# COMMERCIAL LAW REMINDERS

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## TRUST RECEIPTS

***What is a trust receipt transaction?***

A trust receipt as "a security transaction intended to aid in financing importers and retail dealers who do not have sufficient funds or resources to finance the importation or purchase of merchandise, and who may not be able to acquire credit except through utilization, as collateral, of the merchandise imported or purchased." *(ROSARIO TEXTILE MILLS CORP., ET AL. vs. HOME BANKERS SAVINGS & TRUST CO., G.R. No. 137232, 29 June 2005 citing Samo vs. People, 115 Phil. 346)*

***What are the obligations of the entrustee in a Trust Receipt transaction?***

The entrustee is obliged to **(1)** hold the goods, documents or instruments in trust for the entruster and shall dispose of them strictly in accordance with the terms and conditions of the trust receipt; **(2)** receive the proceeds in trust for the entruster and turn over the same to the entruster to the extent of the amount owed to the entruster or as appears on the trust receipt; **(3)** insure the goods for their total value against loss from fire, theft, pilferage or other casualties; **(4)** keep said goods or the proceeds therefrom whether in money or whatever form, separate and capable of identification as property of the entruster; **(5)** return the goods, documents or instruments in the event of non-sale or upon demand of the entruster; and **(6)** observe all other terms and conditions of the trust receipt not contrary to the provisions of the Trust Receipts Law. *(METROPOLITAN BANK vs. SEC.GONZALES, et al., G.R. No. 180165, 7 April 2009)*

***If the entrustee were to return the goods to the entruster as he was not able to sell them, would the obligation secured by the trust receipt be extinguished? Is deficiency claim proper in a trust receipt transaction?***

NO. A trust receipt is a security agreement, pursuant to which a bank acquires a "security interest" in the goods. xxx The initial repossession by the bank of the goods subject of the trust receipt did not result in the full satisfaction of the loan obligation. A claim for deficiency would thus be in order. *(LANDL & COMPANY INC., VS. METROPOLITAN BANK & TRUST COMPANY G.R. No. 159622, 30 July 2004)*

***If the entrustee were to cancel the trust receipt and take possession of the goods, would this amount to dacion en pago?***

Neither can said repossession amount to *dacion en pago*. Dation in payment takes place when property is alienated to the creditor in satisfaction of a debt in money and the same is governed by sales. Dation in payment is the delivery and transmission of ownership of a thing by the debtor to the creditor as an accepted equivalent of the performance of the obligation. *(Ibid, citing PNB vs. Hon. Pineda, G.R. 46658, 13 May 1991)*

The repossession of the goods by the entrustee was merely to secure the payment of its obligation to the entrustor and not for the purpose of transferring ownership thereof in satisfaction of the obligation.

## LETTERS OF CREDIT

***How does the independence principle apply to letters of credit?***

The so-called "independence principle" assures the seller or the beneficiary of prompt payment independent of any breach of the main contract and precludes the issuing bank from determining whether the main contract is actually accomplished or not. Under this principle, banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon, nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any documents, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers, or the insurers of the goods, or any other person whomsoever.

The independence principle thus liberates the issuing bank from the duty of ascertaining compliance by the parties in the main contract. The obligation under the letter of credit is independent of the related and originating contract. *(TRANSFIELD PHILIPPINES, INC. vs. LUZON HYDRO CORPORATION, G.R. No. 146717, 22 November 2004)*

***What is a standby letter of credit? How does it differ from a commercial letter of credit?***

There are three significant differences between commercial and standby credit. First, commercial credits involve the payment of money under a contract of sale. Such credits become payable upon the presentation by the seller-beneficiary of documents that show he has taken affirmative steps to comply with the sales agreement. In the standby type, the credit is payable upon certification of a party's nonperformance of the agreement. The documents that accompany the beneficiary's draft tend to show that the applicant has not performed his obligation. **The beneficiary of a commercial credit must demonstrate by documents that he**

**has performed his contract. The beneficiary of the standby credit must certify that his obligor has not performed the contract.** *(Ibid)*

