

CF03

Law And Practice Of Banking

12 MAY 1999

1. Time allowed : Three (3) hours
2. Total number of questions : Six (6) questions on 4 pages
3. Number of questions to be answered : Five (5) questions
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) Define and explain “law”. [5]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) National law is that body of law which consists of the principles and rules of conduct which States feel themselves bound to observe, and consequently do commonly observe in their relationship with each other. [1]
 - (ii) The **two** main sources of law are written law and oral law. [1]
 - (iii) The Supreme Court is presently the highest Court in Malaysia. [1]
 - (iv) The word “bank” is defined in Section 2 of the Banking and Financial Institutions Act 1989 (BAFIA) as “a person which carries on banking business”. [1]
 - (v) The basic nature of the banker-customer relationship is contractual; that is, in the nature of a debtor-creditor relationship. [1]
- (c) Section 97 of the BAFIA provides that all financial institution employees are bound by the duty of secrecy as regards customers’ affairs and accounts.

State any **five** of the permitted disclosures (that is, exceptions to the duty of secrecy) under BAFIA. [10]
(Total:20 marks)

2. (a) The main elements of a valid contract are offer, acceptance, intention to create legal relations, consideration, certainty and capacity.

Write short notes on the following:

- (i) consideration [5]
 - (ii) capacity [5]
- (b) Choose the **correct word** from the words in the brackets:
- (i) According to the doctrine of “(frustration / privity / validity / breach / performance) of contract”, only the parties to a contract can enforce the rights or be subject to the obligations which arise under it. [1]
 - (ii) (Fraud / Undue influence / Coercion / Misrepresentation / Mistake) is defined in Section 15 of the Contracts Act 1950 as “the committing or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement”. [1]
 - (iii) An agreement which is not enforceable by law is a (void / voidable / valid / *prima facie* / *inter alia*) contract. [1]
 - (iv) A refusal to perform a contract which occurs before the time for performance is due is an (ante-dated / anticipatory / *inter alia* / automatic / erroneous) breach of contract. [1]
 - (v) An injunction is an (*inter alia* / English common law / equitable / antecedent / exempted) remedy. [1]
- (c) Fill in the blanks with the **correct words** in **all** of the following:
- (i) Specific performance is a discretionary remedy provided for, by the _____ Act 1950 (Revised 1974). [1]

- (ii) The Code of _____ Practice was implemented by The Association of Banks in Malaysia since 1 July 1995 to be observed by banks when dealing with their customers. [1]
- (d) Answer “**True**” or “**False**” for each of the following:
- (i) Consideration need not be adequate. [1]
- (ii) Past consideration may be good consideration. [1]
- (iii) Consideration may move from a person who is not the promisee. [1]
- (Total:20 marks)
3. (a) Chong Kim Lan was recently employed as a teller in Bank Bagus Bhd. She knows that she should perform her duties carefully so that she will not be liable for negligence.
- In the above context, answer **all** of the following:
- (i) What is the meaning of “negligence”? [2]
- (ii) List the **three** elements (ingredients) of negligence. [3]
- (iii) Explain what “contributory negligence” is. [5]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) The only defence to an action for defamation is justification. [1]
- (ii) If a banker wrongfully debits the customer’s account, the banker may be liable for damages if it is proven that he has committed libel. [1]
- (iii) In relation to professionals, negligence is judged by the test of the ordinary skilled man exercising and professing to have that special skill. [1]
- (iv) In the case, *Carlill v Carbolic Smoke Ball*, the Privy Council held that consequences are too remote if a reasonable man would not have foreseen them. [1]
- (v) Conversion is a defamatory statement or representation in permanent form. [1]
- (c) When a financial institution wants to take a charge over landed property as security, it is very important to register that charge. Explain why this is so. [5]
- (Total:20 marks)
4. (a) In relation to a contract of sale of goods, describe how the price of goods may be fixed. [5]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) In relation to the sale of goods, the *nemo dat quod non habet* rule means that no one can give a better title than that which he himself has. [1]
- (ii) The Hire-Purchase Act 1967 applies to all hire-purchase agreements in relation to goods specified in the Second Schedule of the said Act. [1]
- (iii) The Hire-Purchase Act 1967 applies to all hire-purchase agreements relating to consumer goods which are purchased for personal, family or household purposes. [1]
- (iv) The Hire-Purchase Act 1967 does not apply to hire-purchase of buses and taxis. [1]

(v) Under the Hire-Purchase Act 1967, one of the rights of the hirer is that the hirer can assign his right, title and interest under the hire-purchase agreement, with the consent of the owner. [1]

(c) Insurance contracts are *uberrimae fidei* and a party to an insurance contract must reveal to the other party all material facts.

