



# THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

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Vol. CI—No. 89

NAIROBI, 30th December, 1999

Price Sh. 40

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GAZETTE NOTICE No. 7560

## Y2K LEGAL GUIDELINES

IT IS notified for the information of the general public that the National Y2K Steering Committee has formulated the following legal guidelines which may be useful and applicable for the management of the Y2K problem in Kenya:-

### Y2K LEGAL GUIDELINES FOR KENYA

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## PART I - PRELIMINARY

### 1. EXECUTIVE SUMMARY

Literally, "Y2K" means "(Y)-Year (2)-Two (K)-Kilo (Thousand)". A great deal of discussion has gone into the issue of the Y2K problem, otherwise described as the Millennium Meltdown or Doomsday 2000. In these Guidelines "Y2K" and cognate expressions will largely be used in the technical sense. Some experts say Y2K is not a "virus" or a "bug"; that it is the result of a conscious software programming decision. They say that in the formative days of computer programming, software developers had limited amount of computer memory to write programs. They tried to save programming space (and costs) by storing dates using only two digits instead of four (for instance, 99 instead of 1999). There is also the factors that 2000 is a leap year and 1900 was not. As a result of both these factors, there would thus be a problem of roll over from the 20<sup>th</sup> to the 21<sup>st</sup> century.

This is true for software, hardware and embedded chips. Though the cause appears simple, rectifying it is difficult due to the wide range of software languages, applications, microchips (embedded systems), and others currently in use today. Just one of the reasons it is so difficult to fix in time is the sheer number of date formats in common use. Dates are used by computers to process and to communicate this data to other computers. If the dates are not processed correctly, the data may be corrupted or distorted and the wrong information may be processed, which, due to the pervasive and interdependent use of computers worldwide, could adversely affect almost all sectors of society.

A lot of uncertainty remains in many Government circles worldwide, in the public mind and in the corporate world as to the exact nature, possible effects and resolution of the Y2K problem. Significantly, however, the disruption, inconvenience and huge costs estimated by some experts prompted the formation of the National Year 2000 Steering Committee and the National Y2K Coordination Centre (NY2KCC), government-sponsored groups whose role is to coordinate awareness and action regarding the problem.

These Guidelines aim at appraising the reader of the critical legal issues that may arise from Y2K failure. The Guidelines deal with the question of who may shoulder liability for Y2K failure; defences that may be available; reliefs and remedies; the possibility of representative suits or class actions; other dispute resolution mechanisms that may be available; as well as remediation and mitigation of injury and loss. The Guidelines also embody procedure for Y2K actions and prosecutions.

In this context the Guidelines have two broad objectives, namely to give users a framework to determine whether they have any legal remedy in relation to computerized systems which suffer Y2K failure and to indicate legal defences suppliers/advisors may rely on in claims against them in relation to any Y2K actions.

## 2. INTERPRETATION OF TERMS

In these Guidelines unless the context otherwise requires-

"claimant" means a plaintiff or claimant in a Y2K action or Y2K dispute;

"consumer" includes an individual, group of individuals, corporation, or agency (including a governmental and non-governmental agency) who acquires a product for purposes other than for resale;

"contract" means a contract, tariff, license, or warranty;

"developer" with reference to software or firmware or any other information technology product includes any person who holds himself or herself out as a programmer, designer, and manufacturer and any person who develops a program in the context of remediation;

"economic loss" includes, but is not limited to, loss of profits or sales, business interruption, loss indirectly suffered as a result of the defendant's wrongful act or omission, loss that arises because of the claims of third parties;

"information technology product" means a computer, a computer program, or computer software, or product using a computer program, chip, or computer software;

"maker" in respect of Y2K statement means each person or entity, that—

(a) issues or publishes any Y2K statement;

(b) develops or prepares any Y2K statement; or

(c) assists in, contributes to, or reviews, reports or comments

on, during, or approves, or otherwise takes part in the preparing, developing, issuing, approving, or publishing of any Y2K statement;

"material defect" means a defect in any product, whether tangible or intangible, or in the provision of a service, that substantially prevents the product, whether tangible or intangible, or in the provision of a service, that substantially prevents the product or service from operating or functioning as designed or intended;

However, defects that have an insignificant or *de minimis* effect on the operation or functioning of a product that, as a whole, substantially operates or functions as designed, or that have an insignificant or *de minimis* effect on the efficacy of the service provided,

may not be regarded as material defects within the meaning of this definition;

"person" means any natural person and any entity, organization, or enterprise, including but not limited to corporations, companies, joint stock companies, associations, partnerships, and governmental or non governmental entities;

"product" includes goods, services or technology;

"property" includes tangible and intangible property, data, and information;

"republish" or "publication" in respect of a Y2K statement means any repetition, in whole or in part, of a Y2K statement originally made by another person;

"Y2K action" means any action of any kind brought under any law, in which-

(a) a Y2K claim is asserted; or

(b) any claim or defence is related, directly or indirectly, to an actual or potential Y2K failure.

"Y2K claim" means any claim or cause of action of any kind, whether asserted by way of claim, counterclaim, cross-claim, third-party claim, or otherwise, in which the plaintiff's alleged loss or injury resulted, directly or indirectly, from an actual or potential Y2K failure;

"Y2K compliance disclosure" means any Y2K statement—

(a) clearly identified on its face as a Y2K compliance disclosure;

(b) inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form; and

(c) issued or published by or with the approval of a person or entity with respect to Y2K processing of that person or entity or of products or services offered by that person or entity;

"Y2K compliant" means -

(a) with respect to an information technology product, that the product does not have a Y2K failure; and

(b) with respect to a business, corporate, governmental or non governmental entity that none of that business's or entity's information technology products that materially affects the business's or entity's capacity to deliver goods, technologies and services has a Y2K failure;

"Y2K failure" (otherwise referred to generally as Y2K problem, millenium bug, millenium challenge, millennium meltdown, millenium glitch, millenium date-change, Y2K date-change, century date-change, or other cognate expressions) means any failure by any product, device or system (including, but not limited to, any computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions, however constructed, in processing, calculating, comparing, sequencing, displaying, storing, transmitting, or receiving date-related data, including failure in accurately dealing with or failure in accurately accounting for transitions or comparisons from, into, and between the years 1999 and 2000, or failure to recognize or accurately to account for the year 2000 as a leap year.