***How does a letter of credit differ from a contract of guaranty?***

The concept of guarantee *vis-à-vis* the concept of an irrevocable letter of credit are inconsistent with each other. The guarantee theory destroys the independence of the bank's responsibility from the contract upon which it was opened and the nature of both contracts is mutually in conflict with each other. In contracts of guarantee, the guarantor's obligation is merely collateral and it arises only upon the default of the person primarily liable. On the other hand, in an irrevocable letter of credit, the bank undertakes a primary obligation. Moreover, a letter of credit is defined as an engagement by a bank or other person made at the request of a customer that the issuer shall honor drafts or other demands of payment upon compliance with the conditions specified in the credit. *(MWSS vs. HON. REYNALDO B. DAWAY, G.R. No. 160732, 21 June 2004)*.

## NEGOTIABLE INSTRUMENTS

***Explain the SHELTER RULE.***

A holder who is not a holder in due course but derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. *(Section 58, NIL)*

***When the drawee bank pays a materially altered check, can it claim reimbursement from the drawer?***

When the drawee bank pays a materially altered check, it violates the terms of the check, as well as its duty to charge its client's account only for bona fide disbursements he had made. Since the drawee bank did not pay according to the original tenor of the instrument, as directed by the drawer, then it has no right to claim reimbursement from the drawer, much less, the right to deduct the erroneous payment it made from the drawer's account which it was expected to treat with utmost fidelity. *(METROBANK vs. CABILZO, 06 DECEMBER 2006)*

Exception: when the drawer was the one who made or authorized the alteration or when he failed to exercise reasonable diligence to avoid it. *(ibid)*

***Distinguish between: contract of indorsement and guaranty.***

A contract of indorsement is primarily that of transfer, while a contract of guaranty is that of personal security. The liability of a guarantor/surety is broader than that of an indorser. Thus, unless the bill is promptly presented for payment at maturity and due notice of dishonor given to the indorser within a reasonable time, he will be discharged from liability thereon. On the other hand, except where required by the provisions of the contract of suretyship, a demand or notice of default is not required to fix the surety's liability. He cannot complain that the creditor has not notified him in the absence of special agreement to that effect in the contract of suretyship. *(ALLIED BANKING CORP. vs. COURT OF APPEALS, et al., G.R. No.125851, 11 July 2006)*

***Will discharge of the drawer from liability due to lack of protest operate to discharge him from his letter of undertaking which he signed as additional security for the draft (bill of exchange)?***

The drawer can still be made liable under the letter of undertaking even if he is discharged due to failure to protest the non-acceptance of the drafts. xxx It bears stressing that it is a separate contract from the sight draft. The liability of the drawer under the letter of undertaking is direct and primary. It is independent from his liability under the sight draft. Liability subsists on it even if the sight draft was dishonored for non-acceptance or non-payment. *(PRODUCERS BANK OF THE PHILS. vs. EXCELSA INDUSTRIES, INC., G.R. No. 152071, 8 May 2009)*

***Who is an accommodation party? What is the nature of his liability?***

An accommodation party is one who meets all the three requisites, *viz*: (1) he must be a party to the instrument, signing as maker, drawer, acceptor, or indorser; (2) he must not receive value therefor; and (3) he must sign for the purpose of lending his name or credit to some other person.

The accommodation party is liable on the instrument to a holder for value even though the holder, at the time of taking the instrument, knew him or her to be merely an accommodation party, as if the contract was not for accommodation. The relation between an accommodation party and the accommodated party is one of principal and surety – the accommodation party being the surety. *(ANG vs. ASSOCIATED BANK, ET AL., G.R. NO. 146511, SEPTEMBER 5, 2007)*

***The accommodated party was allowed extension of payment without the consent of the accommodation party. Is the latter still liable?***

Since the liability of an accommodation party remains not only primary but also unconditional to a holder for value, even if the accommodated party receives an extension of the period for

the payment without the consent of the accommodation party, the latter is still liable for the whole obligation and such extension does not release him because as far as the holder for value is concerned, he is a solidary co-debtor. *(Ibid.)*

***A check, payable to the order of X and Y was deposited to a bank (collecting bank) with the lone indorsement of X. X, subsequently withdrew the entire proceeds thereof. State the implications.***

Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. The payment of an instrument over a missing indorsement is the equivalent of payment on a forged indorsement or an unauthorized indorsement in itself in the case of joint payees.

