

CF03

Law and Practice of Banking

12 OCTOBER 2005

1. Time allowed : Three (3) hours
2. Total number of questions : Six (6) questions
3. Number of questions to be answered : Five (5) questions [20 marks each]
4. Answers should be supported by references to cases and/or statutes.
5. Begin each answer to a new question on a fresh page.
6. Answer **all** questions in **English**.

ANSWER FIVE (5) QUESTIONS ONLY

1. (a) Describe **five** main sources of law affecting bankers in Malaysia. [10]
- (b) For each of the following questions, choose the **correct** answer (A, B, C or D):
- (i) _____ is the body of principles recognised and applied by the State in the administration of justice. [1]
- A. Contract
B. Parliament
C. Customs
D. Law
- (ii) The _____ is the supreme law of Malaysia and any law passed which is inconsistent with it, shall to the extent of the inconsistency, be void. [1]
- A. written law
B. Federal Constitution
C. Federal legislation
D. Banking and Financial Institutions Act 1989
- (iii) The two essential elements of a crime are _____ and *mens rea*. [1]
- A. *actus reus*
B. *actus rea*
C. *actus mens*
D. *bona fide*
- (iv) The main sources of law applicable to bankers are: [1]
- A. State Constitutions.
B. guidelines issued by Bank Negara Malaysia.
C. English commercial laws.
D. legislation.
- (v) In Malaysia, appeals from the High Court are heard by the: [1]
- A. Federal Court.
B. Court of Appeal.
C. Yang Di-Pertuan Agong.
D. Supreme Court.
- (c) Answer “**True**” or “**False**” for each of the following statements:
- (i) The basic elements of a contract are offer, acceptance, intention to create legal relations, consideration, certainty and capacity. [1]
- (ii) Tortious liability is based on legal obligations and is the breach of contractual duties imposed by law. [1]
- (iii) Under the Anti-Money Laundering Act 2001, The Association of Banks in Malaysia is empowered to issue guidelines for bankers. [1]
- (iv) The High Court is a subordinate court in the Malaysian judicial system. [1]
- (v) Consideration in an agreement that must always be adequate and must move from the promisor to the promisee. [1]
- (Total:20 marks)

2. (a) Bank Kawan Bhd advertised in the local newspapers that there are 20 vacancies for the position of Marketing Executive. [5]
- Is this advertisement an offer to contract? Give reasons for your answer. [5]
- (b) For each of the following questions, choose the **correct** answer (A, B, C or D):
- (i) The nature of the banker-customer relationship is basically:
- A. vicarious.
B. libelous.
C. contractual. [1]
D. optional.
- (ii) Minors are persons below the age of 18 by virtue of the:
- A. Minority Act 1989.
B. Majority Act 1978.
C. Age of Majority Act 1971. [1]
D. Contracts Act 1950.
- (iii) An _____ is made when the person to whom the proposal is made, signifies his assent thereto.
- A. offer
B. invitation to treat
C. acceptance [1]
D. indorsement
- (iv) Terms of a contract may be classified as conditions and:
- A. indemnities.
B. warranties.
C. authorities. [1]
D. assurances.
- (v) The remedies for breach of contract include damages, specific performance and:
- A. counter-claims.
B. writs.
C. mitigation. [1]
D. injunction.
- (c) MSC Sdn Bhd entered into a contract of sale to sell 10,000 units of computers to USUME Sdn Bhd.
- (i) State **two** remedies available to MSC Sdn Bhd in the event USUME Sdn Bhd breaches the contract. [5]
- (ii) State **two** remedies available to USUME Sdn Bhd in the event MSC Sdn Bhd breaches the contract. [5]
- (Total:20 marks)
3. (a) In relation to agency, distinguish between actual authority and apparent authority (also known as ostensible authority). [10]
- (b) For each of the following questions, choose the **correct** answer (A, B, C or D):
- (i) The law that applies to goods not listed in the First Schedule of the Hire-Purchase Act 1967 is:
- A. rules of equity.
B. customary law.
C. common law. [1]
D. constitutional law.

