

CF03

Law and Practice of Banking

8 MAY 2002

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) Answer “**True**” or “**False**” for each of the following statements:
- (i) Malaysia, like England, does not have a written constitution. [1]
 - (ii) Criminal law lays down the rights of individuals in Malaysia. It covers areas such as the rights of Malaysian citizens as well as state and federal powers. [1]
 - (iii) Private international law consists largely of rules that guide a judge when the laws of more than **one** country affect a case. [1]
 - (iv) Tort is based on agreement and is the branch of private law that determines when a promise or a set of promises is legally enforceable. [1]
 - (v) A trust binds the trustee who deals with the trust property for the benefit of the *cestui que trust*; and the trustee may himself be **one** of the beneficiaries. [1]
- (b) To what extent does the English commercial law (which includes English banking law) apply in Malaysia? [10]
- (c) Name any **five** of the elements of a valid contract. [5]
(Total:20 marks)
2. (a) In relation to the law of contract, answer the following questions:
- (i) What does the word “fraud” mean? [5]
 - (ii) What is the legal effect if consent to an agreement is caused by fraud? [5]
- (b) Name **three** types of remedies for breach of contract. [3]
- (c) In relation to the law of contract, answer “**True**” or “**False**” for each of the following:
- (i) There is a presumption against the existence of an intention to create legal relations in domestic arrangements, whereas in commercial arrangements, the rebuttable presumption is that legal relationships are intended. [1]
 - (ii) Consideration need not be adequate. [1]
 - (iii) Part payment may discharge a contractual obligation. [1]
 - (iv) The terms of an agreement must be certain. [1]
 - (v) Generally, a person who is not a party to a contract has no right to sue on the contract. [1]
 - (vi) Every person who is of the age of majority according to the law to which he is subjected to, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject, is competent to contract. [1]
 - (vii) A minor cannot make a valid contract except for contracts of employment, banking and finance. [1]
- (Total:20 marks)

3. (a) Registration of dealings confers indefeasibility upon the registered title or interest over land. In relation to this statement, answer the following questions:
- (i) Explain what "indefeasibility" means. [5]
 - (ii) State **five** exceptions to indefeasibility as provided in the National Land Code 1965. [5]
 - (iii) What is the effect of defeasibility on a registered title or interest? [5]
- (b) Answer "**True**" or "**False**" for each of the following:
- (i) A bill of exchange is negotiated when it is transferred from **one** person to another in such manner as to constitute the transferee as the holder of the bill. [1]
 - (ii) Negotiation is the signification by the drawee of his assent to the order of the drawer. [1]
 - (iii) The payee is the person to whom the bill is addressed. [1]
 - (iv) The holder is the person who promises to pay the bill according to its tenor. [1]
 - (v) A bill must be duly presented for payment or else the drawer and indorsers shall be discharged. [1]
- (Total:20 marks)
4. (a) Apart from cheques and bills of exchange, name **five** other types of negotiable instruments. [5]
- (b) What is the legal effect if a cheque is crossed and bears across its face the words "account payee"? [5]
- (c) Describe how a bill of exchange payable to "Azman bin Kassim OR ORDER" may be negotiated. [5]
- (d) Answer "**True**" or "**False**" for each of the following:
- (i) A minor is anyone younger than 18 years. [1]
 - (ii) Minors cannot be current account holders. [1]
- (e) Besides companies being classified as public or private companies, state **three** types of companies in relation to the **nature of their liabilities**. [3]
- (Total:20 marks)
5. (a) Describe the **two** parties to a hire-purchase agreement. [5]
- (b) Select the **correct** word from the words in brackets for each of the following:
- (i) The sale of (shares, crops, chattels, land, cars) is not governed by the Sale of Goods Act 1957. [1]
 - (ii) (Owned, Specific, Approved, Existing, Defined) goods are goods already owned or possessed by the seller, and may either be specified or agreed upon at the time a contract of sale is made. [1]
 - (iii) (Owned, Specific, Approved, Existing, Defined) goods are goods which are identified and agreed on at the time a contract of sale is made. [1]
 - (iv) (Owned, Specific, Approved, Existing, Unascertained) goods are goods identified by description only. [1]
 - (v) (Future, Specific, Approved, Existing, Unascertained) goods are goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. [1]

- (c) Mrs Tan is a customer of Bank ABC Bhd. Due to the negligence of both Mrs Tan and Bank ABC Bhd, Mrs Tan suffered a loss of RM56,000. Mrs Tan wants to claim RM56,000 from Bank ABC Bhd.

