

LAW AND THE DISTRIBUTION PROCESS,

A Case Study of Esso Standard Kenya Limited.

Dissertation submitted in partial fulfilment of the
Requirements of the LL.B. Degree, University of Nairobi.

TO MY HUSBAND AND DAUGHTER

BY

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INTRODUCTION

This paper is intended to show how two branches of law, that is Contract Law and Agency Law are used to facilitate the distribution process of Esso's Petroleum Products. If one was to write a complete paper on this process there are other branches of law such as Company Taxation Law etc. which would need to be discussed. However this paper only seeks to analyse both contract law and agency law as being the only relevant ones to the discussion.

These two branches of law are to be analysed in some detail since the paper intends to show how the legal rules pertaining to both are applicable to the distribution process and whether they facilitate or inhibit this process.

TO MY HUSBAND AND DAUGHTER real development of each of these laws so as to trace their origin as they were imposed on Kenya from without. The relevant legal rules pertaining to both will then be looked into. This forms Chapter One of this paper.

Chapter Two of the paper is intended to look at the Company, that is, Esso Standard Kenya Limited more closely because it is our case study. Such a closer look entails an analysis of the Company's history so as to know how it has been carrying on business in Kenya.

The second part of this Chapter will be an analysis of the two branches of law as they apply to the distribution process of the Company's products. For this the Operators' Agreement, (Appendix) forms the basis of our discussion.

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I N T R O D U C T I O N

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These two branches of law are to be analysed in some detail on the distribution process is as a result of an interview carried since the paper intends to show how the legal rules pertaining to out by the present writer who interviewed Esso's Senior Sales both are applicable to the distribution process and whether they Representatives. facilitate or inhibit this process.

Such detailed analysis will cover the historical development I am greatly indebted to Mr. Willy Mutunga who was my supervisor of each of these laws so as to trace their origin as they were both and without whose help I could not have accomplished such in this imposed on Kenya from without. The relevant legal rules pertaining distribution. to both will then be looked into. This forms Chapter One of this paper.

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C O N T E N T S

From this the notion of agency will be inferred because although this Agreement does not expressly provide that it creates any agency relationship, it is clear from some of its clauses that it does. This will be an attempt to show how legal rules are applied to render the distribution process successful.

This paper will follow this up in its last Chapter by a theoretical discussion of production and distribution of goods. This will then be briefly related to the distribution process of petroleum products by Esso so as to study the theory on the ground. This information on the distribution process is as a result of an interview carried out by the present writer who interviewed Esso's Senior Sales Representative. Pertaining to Contract Law

B. AGENCY LAW

I am gratefully indebted to Mr. Willy Mutunga who was my Supervisor and without whose help I could not have accomplished much in this dissertation.

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ABBREVIATIONS

- A. L. J. Australian Law Journal
- E. A. L. R. East African Law Review
- I. C. L. Q. International and Comparative Law Quarterly

The relevant legal rules pertaining to both these laws will be discussed. These form the basis of the paper as the paper will attempt to show how distribution of goods is affected by the two laws.

A CONTRACT LAW

1. Historical Development

The history of the law in Britain is important because this law was later imposed on Kenya. British society has developed through the stages of primitive communalism, slave economy, feudal era and capitalist stage. This last stage can be subdivided into both competitive and monopoly capitalism. Britain colonized Kenya at this monopoly stage and the development of the law of contract falls within the pattern. The doctrine of freedom of contract is the fundamental basis of all principles of the law of contract.

Common law relating to contract was inadequate to quote Chechira and Fifoot:

"The medieval common law was thus equipped to deal with a number of transactions which fall within the modern law of contract and quasi-contract. But there were serious gaps. The royal judges did not recognize an agreement to convey land, whether or not the purchase price had been paid, unless it was under seal. They would not sanction a claim to reasonable remuneration for goods delivered or services rendered in the absence of a fixed and predetermined sum.

CHAPTER ONE

Above all, come in the exceptional, if important, case of the sale of a CONTRACT AND AGENCY LAWS means of obtaining damages where neither party had as yet performed his part of the bargain. In technical languages, they gave no In this Chapter we shall examine both contract and agency laws. The historical development of each of them will be necessary to examine so as to show how the two came to be part of our law. The relevant legal rules pertaining to both these laws will be discussed. These form the basis of the paper as the paper will attempt to show how distribution of goods is affected by the two laws.

dependence and "free" of property (the serf depended on land for subsistence. By freeing him from land, he was also freed from his sole means of subsistence), and whom hunger would drive to the factories. The indispensability of contract to law was later imposed on Kenya. British Society has developed the development of free enterprise system is put forward by Sessler through the stages of primitive communalism, slave economy, feudal era and capitalist stage. This last stage can be subdivided into both competitive and monopoly capitalism. Britain colonized Kenya at this monopoly stage and the development of the law of contract falls within the pattern. The doctrine of freedom of contract is the fundamental basis of all principles of the law of contract.

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which dominate the scene today. The facts of contract had to "The medieval common law was thus equipped to deal with a number of transactions which fall within the modern law of contract and quasi-contract. But there were serious gaps. The royal judges did not recognize an agreement to convey land, whether or not the purchase price had been paid, unless it was under seal. They would not sanction a claim to reasonable remuneration for goods delivered or services rendered in the absence of a fixed and predetermined sum.

Above all, some in the exceptional, if important, case of the sale of goods, they offered no means of obtaining damages where neither party had as yet performed his part of the bargain. In technical languages, they gave no sanction to exemptory contracts not under seal; and until this omission was supplied, it was not possible to say that a general conception on contract had been received into law."¹

When the bourgeoisie seized power in Britain they demanded "free" labour market, "free" play of economic forces on which capitalism was to be based for a long time. "Free" labour market meant workers who were "free" of feudal fetters, serf dependence and "free" of property (the serf depended on land for subsistence. By freeing him from land, he was also freed from his sole means of subsistence), and whom hunger would drive to the factories. The indispensability of contract to the development of free enterprise system is put forward by Kessler:

"With the development of a free enterprise system based on unheard of division of labour, capitalist society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Common lawyers, responding to this social need transformed "contract" from the clumsy institution that it was in the sixteenth century to a tool of almost unlimited usefulness and pliability. Contract became the indispensable instrument of the enterpriser enabling him to go about his affairs in a rational way."²

However, this position changed in the 19th Century and the individual enterpriser was replaced by the huge corporations which dominate the scene today. The form of contract had to change. Kessler goes on to state:

"The development of large scale enterprise with its mass distribution made a new type of contract inevitable - the standardised mass contract. A standardised contract, once its contents have been formulated by a business firm, is used in every bargain with some product or service.

while others need some detailed analysis as they are the ones which this paper attempts to relate to the distribution process.

2. Legal Rules Pertaining to Contract Law

The individuality of the parties which so frequently gave colour to the old type of contract has disappeared. The stereotyped contract of today reflects the impersonality of the market."³

He continues to trace the development and states:

"The individualism of our rules of contract law of which freedom of contract is the most powerful symbol is closely tied up with the ethics of free enterprise capitalism and the ideas of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen. This society believed that individual and co-operative action left unrestrained in family, church and market would not lessen the freedom and dignity of man but would secure the highest possible social justice. It was firmly convinced of a natural law according to which the individual serving his own interest was also serving the interest of the community.

... With the decline of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has changed radically. Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms."⁴

Among the latter are contracts which are entered into in restraint of trade.

The law of contract was imposed in Kenya through the contract Act, 1872 of India. It was repealed by the Contract Act, Cap. 23

of the Laws of Kenya. Section Two (2) of the act provides that the English law of contract is our law. The general principles of the law are to be discussed shortly.

Inorder for a contract to be said to exist there are various requisites some of which need to be mentioned here only in passing, while others need some detailed analysis as they are the ones which this paper attempts to relate to the distribution process.

2. Legal Rules Pertaining to Contract Law

In the first place there has to be an offer which when accepted by the party to whom it is made becomes binding on him unless it does not fulfil certain conditions. Consideration is one element that has to be there in order for a contract to be said to be binding on both parties. Sir Frederick Pollock said:

"An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

It must also be shown that there was an intention on the part of both parties to create legal relations but in commercial agreements there is a presumption that the parties intended to create legal relations and make a contract.

Certain contracts are said to contain vitiating elements such as those that are entered into through mistake, misrepresentation, duress or undue influence, those that are rendered void by statute, those that are illegal by statute or at Common Law and there are those that are void at Common Law on grounds of public policy. Among the latter are contracts which are entered into in restraint of trade.