A collecting bank, where a check is deposited and which indorses the check upon presentment with the drawee bank, is an indorser. This is because in indorsing a check to the drawee bank, a collecting bank stamps the back of the check with the phrase "all prior endorsements and/or lack of endorsement guaranteed" and, for all intents and purposes, treats the check as a negotiable instrument, hence, assumes the warranty of an indorser. Without the collecting bank's warranty, the drawee bank would not have paid the value of the subject check.

The collecting bank or last indorser, generally suffers the loss because it has the duty to ascertain the genuineness of all prior indorsements considering that the act of presenting the check for payment to the drawee is an assertion that the party making the presentment has done its duty to ascertain the genuineness of prior indorsements. *(METROBANK vs. BA FINANCE CORPORATION, G.R. No. 179952, 4 December 2009)*

***Can the holder sue the drawee bank if the latter refuses payment of a check notwithstanding sufficiency of funds?***

NO. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check *(Section 189, NIL).* Thus, if a bank refuses to pay a check (notwithstanding the sufficiency of funds), the payee-holder cannot sue the bank. The payee-holder should instead sue the drawer who might in turn sue the bank. Section 189 is a sound law based on logic and established legal principles; no privity of contract exists between the drawee-bank and the payee. *(VILLANUEVA vs. NITE, G.R. No. 148211, 25 July 2006)*

***Does the alteration on the serial number of the check constitute material alteration?***

The alterations on the serial numbers do not constitute material alteration within the contemplation of the Negotiable Instruments Law. An alteration is said to be material if it alters the effect of the instrument. It means an unauthorized change in an instrument that purports

to modify in any respect the obligation of a party or an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party. In other words, a material alteration is one which changes the items which are required to be stated under Section 1 of the NIL. *(THE INTERNATIONAL CORPORATE BANK, INC. v. COURT OF APPEALS, G.R. No. 129910, September 5, 2006)*

***Distinguish between: inland and foreign bill of exchange.***

An inland bill of exchange is a bill which is or on its face purports to be, both drawn and payable within the Philippines *(Sec. 129, NIL)*. Thus, a foreign bill of exchange may be drawn outside the Philippines, payable outside the Philippines, or both drawn and payable outside of the Philippines *(BANK OF PHILIPPINE ISLANDS vs. CIR, G.R. No. 137002, 27 July 2006).* Further, a foreign bill of exchange must be protested in case of dishonor to charge the drawer and the indorsers while an inland bill of exchange need not be protested.

***What is a manager's check?***

A manager's check is one drawn by the bank's manager upon the bank itself. It is similar to a cashier's check both as to effect and use. A cashier's check is a check of the bank's cashier on his own or another check. In effect, it is a bill of exchange drawn by the cashier of a bank upon the bank itself, and accepted in advance by the act of its issuance. It is really the bank's own check and may be treated as a promissory note with the bank as a maker. The check becomes the primary obligation of the bank which issues it and constitutes its written promise to pay upon demand. The mere issuance of it is considered an acceptance thereof. *(EQUITABLE PCI vs. ONG 15 September 2006)*

***Discuss the effects of certifying a check.***

The effects are:

1) It is equivalent to acceptance and is the operative act that makes the bank liable.
2) It amounts to the assignment of the funds of the drawer in the hands of the drawee.
3) If obtained by the holder, persons secondarily liable are discharged.