Is Mrs Tan likely to succeed in her claim? Give reasons for your answer. [10]
(Total:20 marks)

6. Describe **ten** differences between a company and a partnership. (Total:20 marks)

- END OF QUESTION PAPER -

OUTLINE ANSWERS

Question 1

This question was fairly well answered except for the part on English commercial law as most candidates failed to mention the statutory provision (Civil Law Act) in their answers. Many candidates also gave irrelevant answers for this part.

1. (a) (i) False
- (ii) False
- (iii) True
- (iv) False
- (v) True
- (b) Section 5(1) of the Civil Law Act 1956 (Revised 1972) states to the effect that in Malaysia (except the states of Penang, Malacca, Sabah and Sarawak), principles of English commercial law as it stood on April 7, 1956 apply in the absence of local legislation.
- For the states of Penang, Malacca, Sabah and Sarawak, section 5(2) of the Civil Law Act states that English commercial law shall apply to the matter which has to be decided in the named states as it would in England “in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England”. Thus, there is a continuing reception of English commercial law in the absence of local legislation.
- However, since so many local statutes dealing with commercial subjects have already been passed there is no total reliance on English commercial law. Such statutes include the Bills of Exchange Act 1949, Companies Act 1965, Partnership Act 1961 and the Insurance Act 1963.
- (c) The elements of a valid contract are (choose any **five**):
- offer
 - acceptance of the offer
 - intention to create legal relations
 - consideration
 - certainty
 - capacity

Question 2

This question was satisfactorily answered, except that most candidates failed to cite or apply the statutory provision. They also could not explain the meaning of “fraud” nor state the “legal effect if consent to an agreement is caused by fraud”.

2. (a) (i) Section 17 of the Contracts Act 1950 defines ‘fraud’ as including certain acts which are committed with intent to induce another party to enter into a contract. Acts of fraud include the following:
- the suggestion, as to a fact, of that which is not true by **one** who does not believe it to be true;
 - the active concealment of a fact by **one** having knowledge or belief of the fact;
 - a promise made without any intention of performing it.

- any other act fitted to deceive; and
 - any such act or omission as the law specially declares to be fraudulent.
- (ii) Section 19(1) of the Contracts Act 1950 provides inter alia that when consent to an agreement is caused by fraud, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true. – section 19(2), Contracts Act 1950.
- (b) The **three** remedies for breach of contract are:
- damage
 - specific performance
 - injunction
- (c) (i) True
(ii) True
(iii) True
(iv) True
(v) True
(vi) True
(vii) False

Question 3

While most candidates knew the meaning of “indefeasibility” (in relation to law) and its exceptions, many did not know the effect of defeasibility on a registered title/interest. Answers to questions on bills of exchange were only average.

3. (a) (i) Indefeasibility is a shield against attacks. This means that subject to limited exceptions, the registered proprietor of land is shielded from attacks against his or her title or interest in land – section 340, National Land Code.
- (ii) **Five** exceptions to indefeasibility:
- fraud
 - misrepresentation
 - forgery
 - insufficient instrument
 - void instrument
- (iii) Section 340(3), National Land Code provides that where a registered title or interest is rendered defeasible, it is liable to be set aside not only in the hands of the immediate registered proprietor or holder but also in the hands of any subsequent purchaser.
- Indefeasibility will, however, attach to the title or interest once it is acquired by a subsequent purchaser in good faith and for value or by any person or body claiming through or under such purchaser – proviso to section 340 (3) National Land Code 1965.
- (b) (i) True
(ii) False
(iii) False
(iv) False
(v) True

Question 4

Many candidates were not aware of the legal effect of the crossing with the word “account payee” (s.81A, Bills of Exchange Act 1949) nor how an “order bill” is negotiated. The other parts of the question on types of customers were well answered.