The doctrine of restraint of trade is the effect that a contract which comes within its ambit, and which restricts the future liberty of a person to carry on his trade, business or profession in any manner he chooses, is contrary to public policy and thus void, unless it is justifiable as being reasonable. The position was stated in Petrolina (Great Britain) Limited V Martin and Another.⁶

In April 1963, Martin the first defendant who was negotiating to buy a garage signed as a condition of the sale a solus agreement with the Plaintiff Oil Company. Martin had to undertake to buy all the petrol for the garage from the Plaintiffs and to stock and sell no other petrol; to sell at retail prices fixed by the Plaintiffs, to use only their lubricating oil in his lubricating bay; to advertise only their lubricating oil and to keep the garage open at all reasonable times for the sale of petrol. He also undertook not to dispose of the premises or any part of them without giving the Plaintiffs the first refusal, and not to sell, let, surrender or part with possession of them to a third party unless that third party agreed to observe and perform all his obligations under the solus agreement. The agreement was to continue for twelve years. If during that period 600,000 gallons of the Plaintiffs' petrol had been sold, Martin could determine the agreement by three months' notice but if then the agreement could not be determined until that amount had been taken. The Plaintiffs on their part undertook to give Martin a rebate of 1 $\frac{1}{5}$ dollar on every gallon of petrol bought from them.

Due to severe competition the business was not flourishing. After operating his business for seven weeks and finding that he was only selling the Plaintiffs' petrol at the rate of about 30,000 gallons a year, Martin began, on 30th May to sell another brand of petrol and on June 5 he signed a two-year solus agreement with the suppliers of that other brand. Martin also intended to convey the business to a Company under his control.

The Plaintiffs brought an action, asking, inter alia, for an injunction to restrain Martin, until the lawful determination of their agreement with him, from selling any petrol other than theirs and also from disposing of the property; and they joined as second defendant the new Company, asking that it be enjoined from acquiring any interest in the garage without first entering into a new solus agreement with the Plaintiffs.

Buckley J. held that the agreement was unenforceable because it was unreasonable restraint of trade. The Plaintiff Company appealed but the appeal was dismissed. Lord Denning M. R. stated the general principle:

"Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests so long as he does nothing unlawful; with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest."

This doctrine of restraint of trade does not apply to every contract which, in any circumstances whatever, restricts a man's liberty to trade. It does not apply to restrictions which are adhesion. The term "contract of adhesion" was invented by Saleilles and according to Ames and Walton it is employed "to denote contractual or conveyancing relations. It is said to be reasonable in which the conditions are fixed by one of the parties in advance when it is seen as reasonable as between the parties and from the point of view of the community. It must protect some proprietary interest either be accepted or rejected but its conditions are not open to discussion."

restraint must not be excessive as regards its area, time of operation or the trades it forbids.

Everyone is his own dictionary in this subject.

This doctrine is covered by the contracts in Restraint of Trade Act,⁸ a section of which reads as follows:

Any agreement or contract which contains any provision or covenant whereby any party thereto is restrained from exercising any lawful profession, trade business or occupation shall not be void only on the ground that such provision or covenant is therein contained: Provided that

(i) The High Court shall have power to declare such provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and to all the circumstances of the case, such provision or covenant is not reasonable either in the interests of the parties, in as much as it affords more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected, or in the interests of the public, inasmuch as such provision or covenant is injurious to the public interests."⁹

So we find that certain contracts in restraint of trade are rendered lawful and contracts that are entered into between Esso and its operators will be seen to amount to being such contracts. This is to be discussed in chapter two.

A new phenomenon which has entered into contractual obligations is the use of standard form contracts. The contracts with which this paper is dealing are standard form contracts.¹⁰

Standard form contracts are also referred to as contracts of adhesion. The term "contract of adhesion" was invented by Saleilles and according to Amos and Walton it is employed "to denote contracts in which the conditions are fixed by one of the parties in advance. The contract, which frequently will contain many conditions, may either be accepted or rejected but its conditions are not open to discussion."¹¹

There is no acceptable definition of a standard form contract. Everyone is his own dictionary in this subject.¹²

But what is acceptable is that you can recognize a standard form contract when you see one. However, Israel, one of the few countries which have made reforms in standard form contracts has formulated a definition which contains all the essential features of a standard form contract.

"Standard form Contract," means a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service (hereinafter "the supplier") with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hereinafter "the customers").¹³

From this it can be seen that a standard form contract is a one-sided affair. The terms are drawn up by one person selling goods or services and all customers have to purchase on the same uniform terms. There is no room for bargaining or modification of the terms. The customer has either to choose to buy at the terms already formulated, or not to buy at all.

The effect of this one-sidedness is written on by Professor Diamond: "But the standard form contract carries with it a temptation to which it is only too easy to succumb. It is usually drawn up by one party to the contract, often by lawyers on his behalf, and the opportunity is there to insert provisions favourable to the drafting party. Where it is known that the other party is unfamiliar with the subject-matter of the contract, that he is unlikely to take advice before entering into the contract, and in particular that he is unlikely even to read the provisions it is perhaps only natural that one-sided terms should find their way into the Contract."¹⁴

This one-sidedness is reflected in the exclusionary nature of the basic principle of English Law, that of freedom of contract. standard form contracts. This is seen in exemption clauses which are based on the premise that each party to a contract is free to impose his own terms. These are of two types, there are those which exclude liability or limit obligations under the contract, and where a fundamental breach exists, it can be applied to prevent reliance on an exemption clause only when the non-breaching party does not

and those which qualify the rights of the promise upon breach. It has been suggested by this case that there is no substantial Exemption clauses are both substantive and procedural in their doctrine of fundamental breach in English Law. It has been suggested that they have a substantive effect. They are substantive if they exclude such primary rights both in this case and in earlier decisions that as a matter of like conditions and warranties and other duties in a contract. interpretation all exemption clauses should be read as if they They will have a procedural effect if they regulate matters like contained an implied limitation restricting their application to when rights under a contract will be enforced. cases in which the main object or purpose of the contract is being

Use of such exemption clauses made an abuse of standard form contracts. The doctrine of fundamental breach was formulated to deal with such abuses. This doctrine has been applied in English Law for some years to contracts for carriage at sea and to some types of bailment contracts. By the 1950^s it was expanded to cover all types of contracts. In Karsales (Harrow) Limited V Wallis¹⁵

L. Denning explained the operation of this doctrine as follows:

"Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. They do not avail him when he is guilty of a breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses and see what are the terms express and implied which impose an obligation on the party. If he was guilty of a breach of those obligations in a respect which goes to the root of the contract, he cannot rely on the exempting clauses ..."¹⁶

There has been a lot of controversy surrounding this doctrine because it has been difficult for commentators and the court to explain how a court could determine the content of the core obligation as put forward by L. Denning. This would interfere with the basic principle of English Law, that of freedom of contract.

In the oft-cited case of Suisse Atlantique¹⁷ their Lordships expressed different views. They seemed to be most invited on the proposition that even if some type of substantive doctrine of fundamental breach exists, it can be applied to prevent reliance on an exemption clause only when the non-breaching party does not affirm the contract after learning of the breach.

It has been suggested by this case that there is no substantive doctrine of fundamental breach in English Law. It has been suggested both in this case and in earlier decisions that as a matter of interpretation all exemption clauses should be read as if they

contained an implied limitation restricting their application to cases in which the main object or purpose of the contract is being carried out.

In assessing the desirability of following Suisse Atlantique in East Africa some interpretation approaches have been used. The first one is more or less traditional, whose supporters feel that the task of regulating the content of exemption clauses and avoiding their harsh effects is primarily one for the legislature and not for the courts. The second approach closely resembles a substantive doctrine of fundamental breach and so if it was followed, many of the criticisms applicable to that doctrine would continue to apply. This would allow courts to avoid exemption clauses in cases of severe breach.

An approach has been suggested by Whitford¹⁸ whereby the East African courts could, in determining the core obligation, or the main object of a contract that cannot be excluded, ascertain what an ordinary layman who had witnessed both the oral and written communications between the parties would assume the parties had agreed to do. In a bargained contract the writing would usually be quite persuasive of the parties intentions. This situation is not entirely consistent with freedom of contract.

AGENCY LAW

When stripped of its ideological cloak, whereby individuals

1. Historical Development

are supposed to be free to enter into contracts when they are not, freedom of contract means no more or less than freedom to exploit and be exploited.¹⁹

Otto Kahn has written on this:

"As a social fact that which the law calls 'freedom of contract' may in many spheres of life (not only in labour relation) be no more than the freedom to restrict or to give up one's freedom. Conversely the to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally and socially unfree will."²⁰

Physical freedom which the doctrine of freedom of contract

emphasizes ignores the relevant consideration, that is, the economic power of the parties to a contract.

