KENYA SCHOOL OF LAW

INTRODUCTION TO COMMERCIAL LAW: SALE OF GOODS AND AGENCY

- One of the most powerful influences on human activity is the driving force of trade
- Traders are constantly developing new sales techniques, new methods and instruments to accommodate more efficiently the needs of the commercial community
- A reading of the history of mercantile law indicates that merchants were deeply involved in the development of maritime and commercial instruments, such as bill of lading and bills of exchange etc
- This lead to the development of a body of substantive rules based on mercantile usage
- Such was the emphasis on commercial usage rather than technical law that lawyers were barred from taking part in the proceedings
- Briefly in English history, the moulding of the diffuse collections of rules into a coherent body of commercial law was largely the work of Lord Mansfield who is considered the founder of English commercial law
- By the time of his retirement, the law merchant had become fully absorbed into the common law, and in the 19th century the formulation of the principles of commercial law in its major aspects was further developed and refined in the writings of a series of outstanding commercial lawyers
- Leading to the Sales of Goods Act 1893 amongst others

THE NATURE OF COMMERCIAL LAW

- Commercial law is the branch of law that is concerned with rights and duties arising from the supply of goods and services in the way of trade
- Its scope is not clearly defined and no two text books adopt the same approach as to the spheres of commercial activity that ought to be properly included in a work on the subject
- There is in fact doubt by some as to whether commercial law is a subject at all, but rather an amalgamation of distinct subjects such as sale, negotiable instruments, etc
- The common thing they do seem to share is the underlying foundation of the law of contract
- Roy Goode in his LEXISNEXIS book 2004 argues that commercial law does exist on the basis that there are unifying principles that bind the almost infinite variety of transactions in which businessmen engage
- It responds to the needs and practices of the mercantile community through the development of principles with sound conceptual framework
- Commercial law is rooted in principles of good faith, the sanctity of agreement, the recognition of trade usage as a source of contractual rights, and the maintenance of a fair balance between vested rights and interests of third parties
- Commercial law is dominated by the sale of goods and central to this subject is the contract between seller and buyer
- But sales are not the concern of the parties alone, there are many other interests to be protected such as consumer interest, and special class of buyers such as buyers on credit etc

PRINCIPLE SOURCES OF COMMERCIAL LAW

1. CONTRACT

- The foundation on which commercial law rests is the law of contract
- Commercial transactions are specific forms of contract
- While each type of commercial contract is governed by rules peculiar to that type, all are subject to the general principles of contract law except to the extent to which these have been displaced by statute or mercantile usage
- Express and implied terms generally
- When considering the law making capacity of parties themselves one must avoid the assumption that they have necessarily negotiated each individual term
- Certain basic terms will of course be bargained in almost every transaction such as the subject matter of the transaction and the price to be paid for it
- Many commercial contracts are indeed hammered out by the parties term by term, and can be truly said to represent their own creation, to which they may be assumed to have addressed their minds
- But a large number of commercial agreements are standard term contracts and are not individually negotiated
- It would be impossible for business to cope with the enormous volume of bargains conducted daily if every term in every agreement, no matter how consistent the pattern of business, had to be negotiated step by step

- The standard term contract is thus an essential feature in business life, and depending on the scale of business the standard term contract may be made by the businessman, his lawyer or trade associations etc
- This however does not alter the fact that the parties to the contract in adopting the standard terms, are making their own law, and such model contracts perform an increasingly valuable function as traders become familiar with them
- Frequently parties do not set out all the terms in the contract itself but find it convenient to incorporate terms by reference to a variety of other documents eg standard contract terms published by an independent body or group of institutions, a model code of practice or usage, a set of standard terms or definitions
- Therefore the law extends what is considered to constitute a consensual undertaking to embrace not only express terms, terms incorporated by reference and terms implied in fact or from prior course of dealing, but also rights and duties implied by law or mercantile usage
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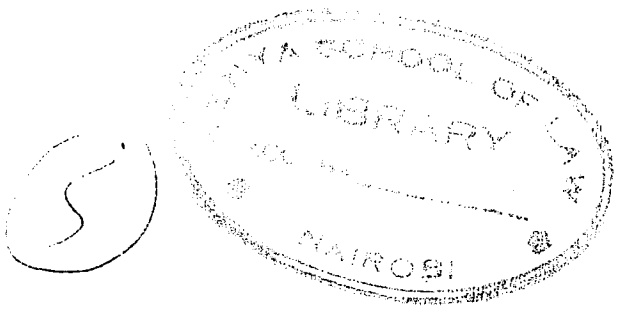
a) Uncodified custom and usage
    - Of great importance as a source of obligation in commercial contracts are the unwritten customs(a rule of a particular locality) and usages (a settled practice of a particular trade or profession) of merchants
    - These have an impact on the content and interpretation of contract terms
    - It is this feature that distinguishes commercial from other types of contracts