Explain the meaning of “material facts”. [5]

(d) Choose the **correct word** from the words in the brackets:

(i) Where the agent of an insurance company completes the proposal form for a proposer, he is acting as the (insurer’s / proposer’s / insured’s / underwriter’s / banker’s) agent. [1]

(ii) (Estoppel / Necessity / Ratification / Express Appointment / Revocation) by the principal is where an agent who was duly appointed has exceeded his authority or a person who has no authority to act for the principal has acted as if he has the authority and the principal accepts and confirms such contract expressly or impliedly. [1]

(iii) If employees of financial institutions act on behalf of their employers and they commit a tort or fraud in the course of their employment, their respective employers are (alternatively / vicariously / necessarily / *prima facie* / unlawfully) liable. [1]

(iv) An agent’s authority is (ostensible / actual / binding / ratified / restricted) where it is not expressly given by the principal but the law regards the agent as possessing such authority although the principal has not consented to his exercising such authority. [1]

(v) The agent has the right to put a/an (charge / easement / transfer / lien / lease) on the principal’s property until the commission, disbursements and payment for services rendered, are paid to him. [1]

(Total:20 marks)

5. (a) Fill in the blanks with the **correct answers**:

(i) According to the National Land Code 1965, the **three** categories of conditions of land use are agriculture, _____ and _____. [2]

(ii) _____ Document of Title is the duplicate copy of the original grant or lease kept in the Land Registry or Land Office which is granted to the alienee or the land owner. [1]

(iii) A _____ is the letting of land for a term not exceeding **three** years. [1]

(iv) Unless earlier withdrawn or removed, a private caveat lodged in Kuala Lumpur lapses upon the expiry of _____ (number of) years from the time when it took place. [1]

(b) Write a short note on a lien-holder’s caveat in relation to taking land in Peninsular Malaysia as security for credit facilities granted by financial institutions. [5]

(c) Choose the **incorrect word** from the words in the brackets:

(i) Dealings comprise (transfers, leases, tenancies, charges, liens, caveats, easements). [1]

(ii) Exceptions to indefeasibility in relation to dealings in land include (fraud, forgery, alienation, insufficient instrument, void instrument). [1]

(iii) **Four** types of caveats which may be lodged over land are (private, trust, lien-holder’s, prohibitory, Registrar’s) caveats. [1]

(iv) The parties to a cheque may be the (drawer, drawee, acceptor, indorser, holder). [1]

(v) Types of negotiable instruments include (bills of exchange, cheques, promissory notes, travellers’ cheques, debentures, assignments). [1]

- (d) Describe the main difference between a “general crossing” and a “special crossing” on cheques. [5]
(Total:20 marks)
6. (a) Is an undated cheque valid? Give reasons for your answer. [5]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) A cheque is not invalid merely because it is ante-dated or post-dated, or that it bears a date on a Sunday. [1]
 - (ii) Crossings on a cheque may be “common” or “special”. [1]
 - (iii) A cheque written in the Chinese language is valid. [1]
 - (iv) An accommodating party is the person who signs a bill of exchange as drawer, acceptor or an indorser without receiving value for it. [1]
 - (v) A sole-proprietorship is not a separate legal entity. [1]
- (c) State **three** of the main differences between a partnership and a company. [6]
- (d) Fill in the blanks with the **correct answers**:
- (i) A company limited by _____ means a company formed on the principle of having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them. [1]
 - (ii) A company limited by _____ is a company formed on the principle of having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of it being wound-up. [1]
 - (iii) A _____ private company is a private company in the shares of which no beneficial interest is held directly or indirectly by any corporation and which has not more than 20 members, none of whom is a corporation. [1]
 - (iv) A private _____ company has the word “Sendirian” or the abbreviation “Sdn” at the end of its name. [1]
- (Total:20 marks)

OUTLINE ANSWERS

Question 1

- (a) **Generally well-answered although some candidates wrote on irrelevant topics such as the Court structure.**
- (b) **Candidates' understanding of the concepts/principles examined was of an average level.**
- (c) **This question was poorly answered. It was noted that there was a lack of knowledge on banking secrecy and the permitted disclosures under the Banking and Financial Institutions Act (BAFIA) 1989.**

- (a) "Law" may be defined as "the body of enacted or customary rules recognised by a community as binding. As explained by John Austin, law may be said to be a command set by a superior being to an inferior being and enforced by sanctions or punishments. The superior being is the government and the inferior being is the individual. The sanctions or punishments include imprisonment, fines, damages, whipping, and injunctions. Law can also be said to be the body of principles recognised and applied by the State in the administration of justice. Thus, law is a body of rules which are enforced by the State.