This paper will attempt to relate these legal rules to the contract and tort, agency was a vital relationship.²¹ process of distribution of petroleum products by Esso Standard,

Kenya Limited. It will seek to establish the fact that these

legal rules play a very important role in this process.

Whether trade there was or not, until the merchants came into the scene. They did trade beyond their local provinces. During the era of competitive capitalism, Britain had a national market and production was stepped up because of the inventions and innovations. Goods are produced for their exchange values and they have to reach their ultimate consumers, thus the need for agents arose. The mass production and distribution necessitated the refining of the rules of agency. The law was then imposed on Kenya by British Imperialism.

B 2. AGENCY LAW and Duties

1. Historical Development

the basis of agency. Friedman has defined the law of agency as were many of the other laws was imposed on Kenya and so a history of this law can only be traced by analysing the development of that law in Britain. Friedman traces the history of this law from the latter part of the Eighteenth and the early part of the Nineteenth Centuries. He says that it was at that time that the leading ideas of the modern law of agency emerged and that they were more or less in the same form as they are to this present day. These developments were refined in the Nineteenth Century to meet the needs of the Commercial Community: Friedman notes:

There are various situations in which this relationship can be said to exist. It can be created by the act of the parties, by estoppel, by operation of law, by ratification and lastly, by contract. The latter method of creation is the one this paper is mostly concerned with for the purpose of analysing the relationship that exists between Base Standard and its Operators. 23

"The medieval community was not sufficiently open and mercantile in character to require more than a rudimentary notion of agency (just as it needed only an elementary law of contract). The growth in importance of commercial life (especially with the rise of trading companies, the ancestors of modern limited liability companies) showed that, both in contract and tort, agency was a vital relationship." 21

Where there is a contract with express terms, those terms will dictate the internal obligations of the principal and agent. During the Feudalism era, the law of agency in Britain was embryonic. Whatever trade there was, was localised until the merchants came into the scene. They did trade beyond their local provinces. During the era of competitive capitalism, the agency is contractual, the agent must perform what he has undertaken to perform. He has a duty to carry out the contract because of the inventions and innovations. Goods are produced for their exchange values and they have to reach their ultimate consumers, thus the need for agents arose. The mass production and distribution necessitated the refining of the rules of agency. Paramount consideration is the benefit of the principal, and as The law was then imposed on Kenya by British Imperialism. long as he acts for the principal's benefit, the agent may use his discretion.

2. Formation and Duties

Thirdly, the agent must perform the undertaking with due care and skill. Contract law forms the basis of agency. Fridman has defined

agency as:

Fourthly, there is a general rule that an agent must perform "The relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."²²

Fifthly, the agent must never deny the title of the principal. There are various situations in which this relationship can be said to exist. It can be created by the act of the parties, by estoppel, by operation of law, by ratification and lastly, by contract. The latter method of creation is the one this paper is

The sixth duty that an agent owes to his principal is that he must pay over to his principal all moneys received to the use that exists between Esso Standard and its Operators.²³

of his principal. This duty exists even if the transaction is

There are certain obligations which arise as a result of respect of which the money is received by the agent on behalf creation of the agency relationship. The express or implied terms of the principal was void or illegal as long as the contract of the contract govern the rights and liabilities of the parties. of agency is not itself illegal.

Where there is a contract with express terms, those terms will

Lastly, an agent has a duty not to let his own personal dictate the internal obligations of the principal and agent. interest conflict with the principal's. He must disclose all

The agent has various duties all of which are aimed at ensuring maximization of profits by the principal. Firstly, where whether to consent to the agent's acting. He must hand over all the agency is contractual, the agent must perform what he has undertaken to perform. He has a duty to carry out the contract

It is clear from this that the principal's property is which he has made with the principal.

protected which is a cardinal principle of bourgeois law. Secondly, in performing the undertaking he must act in accordance with the authority which has been given to him. The maximization of profits is reinforced. Profits can only be paramount consideration is the benefit of the principal, and as maximized if the agent performs his duties diligently and long as he acts for the principal's benefit, the agent may use hands over the money to the principal. his discretion.

Thirdly, the agent must perform the undertaking with due care and skill.

Fourthly, there is a general rule that an agent must perform his undertaking personally. Any delegation will be a breach of the agent's obligation to the principal unless permitted by the contract.

Fifthly, the agent must never deny the title of the principal to goods, money or land possessed by the agent on behalf of the principal. This rule has a half-hearted exception where a third party is involved.²⁴

The sixth duty that an agent owes to his principal is that he must pay over to his principal all money received to the use of his principal. This duty exists even if the transaction in respect of which the money is received by the agent on behalf of the principal was void or illegal as long as the contract of agency is not itself illegal.

Lastly, an agent has a duty not to let his own personal interest conflict with the principal's. He must disclose all the material circumstances so that the principal can choose whether to consent to the agent's acting. He must hand over all secret profits.

It is clear from this that the principal's property is protected which is a cardinal principle of bourgeois law. The circulation process of goods and the ultimate goal of maximization of profits is reinforced. Profits can only be maximized if the agent performs his duties diligently and hands over the money to the principal.

FOOTNOTES TO CHAPTER ONE

The principal on the other hand, has a duty to remunerate the agent. The latter has to earn his commission by performing his duties and has to be indemnified for any losses, liabilities and expenses incurred during the undertaking.

3 Kessler, Ibid. P. 631

It is clear from these legal rules that they facilitate appropriation of the surplus value, thus facilitating the distribution process.

4 Ibid. P. 640

5 [1966] Chapter 146

6 Ibid. at P. 169

7 Cap. 24, Laws of Kenya

8 Ibid. Section 2

9 See Appendix

10 Introduction to French Law by Ames and Walton P. 152 quoted by C. H. Bright "Contracts of Adhesion and Exemption Clauses" 41 A. L. J. at P. 261

11 C. H. Bright Ibid. at P. 261

12 Quoted in A. Diamond "The Israel Standard Contracts Law 5724-1974 I.C.R.S. 1410. at P. 1415

13 Diamond, Ibid.

14 [1956] 2 All ER 866

15 Ibid. at P. 868-69

16 [1967] 1 A. C. 361

17 In W. C. Whitford "The Doctrine of Fundamental Breach in East Africa" in [1969] E. A. L. R. 87

18 Matunga, Origin and purpose of the Kenyan Law of Contract (Misc)

19 Otto Kahn - Freund - Labour and the Law, London, [1962] P. 16

20 Fridman - The Law of Agency, London, [1971] P. 7

21 Ibid. P. 8

22 See Appendix

23 Fridman, Ibid. P. 131

FOOTNOTES TO CHAPTER ONE

This Chapter will give a brief history of Esso Standard,

- 1 Cheshire and Fifoot - Law of Contract, London, [1972] P.5
- 2 F. Kessler, Contracts of Adhesion - Some thoughts about Freedom on Contract in 43 Columbia Law Review [1943] P.629
- 3 Kessler, Ibid P.631
- 4 Ibid. P.640
- 5
- 6 Pollock on Contracts, 13th Edn. P. 133
- 7 [1966] Chapter 146
- 8 Ibid. at P. 169
- 9 Cap. 24, Laws of Kenya
- 10 Ibid. Section 2
- 11 See Appendix
- 12 Introduction to French Law by Amos and Walton P. 152 quoted by C. H. Bright "Contracts of Adhesion and Exemption Clauses" 41 A. L. J. at P. 261
- 13 C. H. Bright Ibid. at P. 261
- 14 Quoted in A. Diamond "The Israel Standard Contracts Law 5724-1972" 14 I.C.E.Q. 1410. at P. 1413
- 15 Diamond, Ibid.
- 16 [1956] 2 All ER 866
- 17 Ibid. at P. 868-69
- 18 [1967] 1 A. C. 361
- 19 In W. C. Whitford "The Doctrine of Fundamental Breach in East Africa" in [1969] E. A. L. R. 87
- 20 Mutunga, Origin and purpose of the Kenyan Law of Contract (Mimeo)
- 21 Otto Kahn - Freud - Labour and the Law, London, [1962] P. 16
- 22 Fridman - The Law of Agency, London, [1971] P. 7
- 23 Ibid. P. 8
- 24 See Appendix
- 25 Fridman, Ibid. P. 131

CHAPTER TWO

This Chapter will give a brief history of Esso Standard, Kenya Limited, which is the case this paper seeks to study. It will then give an analysis of some of the documents which embody the legal rules pertaining to both contract and agency laws. This will help to show how law is related to the distribution process.

A History of Esso Standard, Kenya Limited

Although the present Company name was adopted in 1966, related forerunners have been supplying petroleum products in Kenya from East Africa. In 1966 there was a further re-organization which about 1870, originally on a "spot" basis but later becoming resulted in the establishment of Esso Standard Kenya Limited involved in all normal marketing operations.