- This means that over time a practice that is accepted by businessmen but which the courts has not recognized can become binding and given force
- In fact in some jurisdictions the binding force of mercantile usage does not depend on adoption by contract, but in theory of English law a usage takes effect as an express or implied term of the contract between the parties
- It is dependent for its validity on satisfying certain external legal criteria:
  a) Certainty
  b) Consistency of practice
  c) Reasonableness
  d) Notoriety
  e) Conformity with mandatory law
  f) It must be observed from a sense of a legally binding obligation, not as a matter of mere courtesy or convenience or a desire to accommodate a customer's wishes

b) Codified custom and usage

- It is in the nature of unwritten custom or usage that its meaning and content may be understood differently by different people
- Indeed the very existence of an alleged usage may be challenged
- To address such concerns national and international bodies and associations find it convenient to formulate



the relevant usages in a published code or set of rules which state or restate best practices

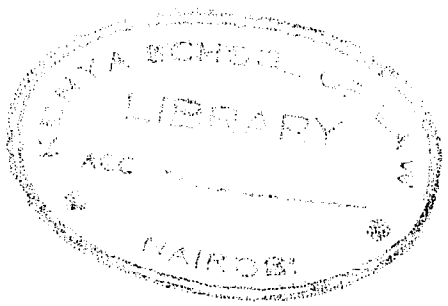
- Members would then be required to adhere to them as a condition of membership, and by incorporation into individual contracts
- Codified customs and usage also depend on their operation on express or implied adoption in the contract

2. DOMESTIC AND INTERNATIONAL LEGISLATION
    - Increasingly the law has intervened in commercial activities and relations through legislation such as The Sale of Goods Act
    - While there remains substantial scope for free bargaining between the parties to a commercial transaction, the parameters within which they are at liberty to make their own law are steadily shrinking
    - It is therefore important to bear in mind the diminishing role of the common law in defining contractual obligations and the growing impact of enacted law and government intervention and international obligations(such as International Conventions , transnational commercial law and Model laws)

IMPORTANT PRACTICAL INDICATORS ON CONTRACT MAKING AND INTERPRETATION

1. THE PROBLEM OF LANGUAGE
   - Much of the work of the courts is taken up with the construction of contracts and statutes
   - Those whose business it is to work with words soon acquire an appreciation of the limitations of language
   - The meaning of a word depends on the context in which it is used and the purposes it is to achieve
   - Contrary to popular belief words are not always made clear by definitions and sometimes these can even obscure rather than clarify meaning
   - Words should be construed in a manner as to give effect to the intention of the parties and that of the law (It is suggested that further reading should be done by those who want to refresh knowledge in this area)
   - Therefore in as far as is possible one should use regular words that are understandable by both parties

2. CONTRACT MAKING
   - It is advisable that contracts be in writing, and the law requires that some types must be in writing to have capacity to confer rights and obligations
   - Contract of sale of goods should specify the parties, item subject matter of contract, quantity of goods, delivery dates, warranties or guarantees or lack thereof, arbitration and termination clauses amongst other terms



- Contracts must be properly negotiated and reviewed to ensure that it meets the intention of the parties, and make expectations clear- define terms and ensure there is no ambiguity
- Some types of business already have set language for contract making and these can be adopted or adapted

3. COMMERCIAL CONTRACTS
   - A Commercial contracts is one entered into between merchants acting for business purposes, and also contracts entered into by merchants and non merchants
   - Repeat transactions between the same parties are a common feature of commercial life so that contract terms not expressly stated will be readily implied from a prior and consistent course of dealing between the parties

Commercial contracts are not homogenous, each type of commercial contract has rules peculiar to that type which are superimposed on the principles and rules applicable to commercial contracts at large, and below them on the general principles of contract law

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- Contracts for sale of goods, for example, are subject to rules not applicable to other types of commercial contracts
- Likewise, contracts of insurance, carriage of goods, finance etc each possess distinct rules tailored specifically to the nature and purpose of the contract

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In terms of contract type and structure, when two parties decide to transact they can achieve their objective through a variety of contract types

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- The legal nature of the relationship and structure to be adopted will depend upon the particular type of contract selected. Examples:
- B wishes to acquire goods from S without having to make a lump sum payment while S does not wish to give up all the rights to the goods until he has received payment in full. There are several different ways in which these dual objectives may be attained
- S could contract to sell the goods to B under a conditional sale agreement, that is an agreement providing for payment of the price by instalments and the retention of the title by S until completion of payment
- Alternatively S could sell the goods to be outright under a contract providing for payment by instalment and B charging the goods to S by way of security for payment, or through hire purchase terms etc
- Usually the factors which will influence the choice of contract type and structure will usually be influenced by commercial necessity or convenience or legal considerations

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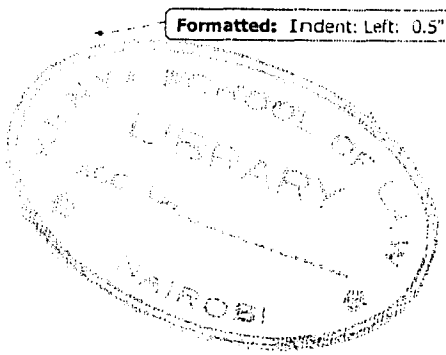

9