

**CF03**

# **Law and Practice of Banking**

**10 OCTOBER 2001**

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 the various sources of banking law in Malaysia. [15]
- (b) Answer “True” or “False” for each of the following:
- (i) The basic elements of a contract are offer, acceptance, intention to create legal relations, consideration, certainty and capacity. [1]
  - (ii) The person who makes an offer or proposal is called the “promisor” or “offeror”. [1]
  - (iii) A contract is made up of terms which may be express and/or implied. [1]
  - (iv) A contract is void *ab initio* if one of the parties to an agreement is under a mistake as to a matter of fact or law. [1]
  - (v) Consideration in an agreement must be adequate and may move from a third party to the promisee. [1]
- (Total:20 marks)
2. (a) The following questions are in relation to contract law. For each of the following, choose the **correct** answer (A, B, C, D or E) to fill in the blanks:
- (i) An auctioneer inviting bids is making an \_\_\_\_\_.  
A. offer  
B. invitation to treat  
C. acceptance  
D. indorsement  
E. option [1]
  - (ii) An \_\_\_\_\_ is made when the person to whom the proposal is made signifies his assent thereto.  
A. offer  
B. invitation to treat  
C. acceptance  
D. indorsement  
E. option [1]
  - (iii) Terms of a contract may be classified as conditions and \_\_\_\_\_.  
A. guarantees  
B. specifications  
C. warranties  
D. assurances  
E. counter-claims [1]
  - (iv) \_\_\_\_\_ of a contract must be exact and precise, in accordance with what the parties had promised.  
A. Frustration  
B. Performance  
C. Breach  
D. Mitigation  
E. Damages [1]
  - (v) A \_\_\_\_\_ injunction is a court order requiring something to be done.  
A. mandatory  
B. prohibitory  
C. specific  
D. default  
E. restraint [1]

- (b) Answer “**True**” or “**False**” for each of the following:
- (i) The nature of the banker-customer relationship is basically contractual, and according to the Greenwood duty, customers are under an implied contractual duty to keep their cheque books under lock and key. [1]
  - (ii) All contracts entered into by minors are void by virtue of the Age of Majority Act 1971. [1]
  - (iii) Acceptance of an offer is only effective when it has been communicated. [1]
  - (iv) Natural love and affection may be valid consideration. [1]
  - (v) Remedies for breach of contract include damages, specific performance and injunction. [1]
- (c) Ali IT Ideas Sdn Bhd entered into a contract of sale to sell 5,000 units of robots to Hassan Holdings Bhd.
- (i) State **two** remedies available to Ali IT Ideas Sdn Bhd in the event Hassan Holdings Bhd breaches the contract. [4]
  - (ii) State **three** remedies available to Hassan Holdings Bhd in the event Ali IT Ideas Sdn Bhd breaches the contract. [6]
- (Total:20 marks)

3. (a) In relation to agency, distinguish between “actual” authority and “apparent or ostensible” authority. [10]
- (b) For each of the following questions, choose the **correct** answer (A, B, C, D or E):
- (i) For goods **not** listed in the First Schedule of the Hire-Purchase Act 1967, the law which applies is the \_\_\_\_\_ .
    - A. rules of equity
    - B. customary law
    - C. common law
    - D. constitutional law
    - E. special law

[1]
  - (ii) Under the Hire-Purchase Act 1967, which **one** of the following is **NOT one** of the hirer’s rights?
    - A. To be supplied with the relevant documents and information.
    - B. To appropriate payment.
    - C. To complete the purchase earlier than due date.
    - D. To determine the hiring.
    - E. To 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. awareness
    - E. strict liability

[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. mistaken
    - B. malicious
    - C. material
    - D. factual
    - E. real

[1]

- (v) In an insurance contract, the loss which is being insured against, is called the “\_\_\_\_\_”.
- A. mitigated loss
  - B. risk
  - C. insured
  - D. proposal
  - E. policy
- [1]

- (c) Insurance contracts are *uberrimae fidei* (“of the utmost good faith”). Explain the meaning and application of this legal principle. [5]  
(Total:20 marks)

4. (a) State **two** main differences between “tort” and “contract”. [5]

- (b) Mrs Kaca is a customer of Bank ABC Bhd. She suffered a loss of RM4,400 when a teller employed by Bank ABC Bhd negligently debited the said sum from her savings account. At the time of this incident, Mrs Kaca was a newly wed and four months pregnant. Bank ABC Bhd took one week to investigate the matter and then decided to compensate Mrs Kaca’s loss by paying her RM4,400.