The original parent Company was the Standard Oil Trust regional headquarters for Exxon. Exxon is the world's largest petroleum Company and is involved in all aspects of the petroleum business namely: exploration, production, transportation, refining and marketing. Standard Oil Company had extended its petroleum products, export and marketing. Esso in Kenya is involved regularly, only in activities throughout the Americas, Europe, Asia and Africa. (John D. Rockefeller's ambition was to carry his kerosene to any place "that wheels could roll or a camel could put its hoof").

Thus we find that whatever problems there may have been, solutions had to be found to ensure that distribution took place.

A branch of the Company started marketing petroleum products in Kenya on a regular basis in 1922, originally through the African Mercantile Company. In 1932, as a result of growth in demand, direct operations were started in Kenya from the headquarters in Nairobi.

The introduction of diesel, fuel oil, the refined grades of petrol and L.P.G. (cooking gas) still lay far off in the future.

The business grew more and more lucrative and for this reason In 1933 the Standard Oil Company (New Jersey) and Socony-Vacuum Oil decided to combine on an equal ownership basis, their producing, refining and marketing interests in the Eastern Hemisphere, and for the purpose formed Standard-Vacuum Oil Company popularly known as Stanvac'. From 1933 Stanvac conducted operations in Kenya and in 1951 a Stanvac East Africa Organisation was created. All areas where there were operations were controlled from Nairobi.

In 1962 Stanvac was dissolved and the Esso name came to East Africa. In 1966 there was a further re-organisation which resulted in the establishment of Esso Standard Kenya Limited affiliated to Esso Africa Inc. based in London which is a major regional headquarters for Exxon. Exxon is the World's largest petroleum Company and is involved in all aspects of the petroleum

business namely: exploration, production, transportation, refining and marketing. Esso in Kenya is involved regularly only in marketing and refining although exploration is on. This paper

will attempt to throw light on the marketing business.

In 1932 in addition to lubricating oils there were only three main products marketed namely: lighting kerosene (for lamps), power kerosene (mainly for lorries, tractors etc), and petrol (for cars). A few cars from an earlier generation were still around. These cars used both power and kerosene and petrol. The car was fitted with two tanks, one for petrol and the other for kerosene. The petrol was used for starting the engine and then switched over to kerosene for driving. The introduction of diesel, fuel oil, in bulk to these depots and then drums were filled and distributed the refined grades of petrol and L.P.G. (cooking gas) still lay far off in the future.

transportation from the depots to the farms was done in Ox-carts.

The business grew more and more lucrative and for this reason all the products, including petrol, were sold either in depots were constructed in various places to cater for distribution returnable drums or four gallon tins ('debes'). Both containers of the products. Between 1928 and 1932 an extensive building programme was completed with assistance of engineers from overseas. The tins frequently leaked, while the returnable drums were always in short supply because some customers did not return them, using them instead. The Ocean terminal at Shimanzi, Mombasa and depots in Nairobi, Nakuru, Kisumu, Eldoret, Kitale, Hoey's Bay and Turbo were completed. The last three were later closed.

There was no further major construction until after the war when further depots were built at Lubwa (later transferred to Londiani), Thompson's Falls and Nanyuki. In 1951 and 1952 fuelling facilities were also built at Eastleigh and Wilson Airport. Later the Eastleigh facilities were transferred to Nairobi Airport in 1958 and those at the Wilson Airport closed.

The history of the depots shows the response to the new demand centres developing, and later the advent of cheaper transport and better distribution leading to depot closures to serve costs.

As concerning mode of distribution, originally the products were imported from South Africa in cases and unloaded at Mombasa. Due to damage occurring during the sea voyage the cases were re-conditioned before being sent up-country by railway. Import in bulk started with the arrival of the first tanker in 1929 in Mombasa and bulk facilities built at Shimanzi. Returnable drums were filled and railed to Nairobi and other upcountry depots and to Uganda depots. After 1932, bulk storage facilities were constructed in Nairobi, Nakuru and Eldoret. Product was railed in bulk to these depots and then drums were filled and distributed in the surrounding areas. Transportation from the depots to the farms was done in Ox-carts.

All the products, including petrol, were sold either in returnable drums or four gallon tins ('debes'). Both containers created lots of problems for consumers and the Company. The tins frequently leaked, while the returnable drums were always in short supply because some customers did not return them, using them instead as domestic containers and in some cases as culverts. Also each time the drums were returned they had to be thoroughly cleaned, regaske/ and painted all over in brand colours. The use of returnable drums was therefore stopped in 1955. They were replaced by bulk installations at the customers' premises. Service and other filling outlets were growing up and most of the retail business was carried on from these outlets. The fifties and sixties saw the major growth of the modern service station in Kenya.

Until the mid-fifties only three oil Companies operated in Kenya but since then the number has increased to seven. The whole Country is well covered by a close network of service and filling stations, supplemented in rural areas by small outlets. As a rough indication

The Contract is seen to be too much of a one-sided affair, of the growth of volumes over the period Esso has been operating it is Esso which draws up the terms of the Contract and it is then handed over to the operators to comply with. This one-sidedness is reflected in the whole contract in that nearly all the terms

The East African Oil Refinery at Changamwe stores many more millions of litres and supplies oil Company products into the new pipeline. This refinery was completed in 1963 and Esso had just over a quarter share of the equity, which has since been reduced by half when the Government of Kenya became 50% partners with the original owners.

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There have been many changes over the years, responsive to the needs of the consumer and indicative of the rapid growth of all proceedings, costs claims and demands of whatever the Kenyan Economy. and whether arising out of death, personal injury or damage to property or otherwise however which may arise at, in or connected with the use of the premises and at the operator's own expense fully to insure and continue to insure against such claims and liabilities with some reputable insurance Company and to

B. ANALYSIS OF THE LAW

1. Operator's Agreement

This second part of the Chapter is an attempt to analyse agents, directors, or employees. the contract entered into between Esso and its operators.² The legal rules pertaining to both contract and agency laws will be of relevance here. These have already been discussed in Chapter One and so what this Chapter will seek to do is to apply those rules on the ground so to speak, by relating the relevant ones to this contract. The contract is a Standard form contract. It is acceptable that one can recognize such a contract at sight but attempts at defining it have been made. Israel has formulated a definition in which the essential features of a standard form Contract are contained.³

The Contract is seen to be too much of a one-sided affair, It is Esso which draws up the terms of the Contract and it is then handed over to the operators to comply with. This one-sidedness is reflected in the whole contract in that nearly all the terms are favourable to Esso and very much prejudiced against the operators. Examples from the terms of the Contract will clearly show this.

Company and having as its name the name of the Station of such similar name then the operator undertakes on the determination of this Agreement forthwith to change the name of the Company in accordance with the Companies Act (Cap. 486) or any law amending or replacing the same. The Operator undertakes that he will not during the currency of this agreement or at any time thereafter transfer the name of the premises specified in the first schedule hereto or any part thereof to or for any other service station or petrol filling station or premises used for the retailing of motor fuels.

The Contract provides that the operator agrees with Esso,

To indemnify and keep indemnified Esso from and against all proceedings, costs claims and demands of whatever nature and kind whether arising out of death, personal injury or damage to property or otherwise however which may arise at, in or connected with the use of the premises or the equipment and at the operator's own expense fully to insure and continue to insure against such claims and liabilities with some reputable insurance Company and to furnish proper proof of such insurance to Esso on demand, it being agreed that the operator shall not be entitled to any indemnity for any such liability from Esso, its agents, Directors, or employees.

It is provided elsewhere that:

"Esso is not responsible for any leakage, theft, evaporation or any other loss of bulk products delivered to the operator by Esso once the discharge valve of the delivering tank lorry is opened."⁵

Such exclusion from liability on the Company's part shows clearly how one sided the agreement is.

Restraint of trade, a doctrine that has been discussed in Chapter One is also evident in the instant contract. It is to the effect that a contract which comes within its ambit, and which restricts the future liberty of a person to carry on his trade, business or profession in any manner he chooses is contrary to public policy and thus void, unless it is justifiable as being reasonable.

The contract provides that the operator agrees with Esso that:

"In the event of the Operator being a Limited Liability Company and having as its name the name of the Station or such similar name then the operator undertakes on the determination of this Agreement forthwith to change the name of the Company in accordance with the Companies Act (Cap.486) or any law amending or replacing the same. The Operator undertakes that he will not during the currency of this agreement or at any time thereafter apply or use the name of the premises specified in the first schedule hereto or any part thereof to or for any other service station or petrol filling station or premises used for the retailing of motor fuels."⁶

In another section of this same clause it is provided that the

"Operator agrees not to operate or participate in the operation of any fuels retailing business within a radius of 10 Kilometres from this filling or service station for a period of two years to be calculated from the date of termination of this Contract except if Esso gives its written approval."

