

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

**ATP 108: COMMERCIAL TRANSACTIONS**

THURSDAY 28<sup>TH</sup> JULY 2011

DURATION: 3 HOURS

**Instructions to Candidates**

- (a) Candidates should attempt **FOUR** questions
- (b) Answer question **ONE** and any other three questions (**candidates must attempt at least one question from each of the three sections**)
- (c) All questions carry **15 marks** each
- (d) Marks may be lost for illegibility

## SECTION ONE

1. Part 1 of the Sale of Goods Act (Cap 21 Laws of Kenya) at Section 2(4) states:

“Goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them”

Part III deals with the transfer of property as between seller and buyer and provides in part:

Sec. 18 “property in unascertained goods – where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained”

Sec. 19 “property in specific or ascertained goods passes when intended to pass

- (1) Where there is a contract for sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

With the aid of the above, and any other relevant sections of the Sale of Goods Act, and other principles of law, present a legal opinion on the following cases:

(i) **Case A**

The plaintiff, Mr. Peter Brown (seller) sold to the defendant Mr. Atul Shah (buyer) all the trees in a named forest in 2010. According to the contract, all the trees which conformed to a certain stated minimum specification would be sold over a 15 year period. The defendant paid a first instalment of the agreed price, but before he could cut down much timber, the forest was nationalized. The seller (plaintiff) now claims that he is entitled to the balance of the agreed price whereas the buyer (defendant) claims that he is entitled to a refund of the first instalment besides damages for breach of contract.

Advise the parties.

**(8 marks)**

(ii) **Case B**

A company (GoldCorp) invited the public in 2010 to invest in gold coins and bullions (gold bars) at a stated price per unit. According to the terms of the agreement, the company would store the gold in a non-allocated basis (that is, in mass and not separated out into portions for each customer). The company gave a certificate of ownership to the investors, and represented that they owned the gold. Unfortunately, the company did not in reality have sufficient stock to meet its commitments. In 2011 a floating charge crystallized upon insolvency before investors could rescind contracts for misrepresentation.

The investors have come to you for advice as they want to lay a claim in the context of insolvency and need to establish that they hold proprietary rights/claims.

Advise the investors.

**(7 marks)**

2. Mrs. Fridah Oliech is a supplier and manufacturer of unique custom made assorted goods in Nairobi, and Miss Joy Ndunda is a hotelier and ranch owner who specializes in unique wedding and special occasions services and products in Kenya. Miss Ndunda has advertised that as part of her special services and products she will offer horse driven carriages to bridal parties. The carriages are to be made of unique and rare make and from materials that can take up to 2 years to source, but Mrs. Oliech has assured Miss Ndunda that she will be able to get the materials needed to make the carriages. Miss Ndunda will pay Kshs.5 million for each of the carriages. Mrs. Oliech has promised to manufacture the two carriages ready for use in four months from 1<sup>st</sup> June, 2011, (the date of the agreement). Miss Ndunda has relied upon that representation and has already advertised the special offer in the daily newspapers. In fact she has already received ten bookings for December 2011 based on that offer, and she anticipates making Kshs.5 million from the use of the carriages in December only.

**Task**

Draft a comprehensive agreement that captures and protects Miss Ndunda's interests and covers all contingencies.

**(15 marks)**

**SECTION TWO**

3. (a) Distinguish between a promissory note and a bill of exchange. **(5 marks)**
- (b) Muidekle Bank Limited, as a holder in due course, sued Makery in respect of a promissory note made by the latter. The note was duly endorsed to the bank but was dishonoured when presented for payment.

Makery contested liability on the ground that the note had been materially altered, in that the place of payment, which had been left blank had been filled without his consent at the time of endorsement, a fact which the bank admitted.

Advise Makery.

**(10 marks)**

4. Write brief explanatory notes on the following terms:

- (a) Cheque truncation system  
(b) EFT; and  
(c) National payment system

**(15 marks)**

### SECTION THREE

5. "The Government of Kenya has finally approved the construction of an ultra-modern techno-city, christened the Konza Technology City - where Africa's Silicon Savanna begins. The city is to be located in the Machakos County. The project will entail the construction of a high-tech science and technology park, a residential estate, hotels for accommodation, universities and schools. This phenomenal project, set to be one of the most successful cities in Africa, competing economically and culturally with the best cities in the world is estimated to cost shillings in trillions with funding coming from the International Finance Corporation.

As a company we intend to participate in the tenders for the construction of the Techno-City. However, as you may well be aware as at now, this project requires real financial muscle on our part and as a company we may not single-handedly be up to it.

I have identified a Swiss Company and I have been in communication with the CEO and they are willing to partner with us in order to be able to participate in the tendering process and the construction of the techno-city in the event we are awarded the tender which I very much believe we will."

You are the Corporate Secretary of the Kenyan company that hopes to tender in the construction of the techno-city. The foregoing is an extract of a briefing from the MD/CEO of the company in the company's board meeting.

As the legal professional at the helm of the legal affairs of the company the MD/CEO wishes that you address a number of issues regarding the envisaged business which *inter alia* include the following:

- (a) Discuss the road map for entering into the joint venture between the Kenyan Company (your company) and the Swiss Company. (5 marks)
- (b) Discuss the critical matters that would have to be thoroughly negotiated and agreed upon between the two companies and the form of arrangement you will enter into, for the business venture to effectively be realized. (10 marks)

6. "My name is Tom Ondek. My friend named Dickson Okend and myself have been running a business of offering cleaning services, named Cleanico Enterprises. Even though the business is not registered, over time it has grown in leaps and bounds.

Just the other day, we came across an advert inviting for bids to tender for cleaning services to one of the big companies around. We have realized that the company has numerous offices in Nairobi and its environs and we may require extra financing to hire more staff and purchase other facilities to be able to meet such a client's needs.

On approaching our regular bank for financing we were informed that, although the bank had a lot of confidence in our business acumen and our ability to repay any loan advanced to our business, it was critical that the business first be transformed into a company. The legal officer indicated to me that this would wield a lot of advantages to our business."

This statement was made to you by a client who visited you in your Chambers, in the firm where you have been newly hired as an associate. The client requires that for his benefit you address a number of legal issues (substantive and procedural) regarding the following:

- (a) The advantages of transforming the business into a company (beginning by identifying the nature of the business arrangement they are into currently).

**(5 marks)**

- (b) The process of transforming the business into a company and noting to address *inter alia* the following matters:

- (1) The critical information that you would require from the client to be able to incorporate the company.
- (2) The documents that would have to be prepared and the import of the said documents.
- (3) The actual procedure of incorporating the company.

**(10 marks)**

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