



## **UNIVERSITY OF JOHANNESBURG KINGSWAY CAMPUS**

### **FACULTY OF LAW**

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<b>PROGRAMME</b>	:	LLM
<b>SUBJECT</b>	:	LLM MODULE: BANKING LAW
<b>COURSE CODE</b>	:	BLW9X1C
<b>DATE</b>	:	17-18 June 2020
<b>DURATION</b>	:	24 hours: Take-home paper
<b>MARKS</b>	:	100
<b>EXAMINERS</b>	:	PROFF CF HUGO and SF DU TOIT
<b>EXTERNAL EXAMINER</b>	:	PROF R BRITS
<b>NUMBER OF PAGES</b>	:	6 (this page included)

## **Instructions**

- 1 Answer all the questions.**
- 2 In all questions refer to relevant material from case law, regulatory materials and academic comment. Since this is a take-home paper in which you should have sufficient time, accurate referencing (either in footnotes or in brackets in the text) should be possible and will lead to better marks. You can use the referencing style of your choice.**
- 3 Students are not permitted to discuss this paper with other students or any other person. Any student who values honesty and integrity will not correspond with anyone to discuss this exam or seek help with it; moreover, any student who values honesty and integrity and who is so contacted by another student will report it to the Faculty.**
- 4 Although this is an open-book take home examination, you are still expected to answer questions in your own words. Do not copy large portions of text from other works and cases. Where it is functional, feel free to use short quotes, but then in inverted commas and properly referenced. In short, therefore, the rules relating to plagiarism are fully applicable to this examination.**
- 5 You have much time available: this does not mean that the examiners are expecting very long answers from you. What is expected is well-structured answers supported by authority and sound reasoning.**
- 6 This paper will be available on Blackboard from 8h00 am on 17 June 2020 and must be both
  - (i) uploaded on Blackboard, and**
  - (ii) emailed to [chugo@uj.ac.za](mailto:chugo@uj.ac.za)**by 8h00 am on 18 June 2020.**

### **Question 1 [6 marks]**

Write an essay leading up to, and substantiating, your personal definition of “the law of banking”. **(6)**

### **Question 2 [9 marks]**

The two-decade history of the Financial Intelligence Centre Act 38 of 2001 shows a clear movement from a rules-based approach to a risk-based approach. Write an essay in which you:

- (a) differentiate between these two approaches to combating financial crime; **(3)** and
- (b) explain the approach of the Act, as amended, to
  - (i) politically exposed persons **(3)**, and
  - (ii) equitable ownership. **(3)**

### **Question 3 [20 marks]**

- (a) Write an essay in which you critically discuss the legal principles determining when a bank may unilaterally close a client's account. **(10)**
- (b) Use the principles analysed in (a) above to advise the banks below whether they can close the accounts of their clients in the following (separate) circumstances: **(10)**
  - (i) Ms X is a racist, as is evident from her postings on social media and her subsequent conviction for *crimen injuria*. Bank A therefore decides to close all her accounts with notice of six months.
  - (ii) Bank B decides to close the accounts of Eskom as, according to Bank B, there are media reports clearly indicating that Eskom's coal-fired power plants are illegally exceeding emission limits. Bank B has furthermore decided not to bank any clients with a dubious environmental record anymore. Bank B gives Eskom notice of one month before all its accounts will be closed.
  - (iii) Bank C decides to bank only clients with an annual income of R500 000 or more in future. Therefore, it gives notice of three months to Mr Y that his account will be closed, as he does not meet the minimum income requirement.

#### **Question 4 [25 marks]**

##### **Background facts**

*Ultra Alloys (UA) is a South African company that specialises in the production of high quality metal alloys. It is approached by the North Korean Government to produce and sell to it one tonne of an extremely strong lightweight alloy, containing, inter alia, copper. After weeks of negotiation, a contract is concluded in terms of which UA undertakes to provide the goods requested for a purchase price of R10 million, payment to be effected by a transferable deferred payment credit, to be issued by the Bank of Beijing (BB - a Chinese bank) and confirmed by Delta Bank (DB - UA's bank in South Africa). The letter of credit is duly issued and confirmed as negotiated. It is issued and confirmed subject to the provisions of the UCP 600.*

*In order to produce the alloy UA purchased copper from a Zambian company, ZCC Mining (ZCC), at a purchase price of R2 million. The contract between UA and ZCC provided for payment by a deferred payment letter of credit in the amount of R2 million. UA accordingly requested DB to "transfer" the letter of credit issued by BB to ZCC for the amount of R2 million*

##### **Question 4(a) [12 marks]**

Against the background of the facts and parties set out above, and with reference to relevant provisions of the UCP 600 and case law, explain the operation and advantages of:

- (i) the deferred payment credit; **(4)**
- (ii) the transferable credit (in this respect deal also with the question whether DB is obliged to "transfer" the credit, and, if it does so, in which respects the "transferred" letter of credit is likely to differ from the original letter of credit); **(6)**  
and
- (iii) the confirmation of a credit **(2)**.