- (ii) Under the Hire-Purchase Act 1967, the following are the hirer's rights **except** to:
- A. be supplied with the relevant documents and information.
 - B. appropriate payment.
 - C. complete the purchase earlier than the due date.
 - D. assign his right, title and interest without the owner's consent. [1]
- (iii) Insurance contracts are generally contracts of:
- A. indemnity.
 - B. necessities.
 - C. subrogation.
 - D. equity. [1]
- (iv) In an insurance contract, a _____ fact is a fact that would influence the mind of a prudent insurer in deciding whether to accept the risk, and if so, at what premium.
- A. fair
 - B. tortious
 - C. material
 - D. written [1]
- (v) In an insurance contract, the loss which is being insured against is called the:
- A. insurer.
 - B. risk.
 - C. insured.
 - D. premium. [1]
- (c) What is the meaning of the statement "Insurance contracts are *uberrimae fidei*"? [5]
(Total:20 marks)
- 4.** (a) Bank Tanah Bhd is the registered chargee of a piece of land in Johor Bahru, which is owned by Ms PT. Under the National Land Code 1965 (NLC), Bank Tanah Bhd's charge is indefeasible.
- (i) Explain the terminology "indefeasible". [5]
 - (ii) State **five** exceptions to indefeasibility. [10]
- (b) Answer "**True**" or "**False**" for each of the following statements:
- (i) The NLC is the legislation governing land for Peninsula Malaysia and this legislation is not applicable in Sabah and Sarawak. [1]
 - (ii) Dealings under the NLC comprise discharge of charge, liens and caveats. [1]
 - (iii) The original copy of a grant or a lease kept in the Land Registry or Land Office is called the Register Document of Title. [1]
 - (iv) The duplicate copy of a grant or a lease issued to the proprietor is called the Issue Document of Title. [1]
 - (v) A tenancy is the letting of land for a term of up to three years and it is not a registrable interest. [1]
(Total:20 marks)

5. (a) In relation to the National Land Code 1965 (NLC), distinguish the following terminologies:
- (i) Final titles and qualified titles [5]
 - (ii) Alienated land and State land [5]
- (b) State **three** conditions of land use as stated in the NLC. [3]
- (c) What is the life span of a private caveat lodged in Peninsula Malaysia? [2]
- (d) Mr HT defaulted in his credit card repayment with Bank AL Bhd and Bank AL Bhd obtained judgement against him for RM50,000. Bank AL Bhd knows that Mr HT owns a piece of unencumbered land in Kuala Lumpur. Bank AL Bhd intends to obtain a prohibitory order in respect of Mr HT's land.

Explain what a "prohibitory order" is.

[5]

(Total:20 marks)

6. (a) (i) What is a special crossing on a cheque? [2]
- (ii) State the legal effects of a special crossing on a cheque. [3]
- (b) (i) Describe the duties and liabilities of a collecting banker. [5]
- (ii) Describe the statutory protection available to a collecting banker under the Bills of Exchange Act 1949. [5]
- (c) Answer "**True**" or "**False**" for each of the following statements:
- (i) A company may be a company limited by shares, a company limited by guarantee or an unlimited company. [1]
 - (ii) A public company can be defined as a company, other than a private company, which must always be listed in the stock exchange and must have more than 50 shareholders. [1]
 - (iii) Clayton's rule states that a third party dealing with a company is not bound to ensure that all internal regulations of the company have in fact been complied with regard to the exercise and delegation of authority. [1]
 - (iv) All partnerships and sole-proprietorships are not separate legal entities. [1]
 - (v) An exempt private company is a private company in the shares of which all beneficial interest are held directly or indirectly by a maximum of 20 corporations. [1]

(Total:20 marks)

- END OF QUESTION PAPER -

OUTLINE ANSWERS

The comments given in the boxes below indicate the areas of weaknesses the examiners have identified and their advice to future candidates.

Question 1

- Candidates gave examples of legislation affecting bankers, instead of stating the main sources of law. Legislation is only one of the sources of law.
- Candidates are advised to read the questions carefully and to answer according to the questions' requirements.