"Y2K website" or "Y2K Internet website" means an Internet website or other similar electronically accessible service, clearly designated on the website or service by the person or entity creating or controlling the content of the website or service as an area where Y2K statements concerning that person or entity are posted or otherwise made accessible to the general public;

"Y2K processing" means the processing (including calculating, comparing, sequencing, displaying, or storing), transmitting, or receiving of date data from, into, and between the 20<sup>th</sup> and 21<sup>st</sup> centuries, and during the years 1999 and 2000, and leap year calculations;

"Y2K remediation product or service" means a software program or service licensed, sold, or rendered by a person or entity and specifically designed to detect or correct Y2K processing problems with respect to systems, products, or services manufactured or rendered by another person or entity;

"Y2K statement" means any communication or other conveyance of information by a party to another or to the public, in any form or medium—

- (a) concerning an assessment, projection, or estimate concerning Y2K processing capabilities of an entity, product, service, or set of products and services; or
- (b) concerning plans, objectives, or timetables for implementing or verifying the Y2K processing capabilities of an entity, product, service, or set of products and services; or
- (c) concerning test plans, test dates, test results, or operational problems or solutions related to Y2K processing by—
  - i) products; or

- ii) services that incorporate or utilize products; or

reviewing, commenting, or otherwise directly or indirectly relating to Y2K processing capabilities.

## **PART II - NATURE AND EXTENT OF THE Y2K PROBLEM**

### **3. NATURE AND EXTENT OF THE Y2K PROBLEM**

Due to the Y2K problem computerized systems may treat some dates such as January 1, 2000, denoted as 01/01/00, as invalid or as 1900; or as any other date. The program may not register the date; it could corrupt data; or even crash the system. Most computerized systems used in business are date driven, hence the importance of the issue.

It must not be assumed the problem will only occur as we enter the next century. It may occur before the transition from the last day of 1999 to the first day of 2000. Indeed, the problem has already manifested itself in a number of countries such as the US, UK and in the Far East. It may also continue to manifest itself long after 01.01.2000.

#### **3.1 Y2K is not just a software problem**

It was originally considered that the problem mainly resided with older mainframe systems. However, this does not seem to be the case. So even recent PC packages and minicomputers may be affected; it relates to software and embedded chips as well.

#### **3.2 Y2K is not just an IT problem**

Financial calculations, maintenance schedules, placed orders, just-in-time deliveries, payroll, tax, and VAT calculations, employee benefits, pension, production line, customer databases, and others are but a few examples of areas which may be affected by Y2K. Y2K may reduce an otherwise profitable enterprise to a total failure.

Some leading Y2K commentators believe approximately 50% of businesses (large and small) worldwide will not be Y2K compliant at the turn of the millennium which, in turn, may lead to the liquidation of 1 in every 5 of them. Some commentators predict that unless drastic remedial steps are taken, Y2K may cause a global recession. Closure of businesses may result in millions of job losses causing, in turn, a rise in taxes and (perhaps) more crime

In Kenya, sectors that were early on identified as particularly vulnerable to heavy Y2K losses include banking and financial services, telecommunications, energy (power generation and distribution), tourism, trade and commerce as well as manufacturing. In

manufacturing, the areas would be where computer aided design and computer aided manufacturing (CAD and CAM) are applied. The Y2K problem could therefore incapacitate computer systems that are essential to the functioning of Government operations, markets, commerce, consumer transactions and products, utilities, and safety and defence systems in Kenya and throughout the world.

Although there may be technical solutions for many computerized systems it may be cost effective to abandon some systems and start again. Whatever the position, a great deal of time and money has been and will need to continue to be expended in resolving the problem. This may have the effect of diverting resources from other projects such as health, food security, shelter, environmental protection, energy or transportation. In some cases it could result in serious disruption of governmental functions or organisations going out of business because they cannot afford the costs involved or do not provide a solution in time.

### **3.3 Measures for Y2K compliance in Kenya**

*Kenya: Y2K Status Report*, published by the National Year 2000 Coordination Centre in October 1999 and materials published by the Centre in the local media indicate that the Government of the Republic of Kenya through NY2KCC has responded timeously and effectively to this technological and legal challenge. Kenya has undertaken concerted national campaigns to create awareness on Y2K, to put in place remediation and contingency measures to rid the national infrastructure of the millennium bug and to protect the economy and citizens from possible damage. The vigorous drive to achieve Y2K compliance in all quarters saw the launch of Y2K compliance programmes in most public utilities. Key business sectors were either Y2K compliant or rapidly approaching Y2K compliance by October 1999. Kenya has also worked with Tanzania and Uganda in the context of the East African Cooperation and participated in other international initiatives on extensive Y2K programmes.

Through the said programmes Kenya has endeavoured to protect banking and financial services which are critical to the economy. The Kenyan financial system operators are reportedly Y2K ready on their mission critical areas and the Nairobi Stock Exchange (NSE) have upgraded their internal mission critical systems. The NY2KCC Report indicates that Telkom Kenya Ltd., the national telecommunications provider, successfully completed its Y2K ready programme in August 1999 and achieved Y2K certification. Other providers and distributors of essential services such as the electricity industry, the petroleum industry, transport and communications, health sector, agriculture and commerce, manufacturing sector and Government services have also addressed the problem effectively according to the NY2KCC's Report. While the major sectors (public and private) have progressed well towards Y2K compliance, small businesses or organizations and individuals have faced major challenges in taking measures to eradicate the Millennium Bug.

### **3.4 Nature and extent of Y2K litigation**



The legal implications of the Y2K problem are astounding – even to lawyers. In legal circles it is accepted that no single "event" in the history of humanity has ever given (or may give) rise to more potential litigation than Y2K. Not even lawyers are sure what types of liability will arise but it is clear that Y2K will affect most sectors of commerce and society. With so much cost being involved and possible corporate survival at stake, individuals, organizations and Governments will inevitably look for someone to blame.

It is of paramount importance to identify some of the potential risks of liability and to take appropriate precautionary measures immediately. Establishing legal liability serves two functions: First, it will enable one to identify one's liability exposure and which steps to take in this regard. Second, it will enable one to identify who is responsible for the costs of fixing one's systems or equipment and whether one should demand satisfaction through litigation or other dispute resolution mechanisms.

Large volumes of Y2K induced litigation are expected to commence early 2000 and some could continue for some time. This is partly due to the complexity and multifaceted nature of Y2K litigation; the huge backlog of cases in Kenyan courts; the fact that insurance litigation would take time; or due to the need for expert witnesses or lawyers who may not be available in Kenya because of being held up in Y2K dispute resolution elsewhere in the world. The cost of Y2K litigation in the United States alone is estimated at more than US\$1 trillion.

On the whole the businesses and sectors that underpin the Kenyan economy are expected to be Y2K compliant at the turn of the century. This in turn means that all factors being constant there may only be limited disruption of operations. Consequently the cost of litigation or dispute resolution will be minimal. However, while we hope for the best we should prepare for any unexpected hiccups, acknowledging the fact that the Y2K challenge is very pervasive.

The following Part deals with possible causes of action.

### **PART III - LIABILITY FOR Y2K FAILURE**

Y2K liability can arise from various causes of action. These causes of action vary depending on the relationship between the parties and the nature of the product (goods, services or technology) involved. Some of the causes of action include product liability; breach of contract; tort of negligence; and breach of director's duty.