Mrs Kaca rejects the compensation as she claims that the extreme anxiety of waiting for Bank ABC Bhd’s decision had caused her to suffer a miscarriage and lose her child. She wants to claim RM13million in damages as she was advised by her doctor that she may not be able to have another child.

Advise Bank ABC Bhd whether Mrs Kaca can succeed in her claim for the loss of her child. [10]

- (c) Answer “**True**” or “**False**” for each of the following:

- (i) The National Land Code 1965 is the legislation governing land for the whole of Malaysia. [1]
- (ii) Under section 340 of the National Land Code 1965, registration confers absolute indefeasibility; that is, there are no exceptions to indefeasibility. [1]
- (iii) The original copy of the grant or lease kept in the Land Registry or Land Office is called the Register Document of Title. [1]
- (iv) The duplicate copy of the grant or lease issued to the proprietor is called the Issue Document of Title. [1]
- (v) The Charge Annexure is basically an agreement between the chargor and the chargee. [1]

(Total:20 marks)

5. (a) State and describe the legal effect of a special crossing on a cheque. [5]

- (b) Abdul, Taib and Mahmud are partners in a firm called “ATM Services” which maintains and repairs automated teller machines of banks in Malaysia. Taib wants to retire as a partner of ATM Services.

Advise Taib with regard to the legal requirements, and mode of giving notice of dissolution of partnership to old and new customers of ATM Services. [10]

- (c) Answer “**True**” or “**False**” for each of the following:
- (i) A company may be a company limited by shares, a company limited by guarantee or an unlimited company. [1]
  - (ii) Turquand’s rule states to the effect that a third party dealing with a company is not bound to ensure that all the internal regulations of the company have in fact been complied with as regard to the exercise and delegation of authority. [1]
  - (iii) A sole proprietorship is where the firm is owned by **one** person. [1]
  - (iv) A partnership is not a legal entity. [1]
  - (v) A sole proprietorship is not a legal entity. [1]
- (Total:20 marks)

6. (a) Distinguish the following terms found in the National Land Code 1965, treating each pair separately:
- (i) “final titles” and “qualified titles” [5]
  - (ii) “alienated land” and “State land” [5]
- (b) Is a caveat a form of “dealing” as defined in the National Land Code 1965? (Elaborate your answer by stating the nature of a caveat, and briefly define the word “dealing”.) [5]
- (c) Fill in the blanks with the **correct word(s)** for each of the following:
- (i) A \_\_\_\_\_ is a letting of land for a term exceeding **three** years and is a registrable interest. [1]
  - (ii) A chargor is entitled to a \_\_\_\_\_ of the charge (using Form 16N) upon full settlement of all monies secured by the registered charge. [1]
  - (iii) An \_\_\_\_\_, being a form of dealing, is a right granted by a proprietor of the servient land to the proprietor of the dominant land for the beneficial enjoyment of the latter’s land. [1]
  - (iv) In relation to negotiable instruments, an \_\_\_\_\_ party is a person who signs a bill as a drawer, acceptor or an indorser without receiving value for it. [1]
  - (v) A \_\_\_\_\_ of a bill is the payee or indorsee of a bill who is in possession of it or the bearer thereof. [1]
- (Total:20 marks)

- END OF QUESTION PAPER -

## **OUTLINE ANSWERS**

### **Question 1**

Candidates generally did well in this question although they could have done better by elaborating more in their answers.

1. (a) The various sources of banking law 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 is laws made by Parliament at federal level and by the various state legislative assemblies at State level. E.g. Banking and Financial Institutions Act 1989, Contracts Act 1950, National Land Code 1965, etc.

- **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. (E.g. BNM Guidelines and ECM Notices).

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. – *UMBC v Pemungut Hasil Tanah, Kota Tinggi*

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

Judges follow precedents; i.e. 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) True  
(ii) True  
(iii) True  
(iv) False  
(v) False

## Question 2

Candidates did well in this question except for the part on the law relating to the sale of goods.

2. (a) (i) **B.** invitation to treat
- (ii) **C.** acceptance
- (iii) **C.** warranties
- (iv) **B.** Performance
- (v) **A.** mandatory

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

- (c) (i) The remedies available to Ali IT Ideas Sdn Bhd, the seller, are:

- **rights of the unpaid seller against the goods**

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

If Ali IT Ideas 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 – s.46(1)(b) SGA.