1. (a) Give any five of the following:

The various sources of law affecting bankers in Malaysia comprise written law and unwritten law.

Written law comprises:

- Federal Constitution

The Federal Constitution is the supreme law of Malaysia and lays down the powers of the federal and state governments as well as the basic or fundamental rights of the individual.

- State Constitutions

These Constitutions govern the respective states.

- Legislation (the main source of banking law)

Legislation represents laws made by Parliament at federal level and by the various state legislative assemblies at State level.

- Subsidiary legislation

Comprise proclamations, rules, regulations, orders, notifications, by-laws or other instruments made under any Ordinance, Enactment or other lawful authority and having legislative effect.

Unwritten law applicable to bankers largely comprises:

- English law (common law and rules of equity)

Common law and rules of equity and English commercial law apply to bankers to a certain extent only – sections 3 and 5, Civil Law Act 1956. English land law does not apply here by virtue of section 6 of the Civil Law Act 1956.

- judicial decisions (doctrine of binding judicial precedents/*stare decisis*)

Judges follow precedents; ie. decisions previously made by judges in similar situations. Decisions of higher courts bind lower courts and some courts are bound by their own decisions.

- (b) (i) D
- (ii) B
- (iii) A
- (iv) D
- (v) B
- (c) (i) True
- (ii) False
- (iii) False
- (iv) False
- (v) False

Question 2

- Candidates were unable to explain the remedies for breach of contract.

2. (a) An offer or proposal is necessary for the formation of an agreement. Section 2(a) of the Contracts Act 1950 states that when one person signifies to another, his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal. An offer is different from an advertisement.

An advertisement is not an offer but is merely an attempt to induce offers – *Coelho v The Public Services Commission* and *Guha Majumder v Donough*. In *Majumder v Attorney-General of Sarawak*, the Federal Court held that an advertisement in the newspapers for the post of a doctor was an invitation to treat.

Therefore applying the above principles, the advertisement by Bank Kawan Bhd in the local newspapers is not an offer to contract but is a mere invitation to treat.

- (b) (i) C
- (ii) C
- (iii) C
- (iv) B
- (v) D

(c) (i) The remedies available to MSC Sdn Bhd, the seller, are:

- rights of the unpaid seller against the goods

If MSC Sdn Bhd is unpaid, and it is in possession of the goods, the company has a lien on the goods for the price – section 46(1)(a), Sale of Goods Act 1957 (SGA).

If MSC Sdn Bhd has parted with the possession of the goods, it has the right to stop the goods in transit if the buyer is insolvent – section 46(1)(b), SGA.

Where the property in goods has not passed to the buyer, the unpaid seller has the right to withhold delivery. – section 46(2), SGA.

- right of the seller to sue for breach of the contract

MSC Sdn Bhd can sue for the price of the goods where the buyer wrongfully neglects or refuses to accept and pay for the goods – section 55, SGA.

(ii) Give any two of the following:

USUME Sdn Bhd, the buyer, has the following rights:

- to bring an action for non-delivery of the goods – section 57, SGA
- to sue the seller for damages for breach of warranty or to set up against the seller the breach of warranty in diminution or extinction of the price
- to sue the seller in tort by bringing an action in detinue and conversion – section 56, SGA.

Question 3

- Candidates could not explain the difference between actual authority and apparent authority.

3. (a) An agent's authority may be actual or apparent or ostensible. Actual authority is that which is expressly given by the principal to the agent orally or in writing or implied from the express authority given, from the circumstances of the case, the custom or usage of trade, or the situation and conduct of the parties.

On the other hand, apparent or ostensible authority is that which is not expressly given by the principal but which the law regards the agent as possessing although the principal has not consented to his exercising such authority – *Watteau v Fenwick*.

- (b) (i) C
(ii) D
(iii) A
(iv) C
(v) B

- (c) “Uberrimae fidei” means utmost good faith. Insurance contracts, unlike ordinary commercial contracts, require the contracting parties to disclose to each other all information which would influence either party’s decision to enter into the contract, regardless of whether such information was requested or not. This is because insurance contracts are based on mutual trust and confidence between the insured and the insurer.