Law may be classified into public law, international law and private law. Law consists of written law (i.e. the Federal Constitution, State Constitutions, legislation, and subsidiary legislation) and unwritten law (i.e. common law and equity, judicial precedents and customs).

- (b) (i) False
(ii) False
(iii) False
(iv) True
(v) True
- (c) Five of the permitted disclosures (or exceptions to the duty of secrecy) are :
- (i) disclosure to Bank Negara Malaysia (BNM), or to any director or employee of BNM, BNM's appointee, the Advisory Panel or professionals authorised in writing by BNM to obtain such information – s. 98, BAFIA.
 - (ii) where written permission to disclose is given by the customer or his personal representatives – s. 99 (1)(a).
 - (iii) where the customer is bankrupt or wound-up – s. 99 (1)(b).
 - (iv) for *bona fide* commercial transactions and to assess creditworthiness – s. 99 (1)(c).
 - (v) for the purposes of criminal or civil proceedings – s. 99 (1)(d).

Other Choices:

- (vi) where the financial institution is served with a garnishee order – s. 99 (1)(e).
- (vii) disclosure to an external bureau or agent appointed by the institution with the prior written consent of BNM – s. 99 (1)(f).
- (viii) where disclosure is authorised or required under BAFIA – s. 99 (1)(g).
- (ix) where disclosure is authorised under any Federal law to be made to a police officer – s. 99 (1)(h).
- (x) where disclosure is authorised in writing by BNM – s. 99 (1)(i).

Question 2

- (a) **Generally, not well-answered. Many candidates thought of 'consideration' as to 'consider' or 'think about' something and 'capacity' as the capacity to pay in terms of networth.**

Answers to parts (b), (c) and (d) of the question showed an average level of understanding of the principles examined.

- (a) (i) Generally, an agreement without consideration is void - Section 26 of the Contracts Act 1950. The word 'consideration' is defined in Section 2 (d) of the Contracts Act as: "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

Consideration need not be adequate – Explanation 2, Section 26, Contracts Act and *Phang Swee Kim v Beh I Hock*. Past consideration may be good consideration – Section 2 (d) and *Kepong Prospecting Ltd. & Ors. v Schmidt*.

Natural law and affection may be valid consideration – Section 26 (a). Part payment may discharge the performance of a contract – Section 64 and *Kerpa Singh v Bariam Singh*. And, consideration need not move from the promisee.

- (ii) The parties entering into a contract should have the legal capacity to do so; that is, they should be competent to contract. Section 11 of the Contracts Act 1950 provides that every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. Thus, persons having the capacity to enter into contracts are those who are of the age of majority, of sound mind and are not bankrupts or wound-up companies.

The age of majority is 18 years - Age of Majority Act. Persons who are of unsound mind (mentally disordered patients) and bankrupts (for individuals) or wound-up companies do not, generally, have the capacity to enter into contracts. For the age of majority requirement, the exceptions to the rule that contracts made by infants are void (*Mohori Bibee v Dharmodas Ghose*) are contracts for necessities, scholarship and insurance.

- (b) (i) privity
(ii) Coercion
(iii) void
(iv) anticipatory
(v) equitable
- (c) (i) Specific Relief
(ii) Good Banking
- (d) (i) True
(ii) True
(iii) True

Question 3

- (a) **Only an average level of knowledge on "negligence" and "contributory negligence" was exhibited in most of the candidates' answers.**
- (b) **The performance of candidates in this question was of an average level.**
- (c) **This question was poorly answered. Many candidates were not aware of the concept of indefeasibility and Section 340 of the National Land Code 1965.**

- (a) (i) Negligence is the breach of a legal duty to take care, which results in damages undesired by the defendant, to the plaintiff.
- (ii) The 3 elements of negligence are :-
- A legal duty on the part of defendant towards the plaintiff to exercise care in such conduct of the defendant as falls within the scope of the duty – *Donoghue v Stevenson*;
 - Breach by the defendant of that duty; and
 - Consequential damage to the plaintiff.

- (iii) Contributory negligence is where the plaintiff ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself; and in his reckoning he might take into account the possibility of others being careless.

Section 12 of the Civil Law Act 1956 provides that where a person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Thus, where there is contributory negligence, the damages recoverable by the plaintiff are to be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

- (b) (i) False
(ii) False
(iii) True
(iv) False
(v) False
- (c) It is very important for the financial institution to register the charge because of the concept of indefeasibility. Registration is required under Section 340 of the National Land Code 1965 to confer indefeasibility. Indefeasibility of the registered charge is a shield of protection against attacks subject only to the limited exceptions provided in Section 340(2) of the said Code such as fraud, misrepresentation, forgery and insufficient or void instruments. Once registered, the charge is effective and the financial institution's interests as chargee are protected against prior unregistered claims to the land and the chargee enjoys priority in case there are subsequent registered dealings. Once the charge is registered, in general, there can be no more dealings over the charged land without the registered chargee's prior written consent.