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

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

Ali IT Ideas Sdn Bhd can sue for the price of the goods where the buyer wrongfully neglects or refuses to accept and pay for the goods – s.55 SGA.

- (ii) Hassan Holdings Bhd, the buyer, has the following rights:

- to bring an action for non-delivery of the goods – s.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 – s.56 SGA.

### Question 3

Most candidates did not seem to know what “ostensible authority” is and the circumstances under which this type of authority arises. Candidates also failed to understand the principles of the law involved in this question.

3. (a) An agent’s authority may be actual, 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) E  
(iii) A  
(iv) C  
(v) B

- (c) 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

Although the question was generally well answered, candidates confused the “law of tort” and the “law of contract”.

4. (a) A tort differs from a breach of contract mainly in that liability in contract can come into existence only by the agreement of the parties concerned, whereas liability in tort is imposed by the law (and not agreed between the parties).

There are differences between the elements constituting tort and contract. The essential elements of contract are: an offer which is accepted by both parties having capacity to contract with valid consideration and certainty, and both parties intending to enter legal relations. On the other hand, a tort arises from an act or omission done intentionally or negligently (or, in cases of strict liability, done independently of any particular state of mind), and there must be damage.

- (b) The main issue here is whether Bank ABC Bhd owes a duty of care to Mrs Kaca; and if so, was there a breach of that duty by the Bank and whether Mrs Kaca suffered damage (i.e. the loss of her baby) which resulted from that breach.

Applying the test of duty of care (the “neighbour” test) as formulated by Lord Atkin in *Donoghue v Stevenson*, Bank ABC Bhd owes a duty of care to Mrs Kaca as a customer. The Bank can reasonably foresee that their customers would likely be injured or suffer loss by their acts or omissions (their negligence).

However, applying the cases of *King v Philips* and *Bourhill v Young*, Mrs Kaca’s pregnancy was beyond the area of foreseeable danger so that the Bank cannot be held liable for the loss of her baby.

Moreover, applying the *Wagon Mound* case, the consequence of the loss of the baby is too remote as a reasonable banker would not have foreseen this consequence from the mere wrongful debit of a savings account.

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

#### Question 5

The question on ‘special crossing of a cheque’ was well answered. However, many candidates could not distinguish between the Partnership Act and the Companies Act in part b) of the question. The dissolution of a partnership and the effects of the dissolution were not well discussed by candidates.

5. (a) 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.

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) Taib is advised that unless notice of dissolution is given, all customers of the partnership are entitled to treat all the former members as continuing to be members – *Tower Cabinet Co. Ltd. v Ingram*.

On Taib’s retirement, any partner may publicly notify the same, and may require the other partners to concur for that purpose in all necessary or proper acts; if any, which cannot be done without his or their concurrence – section 39, Partnership Act 1961. The transfer of Taib’s share in the partnership would have to be registered with the Registry of Businesses pursuant to the Registration of Businesses Act 1956.

Notice may be given by an advertisement in a local press, gazette or by circular letter.

However, for old customers and clients of the partnership, an advertisement in a gazette alone is not sufficient notice – *Re Hodgson, Beckett v Ramsdale* and *Kam Hoy Trading v Hup Aik Tin Mining*. Express notice such as a circular letter must be served on old customers and clients of the firm – *Barfoot v Goodall*. It was decided in *Graham & Ors v Hope & Ors* that when partners dissolve their partnership, they should send notice to all persons who have trusted them as partners.

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

**Question 6**

Candidates' had only a poor understanding of the terms "final titles" and "qualified titles". However, they answered the questions relating to negotiable instruments and the basic principles of land law well.

6. (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), whilst alienated land is State land which has been disposed off / alienated by the State to proprietors in perpetuity (freehold land) or for a term not exceeding ninety-nine years (leasehold land).
- (b) A caveat is not a dealing but a form of restraint on dealings. Dealings comprise transfers, leases, tenancies, charges, liens and easement. Restraints on dealings, such as caveats and prohibitory orders, once lodged with the Land Registry or Land Office concerned, operate to prevent dealings from being registered subsequently; thus protecting the interest claimed by the caveator.
- (c) (i) lease
- (ii) discharge
- (iii) easement
- (iv) accommodating
- (v) holder