Most causes of action for non-compliant goods or services will arise from either contract or tort. Contractual liability requires a contractual relationship between the parties (such as agreements of sale of hardware or packaged software or the provision of software related services). No direct relationship needs to exist between parties for tortious liability to arise.

As indicated in section 5 of this part, a tort is committed whenever an act or omission causes harm to someone's person, property or financial position. The same conduct may give rise to either contractual or tortious liability or both. A person may have to elect or choose either cause of action.

#### **4. CONTRACTUAL LIABILITY**

Liability under contract may arise under various circumstances.

##### **4.1 Non-performance**

In general, a hardware vendor or developer of software may face liability for breach of contract if the supply or quality of goods or services to a consumer is affected as a result of Y2K. The breach may lie in the vendor's or developer's failure to comply with a specific term of the contract or its failure to perform any term of the contract at all.

An example of non-performance could arise where, for instance, a customer buys a computer or specifically has a new software installed by an expert in 1999 which fails to perform the purpose for which it was bought. For instance, it may be that a point of sale system or vending machine crashes (when one uses a card with a date in 2000) and crashes all other systems linked to it. The buyer may successfully argue that what he or she has is not the machine specifically contracted for as it does not fit the description or it does not perform the purposes specified. However, this would depend on the exact agreed terms of the contract and obligations. Moreover, remedies for such breach require to be developed further by Kenyan lawyers and the judiciary. For instance, substantial performance (such as where the computer performs most of the operations) may disentitle the plaintiff from seeking damages on grounds of non-performance.

The court assesses non-performance by ascertaining "what was asked for" (according to the contract) and "what was delivered". If the delivered product differs materially from the product contracted for it would be regarded as non-performance. Failure of an information technology product, such as computer software, to function due to date changes (Y2K failure) would ordinarily be regarded as material.

##### **4.2 Breach of warranty or condition**

###### **(a) Warranties and conditions defined**

Ordinarily a condition is a term of greater importance than a warranty. While a condition often goes to the root of the contract and its breach gives rise to a right to repudiate the contract, a warranty is usually regarded as a stipulation of lesser importance and may not go to the root of the contract. Breach of a warranty therefore may only entitle one to claim damages but not to treat the contract as repudiated.

The term "warranty" is widely used when discussing contractual liability for Y2K non-compliance. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract and a stipulation may be a condition, though called warranty in the contract. Section 13 of Kenya's Sale of Goods Act (Cap 31) is material on this issue.

However, under this section, defenses such as impossibility or frustration may easily be availed by the seller for breach of conditions or warranties. Because of the uncertainty that surrounds the Y2K problem, compliance may be regarded as an innominate term. This is a term whose consequences depend on the actual outcome of the breach. That is to say, in order to determine whether a party is entitled to repudiate a contract on the ground of breach of such a term, the law has regard to the nature and extent of the breach. This is a common law rule and would be applicable in Kenya by virtue of section 59(2) of the Sale of Goods Act (Cap.31) The subsection preserves the application of common law except insofar as it is inconsistent with the Act.

#### (b) Implied warranties and conditions

Under section 16 of Kenya's Sale of Goods Act, some of the circumstances under which an implied warranty (as to fitness for purpose) may be inferred is where the purchaser has informed the seller of the purpose for which the goods are intended; or where the goods are bought by description; or where an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Where goods are bought by description, if the buyer examined the goods, defects which such examination ought to have revealed are exempted from the general rule. Thus consumers who examined their software (which belong under the category of goods) are disentitled from claiming breach of implied warranty if that examination would have revealed Y2K related defects. This largely depends on the nature and extent of the examination. Thus if a Y2K compliance test is carried out before the contract of sale, then there may be no implied condition or warranty as to the defects that may arise from Y2K failure.

It appears that a test of Y2K compliance carried out after the contract of sale is concluded would not affect the buyer's right to claim an implied condition or warranty regarding defects that the buyer discovers upon these tests. On the same note it would be a matter of fact (to be proved, not implied or assumed) whether a given examination ought to have revealed Y2K compliance defects. This would depend on the specific circumstances as the testing process, for instance, could take anywhere between minutes to months depending on the type of system or product being tested.

#### (c) Where sale is under patent name

Y2K compliance may raise particular difficulties especially where specified products or systems are sold or bought under their patent or other trade name. Under such contracts

the Sale of Goods Act (Cap.31) expressly provides that conditions or warranties as to the products' fitness cannot be implied. Thus it would appear that where a user acquired specified goods, say off-the-shelf software, under their service mark or trade name the buyer would not be entitled to claim breach of implied condition or warranty if that product later proves not to be Y2K compliant.

(d) Disclaimers or exclusion of warranties or conditions

A major provision of the Sale of Goods Act (section 55) is that implied warranties and/or conditions can be expressly excluded in the agreement between the parties. This is likely to be brought into sharp focus. Section 16(d) of the Sale of Goods Act indicates that any express warranty or condition must be clearly inconsistent with any provided in the Act otherwise those implied under the Act would take effect. Some judicial decisions and writers indicate that such exclusion clauses are strictly interpreted by courts. For instance, in *Baldry v. Marshall* (1925) an express exclusion of any guarantee or warranty or otherwise, was held not to exclude liability for breach of a condition. Similarly, in *Andrew v. Singer* (1934) where the contract excluded all warranties, conditions and liabilities implied by statute, common law or otherwise, it was held that the exclusion clause did not protect one who broke a condition.

Vendors may attempt to exclude all forms of Y2K warranties while consumers, in turn, may demand the inclusion thereof. It is instructive to note that implied warranties or conditions can only be expressly excluded in a contract where the express warranty or condition is not fundamental to the contract. This may be relevant in light of the fact that a lot of disclaimers and exclusion clauses may have been given in relation to Y2K failure. Thus where an obligation arising out of a contract is so fundamental then the exemption clause cannot exclude liability. Therefore it may be necessary to determine the relevance or materiality of Y2K compliance with regard to products or systems. Some of the issues, which have been addressed in relevant case law include whether a disclaimer or exclusion of warranty was properly and promptly brought to the consumer's notice; whether the consumer signed onto the disclaimer; and whether the disclaimer was attended by misrepresentation or fraud.

Most contracts contain exclusion clauses which cover implied terms and negligence. If a person used standard terms and conditions without allowing amendments to key clauses then an exclusion clause may only be valid and enforceable if it is reasonable. Disclaimers by insurance and software and hardware corporations are material here. Whether the exclusion clause is reasonable will be determined by factors such as the bargaining powers of the parties any inducements offered, the extent of the insurance cover and the relative resources of the parties generally.