Question 4

- (a) **Many candidates answered incorrectly.**
(b) **Average**
(c) **Good**
(d) **Average**

- (a) Price means the money consideration for the sale of goods and may be fixed by :
- (i) the contract;
(ii) the manner agreed in the contract; and
(iii) the course of dealing between the parties.

Where the price is not fixed as above, the buyer must pay a reasonable price for the goods. What is 'reasonable' is a question of fact depending on the circumstances of each particular case – Section 9 of the Sale of Goods Act.

- (b) (i) True
(ii) False
(iii) True
(iv) False
(v) True
- (c) A material 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. If a person fails to disclose an immaterial fact, the insurance contract is still valid – *New India Assurance Co. Ltd. v Pang Piang Chong & Anor* and *Abu Bakar v Oriental Fire & General Insurance Co. Ltd.* However, if the party fails to disclose a material fact, the contract is voidable –

Goh Chooi Leng v Public Life Assurance Co. Ltd. An exception to this general rule is provided under Section 15C(1) of the Insurance Act 1963 which provides that a policy is not avoided by reason only of a misstatement of the age of the life insured. There is no duty on the insured to disclose facts which he does not know or facts which he cannot reasonably be expected to know – *Kathirvelu v Pacific & Orient Insurance Co. Sdn. Bhd.*

- (d) (i) proposer's
- (ii) Ratification
- (iii) vicariously
- (iv) ostensible
- (v) lien

Question 5

- (a) **Average**
- (b) **Generally, this question was poorly answered. Very few candidates have the knowledge on lien-holder and caveat.**
- (c) **Average**
- (d) **Most candidates knew about general crossings on cheques but were not precise on special crossings.**

- (a) (i) building, industry
 - (ii) Issue
 - (iii) tenancy
 - (iv) six
- (b) A lien-holder's caveat may be lodged by a person with whom the document of title has been deposited as security for credit facilities granted by financial institutions - Section 281, National Land Code. Thereafter, the caveator must continue to have custody of the land title.

In order to enter a lien-holder's caveat, the caveator must prove the deposit of the title deed with the intention that it be a security for credit facilities. This is normally done by way of having a Memorandum of Deposit executed and stamped. The holder of a lien-holder's caveat shall, by virtue of Section 281(2) of the National Land Code 1965, be entitled to apply to Court for an order for sale after judgment for the debt has been obtained.

- (c) (i) caveats
 - (ii) alienation
 - (iii) prohibitory
 - (iv) acceptor
 - (v) assignments
- (d) A general crossing is where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "Not negotiable" or two parallel transverse lines, either with or without the words "Not negotiable".

On the other hand, a special crossing is where a cheque bears across its face an addition of the name of a banker, either with or without the words "Not negotiable". – Section 76, Bills of Exchange Act.

Thus, the main difference is that a generally crossed cheque does not have the addition of the name of a banker and therefore, it can be banked into an account in any bank whereas, a specially crossed cheque contains an addition of the name of a banker and it has to be banked into an account maintained in that specified bank only.

Question 6

- (a) **Very few candidates knew the legal impact of an undated cheque.**
- (b) **Average**
- (c) **Candidates did very well in this question.**
- (d) **Candidates exhibited a poor understanding of the types of companies.**

- (a) An undated cheque is not invalid merely because the date is omitted – Section 3 (4)(a) Bills of Exchange Act 1949.

In practice, however, the drawee bank would refuse to pay an undated cheque and return it with the answer “Date Required”. This is because the date of a cheque is a material part of the cheque. If the cheque is presented over the counter, the drawee bank may request the holder of the cheque to insert the date. If the cheque is presented otherwise than over the counter, the bank may confirm with the drawer the date of issue and then insert the date if instructed by the drawer - Section 20(1) Bills of Exchange Act 1949.

- (b)
 - (i) True
 - (ii) False
 - (iii) True
 - (iv) True
 - (v) True
- (c) Three main differences between a partnership and a company:
 - (i) A partnership is not a separate legal entity whilst a company is a separate legal entity as it has an existence quite distinct from that of its directors and members.
 - (ii) A partnership may be created orally or in writing whilst a company must be registered at the Registry of Companies or incorporated before it is in existence.
 - (iii) A partnership does not have perpetual succession unlike a company which never “dies” until it is wound up. A partnership, generally, would be dissolved if any one of the partners dies, becomes bankrupt or of unsound mind or retires or resigns from the partnership.
- (d)
 - (i) shares
 - (ii) guarantee
 - (iii) exempt
 - (iv) unlimited