***Explain the meaning of check kiting.***

It refers to the wrongful practice of taking advantage of the float, the time that elapses between the deposit of the check in one bank and its collection at another. In anticipation of the dishonor of the check that was deposited, the original check will be replaced with another worthless check. *(Notes and Cases on Banks, Negotiable Instruments and other Commercial Documents, Aquino, 2006ed)*

## INSURANCE

***The policy reads:*** *"The insurance of any eligible Lot Purchaser shall be effective on the date he contracts a loan with the Assured. However, there shall be no insurance if the application of the Lot Purchaser is not approved by the Company."* ***It would appear that at the time of loss, a loan has been contracted with the Assured but it is not clear whether the Insurer has approved the insurance application. When should the policy be deemed effective?***

While one provision appears to state that the insurance coverage of the clients of Assured already became effective upon contracting a loan with the Assured, another appears to require the Insurer to approve the insurance contract before the same can become effective.

It must be remembered that an insurance contract is a contract of adhesion which must be construed liberally in favor of the insured and strictly against the insurer in order to safeguard the latter's interest. Thus, the vague contractual provision must be construed in favor of the insured and in favor of the effectivity of the insurance contract.

The seemingly conflicting provisions must be harmonized to mean that upon a party's purchase of a memorial lot on installment from the Assured, an insurance contract covering the lot purchaser is created and the same is effective, valid, and binding until terminated by the Insurer by disapproving the insurance application. The second sentence is in the nature of a resolutory condition which would lead to the cessation of the insurance contract. Moreover, the mere inaction of the insurer on the insurance application must not work to prejudice the insured; it cannot be interpreted as a termination of the insurance contract. The termination of the insurance contract by the insurer must be explicit and unambiguous. *(ETERNAL GARDENS MEMORIAL PARK vs. PHILAMLIFE, G.R. No. 166245, 09 April 2008)*

***Does the buyer have insurable interest over the goods even while the goods are still in transit?***

YES. The buyer's interest is based on the perfected contract of sale. The perfected contract of sale between him and the seller/shipper of the goods operates to vest in him an equitable title even before delivery or before he performed the conditions of the sale. The contract of shipment, whether under "F.O.B.", "C.I.F.", or "C & F" is immaterial in the determination of whether the buyer has insurable interest or not in the goods in transit. *(FILIPINO MERCHANTS INSURANCE CO. vs. CA, 28 November 1989)*

***Distinguish between: Loss Payable Clause and Standard or Union Mortgage Clause.***

Under a Loss Payable Clause, the mortgagee is made merely a beneficiary under the contract. Any default on the part of the mortgagor, which by the terms of the policy defeat his rights, will also defeat all rights of the mortgagee under the contract, even though the latter may not have been in any fault. On the other hand, a Standard or Union Mortgage Clause create collateral independent contracts between the insurer and the mortgagee and provide that the rights of

the mortgagee shall not be defeated by the acts or defaults of the mortgagor. *(Vance, pp. 654-655)*

***What is a Mortgage Redemption Insurance?***

A "Mortgage Redemption Insurance" is a group insurance policy of mortgagors which is intended as a device for the protection of both the mortgagee and the mortgagor.

On the part of the mortgagee, it has to enter into such contract so that in the event of the unexpected demise of the mortgagor during the subsistence of the mortgage contract, the proceeds from such insurance will be applied to the payment of the mortgage debt, thereby relieving the heirs of the mortgagor from paying the obligation. In a similar vein, ample protection is given to the mortgagor such that in the event of death, the mortgage obligation will be extinguished by the application of the insurance proceeds to the mortgage indebtedness. Consequently, where the mortgagor pays the insurance premium under the group insurance policy, making the loss payable to the mortgagee, the insurance is on the mortgagor's interest, and the mortgagor continues to be a party to the contract. In this type of policy insurance, the mortgagee is simply an appointee of the insurance fund, such loss-payable clause does not make the mortgagee a party to the contract. *(GREAT PACIFIC LIFE ASSURANCE CORP. vs. CA, 316 SCRA 677)*

***In a contract of insurance, how does subrogation take place?***

Upon payment to the consignee of an indemnity for the loss of or damage to the insured goods, the insurer's entitlement to subrogation *pro tanto* equips it with a cause of action in case of a contractual breach or negligence. In the exercise of its subrogatory right, an insurer may proceed against an erring carrier. To all intents and purposes, it stands in the place and in substitution of the consignee. (*FEDERAL EXPRESS CORPORATION vs. AMERICAN HOME ASSURANCE COMPANY and PHILAM INSURANCE COMPANY, INC., G.R. No. 150094, August 18, 2004)*

***State the exceptions to the subrogation rule.***

There is no subrogation in the following cases:

(1) When the insured, by his own act, releases the party at fault from liability.
(2) When the insurer pays the insured without notifying the carrier who has in good faith settled the insured's claim for loss.
(3) When the insurer pays the insured for a loss excepted from the policy.
(4) When life insurance is involved.