As discussed above, certain representations are deemed to be included as terms of every contract of sale of goods. This is subject to their express exclusion. The exclusion must in turn be reasonable. Because of this implication of certain terms (warranties or conditions) the customer is protected from the risk of quality unless exclusion of Y2K warranties has

been made. This protection would be available if Kenyan courts regard Y2K compliance as an implied condition or warranty. Kenya has not experienced Y2K litigation, hence this is a speculative matter and Y2K warranties should rather be expressly dealt with because there is no knowing what the courts may say.

It should be noted that express warranties may be made in many forms. Warranties of Y2K compliance of goods or services can be found in contract documents, tender documentation, product manuals, the prospectus, Y2K compliance disclosure, Y2K website, sales or marketing materials or statements by directors, officers or employees.

## 5. TORTIOUS LIABILITY

If through one's negligent or intentional action or omission one causes harm to another's person, property or financial position one has committed a wrong or a tort and may be liable for damages. Generally speaking, one is negligent if a "reasonable person" in one's position would have reasonably foreseen that such act (or omission) could result in harm and would have taken reasonable steps to prevent the harm. This is a restatement of the principles expounded by Lord Atkin in *Donoghue v. Stevenson* (1932) in the following terms:

"you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbours.... [Neighbours are] persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation, as being so affected, when I am directing my mind to the acts or omissions which are called in question".

To some extent Y2K is a foreseen risk which should be guarded against and any omission to take reasonable remedial steps could be regarded as negligent conduct which may lead to liability. In general, one will only sue another in tort if no contractual relationship exists or if the claim under contract has a lower probability of success (examples are motor vehicle accidents, aeroplane crashes, false statements which cause someone to lose money, among others etc.). The following are some examples of causes of action under tort:

### 5.1 Misrepresentation

Inaccurate representations made on the quality or capability of goods or services can be negligent or intentional. Kenyan law recognizes liability where negligent misrepresentation gives rise to damage. Liability under this cause of action may arise if a vendor or developer were to assure a customer that a particular product or system was Y2K compliant without knowing whether this was true. If a plaintiff can show that this statement was, in fact, not true and the vendor or developer should have reasonably known about this, liability may arise. Y2K statements and republication thereof may be material here.

Where a vendor or developer sells products it knew or should have known embody material defects (such as Y2K non-compliance) it may be liable for making a false representation (by its actions or omission). If misrepresentation accompanied the conclusion of a contract, the customer, depending on the seriousness of the defect, may elect to cancel or rescind the agreement, return the goods or reject the services and seek a refund. This issue is further discussed under Reliefs and Remedies, Part V below.

In other instances the customer may not be entitled to cancel the agreement but, in turn, be eligible for a partial refund. The vendor may also be liable to the customer for damages. Significantly, many contracts expressly provide that no representations have been made other than those in the contract. Many also provide that the product is sold or leased under the doctrine of *caveat emptor* or let the buyer beware. This maxim summarizes the rule that the purchaser must examine, judge, and test the product for himself or herself. The implied warranties discussed above have made serious inroads into the *caveat emptor* doctrine.

Recent developments in the law of torts indicate that a person may be responsible for negligent misstatement leading to financial loss (*Hedley Byrne Co. v. Heller and Partners Ltd.* (1964)). In a situation where one makes or republishes a misleading reference about the Y2K compliance or Y2K processing of a product or system or a corporate person makes a representation to an information user who relies on it, the maker of such statement would be liable. This may apply specifically to auditors, corporate executives and vendors, among others.

## **5.2 Professional negligence**

In many instances a customer relies on the expertise and skill of a vendor or developer to perform certain services. In law, "professionals" are held to a higher standard of care than ordinary vendors or developers. Any vendor or developer who holds himself or herself out as having special expertise will be held to the standard of expertise implied by law to prevail in that specific sector of the industry.

With relation to Y2K it may matter not whether the services performed relate specifically to software or hardware or whether it relates to non-computer goods or services. For instance, manufacturers of customised mechanical equipment may perform "professional services". However, liability under this cause of action may primarily arise in instances where a vendor or designer supplies customised or designer software and/or services to a customer. Professional advisors such as lawyers or auditors may, depending on the facts, risk liability if they should have advised the client on potential Y2K liability. This may be during drafting of the prospectus pending a share offer; or in the process of "auditing" the corporation's contractual commitments; or during the conduct of "due diligence" exercises on companies to be taken over or merged.

## **5.3 Product liability**

If manufacturing or design defects in goods (such as "off-the-shelf" software, PC's, mainframes, mechanical equipment, and others) give rise to damage, the manufacturer and/or the vendor may face damages (including consequential damages) if it is proven that the defect had been negligently caused and the manufacturer should have guarded against the harm. This cause of action, with relation to Y2K, is difficult to prove. This is mainly because of the "state of the art" defence, on which Part IV of these guidelines is applicable.

Like other areas of consumer law and intellectual property law, Kenyan law of product liability is attracting legislative, judicial and scholarly attention. (See B. Sihanya *Intellectual Property in Africa: Transferring Technology for Sustainable Development* Faculty of Law, University of Nairobi and Innovative Lawyering, Nairobi, forthcoming). Some of the developments, which are relevant to the Y2K problem, are discussed under Part VII (Intellectual Property Aspects of Y2K) below.

In the UK, product liability law is largely linked to the UK Consumer Protection Act 1987, and the Data Protection Act; 1984. Product liability may become popular in Y2K litigation. The contention that "most software developers are in the United States and, therefore, we cannot sue them" should not cause too much difficulty since the plaintiff may rather elect to sue those in the distribution chain including the local distributor, agent or vendor for product liability.

#### **5.4 Breach of duty of care**

The general principle under Kenyan law is that whenever a reasonable person (which includes a business enterprise) would take steps to warn consumers about potentially defective (or harmful) goods or deficient services, failure to do so may constitute a breach of a common law "duty to take care" to prevent damage to others. If a "duty to take care" exists the person on whom the duty rests must take proactive steps to remedy Y2K defects (such as by providing "patches", "fixes" or free upgrades).

### **6. CRIMINAL LIABILITY**

In the absence of *sui generis* (specific) Y2K legislation, criminal liability for Y2K failure may present difficulties. This is mainly because section 77 of the Kenya Constitution provides that one can only be penalized for an offence which was written at the time it was allegedly committed and second, the penalty therefor must also have been provided in writing.

To some extent the Penal Code (Cap. 63) covers Y2K related offences. Under section 244 of the Penal Code negligent acts or omissions causing harm may give rise to a misdemeanour punishable by imprisonment. Criminal fraud arises from the act of intentional misrepresentation. Only in the most extreme circumstances would a vendor, manufacturer or distributor who intentionally provides or supplies Y2K non-compliant

hardware or software to innocent consumers risk being charged with criminal fraud. There would have to be some sort of moral disapproval or disgust with the action in question before the State may consider prosecution (e.g. if the accused continued supplying defective goods to customer even though he or she had been warned not to do so). Significantly, fraud and related offences are quite difficult to prove.