In dealing with these questions you may accept that South African law applies, and that it is likely to be similar to English law.

##### **Further background facts**

*Neither BB, when issuing the credit, nor DB when confirming it, had knowledge of the purpose of the sale of the alloy by UA to North Korea. Before payment of the letter of credit by either bank, but after it had been issued, confirmed and "transferred", an investigative journalist published a newspaper article in which a strong case was made out for the fact that North Korea was planning to build missiles from a lightweight alloy which it was in the process of acquiring from South Africa. If this were to be true the contract of sale between UA and the North Korean Government would be illegal under the law of both China and South Africa (and international law) since it would be in breach of UN sanctions against North Korea.*

**Question 4(b) (10 marks)**

Against this background you are briefed by DB for a legal opinion on:

- (i) whether DB could refuse payment of the letter of credit as against UA on the basis of the illegality of the contract of sale between UA and the North Korean Government (you may accept that South African law will apply and that it is likely to be similar to English law); **(7)**
- (ii) whether DB could refuse payment of the letter of credit as against ZCC on the basis of the illegality of the contract of sale between UA and the North Korean Government (you may accept that South African law will apply and that it is likely to be similar to English law). **(3)**

**Question 4(c) (3 marks)**

Assume, on the facts set out above, that DB has paid both UA and ZCC. Will BB be entitled, under the UCP 600, to refuse to reimburse DB on the basis of the illegality of the contract between UA and the North Korean Government? **(3)**

**Question 5 (20 marks)**

**Background**

*On the 1<sup>st</sup> of December 2016 rules formulated by the Judicial Committee of the Supreme Court of the People's Republic of China governing guarantees came into operation ("the PRC Rules").*

*Article 6 of the PRC Rules provides as follows under the heading "Honour or Payment":*

*"Where the documents presented by the Beneficiary comply on their face with the terms and conditions of the Independent Guarantee, and are consistent with one another, the Beneficiary's claim against the Issuer for payment under the Independent Guarantee shall be supported by a People's Court.*

*The Issuer may not seek to excuse its payment obligation based on defenses arising from the underlying transaction relationship or the Independent Guarantee's relationship with the Applicant and such defenses shall not be supported by a People's Court, except under the circumstances provided in article 12 [fraud] ..."*

*Article 12 of the PRC Rules then provides as follows under the heading "Fraud":*

*"Independent Guarantee fraud shall be found by a People's Court under one of the following circumstances:*

- (1) The Beneficiary, acting in collusion with the Guarantee Applicant or any other party, has fabricated the underlying transaction;*
- (2) Any of the third-party documents presented by the Beneficiary is forged or contains false information;*

- (3) Any court judgment or arbitral award finds that the party obligated on the underlying transaction shall not be liable for payment or damages;
- (4) The Beneficiary acknowledges that the obligations under the underlying transaction have been fully discharged, or that the payment triggering event specified in the Independent Guarantee has not occurred; or
- (5) The Beneficiary otherwise knowingly abuses its right to demand payment when it has no such right.”

#### Question

Write a critical essay relating to the provisions of article 6 read with article 12 of the PRC Rules quoted above. Your essay should concentrate especially on the question in which respect or respects these provisions depart from or coincide with the position in South Africa with reference to relevant case law. It should also evaluate the respective legal positions in order to arrive at a conclusion as to whether the Chinese law set out in the quoted provisions, is an improvement on the position in South Africa and any other jurisdictions considered. **(20)**

#### **Question 7 [10 marks]**

Critically discuss *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 1 SA 441 (SCA) and *ABSA Bank Ltd v Lombard Insurance Co Ltd* 2012 6 SA 569 (SCA). In your answer you should consider whether each judgment is correct, compare and, if possible, reconcile the two judgments. **(10)**

#### **Question 8 [10 marks]**

The potential liability of a bank that has been involved in a payment transaction for loss suffered by a person with whom the bank concerned is not in a contractual relationship (in other words a person who is not a customer of the bank concerned) has emerged over time in the context of the law of delict. With reference to South African cases such as *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* (1995 1 SA 377 (D)), *Columbus Joint Venture v Absa Bank Ltd* (2002 1 SA 90 (A)), *Peterson NO v Absa Bank Ltd* (2011 5 SA 484 (GNP)) and *Gilbey Distillers and Vintners (Pty) Ltd* (unreported) write an essay leading to your motivated conclusions as to the state of this part of South African law. [Please note that a detailed discussion of each of these cases is not called for. You are requested to advise critically on the law in this regard with reference to cases supporting your conclusions.] **(10)**

**Total of paper: 100 marks**