From such sections we can conclude that the Contract has some effect, the operators have no choice but to comply with it. Experience evidence of restraint of trade. The operator is restricted in the area and time he may carry on business. But then the question arises as to whether or not the restraint is reasonable.

Considering the nature of Esso's business, such restrictions even in the discussion of the terms leave alone the drawing up of the Contract? This freedom of Contract is indeed a myth and it field which experiences a lot of competition and in order for the Company to flourish, such has to be curbed. Secondly, if the operators

were given the freedom to set up similar business, it would mean that Esso's sales would go down as the operators would inevitably concentrate on their own business. In this way the targets the Operators Agreement is a legal point to be discussed. Company has set would not be met and it would not be possible

Agency relationship can be inferred from this contract to maximize profits which is the ultimate aim of the targets. In order for restraint to be said to be reasonable it must

not be excessive as regards its area of operation. The area given, that is, 10 Kilometres cannot be said to be excessive considering on the operators as has been discussed above. For if one was a buyer the way the Country is covered with a network of service and filling stations. As regards time, years is reasonable as the rate in which such stations are being put up is incredible. So the Law would still aid Esso in its business if the operator brings up a case against it.

It would be necessary here to comment on the oft-discussed freedom of contract which has been said to be nothing but a myth. We have already established that the Contract in question is a standard form Contract and as is the case with such Contracts, only one party to the contract draws up and presents the Contract to the operators and although it is so much prejudiced against them, the operators have no choice but to comply with it. Experience has in fact shown that most operators sign the agreement even before they read it and once they do this, the Contract binds them. What freedom of contract is there if one party does not participate even in the discussion of the terms leave alone the drawing up of the Contract? This freedom of Contract is indeed a myth and it "means no more or less than freedom to exploit and be exploited."⁹ Just like an agent is expected by his principal to keep proper accounts, so is the operator expected to do as regards his sales of Esso Products. The Contract provides that the Operator agrees: there is evidence of any agency relationship in this Contract, the Operators Agreement, is a legal point to be discussed. Agency relationship can be inferred from this contract in spite of the fact that the operators are buyers in the sense that they buy their products cash and then go to sell them. This inference is drawn from the way the Company imposes restrictions on the operators as has been discussed above. For if one was a buyer would there be any reason why he should be thus restricted? There is no reason why this should be the case, he should be left to have the freedom to deal with the goods as he thinks fit. An example of this is seen in a section which provides that the operator agrees: through fast disposal of products.

Agency law also comes in handy for Esso because it would be
"To buy exclusively from Esso and sell at the premises
Exclusively Esso's Petroleum Products and those specialities
marketed by Esso. ..."¹⁰

By affording duties for such operators, the law meets the need

This inference can be supported by the terms which impose
of Esso because such the operator
certain duties on the Operators owed to Esso in the same way as
their duties on this they are
agents owe their principals certain duties. For instance, an
agent owes a duty to his principal not to delegate the undertaking
and there is a general rule that the agent must perform the
undertaking personally. In this instant contract, the operator
agrees with Esso:

"Not to assign, underlet, change or part with possession
of the premises or any part thereof or the equipment therein
or any item thereof nor any of the benefits or obligations
of this agreement."¹¹

Just like an agent is expected by his principal to keep proper
accounts, so is the operator expected to do as regards his sales
of Esso Products. The Contract provides that the Operator agrees:

"To keep in a just and true manner all such records and accounts
as may from time to time be required by Esso in regard to his
sales of Esso Products at the premises and to permit Esso to
enter the premises at all reasonable times to inspect such
records accounts and bulk and packaged stocks."¹²

From this analysis of the Operators Agreement it becomes
clear that law aids Esso in the distribution process. Contract
law enables the Company to impose such terms as it may deem
necessary through the use of a standard form Contract and to
exploit the Operator under the guise of freedom of contract. By
the use of such a contract, Esso is able to maintain least
competition and in this way to ensure maximization of profits
through fast disposal of products.

FOOTNOTES TO CHAPTER TWO

Agency law also comes in handy for Esso because it would be impossible to carry on business without agents like the Operators. By affording duties for such operators, the law meets the need of Esso because then the operators will be bound to carry out their duties. In this way the distribution process is hastened.

been fixed in advance by, or on behalf of, the person supplying the commodity or service (hereinafter "the supplier") with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hereinafter "the customers)."

- 4 See Appendix, Clause 3 (14)
- 5 Ibid Clause 8
- 6 Clause 3 (26) (C)
- 7 Clause 3 (28)
- 8 / Restraint of Trade Act (Cap 24, Laws of Kenya) / Contracts in
- 9 Matunga, Origin and Purpose of the Kenyan Law of Contract (Niseo)
- 10 See Appendix, Clause 3 (2)
- 11 Ibid, Clause 3 (18)
- 12 Clause 3 (25)

FOOTNOTES TO CHAPTER TWO

1 Research Information from Esso's official documents.

2 See Appendix

3 Footnote 13 of Chapter One. It is defined thus "Standard form Contract, 'means a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service (hereinafter "the supplier") with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hereinafter "the customers)."

4 See Appendix, Clause 3 (14)

5 Ibid Clause 8

6 Clause 3 (26) (C)

7 Clause 3 (28) industrialist already possesses the surplus value produced by the workers. But this surplus value exists in particular form;

8 Restraint of Trade Act (Cap 24, Laws of Kenya) /Contracts in

9 Mutunga, Origin and Purpose of the Kenyan Law of Contract (Mimeo).

10 See Appendix, Clause 3 (2) the commodities produced. But the industrialist does not work for definite customers (except when

11 Ibid. Clause 3 (18) or the "ultimate consumer"); he works for the anonymous market.

12 Clause 3 (25)

Everytime that a product cycle is completed, he would thus have to stop work at the factory, sell his commodities in order to recover his outlay, and then resume production. By buying what the industrialist produces, the traders relieve him of the trouble of going himself to look for the consumer. They save him the losses and changes involved in interrupting production until the commodities have reached their destination. They, so to speak, advance him the money capital that allows him to carry on producing without any interruption.

But the traders who advance to the industrialist the funds they need to reconstitute their capital and realize their surplus value, must in their turn quickly sell the goods thus bought, so as to begin the operation anew as soon as possible.¹

The ultimate objective of all this is quick appropriation of an increased surplus value.

"How each production cycle brings in the same amount of surplus-value, provided that the capital and the rate of surplus-value remain the same. Increasing the number of production cycles accomplished in one year means increasing the total amount of surplus value produced that year. Reducing the circulation

None of the CHAPTER THREE Etc., circulation and

distribution of a product have any interest in its existence or

A. THEORY OF PRODUCTION AND DISTRIBUTION OF GOODS

Goods are produced for their exchange - value. All value of a commodity is not realised until the commodity which is the embodiment of the value reaches its ultimate destination, the consumer. Before reaching this stage, a commodity possesses exchange value only potentially. So in order for the products to realize their profits they must make sure that the goods reach the ultimate consumer. To quote Mandel

"When the production of commodities is completed, the industrial capitalist already possesses the surplus value produced by the workers. But this surplus value exists in particular form; it is still crystallized in commodities, just as capital advanced by the industrialist is, too. The Capitalist can neither reconstitute this Capital nor appropriate the surplus value so long as they retain this form of existence. ... To realize the surplus-value he must sell the commodities produced. But the industrialist does not work for definite customers (except when he carries orders for the "ultimate consumer"); he works for the anonymous market. but buys it just as the manufacturer

Everytime that a product cycle is completed, he would thus have to stop work at the factory, sell his commodities in order to recover his outlay, and then resume production. By buying what the industrialist produces, the traders relieve him of the trouble of going himself to look for the consumer. They save him the losses and changes involved in interrupting production until the commodities have reached their destination. They, so to speak, advance him the money capital that allows him to carry on producing without any interruption.urer gets in exchange

But the traders who advance to the industrialist the funds they need to reconstitute their capital and realize their surplus value, must in their turn quickly sell the goods thus bought, so as to begin the operation anew as soon as possible.¹

The ultimate objective of all this is quick appropriation of price.

an increased surplus value.