## 7. LIABILITY OF DIRECTORS AND OFFICERS

At common law the directors owe a duty of care and skill to the company. The standard of care requires that the officers exercise due diligence in their duties. It behoves the directors to reasonably manage the Y2K problem, for instance, through compliance evaluation, general remediation, legal audits and review of contracts. A reasonable person will be expected to do a thorough inventory of all systems and certify whether or not they are Y2K compliant. If a company does not have the requisite expertise for this, the most reasonable thing for it to do is to engage an external Y2K solution provider to make the assessment and test the equipment or system for compliance. Thus, directors and officers have a duty to properly investigate their problem in time. If the company loses money when they cannot process invoices or orders, or where the company is sued for Y2K non-compliance, the directors and/or officers may be subject to claims from shareholders. The claims against directors may be founded upon a breach of their fiduciary duties or the duty of care owed towards the company.

Analogous to a duty to take care is the fiduciary duty of directors and officers of a company to act in its best interests and thus to protect it from any foreseeable harm. (See generally L.S. Sealy (1996) *Cases and Materials on Company Law* Butterworths, London). Negligent failure on the part of the directors to institute proper Y2K identification and remedial steps could constitute a breach of this duty making the directors liable to the company or shareholders for any damage suffered because of Y2K. The operative principles are still in flux. It may transpire that "directors & officers liability" insurance are non-existent or unenforceable.

The fiduciary duty extends to persons occupying executive positions in the company such as IT or Y2K managers.

In the US, Y2K status has been legislated as a mandatory disclosure requirement. In Africa the Johannesburg Stock Exchange has informed the business community that Y2K issues are material to the financial stability of a listed company. These raise the standard of care of directors. However, in Kenya, these rules may not apply because directors duties are governed by the less stringent Companies Act, (Cap.446) the equivalent of UK Companies Act. Kenya's securities regulators, Capital Markets Authority (CMA) and Nairobi Stock Exchange (NSE) have been monitoring the Y2K progress of the 58 listed companies.



## **PART IV - DEFENCES**

### **8. BEST PRACTICE OR REASONABLE EFFORT**

Parties may raise the defence that they engaged in best practices. This may be in any Y2K action or claim in which breach of contract is alleged. This defence may be in addition to any other rights or defences provided under the applicable law. The party against whom the claim of breach is asserted may be allowed to offer evidence that its implementation of the contract, or its efforts to implement the contract, were reasonable in light of the circumstances. A successful best practice or reasonable effort defence may limit or totally exclude the defendant's liability.

In any Y2K action involving a claim for money damages, a defendant may be entitled to establish, as a defence to the claim, that it took measures that were reasonable under the circumstances to prevent the Y2K failure from occurring or from causing the damage upon which the claim is based. This may not apply with respect to claims asserting breach or repudiation of contract by the party against whom the claim is asserted.

### **9. STATE OF THE ART**

This is closely related to the best practice or reasonable effort defence. Some experts indicate that Y2K non-compliance may be regarded as a "design defect" in the product (as opposed to manufacturing defect). Various defences or counter arguments may eventually strike down this contention. For instance, it may be contended that the two-digit design had been the "state of the art" at the time. The closer to 2000 the software has been manufactured the less likely any defence to a charge of or suit under design defect will succeed. Moreover, because of the software aspects of Y2K, it may be regarded as a programming (not quite a "design") problem.

### **10. FRUSTRATION, IMPOSSIBILITY OR COMMERCIAL IMPRACTICABILITY**

The common law of contract applicable in Kenya under the Law of Contract Act (Cap. 23) recognises that a party may be excused from performing a contractual obligation on the basis of frustration. This involves the intervention of circumstances beyond the party's powers. It relates to what some Y2K experts call impossibility and/or commercial impracticability. A party may plead that it was impossible (rather than merely onerous) or commercially impracticable to be Y2K compliant. In any Y2K action in which such a defence is raised, the applicability of the doctrine depends on the facts and circumstances generally.

### **11. Y2K UPSET**

Under this defence the defendant may plead that Y2K failure was caused by an exceptional temporary non-compliance with the applicable legal or regulatory, measurement, monitoring, or reporting requirement directly related to a Y2K failure that is beyond the reasonable control of the defendant.

Moreover, according to some authorities the Y2K upset defence may only be available where non-compliance with the legal or regulatory, measurement, monitoring or reporting requirement was necessary in order to prevent the disruption of critical functions or services that could result in harm to life or property, but may not excuse the defendant's negligence or failure to remediate or prepare for Y2K failure.

## 12. REMOTENESS OF DAMAGE

In a Y2K claim for money damages in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim, the defendant may not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves that the defendant actually knew, or disregarded a risk, that such failure would occur in the facts and circumstances of such claim.

According to some authorities, in a Y2K claim for money damages in which the defendant's actual or constructive awareness of actual or potential injury to the plaintiff is an element of the claim, the defendant may not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves that the defendant knew, or had reason to know, or disregarded a known risk, that the plaintiff or a class of persons to which the plaintiff belongs would suffer such injury.

Third, in a Y2K claim for money damages, the defendant may not be liable unless the plaintiff establishes in addition to all other requisite elements of the claim, that the defendant knew or had reason to know that its actions would cause injury to the plaintiff or to a class of persons to which the plaintiff belongs in the facts and circumstances of such claim.

## 13. ACT OF GOD

An act of God is an inevitable accident which is caused by forces of nature and is not connected in any way with human agency. It would be due to such causes as earthquake, storm, and lightning which do not involve human intervention. It is doubtful whether Y2K failure would give rise to this defence. This is because of the controversy whether Y2K failure and related injury is due to natural causes or it is due to human intervention. In addition, if foresight or human wisdom can provide against it then act of God will not relieve the defendant of liability in tort. Thus in *Nichols v. Marsland* it was held that the defendant was not liable where an extraordinary act of nature (in this case unprecedented rain such as had never been witnessed in living memory) which he could not reasonably have anticipated burst the banks of the defendant's artificial lakes and damaged a neighbour's property.

## 14. CONTRIBUTORY NEGLIGENCE

Persons may by their own negligence contribute to the injury they receive. Under the provisions of the Law Reform Act (Cap. 26) the person who has partly contributed to the injury will have the damages recoverable reduced to the extent of his or her responsibility for the damage.

## PART V - RELIEFS AND REMEDIES

### 15. DAMAGES

The party claiming damages or compensation may have to prove the damage or loss. Every plaintiff is obligated to mitigate or limit its damage and one cannot sit back and do nothing about Y2K risks and claim the resulting loss. If the risk had been foreseeable the party claiming damages may find that its own negligence contributed to the damage it suffered and the amount the plaintiff would have been entitled to would be reduced by the proportion of its own contributory negligence. In some instances a plaintiff, having proven its case, may find that it is not entitled to any compensation whatsoever.