***In what cases is the designation of beneficiary in life insurance void due to disqualifications under the law?***

In the following cases, the designation of beneficiary is void:

(a) Those made between persons who were guilty of adultery or concubinage at the time of the donation;
(b) Those made between persons found guilty of the same criminal offense, in consideration thereof;
(c) Those made to public officer or his wife, descendants and ascendants, by reason of his office.

(NOTE: The disqualification applies to **life insurance** (Article 2012, NCC) and the insurance contract itself remains valid, only the designation of beneficiary is void.)

***Under the policy, disabilities which existed before the commencement of the agreement are excluded if they become manifest within one year from its effectivity. The insured allegedly prevented presentment by the insurer of the doctor who will testify on her medical condition because of the doctor-patient privilege. The insurer thus assumed that the testimony would be adverse as it was willfully suppressed by the insured. Decide whether the insurer is liable.***

It is an established rule in insurance contracts that when their terms contain limitations on liability, they should be construed strictly against the insurer. These are contracts of adhesion the terms of which much be interpreted and enforced stringently against the insurer which prepared the contract. *(BLUE CROSS HEALTH CARE, INC. vs. OLIVARES, G.R. No. 169737, 12 February 2008)*

The insurer never presented any evidence to prove that the insured's stroke was due to a pre-existing condition. It merely speculated that the doctor's report would be adverse to the insured based on her invocation of doctor-patient privilege. This was a disputable presumption at best. *(Ibid)*

***In a third party liability insurance, could the insurer be sued directly by the victim? Could the insurer be made solidarily liable with the insured or the wrongdoer?***

The victim may proceed directly against the insurer for indemnity. The insurance is intended to provide compensation for death or bodily injuries suffered by innocent third parties or passengers as a result of the negligent operation of motor vehicles. The victims and their dependents are assured of immediate financial assistance, regardless of the financial capacity of vehicle owners.

Be that as it may, the direct liability of the insurer under indemnity contracts against third party liability does not mean that the insurer can be held liable *in solidum* with the insured and/or the other parties found at fault. For the liability of the insurer is based on contract, that of the

insured carrier is based on tort. *(WILLIAM TIU AND VIRGILIO TE LAS PIÑAS vs. PEDRO A. ARRIESGADO, BENJAMIN CONDOR, SERGIO PEDRANO AND PHIL PHOENIX SURETY AND INSURANCE, INC. [G.R. No. 138060, 01 September 2004)* The third party liability of the insurer is only up to the extent of the insurance policy and that required by law; and it cannot be held solidarily liable for anything beyond that amount. Any award beyond the insurance coverage would already be the sole liability of the insured and/or the other parties at fault. *(THE HEIRS OF GEORGE POE vs. MALAYAN INSURANCE COMPANY, INC., G.R. 156302, 7 April 2009)*

***In what cases is the policy binding even if premium is unpaid?***

(1) When the grace period applies in case of life and industrial life policy;
(2) When there is an acknowledgement in the policy of receipt of premium;
(3) When there is an agreement that the premium shall be payable on installment;
(4) When there is a credit extension; and
(5) When the equitable doctrine of *estoppel* applies *(Summary based on the ruling in UCPB GENERAL INSURANCE vs. MASAGANA TELAMART, INC., G.R. 137172, 04 April 2001)*

***When is return of premium warranted?***

Return of premium is warranted in the following cases:

(1) The thing insured was not exposed to the period insured against (Sec. 78, ICP)
(2) Time policy is surrendered before the stipulated period lapses (Sec. 79, ICP)
(3) The contract is voidable due to fault or misrepresentation of the insurer or default of the insured other than actual fraud (Sec. 81, ICP)
(4) Over-insurance by several insurers (Sec. 82, ICP)

