto- when using seals, certifying electr copies**

Chapter 4: Legal effect of data messages : integrity - I

- **Sect 24 – original information**: law requires information to be presented or retained in its original form, that requirement is met by a data message if:
  - there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and
  - that information is capable of being displayed in the form of a data message to the person to whom it is to be presented.

Chapter 4: Legal effect of data messages – integrity: II

- Where relied upon: required:
  - criteria for assessing integrity shall be whether the information has remained complete and unaltered,
  - the level of reliability ...be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

Chapter 4: Legal effect of data messages – sect 25 - admissibility / evidence : I

- the application of the rules of evidence shall apply so as (not) to deny the admissibility of a data message in evidence:
  - on the sole ground that it is a data message; or,
  - if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

Chapter 4: Legal effect of data messages – sect 25 - admissibility / evidence : II

- Information in the form of a data message shall be given due evidential weight.
- In assessing the evidential weight of a data message: take into account –
  - reliability of …. (how) data message was generated, stored or communicated;
  - the integrity of the data message was maintained;
  - (how) its originator was identified
  - any other relevant factor
- admissible in any civil, criminal, administrative or disciplinary proceedings (**NOTE : EVMs??**)

Chapter 4: Legal effect of data messages – sect 25 - admissibility / evidence : III

- AND also applies to: the rules of a self regulatory organisation or any other law or the common law, as evidence of the facts contained in such record, copy, printout or extract, provided –
  - the affidavit is made by the person who was in control of the system at the time when the data message was created;
  - Reliability & integrity: how generated, stored, or communicated & info system; how system maintained

Chapter 4: Legal effect of data messages – sect 26 – retention of e-records

- Certain documents, records or information be retained? requirement met by electronic record retention, (but)
- On condition It is a data message; and
- It is retained in the format in which it was generated, sent or received, or (must) demonstrate that the info generated, sent or received (is accurate); and
- It is retained in a form (to)identify of the origin and destination of a electronic record or data message and the date and time when it was first generated, sent or received and the date and time it was first retained.
- **(NOTE: E-records systems!)**

Chapter 4: Legal effect of data messages – sect 27 – production of docs/info: I

- **Where a law requires production of a doc or info, the e-form of that doc /info in data message is met if (as long as completed & not altered),**
  - considering all the relevant circumstances at the time it was sent, the method of generating it was reliable ; & its maintenance & integrity are assured;
  - it was reasonable to expect that the information contained therein would be readily accessible so as to be usable for subsequent reference

Chapter 4: Legal effect of data messages – sect 28 – other requirements : I

- Where any law requires or permits: send a doc or info by post or similar service - that requirement met if e- form of that doc/info is sent to the electronic address or designated information system provided by the addressee
- multiple copies of a document to be submitted to a single addressee at the same time is satisfied by the submission of a single electronic communication that is capable of being reproduced by that addressee.

NOTE: see the important role of IT experts

U/ETC Bill practical daily use in current statutes – examples

- **Labour Act of 2007** (sec 133) " In any legal proceedings a statement or entry …by the use of a computer…is admissable in evidence.."

  - Provision in Draft Bill assist: "admissibility & evidential weight of data message

- **Anti – Corruption Act of 2003** (sec 27(2) …to disclose data stored in electronic form"

  - Legal recognition, retention of records

- **Companies Act 2008** – registrar can issue directives.

THUS, BILL TO BE SEEN AS OMNIBUS LEGISLATION

IT Professionalization

- General comment:
- CHAPTER 12: THE INFORMATION TECHNOLOGY PROFESSIONS' SOCIETY

- (Still in process to be developed – stakeholders consulted)
- (9 sections provided for – sections 78 to 86)

Hopefully the draft proves our harmonization / transposition efforts THANK YOU.....

Gordon Elliott
ITU national EXPERT
g.elliott@gdeconsult.com

Union Internationale des Télécommunications
International Telecommunication Union