#### 15.1 Damages under Contract

Once breach of contract has been established the plaintiff may: cancel or rescind the contract; or enforce (an appropriate part of) the contract; and/or claim general and/or special damages.

##### (a) General damages

General damages are the normal remedy for breach of contract. These are the amounts of money equal to the extra costs which a plaintiff would have to spend in order to obtain the same results as if the contract had been performed. For example, if the same goods or services can only be obtained from someone else at a higher price, the defendant would be liable to pay the difference between the original contract price and the new price. For the plaintiff to recover damages the plaintiff must show that the damage suffered was caused by breach of contract. The loss sustained from such breach must be directly or indirectly related to the breach but not too remote (see *Hadley v. Baxendale* (1854); and *Victoria v. Newman* (1949)).

##### (b) Special damages

In some instances the customer may, in addition to general damages, be entitled to claim "special" damages. These are analogous to consequential damages in tort and include loss of profit. Special damages include all damages which the parties, at the time of

contracting, reasonably contemplated would result from breach of contract. This is a question of fact; it must be pleaded. It should be discussed with a lawyer.

Damages may also be classified under the following headings; ordinary (the same as general); exemplary or punitive; liquidated; and unliquidated. Punitive damages are damages that are awarded against any person to punish such person or to deter such person, or others, from engaging in similar behaviour in the future. Other reliefs include specific performance, and injunctions, which are discussed in this Part.

### **15.2 Damages under Tort**

To succeed in a claim in tort a plaintiff must prove breach of duty which breach gives rise to damage for which a court will award an amount of money ("damages") to compensate the plaintiff's loss. These damages are the amounts equivalent to the actual and direct financial harm suffered by a party. The damage may consist of harm to the plaintiff's person or property or it could consist of pure economic loss.

Liability for pure economic loss depends on the facts of each case and should be discussed with a lawyer.

Consequential damages are forms of damage (pecuniary loss) suffered by a plaintiff which were an indirect (but foreseeable) result of the wrongful conduct. For example, if a consumer's computer system fails due to Y2K failure, the costs to fix the system is the direct damage suffered. If, because of system failure, one cannot provide one's goods or services for two months, the loss of profit during this period may constitute consequential damages for which the defendant may (if such loss could have been reasonably foreseeable by the defendant) be liable. Generally, courts are very reluctant to allow liability for consequential damage and a lawyer should be consulted on one's rights, risks and/or obligations in this regard.

## **16. INJUNCTIONS**

An injunction is an equitable remedy that compels one to perform a specified act or orders one not to do something. It may be granted for a specified time or with no time limit attached. Courts rarely grant injunctions unless a number of requirements are met. These include the possibility of undue hardship to the plaintiff and inadequacy of damages. This remedy may not be available where damages are a more suitable remedy or the suit is for specific performance of a contract for personal services. A plaintiff may secure an injunction to restrain the defendant from breaching a contract. This may have the effect of ensuring Y2K compliance or remediation where Y2K compliance is treated as a material term of the contract.

## **17. REMEDIATION**

A party may seek remediation to secure Y2K compliance or in the event of Y2K failure. This may include fixing, upgrading, and replacement. Remediation is discussed in greater detail in Part VIII.

## **18. REVIEWING CONTRACTS**

As indicated elsewhere courts may review contracts and enforce implied terms. Some of the difficulties that a party may face in seeking this relief is the common law rule that frowns upon courts mending bargains. Thus it would only be in rare circumstances such as where the parties were of unequal bargaining or economic power that the law may allow review of contracts. This is linked to the doctrine of sanctity of contract that requires that agreements entered into voluntarily ought to be performed.

## **PART VI - REPRESENTATIVE SUITS AND CLASS ACTIONS**

### **19. WHO MAY BRING REPRESENTATIVE SUITS AND CLASS ACTIONS**

Any person may sue on behalf of all other persons in a suit in which all of them have the same interest. The legal interest translates into *locus standi*. This has been the subject of case law and judicial decisions suggest that the interest required to maintain such an action is quite rigorous to prove. For instance, the courts have stated that *locus standi* for an individual in a matter involving public policy may only be established depending on whether the aggrieved person has suffered damage and whether that person is part of a group of persons specially catered for by the law under which the representative suit is brought. (See *Wangari Maathai v. Kenya Times Media Trust & Another* (1989)).

### **20. PROCEDURE FOR BRINGING REPRESENTATIVE AND CLASS ACTIONS**

The plaint and other relevant pleadings must indicate in the headings and in the body that the suit is representative. The representative plaintiff must mention the fact that the suit is representative and not brought individually. The court will require that notice of the suit be given to all persons represented therein either by personal service or otherwise (for instance, through a newspaper advertisement). The provisions of the Civil Procedure Act (Cap.21) and particularly Order I Rule 8 of the Civil Procedure Rules, are material here.

### **21. SHARING BENEFITS AND BURDENS OF SUITS AND ACTIONS**

A successful representative suit or class action usually benefits all the members of the class. Thus, for instance, all may be entitled to free fixes or replacement. On the other hand, unsuccessful claims may result in cost of litigation which may amount to substantial sums of money. Usually the parties in whose names the suit is brought bear the burden. It is advisable to clearly identify all the class suitors; their addresses; and secure their signatures to the effect that they will contribute to any burdens borne by the suitors.

## **PART VII - INTELLECTUAL PROPERTY ASPECTS OF Y2K**

### **22. INTELLECTUAL PROPERTY ASPECTS OF Y2K**

#### **22.1 Patents in the context of Y2K**

Intellectual property rights relevant to the Y2K problem are patents, trade marks and copyright and trade secrets. In January 1999 the US Patents and Trademark Office (USPTO) granted the Quick Install Process Patent (QIPP) to an American who claimed to have invented a "process [which] does not suffer from any of the limitations all other Y2K tools have, [and] which works on everything, installs much faster than other methods and does not require a lot of costly programmers to use or install". Dubbed the Y2K silver bullet, QIPP has however not proved so magical.

In Kenya, inventors of Y2K remediation products may seek appropriate protection under the Industrial Property Act, (Cap. 509) which is administered by the Kenya Industrial Property Office (KIPO).

#### **22.2 Trade mark and copyright in Y2K**

Trade mark and copyright law are critical to the Y2K problem depending on whether the computerized system is a good or service. A number of IT products (hardware and software) are protected under the Trade Marks Act (Cap.506) as names, trade or service marks, signs, symbols or sounds. The Act protects registered marks as well as well known (or notorious) marks which may not have been registered in Kenya.

#### **22.3 Applicability of copyright to Y2K**

Copyright is probably the most extensive intellectual property regime on the Y2K problem. The extent of its applicability depends on whether software is a good or a service.