"Now each production cycle brings in the same amount of surplus-value, provided that the capital and the rate of surplus-value remain the same. Increasing the number of production cycles accomplished in one year means increasing the total amount of surplus value produced that year. Reducing the circulation time of commodities is thus not only a way of realizing surplus value more quickly, it is also a way of increasing the amount."²

None of those interested in the production, circulation and distribution of a product have any interest in its existence or desire for its possession. None of them gets any share of it physically. Their distributive shares comes out of the purchase price paid for it by its ultimate consumer, who takes it out of the "market", converts it from a commodity into an ordinary good possessing only its natural qualities of a use-value. In other words, each of their distributive shares comes of the exchange-value of the commodity which is turned into the universal medium of exchange-money - by its sale to the ultimate consumer.

The manufacturer produced the product not for its use-value, he never had any personal use of it and never intended to use it, but for its exchange-value and as soon as it is ready in exchangeable form he offers it for sale or exchange. He sells it, again, to somebody who has absolutely no personal use of it and does not intend to use it himself but buys it just as the manufacturer manufactured it because of the exchange value there is in it, and which, by the way, for reason or other, he expects to be more than he pays for it.

On this first manifestation of the exchange-value of the factory-produced commodity, the manufacturer gets in exchange for it a certain sum of money or other commodities, the price obtained on its sale or exchange. The exchange value of the commodity has realized itself in his hands in the form of its price.

B. THEORY ON THE GROUND

reduced in importance since products are now transported straight
In order for a Company to function properly it will require
away from the refinery. However it will continue playing an
the use of an ocean terminal, a point at which products are
important role as it will still remain a supply point for bulk
received, stored and distributed inland and exported. Esso has
products required for the coastal region including bunkering
such a terminal at Mombasa.

of ships. The oil manufacturing plant, receiving of imported
Before 1963 when the East African Oil Refinery became
operational, all products were imported and pumped from the ships
oils and despatch of fuel oils, L.P.G., chemicals and asphalts
which will not be transported through the pipeline will continue
straight into the storage tanks. After 1963 some of the products
to be handled at the terminal.

came through a pipeline from the refinery into the tanks. The
Transportation is mainly by the pipeline. This has provided
quantity of products received is dependent on the market needs
factor means than before when the only means of transport were
from time to time because in order to realize profits all the

by rail and road.
goods have to be got rid of. For the petroleum products
However there are some products which are still being trans-
refined at the refinery, the oil Companies collaborate closely
ported by other means. Such products are fuel oil and L.P.G.,
with the Refinery in working out the market requirements.

the former being transported mainly by railway while the latter
The Company's supply Planning Department has one person whose
goes by road. For transporting L.P.G., Esso has a few trucks of
duty is to co-ordinate with the Refinery on all crude supply
its own and it also uses hired transporters. The products are
matters and orders crude oil to be processed by the refinery.

transported to either a factory or to petrol-stations.
There are many other Companies whose crude oil is refined at
This is the point at which distribution takes root. The
the Refinery and so when it comes to distribution of the products,
products are sold to operators who buy the products for the purposes
these are given in proportion to the crude oil that each Company had
of reselling them. They are also sold for re-sellers who are small
given in to the Refinery.

scale operators who buy and go round selling in remote areas.
The terminal as a receiving point for an oil Company is therefore
Consumers also buy the products. These are customers who buy
important to the Company since all its operations and success
for their own consumption, for example, Ministry of Works, Industries
entirely relies on its efficient operation.

etc. All these are governed by contracts which are entered into
with the Company. As far as sale to the consumers is concerned,
all it involves is a negotiation of prices whereby Esso tries to
get the best possible price for its products. It supplies tanks
to the consumer and in case the consumer decides to change the

With the arrival of the pipeline the terminal has been reduced in importance since products are now transported straight away from the refinery. However it will continue playing an important role as it will still remain a supply point for bulk products required for the coastal region including bunkering of ships. The oil manufacturing plant, receiving of imported oils and despatch of fuel oils, L.P.G., chemicals and asphalts which will not be transported through the pipeline will continue to be handled at the terminal.

Transportation is mainly by the pipeline. This has provided faster means than before when the only means of transport were by rail and road.

However there are some products which are still being transported by other means. Such products are fuel oil and L.P.G., the former being transported mainly by railway while the latter goes by road. For transporting L.P.G., Esso has a few trucks of its own and it also uses hired transporters. The products are transported to either a factory or to petrol-stations.

This is the point at which distribution takes root. The products are sold to operators who buy the products for the purpose of reselling them. They are also sold for re-sellers who are small scale operators who buy and go round selling in remote areas.

Consumers also buy the products. These are customers who buy for their own consumption, for example, Ministry of Works, Industries, etc. All these are governed by contracts which are entered into

with the Company. As far as sale to the consumers is concerned, all it involves is a negotiation of prices whereby Esso tries to get the best possible price for its products. It supplies tanks to the consumer and incase the consumer decides to change the service by buying products from another Company besides Esso.

he is obligated to buy the tanks which Esso had provided for its service.

If the consumer fails to pay for the products the Company takes it very seriously and may cancel any further deliveries to the Consumer. The latter will be interfering in Esso's aim to realize profits as soon as possible so that the business may go on.

As regards operators, the Company has to look for the most suitable ones so as to get the best price for its products. The operator's financial stand is looked into to see whether he will manage to buy the products as he has to pay cash for the goods he buys. There are certain targets which the Company sets for the operator and the latter has to meet them. This gives the operators a nudge to do the maximum. There is a lot of competition and so to meet Esso's interests the contracts entered into with its buyers are made very tight.³ There is restriction as to what products to buy and the operator has to buy from Esso all his products. A clause from the operators Agreement provides that the operator agrees with Esso:

"To buy exclusively from Esso and sell at the premises Exclusively Esso's Petroleum Products and those specialities marketed by Esso. Purchases will be made at the prices in force on the day of delivery as appearing in Esso's Dealer Price List."⁴

If the operators were allowed to buy products from other Companies, these would depreciate Esso's products and it would also slow the distribution process.

From this we can see how important the distribution process is. If this is not effected it would mean that Esso would not realise

the exchange - value of the products which is the ultimate aim. In order for this to be accomplished there has to be an instrument which sees to it that the distributors, that is, the operators, re-sellers carry on their duties which have been imposed on them. Law comes in as an instrument to meet this goal. As has been already discussed in Chapter Two, Law plays a very crucial role in this distribution process.

By ensuring that the operators and re-sellers carry out their duties, this enables the Company to keep on buying crude oil and having it refined and then selling the refined products. By so facilitating its trade, such a contract emphasizes only the rights carrying out their duties properly, the operators will make it possible for disposal to be effected quickly and hence the Company will stand a better chance of increasing its profits. Goods are produced for their exchange - value and so the distribution process is a crucial process in any business. terms are binding and the people Esso deals with such as operators have to abide with them.

Contract Law is thus seen as helpful for Esso and it comes in handy as an instrument to enforce Esso's rights.

Although such a contract can, to a greater extent, be said to be very much biased against one party, we can justify its use to the extent that without it, distribution of whatever goods a firm produces would be very difficult. This is because the Society we have is such that everybody wants to maximize his own profits without considering his fellow men and so if nothing is done to make him abide with his promises, they would go unfulfilled. By entering into such a contract whose terms are binding, a firm like Esso is able to facilitate the distribution of its goods.

In Contract C. CONCLUSION agency, we were able to draw an inference from the Contract, that is, the Operators Agreement. During the course of our discussion we have tried to show what contract and agency laws entail and what part they play in aiding Esso to carry on its business. Although there are other legal aspects involved in the distribution process as we mentioned in the Introduction, it is very clear from the whole discussion that these two branches of law play a very important role in the distribution of Esso's Petroleum Products.

As we saw in Chapter Two, Esso uses a standard form contract⁵ to facilitate its trade. Such a contract emphasizes only the rights of Esso, it imports crude oil which it then takes to the coast of the individual who draws up the contract. The other party's rights are ignored in the sense that he is not given a chance to participate in the drawing up of the contract. To this end then, Esso has been able to benefit from the use of such a contract. The terms are binding and the people Esso deals with such as operators have to abide with them.

Contract Law is thus seen as helpful for Esso and it comes in handy as an instrument to enforce Esso's rights.

Although such a contract can, to a greater extent, be said to be very much biased against one party, we can justify its use to the extent that without it, distribution of whatever goods a firm produces would be very difficult. This is because the Society we have is such that everybody wants to maximize his own profits without considering his fellow men and so if nothing is done to make him abide with his promises, they would go unfulfilled. By entering into such a contract whose terms are binding, a firm like Esso is able to facilitate the distribution of its goods.

