

UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCE
DEPARTMENT OF LAW
MAIN EXAMINATION PAPER 2009

TITLE OF PAPER : MERCANTILE LAW

COURSE CODE : L405

TIME ALLOWED : THREE (3) HOURS

**INSTRUCTIONS : ANSWER QUESTION 1
WHICH IS COMPULSORY
AND ANY OTHER THREE
QUESTIONS OF YOUR
CHOICE.
MARKS FOR EACH
QUESTION ARE
INDICATED IN BRACKETS.**

**THIS PAPER MUST NOT BE OPENED UNTIL PERMISSION
HAS BEEN GRANTED BY THE PROCTOR.**

Question 1

You are the General Counsel, working in New York, for a large oil company, KoolOil, with operations in many places around the world. These operations include wholly-owned plants and manufacturing facilities, sales subsidiaries, representative offices, small prospecting offices in remote parts of the world, and many other MNE operations. The headquarters and legal corporate location of the parent company is New York. Recently, it has become apparent to senior executives of KoolOil that an oil pipeline across Namibia and related regions may become a reality, thus making accessible oil fields out in regions of Central Africa, including the Democratic Republic of Congo, Uganda and possibly Namibia. As a consequence, business staff has been exploring the idea of setting up an office to explore possible new oil fields in the area as well as extracting left-oil from already opened fields. At the moment, senior executives would like to open a small office in Mbabane, the capital of Swaziland, for the purposes of discussions with the Swazi government and its State-owned oil company, initiating physical explorations of a new possible fields if the Swazi government and its state oil company will cooperate, and looking forward to expanded operations in the future if investigations pay off. At some point down the road, management contemplates setting up a full scale manufacturing and extraction facility, perhaps in combination with the Swazi State-owned oil company and perhaps not.

If KoolOil were to seek to form a joint venture with the Swazi state oil company, it would agree to transfer to Swaziland western state of the art technology and technical know-how and management, but would insist that the agreement cover extraction of oil, refinement at newly built facilities in Swaziland, transportation of refined oil, and sale abroad in regular international oil wholesale markets. The Swazi state company would insist on having a majority stake of the voting shares of the joint venture company (assume 51%), but would be willing to allow special arrangements to protect KoolOil as the minority shareholder for things particularly important to KoolOil, such as quality of oil, environmental damage (KoolOil has made a commitment in the US only to extract oil abroad at level of environmental quality comparable to that it would use in the US), and

any important decisions that would require commitments of new capital. KoolOil would absolutely insist that the agreement allow it to repatriate hard currency profits and that it be able to terminate the agreement at any time. KoolOil would agree to put in 66% of the needed capital for the venture, notwithstanding that it has only 49% of the voting shares, but KoolOil would also insist that it receive 66% of the profits. KoolOil would also insist on a state guarantee from the Central Bank of Swaziland to cover the company's commitment.

Despite your unlimited faith in the good offices of the central Bank of Swaziland, you prefer not to leave payment to faith alone, and would like to present senior management with mechanisms by which to make:

- (i) the state oil company's commitment to pay its capitalization costs (1/3) a reality and,
- (ii) the Central Bank's guarantee worth something outside of Swaziland.

Drawing on discussions of documentary credits, prepare a memorandum of your proposals to senior management to accomplish both of these goals

In addressing all these questions, flag for consideration any additional legal issues that should be addressed by senior management in order to finalize the business deal.

(25 Marks)

Question 2

- a) With the aid of statutory and decisional authority, critically examine the concept of "value" under the Law of Negotiable Instruments. (20 Marks)

- b) In terms of economic realism and philosophy, “value” is an anomalous concept of commercial intercourse. What do you understand this to mean, and how does this reconcile with its place under the Law of Negotiable Instruments? (5 Marks)

Total (25 Marks)

Question 3

Siyababa Security Services (Pty) (Ltd) and Kuyafiwa Sandwich Makers (Pty) (Ltd), an immensely popular sandwich and confectionery eatery located at the Kwaluseni Campus, UNISWA, entered into a contract for services in terms of which Siyababa undertook to pick up the cash box of Kuyafiwa containing cheques, encash the cheques at Kuyafiwa’s bank, FNB Matsapha, and then redeliver the cash box now containing cash to Kuyafiwa. On one occasion a substantial amount of money was discovered to be missing. One of the contentions raised by Siyababa, when sued by Kuyafiwa, was that the fact that Siyababa had undertaken to indemnify Kuyafiwa against loss of its money “virtually created an insurance contract” between the parties, so that certain undertakings by Kuyafiwa would amount to promissory warranties; it was thus argued that the liability of Siyababa was dependent upon the strict performance of these warranties by Kuyafiwa.

Discuss the legal implications of this novel argument in light of the factual matrix and applicable law.

(25 Marks)

Question 4

(Agree or disagree with the following statement; in framing your answer, take a position, give your reasons for it, give objections to your position, and answer those objections. Remember that your argument is interesting only in so far as you give fair weight to views opposed to your own.)

“Lex Mercatoria” – the law merchant – should take precedence over national laws and national legal doctrines when national courts deal with international business issues, especially in the interpretation of contracts. National courts should set aside their own doctrines of contract and other substantive bodies of law in favor of the long developed, widely shared concepts of the *lex mercatoria* when dealing with international business cases, especially in international trade in goods. Agree or disagree.

(25 Marks)

Question 5

Caesar’s Prestige Motor Vehicle Company (Pty) (Ltd) has had lucrative current accounts with three Swazi banks, which were authorized to honour cheques bearing certain signatures. A dishonest employee of Caesar’s forged some 300 cheques over six years amounting in total to E5,000 000.00. His employers apparently had had no proper financial system in place and had left him unsupervised. On an instituted suit by the company for wrongful dishonour, the banks proffered certain arguments premised on the banker-customer relationship.

Critically discuss the prospects of the legal arguments advanced by the banks.

(25 Marks)

Question 6

(Agree or disagree with the following statement; in framing your answer, take a position, give your reasons for it, give objections to your position, and answer those objections. Remember that your argument is interesting only in so far as you fair weight to views opposed to your own.)

“Lex Mercatoria” – the law merchant – should take precedence over national laws and national legal doctrines when national courts deal with international business issues,

especially in the interpretation of contracts. National courts should set aside their own doctrines of contract and other substantive bodies of law in favor of the long developed, widely shared concepts of the *lex mercatoria* when dealing with international business cases, especially in international trade in goods. Agree or disagree.

(25 Marks)