***What devices are used to prevent lapse of life insurance policy?***

To prevent lapse of life insurance policy, the following devices are used: (a) grace period; (b) automatic policy loan; (c) application of dividend; and (d) restatement clause. *(Aquino, Essentials of Insurance Law, p. 80)*

***What is an "All Risks" insurance policy?***

An "All Risks" insurance policy covers all kinds of loss other than those due to willful and fraudulent act of the insured. *(MAYER STEEL PIPE vs. COURT OF APPEALS, 274 SCRA 432)*

***What is an industrial life insurance?***

An industrial life insurance is one where the premiums are payable either monthly or oftener, if the face amount of the insurance provided in any policy is not more than 500 times that of the current statutory minimum daily wage in the City of Manila, and if the words *"industrial policy"* are printed upon the policy as part of the descriptive matter. *(Sec. 229, ICP)*

***What are cover notes? What are the limitations on the issuance of cover notes?***

Cover notes are interim or preparatory contracts of insurance. An interim coverage may be necessary because the insurer may need more time to process the insurance application. The issuance of cover notes is subject to the following:

(1) Issuance or renewal is upon approval of the Insurance Commission.
(2) Duration is not more than 60 days from issuance.
(3) Cancellation by either party is upon prior 7-day notice to the other.
(4) Main policy to be issued within 60 days after cover note was issued.
(5) Extension of 60-day coverage is subject to Insurance Commission's approval.

***In reinsurance, when does the original insured have direct recourse against the reinsurer?***

The original insured may directly sue the reinsurer if the reinsurance policy clearly contains a stipulation *pour autrui* in his favor. Such stipulation, however, should not, in any way, affect or curtail, the original insured's recourse to the original insurer and the latter's recourse against the reinsurer.

***Explain the Inchmaree Clause in a marine insurance.***

This is a clause included in a hull policy to cover loss or damage through the bursting of the boiler, breaking of shafts or through latent defects of the machinery or equipment, hull or its appurtenances and faults or errors in navigation or management of the vessel. *(CEBU SHIPYARD ENGINEERING WORKS, INC. vs. WILLIAM LINES, INC., et al., G.R. No. 132607, 05 May 1999)* The clause should be expressly provided for because damage of this sort are not included in the term "perils of the sea." *(Ibid.)*

***State the requisites of co-insurance in marine insurance.***

Co-insurance in marine insurance is subject to the following requisites: (a) there must be partial loss; and (b) the insurance coverage is less than the value of the property insured.

***Explain the FPA Clause.***

FPA or Free from Particular Average) clause limits the liability of the insurer in case of partial loss. *(Sec. 136, ICP)*

***What are the rules on claims under the "no fault indemnity" provision?***

Proof of fault or negligence is not necessary for payment of any claim for **death or injury** to a third party subject to the following:

(1) A claim may be made against one motor vehicle only.
(2) If the victim is an occupant of a vehicle, his claim shall lie against the insurer of the vehicle in which he is riding, mounting or dismounting from.
(3) If the victim is not an occupant, the claim shall lie against the insurer of the directly offending vehicle.
(4) In any case, right to recover from the owner of the responsible vehicle shall remain.
(5) Total indemnity in respect of any person shall not exceed P15,000.00. *(IC Memo Circular 4-2006)*
(6) Proofs of loss shall consist of: (a) police report; (b) death certificate; and (c) medical report and evidence of medical or hospital disbursement.

## TRANSPORTATION

***Is a travel agency a common carrier?***

No. A travel agency is not an entity engaged in the business of transporting either passengers or goods. Its covenant with its customers is simply to make travel arrangements in their behalf. Its services include procuring tickets and facilitating travel permits or visas as well as booking customers for tours. *(CRISOSTOMO vs. CA, G.R. No. 138334. 25 August 2003)*

***Explain the registered owner rule. What is the purpose of the rule?***

Regardless of who the actual owner is of a motor vehicle might be, the registered owner is the operator of the same with respect to the public and third persons, and as such, directly and primarily responsible for the consequences of its operation. In contemplation of law, the owner/operator of record is the employer of the driver, the actual operator and employer being considered merely as his agent.