FOOTNOTES TO CHAPTER THREE

As Contract Law forms the basis of agency, we were able to draw an inference from the Contract, that is, the Operators Agreement For Esso to distribute its goods as fast as possible the use of such agents becomes indispensable. Agency law affords certain duties which it places upon the operators and by so doing it facilitates the distribution process. Examples of such duties were given in Chapter Two.⁷

Our discussion in Chapter Three revealed to us that goods are produced for their exchange - value and thus the producer has to exchange them if he is to get the fruits of his toil. In the case of Esso, it imports crude oil which it then takes to the East African Oil Refinery at Changamwe to be refined. If Esso is to benefit from such a business, the refined products have to be exchanged for money. It is for this reason that Esso involves the use of both contract and Agency Laws so as to make this possible.

In conclusion, we emphasize the fact that the legal rules pertaining to both Contract Law and Agency Law facilitate rather than inhibit the distribution process.

FOOTNOTES TO CHAPTER THREE

A P P E N D I X

- 1 E. Mandel - Marxist Economic Theory, London (1968) P. 185
- 2 Ibid. P. 187
- 3 See Appendix
- 4 Ibid. Clause 3 (2)

5 This Definition Supra. in Chapter Two Footnote 3 of

One 16 See Appendix and Seventy

8880 7 Ibid. Clause 3 (18) limited liability company incorporated

in Kenya having a postal address P.O. Box 30200, Nairobi, Kenya

(hereinafter called "E8880") of the one part and

..... of

(hereinafter called the "OPERATOR") of the other part.

1. Esso agrees to permit the Operator on the terms and conditions herein appearing to use:

a) The Filling or Service Station premises described in the first schedule hereto (hereinafter called "the Premises") subject to the terms of the permitted user thereof specified therein.

b) The equipment set out in Esso's Service Station Equipment Order and Receipt form No. 4-D-21 (which equipment and all additions and substitutions is hereinafter called "the Equipment") But Esso reserves the right to enter the premises at any time with workmen and others for the purpose of carrying out such repairs, improvements, additions to the premises and equipment as Esso may consider necessary without any obligation of Esso to indemnify the operator for any disturbances whatsoever to his business as a result of such repairs, improvements and additions as aforesaid.

A P P E N D I X

2. This Agreement shall be effective as from the day of ESSO STANDARD KENYA LIMITED Nine Hundred and Seventy P.O. BOX 30200, NAIROBI - KENYA

3. The Operator agrees OPERATORS AGREEMENT

(1) To pay to Esso on the first day of each month or to have This Agreement is made theday of

One Thousand Nine Hundred and Seventybetween ESSO STANDARD KENYA LIMITED a limited liability company incorporated in Kenya having a postal address P.O. Box 30200, Nairobi, Kenya (hereinafter called "ESSO") of the one part and of (hereinafter called the "OPERATOR") of the other part.

1. Esso agrees to permit the Operator on the terms and conditions herein appearing to use:

a) The Filling or Service Station premises described in the first schedule hereto (hereinafter called "the Premises") subject to the terms of the permitted user thereof specified therein.

b) The equipment set out in Esso's Service Station Equipment Order and Receipt form No.4-D-21 (which equipment and all additions and substitutions is hereinafter called "the Equipment") But Esso reserves the right to enter the premises at any time with workmen and others for the purpose of carrying out such repairs, improvements, additions to the premises and equipment

(3) To sell Esso Products at Retail prices notified to him as Esso may consider necessary without any obligation of Esso to indemnify the operator for any disturbances whatsoever to his business as a result of such repairs, improvements and additions as aforesaid.

2. This Agreement shall be effected as from the day of One Thousand Nine Hundred and Seventy and continue for a period of two years.
3. The Operator agrees with Esso as Follows:-
- (1) To pay to Esso on the first day of each month or to have that included with the payment for the first invoice in that month, the sum of K.Shs..... being advance fee for the right to operate the premises and for the use of the equipment. In addition a fee of cents per litre will be charged on Invoice/Cash Sale for all purchases of Motor Fuels - (Esso Extra, Esso Regular, and also Esso Diesel). This is subject to revision on each anniversary date of signing this Agreement.
 - (2) To buy exclusively from Esso and sell at the premises Exclusively Esso's petroleum products and those specialities marketed by Esso. Purchases will be made at the prices in force on the day of delivery as appearing in Esso's Dealer Price List. PROVIDED THAT ESSO may allow the dealer to stock and sell such other non-petroleum products not currently marketed by Esso if such products in the opinion of Esso will enhance the Operator's business. Such allowance shall be confirmed in writing.
 - (3) To sell Esso Products at Retail prices notified to him from time to time by Esso.

- (7) PROVIDED THAT this clause shall operate without prejudice to any agreement made by Esso to supply any customer (whether a Government authority, Corporation, Company, Person or Body of Persons) with Esso products at any special price and the Operator hereby expressly agrees that on being notified that such an agreement exists with any particular customer and that such customer is permitted to draw supplies at the premises, he will supply such customer at such margin or margins and on such terms as may be agreed to between Esso and the Dealer.
- (4) To pay all rents and charges for services such as water, electricity, telephone, trade and storage licences, payable in respect of the premises and the equipment during the period of the agreement.
- (5) To use the Equipment solely for the storage and handling of products purchased by the Operator from Esso and not neglect or misuse the same and not to encumber or remove the equipment and not to do or suffer to be done anything by which the Equipment or any part thereof may be seized taken in execution attached destroyed or injured.
- (6) To pay Esso for all products delivered by Esso or its contractors in such manner on such terms and at such times as Esso may from time to time decide.

Illuminating Kerosene

Esso Extra Motor Oils

Esso Motor Oils

Esso Lubricants

Esso Handy Oil

Esso Brake Fluid

- (7) To keep the premises and the equipment thereon clean and tidy at all times and to adhere to and maintain the standard of cleanliness and carry out such duties at such times as set out in the Appendix to this Agreement or any amendment thereof: PROVIDED AND IT IS HEREBY agreed that Esso shall be entitled after the expiry of 14 days' notice to the Operator of his failure to maintain such standards do to all such things as may be necessary to re-establish the premises and the equipment to the standards of cleanliness aforesaid and any costs thereby incurred shall be recoverable from the Operator forthwith.
- (8) To stock and maintain in good working order and repair the servicing equipment as listed out in the Fourth Schedule hereto. Provided that Esso may at its discretion supply or repair any such equipment after giving 14 days notice of its intention to do so and any costs thereby incurred will be recoverable from the Operator forthwith.
- (9) To maintain a sufficient stock at the station at all times of Esso fuels and specialities and such other items as may be advised by Esso from time to time. Without prejudice to the generality of the foregoing, the Operator shall stock the following items at all times:
- Fuels - Esso Extra, Esso Regular, Esso Diesel, Esso Illuminating Kerosene
 - Esso Extra Motor Oils
 - Esso Motor Oils
 - Esso Handy Oil
 - Esso Brake Fluid
- (10) To indemnify and keep indemnified Esso free and against all proceedings costs claims and demands of whatever nature and kind whether arising out of death personal injury or damage to property or otherwise however which may arise at in or connected with the use of the premises

- (10) To insure against any loss or damage to the premises and the equipment as well as the stocks of motor fuels from time to time at the premises with reputable insurance Company and to produce to Esso at its request the policy or policies and receipt for the last premium due thereon.
- (11) To permit all persons authorised by Esso at all reasonable times to inspect the premises and the equipment and to
- (12) To replace, repair or make good to the satisfaction of Esso by all replacements, defects, repairs or lack of maintenance that Esso may consider necessary as notified to him and
- (13) To be liable for which the Operator is liable under the provisions of the third schedule hereto within such times as Esso may require in writing. If the Operator defaults in so doing Esso may enter the premises and carry out all such replacements as repairs at the cost of the Operator, including the time and effort devoted by Esso employees at such rate or rates as Esso may reasonably require.
- (14) (12) To employ at the station a minimum number of of blue bay attendants) who shall have passed Government Trade Test Grade or its equivalent.
- (15) To give Esso at least two clear working days' notice of
- (16) To meet all requirements of motor fuels and to accept delivery in the largest possible quantities in relation to the size of the storage tanks at the premises.
- (17) To indemnify and keep indemnified Esso from and against
- (18) To display any sign, notice or advertisement on the premises or the equipment except such as are approved by Esso in writing and not to take down or alter any such sign, notice or damage to property or otherwise however which may arise at in or connected with the use of the premises
- (19) To display any sign, notice or advertisement on the premises or the equipment except such as are approved by Esso in writing and not to take down or alter any such sign, notice or damage to property or otherwise however which may arise at in or connected with the use of the premises

- (20) or the equipment and at the Operator's own expense fully to insure and continue to insure against such claims and liabilities with some reputable insurance company and to furnish proper proof of such insurance to Esso on demand, it being agreed that the operator shall not be entitled to any indemnity for any such liability from Esso, its agents, Directors or employees.
- (15) To comply in all respects with all statutes, regulations and by-laws made by any competent authority relating to the premises and equipment or user thereof.
- (16) To keep the premises and all facilities thereat open for the sale of motor fuels to the public during all hours of the day and night, unless otherwise agreed by Esso in writing, and subject to such limitations in this regard as may be imposed by law, and to promote the sales of Esso's motor fuels at the premises and generally to foster the sales of Esso's products to Esso's satisfaction.
- (17) To operate the premises in accordance with the principles of Esso Operator Co-operation Plan for the time being in force which said Co-operation Plan in force as at the date hereof is set out in the Third Schedule hereto.
- (18) Not to assign, underlet, charge or part with possession of the premises or any part thereof or the equipment therein or any item thereof nor any of the benefits or obligations of this agreement.
- (19) Not to display any sign, notice or advertisement on the premises or the equipment except such as are approved by Esso in writing and not to take down or alter any such sign, notice or advertisement without such approval.