Standard, off-the-shelf, packaged or shrink-wrap software is regarded as a good. In this context, patent and trade mark law would be the most apposite. However, even in such cases, the software may be sold but the developer, designer or manufacturer actually retains copyright in the source code, for instance. Hence, technically, the transaction is not an absolute sale but a licence. On the other hand, customized or designer software is largely regarded as a service, and the transaction is a licensing one.

The Copyright Act (Cap.130) vests the first right of ownership in the author, which is defined to include the author of a computer program.

#### **22.4 Protecting copyright interests in Y2K**

Y2K remediation may involve modification of software. Where the licence did not allow this, the modification may constitute copyright infringement. It is necessary to secure the consent of the author, developer or vendor.

Copyright law recognises that a derivative work (that is, a work which is derived from another) does not automatically amount to copyright infringement. It may itself qualify for copyright especially if the designer, developer or writer has expended substantial skill, judgment and/or labour in creating the derivative or modified work. It is advisable to assert copyright in such derivative works which may be generated in the context of Y2K remediation. This may be done by including the copyright notation (©) in the work and/or in the paper trail (correspondence, invoices, among others).

## **PART VIII - REMEDIATION AND MITIGATION OF INJURY AND LOSS**

These Guidelines are not exhaustive and can be adapted and expanded.

### **23. TESTING**

Persons should conduct tests to establish the degree of compliance. While problems may not be only due to Y2K failure, some of the issues include: Does the company or agency have the right tools to do Y2K testing? How can it be sure? Does it have an evaluation process and checklist to ensure that the vendor, developer, outsourcer or partner who checks its systems is competent? What criteria does it use? Has it set up a system to periodically monitor progress towards the Y2K solution? Does it have mission critical and "drop dead" dates?

### **24. INVENTORY**

The need to assess and process of assessing Y2K compliance and impact of Y2K failure is discussed under this Part and elsewhere in these Guidelines.

### **25. FIXING AND CONTINGENCY PLANS**

The reduction of tax on computer systems in the recent past by the Government has provided opportunity for fixing, upgrading or replacing non-compliant systems. Fixing the Y2K problem (and addressing the related failure) requires technical, human and financial resources. It may also introduce new problems such as infringement of copyright (for instance, through unlawful modification of software). Thus a number of issues arise.

To what extent is management committed to fix the problem? What project plans does it have to perform a complete systems test of all fixed mission critical systems before it

goes into production? To what extent will it be able to freeze other systems development projects and/or functional enhancements, as it makes its changes to its systems to be Y2K compliant? What has it done to ensure that it will be receiving reliable and timely status reports that will identify the work planned and completed; the programmes that arose and their solutions; the issues that the directors and officers must work on; and to summarize progress and highlight problems?

## **26. UPGRADING AND REPLACEMENT**

Most legal aspects of upgrading and replacement are addressed under Fixing, Conducting a Legal Audit, and Mitigating Injury in this Part as well as in Part VII (Intellectual Property Aspects of Y2K).

## **27. Y2K INSURANCE**

What insurance coverage does a person or agency have in terms of errors and omissions and directors/officers liability? When will they be renewed? Will coverage be excluded? What can be done to minimize legal liability exposure? What are the plans to disclose the Y2K project status in the annual or any other report to shareholders? What are the trading partners, suppliers and customers doing? Can it join forces? Are shareholders ready for the problem? If founders go down the company might go down. Does it have backup plans?

One should not entirely rely on insurance to cover one's remedial work expenses, legal liability and/or damages. Y2K insurance aspects are a highly debated and controversial issue. There are various legal technicalities in insurance law which may result in a person not being entitled to any form of cover for Y2K risks. These include the principles of causation, remoteness of damage, privity of contract or insurable interest; and insurable risk.

Virtually no insurers in Kenya are currently willing to provide any form of Y2K coverage. Most insurance policies expressly excluded any form of Y2K related coverage when the 1999 policies were issued. Some companies have argued that, because Y2K is a foreseen risk and insurance does not apply to foreseen risks, insurance law would not recognize Y2K as an insurable risk. All insurance issues should be discussed with the insurer and/or a lawyer.

## **28. CONDUCTING A LEGAL AUDIT**

### **28.1 Purpose of legal audit**

The purpose of the legal audit should primarily focus on the following: one's liability risks; who should pay for fixing non-compliant hardware or software; what one's rights are if one is sued; which defences one may avail oneself of; and what obligations one owes contracting parties and/or third parties.



## 28.2 Areas of legal audit

- (a) One important way to obtain some sort of certainty with relation to Y2K legal liability risks would be to consult a lawyer to conduct a legal audit on the following:
- (i) agreements with suppliers or providers from which one obtained computer hardware or software, which were incorporated into or bundled with its products and sold, either directly or through various channels of distribution, to a customer;
  - (ii) agreements with third parties for development of software or databases which the company has incorporated into or bundles with its products;
  - (iii) maintenance and support agreements with third party vendors and trading partners;
  - (iv) license agreements with customers for vendor software or data bases; and distribution agreements for vendor products;
  - (v) maintenance and support agreements with customers for vendor products or services as well as computer service agreements with customers;
  - (vi) manuals and other documentation for vendor products provided to customers;
  - (vii) advertising and promotional matters for the vendor's or developer's product or services;
  - (viii) mergers and acquisition agreements; and
  - (ix) publicly available disclosure documents filed with public agencies; and insurance contracts.
- (b) All new agreements must be presented to a lawyer for close scrutiny with regards to matters such as conditions or warranties, indemnities and limitation of liability on both sides.

## 28.3 Procedures to be followed after legal audit

The various remedial steps to be taken by a party with regard to amendments to existing contracts; negotiations in relation thereto; duty to disclose Y2K status to customers; scope of conditions, warranties and exclusion of liability; and others should be discussed with a lawyer.

Demand letters should be sent to suppliers who may be liable to fix non-compliant hardware or software. Attempts should be made to obtain warranties from suppliers who are (currently) not legally liable to fix the defective goods or deficient services or technologies.

The contents of the legal audit as well as advice on remedial steps pursuant thereto may be protected by advocate-client privilege in the event of litigation and would thus be prevented from disclosure to any future litigants.

Accordingly, the content of the audit should not be disclosed to third parties.