4. (a) Types of negotiable instruments other than cheques and bills of exchange (choose any **five**):
- promissory notes
 - bankers’ drafts
 - bank notes
 - Treasury bills
 - Share warrants
 - dividend warrants
 - debentures
 - travellers’ cheques
- (b) Section 81A of the Bills of Exchange Act 1949 provides that such a cheque shall not be transferable but shall only be valid as between the parties thereto.
- (c) The bill payable to order is negotiated by the indorsement of the holder completed by delivery.
- (d) (i) True
(ii) True
- (e) Types of companies (in relation to the nature of their liabilities)
- company limited by shares
 - company limited by guarantee
 - unlimited company

Question 5

Most candidates did not understand the concept of contributory negligence and the application of section 12, Civil Law Act that states that the damages recoverable are reduced to what the court thinks is just and equitable as to the extent of the claimant’s responsibility in the damage. Many confused this concept with “mitigation of changes” (which comes under contract law) and were under the misconception that in contributory negligence, damages must be apportioned in halves (equal shares).

5. (a) The **two** parties to a hire-purchase agreement are the hirer and the owner. The hirer is the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer’s rights or liabilities under the agreement have passed by assignment or by operation of law.
- The owner is the person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner’s rights or liabilities under the agreement have passed by assignment or by operation of law.
- (b) (i) Land
(ii) Existing
(iii) Specific
(iv) Unascertained
(v) Future
- (c) Mrs Tan is unlikely to succeed in claiming RM56,000. She may, however, be able to claim part of her loss. Section 12 of the Civil Law Act 1956 provides that where a person suffers damage partly as the result of his own fault and 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.

As Mrs Tan's loss was also caused by her own negligence, she is guilty of contributory negligence. A person is guilty of contributory negligence if he ought to have reasonably foreseen that if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckoning he might take into account the possibility of others being careless.

Thus since Mrs Tan is guilty of contributory negligence, the damages recoverable by her are to be reduced to such extent as the court thinks just and equitable having regard to her share in the responsibility for the damage.

Question 6

Although there were candidates who did very well in this question, there were some who were confused about the following concepts and principles:

- partnerships should not be called "companies"
- the maximum number of members (of a company) and partners (of a firm)
- companies are never "bankrupt" – they are either wound up or liquidated (only partners, being individuals, can be bankrupts)

6. **Ten** differences between a company and a partnership are:

- A company is a legal entity separate and distinct from its members and directors whereas a partnership is not a separate legal entity.
- A company is registered with the Registry of Companies whereas a partnership is registered with the Registry of Businesses.
- Shares in a company are generally transferable although the right of transfer may be restricted. On the other hand, a partner cannot generally transfer his status as partner to someone else without the consent of all the other partners.
- Members of a company may not necessarily be its managers, directors or agents. On the other hand, partners are agents of the firm for carrying on its business in the course of business and are generally entitled to manage the firm.
- Companies have no maximum number of members but partnerships (except professional firms) can have a maximum of twenty partners.
- Companies must be constituted in writing (by M&A) but a partnership may be formed either orally or in writing.
- Companies can borrow for purposes covered by their objects as contained in the Memorandum of Association. Partners generally have unrestricted powers of borrowing.
- Companies can use current assets as security by creating floating charges. Partnerships cannot do so but can mortgage the firm's assets.
- Companies are subject to various statutory rules of procedure and are required to supply certain information to the public. On the other hand, partnerships are formed informally and need not supply information to the public.
- Companies are dissolved by winding up and liquidation, which is a formal procedure whereas partnerships are dissolved informally, e.g. by the agreement of the partners.