- (20) To keep in a just and true manner all such records and
- (20) Not to make any alteration or addition to the premises or the equipment or any part thereof or to the external appearance of paintwork thereof nor to cut, maim or injure any of the walls or timbers of the premises without the written consent of Esso.
- (21) Not to do, permit to be done in or upon the premises or any part thereof, any act or thing which shall or may be or become a nuisance, damage, annoyance or inconvenience to Esso or the occupiers of any adjoining or neighbouring premises, in particular not to allow any hawkers to be or remain upon any part of the premises.
- (22) Not to stand or display motor vehicles for resale or otherwise on any part of the forecourt of the premises or to do anything whereby access to the pump islands may be impeded.
- (23) Not to engage in or be associated either directly or indirectly with the business of the sale of Motor Fuels at any other Filling or Service Station owned or controlled either directly or indirectly by any Petroleum Company including Esso except with the previous written consent of Esso.
- (24) To ensure that all persons employed in or about the premises are paid wages and afforded conditions of service similar to those paid and observed by good employees in the area. In the event of any difficulty in determining what would be fair wages, the rates paid in the area by the Kenya Government may be used as standard.

- (25) To keep in a just and true manner all such records and accounts as may from time to time be required by Esso in regard to his sales of Esso products at that premises and to permit Esso to enter the premises at all reasonable times to inspect such records accounts and bulk and packaged stocks.
- (2) Without prejudice to the generality of the foregoing, the Operator shall keep the following records at all times during the continuation of this Agreement, viz,
- a) Daily sales of main fuels (i.e. EEMO, EMO, Diesel and Kerosene).
 - b) Daily Sales of other petroleum products, L.P.G. Lubricants, Brake Fluid and Handy Oil.
 - c) Daily Sales of Tyres, Batteries and Accessories (T.B.A.) and other merchandise eg, steering gloves, cool cushions, polishes, soft drinks, etc.
 - d) Full records showing realizations and expenses.
 - e) Customer Service Record Cards.
- (26) a) NOT without the previous written consent of Esso
- i) To make any change in the name of the Station as specified in the first schedule hereto and this name as specified in the first schedule hereto.
 - ii) To carry on the business of a Service Station of Esso at all times and shall not at any time be used or filling station at the premises otherwise by the Operator except with the express prior written permission of Esso and then only during the continuance of this agreement.

- (27) b) NOT during the period of the Agreement nor at any time thereafter to use the said name or any other part thereof (other than any word or words in common use in the petroleum retail business) to or for any other service or filling station or premises used for the retailing of motor fuels.
- (28) c) In the event of the Operator being a limited liability Company and having as its name the name of the station or such similar name then the Operator undertakes on the determination of this Agreement forthwith to change the name of the Company in accordance with the Companies Act (Cap. 486) or any law amending or replacing the same. The Operator undertakes that he will not during the currency of this agreement or at any time thereafter apply or use the name of the premises specified in the first schedule hereto or any part thereof to or for any other service station or petrol filling station or premises used for the retailing of motor fuels.
- (29) d) The station shall be known by the name of the premises specified in the first schedule hereto and this name and the right to use the same shall be the exclusive property of Esso at all times and shall not at any time be used by the Operator except with the express prior written permission of Esso and then only during the continuance of this agreement.

- (27) At the expiration or sooner determination of this agreement quietly to yield up the premises and the equipment in such repair and condition as aforesaid together with such stocks or petroleum fuels and lubricants thereat as shall have been supplied by Esso (as to which Esso shall be the sole judge) to be paid for by Esso at the price at which they have been supplied and paid for or at the price at which the stocks would have been supplied to the Operator as at the date of expiration or determination if lesser and the Operator shall not have any claim against Esso in any event in respect of any loss of goodwill or trade.
- (28) The Operator agrees not to operate or participate in the operation of any fuels retailing business within a radius of 10 kilometers from this filling or service station for a period of two years to be calculated from the date of termination of this contract except if Esso gives its written approval. the Operator shall commit a breach of any of the
- (29) In the event of the Operator being given permission to use any of Esso's trade marks on the Operator's property equipment vehicles or stationery the Operator shall upon the determination of this agreement forthwith paint out or obliterate or destroy Esso's trade mark on such property equipment vehicles or stationery wherever it may appear and discontinue the use of the trade mark forthwith. otherwise than for the purpose of amalgamation or reconstruction or if a petition for winding up shall be presented.

4. ESSO AGREES WITH THE OPERATOR AS FOLLOWS:-

Subject to the provisions of Clauses 3 (9) and 3(11) hereof to bear the cost of maintaining fuel pumps and tanks, the main buildings, Esso identification signs, driveway and forecourt of the premises in reasonable repair when such repair or maintenance is due to normal wear and tear where Esso is the owner of the improvement loaned to the Operator or where Esso leases the improvements and land from a property not covenant to this agreement.

5. a) THIS AGREEMENT may be terminated by either by giving

to the other six (6) months written notice of such termination. PROVIDED THAT Esso may (without prejudice to any right in respect of any previous breach of the Operator's obligations hereunder) re-enter upon the

premises and determine the agreement immediately or with such delay as may be determined in writing by Esso:-

(i) If the Operator shall commit a breach of any of the Operator's obligations heretofore, or

(ii) If the Operator shall commit any act of bankruptcy or suffer any distress or execution to be levied upon

the Operator's goods or upon the premises or the equipment installed at the premises, or if being a

Company, the Operator shall call any meeting with a view to going into voluntary liquidation otherwise than

for the purpose of amalgamation or reconstruction or if a petition for winding up shall be presented,

the parties except where arising wholly or in part from the negligence or breach (whether an act or omission) of such part of any of the terms hereof whether contained expressly or by implication.

against the Operator or if the Operator shall have a Receiver and/or Manager appointed of any of the Operator's property or assets.

b) In the case of the events mentioned in clause 5 (a) occurring, Esso shall be at liberty to engage or employ another Operator, or employee to operate the premises and in furtherance thereof to enter upon and occupy the premises.

6. Any notice required to be served under this Agreement shall be sufficient served on Esso if sent by registered post to its principal office for the time being in Kenya and on the Operator if delivered personally or sent by registered post to or affixed in a prominent place on the premises or to his usual or last known address.

7. Neither Esso nor the Operator shall be responsible for any failures to fulfil any terms of this Agreement if fulfilment has been delayed, hindered, interfered with or prevented by any circumstances whatsoever which are not within the control of Esso or the Operator as the case may be by compliance with any order or request of any national, regional, ports, transportation, local, municipal, police or other authority of anybody or person purporting to be or to act for such authority. For the avoidance of doubt and without limiting the generality of the foregoing it is hereby agreed that fires, explosions, storms, tempests, breakdown of machinery, riots, strikes, lockouts and labour disputes are circumstances beyond the control the parties except where arising wholly or in part from the negligence or breach (whether an act or omission) of such part of any of the terms hereof whether contained expressly or by implication.

- 8. Esso is not responsible for any leakage, theft, evaporation or any other loss of bulk products delivered to the Operator by Esso once the discharge valve of the delivering tank lorry is opened.
- 9. This Agreement replaces any previous agreements between Esso and the Operator.
- 10. Nothing herein contained shall be deemed to constitute a partnership between the parties hereto or to constitute the Operator a tenant of or person in possession of the said premises or to create any interest in land and the Operator shall not enter into any contract or commit on behalf or in the name of Esso nor in any way pledge the credit of Esso.

AS WITNESS the hands of the parties hereto the day and year first above written.

SIGNED BY:)
)
 for and on behalf of the with-)
)
 in named ESSO STANDARD KENYA)
)
 LIMITED in presence of:)

SIGNED BY within named)
)
)
)
 Director/Partner/Proprietor)
)
 in the presence of:)

Address:

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