#### **28.4 Y2K due diligence record or paper trail**

A structured program should be implemented and strictly adhered to whereby all documentation pertaining to Y2K remedial steps are filed. The program depends on the transaction or business in question. It should strive to achieve the following:

- (a) All internal and external correspondence relating to Y2K should be dealt with by a "Y2K manager" who should preferably be appointed from within the ranks of senior management. Employees should be alerted to the Y2K risks, educated on preventive and remedial procedures and persuaded to participate in the programme.
- (b) One should assess the Y2K compliance of business partners. Compliance inquiry letters should be sent to them until adequate warranties are obtained. A business may still face liability towards consumers if (although its systems are compliant) it cannot deliver its products or services because of third parties' Y2K non-compliance.
- (c) Accurate and comprehensive records should be kept of all Y2K testing and remedial steps. On the one hand, such a record may serve to prove that the person took all reasonable steps at an early stage to obtain Y2K compliance. Conversely, if such a paper trail is eventually used in Y2K litigation and serves to prove that the person failed to take reasonable steps to remedy problems, this very same record may serve to hold the person liable against virtually all its potential plaintiffs. Accordingly, the existence of such a paper trail should be held in confidence and the file or files containing such documentation should be managed by senior management. Updates of progress should be communicated to lawyers to subject the documentation to the protection of advocate-client privilege. All correspondence in this regard should be filed.
- (d) Employees and management should be aware that any oral representations made on Y2K compliance may be legally binding on the employer.

### 28.5 Directors and officers and Y2K audit

It would be useful if company directors or officers in Governmental and NGO agencies and officers ask and address the following questions to limit their potential Y2K liability:

- (a) What is the company or agency doing at the present time? What is the status of the company's or agency's systems? The systems should be ranked in the order of criticality. Has the company or agency begun to estimate the time and resources it will take to address the problem? How long will the identification and remedial programme take? What will it cost? What should be budgeted for?
- (b) Is the company or agency or the supplier of the software responsible for the costs of repairs? Where will it find the money? What options does it have (replace, repair, or upgrade)?
- (c) Does the company or agency have the source code and does it have the right to use it? Does the company or agency have a capable full time Y2K project manager? If not, where can it get one urgently? Are there any internal resources that the company or agency can assign to the job? When? Should it consider outsourcing? Who can be used? What will it cost? When?
- (d) What can the company or agency do to keep its own competent IT people from taking lucrative Y2K jobs elsewhere? What incentive programmes can be used? Can it make its current not-so-competent IT employee Y2K-literate? How? What are the costs?

### 29. MITIGATING INJURY

Mitigation of injury has been dealt with under Reliefs and Remedies (Part V) above. The extent of a supplier's liability may depend on the complainant's duty to mitigate own loss. If the supplier notifies its consumers and the public of the Y2K problem, and offers fixes or updates and general advice which is not taken, then the amount of any loss might be reduced by the extent to which that loss could have been avoided if one of the solutions offered had been taken.

## PART IX - DISPUTE RESOLUTION

### 30. LITIGATION

It is unclear how much litigation may arise in Kenya from Y2K failure. Depending on the extent to which the millenium bug negatively impacts on functions and operations of

large and small scale business operators, institutions, Government as well as individuals, the amount of litigation could vary between a trickle and a flood. Currently the Kenyan judicial system is already facing a serious backlog of cases, with the average period before judicial determination of a case ranging from 5-10 years.

The potential for Y2K litigation being high, and with the possibility of numerous causes of action, there is a chance that Y2K cases could overwhelm Kenyan courts. It is for this reason that in many countries Governments advocate that litigation should not be viewed as the only solution to the Y2K problem. Persons affected by Y2K failure should also consider alternative dispute resolution.

### **31. ALTERNATIVE DISPUTE RESOLUTION**

Some of the alternative dispute resolution mechanisms available to claimants include arbitration, mediation, good offices, and conciliation. Arbitration involves the settlement of disputes between parties by one or more persons (arbitrators) appointed by them directly or indirectly. Arbitration agreements are governed in Kenya by the Arbitration Act (Cap. 49) and the Civil Procedure Act (Cap. 21), among others. The parties to a dispute would have to make a written agreement to refer the matter to arbitration. Arbitration agreements entered into by consent of the parties usually have the effect of staying any court proceedings. This mechanism has the advantage of being informal, quicker, often cheaper and may facilitate the application of special expertise which is critical in Y2K disputes.

A major disadvantage would be that where the issues in dispute are purely legal sound legal knowledge may be necessary on the part of the arbitrator. Moreover, consumers would need to be organized as a group so as to benefit from it.

The arbitrator's award can be appealed against to the High Court on matters of law.

Some Y2K experts argue that reference of Y2K disputes to good offices, negotiation or mediation may be the most appropriate mechanism of resolving them. Others have suggested that for everybody's benefit specialized institutions like a Y2K Dispute Resolution Tribunal be established consisting of experts in the various legal, technical, consumer and other aspects of Y2K.

## **PART X - PROCEDURE FOR Y2K ACTIONS**

### **32. CIVIL AND CRIMINAL PROCEDURE**

Y2K suits are likely to involve a number of causes of action, and may be quite complex. They may be multi-disciplinary and multijurisdictional, involving difficult issues of conflict of laws. Some of the issues would revolve around choice of law and forum as well as enforcement of the decision. Competent legal counsel would be necessary to handle the complex substantive law questions; as well as pleading and evidentiary issues.

Parties would need to establish the most appropriate courts (in Kenya or abroad) in which to file the matter. Under Kenyan law, this depends on the jurisdiction of the court: is it original? national (or only district); are there any financial limitations? Thus although the High Court may otherwise be the most suitable generally, parties may wish to consider the logjam in these courts.

Criminal procedure would rest with the state (or an individual through private prosecution) determining that a crime has been committed. This is discussed in Part III and elsewhere in these Guidelines.

### **33. LIMITATION OF ACTIONS**

A claim may be excluded by being time-barred under the Limitation of Actions Act, Cap. 22 or any other appropriate law. This legal rule embodies a trite principle of justice and public policy that equity assists the diligent, not the indolent.

#### **33.1 Limitation in contract**

The basic rule in contract is that the right of action accrues as soon as there is a breach of contract, notwithstanding that at the time the plaintiff has suffered no damage. The case must be brought within six years from the date of the breach. Where there is an obligation to provide Y2K warranty or where Y2K compliance was material to the contract then a claim must be made within six years from the date the contract came into effect, even if the breach has not been discovered. The breach may not have been discovered because 21st century dates have not had to be used.

#### **33.2 Limitation in tort**

The basic rule in tort is that the action must be brought within three years from the date when the damage occurred. Where the damage is not apparent, the plaintiff may seek an extension of the period or enlarge next of time. Damage may not arise until the year 2000 or thereafter as forward dates need not be used until then.

## **PART XI - DISCLAIMER REGARDING THESE Y2K LEGAL GUIDELINES**

### **34. DISCLAIMER**

These Y2K Legal Guidelines are intended to provide general information and are not intended to provide or substitute for legal or other professional advice regarding any individual problem or situation. No representation is made to the accuracy, completeness or the absence of error. One should consult a lawyer or any other appropriate professional adviser before relying on these Guidelines or applying them to particular fact situations.

Dated the 23rd December, 1999.

**M. L. ODUOR-OTIENO,**  
*Permanent Secretary, Treasury  
and Chairman, National Y2K  
Steering Committee.*