Failure to disclose material information gives the other party the right to regard the contract as void. In particular, this duty must be fulfilled by the insured as he, not the insurer, knows about himself or the subject matter of the insurance. – *Goh Chooi Leng v Public Life Assurance Co. Ltd.*

Question 4

- Candidates were unable to cite the relevant statutory provisions.

4. (a) (i) That the registered charge is “indefeasible” means that the registered title or interest shall, subject to the limited exceptions provided in section 340(2) of the National Land Code, not be defeated by any unregistered or subsequently registered title or interest.
- (ii) The five exceptions to the indefeasibility given in section 340(2) of the National Land Code are:
- **fraud**; or
 - **misrepresentation**, to which the person or body, or any agent of the person or body, was a party or privy; or
 - where registration was obtained by **forgery**;
 - or by means of an **insufficient or void instrument**; or
 - where the **title or interest was unlawfully acquired** by the person or body in the purported exercise of any power or authority conferred by any written law.
- (b) (i) True
- (ii) False
- (iii) True
- (iv) True
- (v) True

Question 5

- Candidates could not differentiate between final and qualified titles.
- They showed poor understanding of prohibitory orders.

5. (a) (i) Final titles are the final forms of title under which lands are alienated after they have been surveyed whilst qualified titles are yet to be surveyed. When any land held under a qualified title has been duly surveyed, a final title will then be issued in continuation of the qualified title.
- (ii) State land is land still belonging to the state [sections 5 and 40, National Land Code (NLC)] whilst alienated land is state land disposed off/alienated by the state to proprietors in perpetuity (freehold land) or for a term not exceeding 99 years (leasehold land).
- (b) The three conditions of land use are:
- agriculture,
 - building, and
 - industry.
- (c) The life span of a private caveat lodged in Peninsula Malaysia unless earlier removed is six years.
- (d) (i) A “prohibitory order” is where “land or an interest in land held by a judgment-debtor is to be sold in execution proceedings, an order made pursuant to rules of court by a court of competent jurisdiction prohibiting the judgement-debtor from effecting any dealing therewith or from effecting such dealing therewith as may be specified in the order.” – section 334, NLC. In other words, judgment creditors may obtain a prohibitory order for the purpose of imposing restraints on dealings over land owned by their judgment debtors.

Once the prohibitory order is registered or entered on the register document of title, the judgment creditor can then apply for the order for sale of the land.

Question 6

- Candidates had poor knowledge of crossing of cheques.
- They showed poor understanding of duties, liabilities and statutory protection of collecting bankers.

6. (a) (i) A special crossing is when the name of a banker is added on the face of a cheque, either with or without the words “Not Negotiable” - section 76(2), Bills of Exchange Act 1949.

(ii) The legal effect of a special crossing is that the paying banker must pay the amount of the cheque only to the collecting banker named in the crossing. Thus, the negotiability of a cheque crossed specially is, to a certain extent, restricted in that such a cheque can only be negotiated to some person who is a customer of the bank to whom it is crossed.

(b) (i) The duties of the collecting banker are to collect the amount stated in the cheque from the drawer’s bank (the paying banker) and credit the same into his customer’s account.

The collecting banker may become liable to his customer for breach of contract; for example, where he fails to collect when instructed to do so. He may also be liable to the true owner for wrongful conversion where he collects improperly on behalf of a customer who is not entitled to the money.

(ii) The statutory protection accorded to the collecting banker is provided for in section 85 of the Bills of Exchange Act 1949. The essence of this protection is that where a banker, in good faith and without negligence, receives payment of a cheque for a customer with no title or a defective title, he is not liable to the true owner.

To be accorded this protection, the banker must have collected the cheque:

- for a customer – *Oriental Bank of Malaya v Rubber Industry (Replanting) Board*.
- in good faith – section 95, Bills of Exchange Act 1949.
- without negligence – *The Rubber Industry (Replanting) Board v Hong Kong and Shanghai Banking Corporation* and *The National City Bank of New York v Ho Hong Bank Ltd*.

- (c) (i) True
- (ii) False
- (iii) False
- (iv) True
- (v) False