The main purpose of vehicle registration is the easy identification of the owner who can be held responsible for any accident, damage or injury caused by the vehicle. Easy identification prevents inconvenience and prejudice to a third party injured by one who is unknown or unidentified. *(NOSTRADAMUS VILLANUEVA vs. PRISCILLA R. DOMINGO and LEANDRO LUIS R. DOMINGO, G.R. No. 144274. September 20, 2004)*

***If the registered owner was made liable to the victim, can he claim reimbursement from the actual owner/operator of the vehicle?***

Yes. The registered owner has a right to be indemnified by the real or actual owner of the amount that he may be required to pay as damage for the injury caused to the victim. *(Ibid)*

***Who is a "ship agent"? Is his liability the same whether he acts as agent of the ship owner or the charterer?***

Article 586 of the Code of Commerce states that a ship agent is "the person entrusted with provisioning or representing the vessel in the port in which it may be found." Hence, whether acting as agent of the owner of the vessel or as agent of the charterer, petitioner will be considered as the ship agent and may be held liable as such, as long as the latter is the one that provisions or represents the vessel. *(MACONDRAY vs. PROVIDENT INSURANCE CORPORATION, G.R. No. 154305, 09 December 2004)*

***Does extraordinary diligence require the carrier to vouch for the correctness of the entries made in the travel papers of a passenger?***

NO. It may be true that the carrier has the duty to inspect whether its passengers have the necessary travel documents, however, such duty does not extend to checking *the veracity of every entry* in these documents. A carrier could not vouch for the authenticity of a passport and the correctness of the entries therein. The power to admit or not an alien into the country is a sovereign act, which cannot be interfered with even by the carrier. *(JAPAN AIRLINES vs. MICHAEL ASUNCION et al, G.R. No. 161730, 28 January 2005)*

Thus, the carrier could not be faulted for the denial of a passenger's shore pass where it was discovered by immigration officials that he appeared shorter than his height as indicated in his passport. *(Ibid)*

***Does the owner of the vehicle being operated under the BOUNDARY SYSTEM remain liable as common carrier?***

YES. Indeed, to exempt from liability the owner of a public vehicle who operates it under the "boundary system" on the ground that he is a mere lessor would be not only to abet flagrant violations of the Public Service Law, but also to place the riding public at the mercy of reckless and irresponsible drivers — reckless because the measure of their earnings depends largely upon the number of trips they make and, hence, the speed at which they drive; and irresponsible because most if not all of them are in no position to pay the damages they might cause. *(SPOUSES HERNANDEZ et al. vs. SPOUSES DOLOR et al, G.R. No. 160286; 30 July 2004)*

***The defendant's main business is brokerage but it also offers carrying services. For liability purposes, may the defendant be sued as common carrier if the damage occurred in the performance of its carrying services?***

YES. Article 1732 does not distinguish between one whose principal business activity is the carrying of goods and one who does such carrying only as an ancillary activity. It suffices that petitioner undertakes to deliver the goods for pecuniary consideration. *(A.F. SANCHEZ BROKERAGE INC. vs. THE HON. COURT OF APPEALS and FGU INSURANCE CORPORATION, G.R. No. 147079, 21 December 2004)*

***Explain the doctrine of last clear chance. When does the doctrine apply?***

The doctrine states that where both parties are negligent but the negligent act of one is appreciably later than that of the other, or where it is impossible to determine whose fault or negligence caused the loss, the one who had the last clear opportunity to avoid the loss but failed to do so, is chargeable with the loss. *(PHILIPPINE NATIONAL RAILWAYS vs. BRUNTY, G.R. No. 169891, 02 November 2006)* The doctrine applies to a suit between the owners and drivers of two colliding vehicles. It does not apply where a passenger demands responsibility from the carrier to enforce its contractual obligations, for it would be inequitable to exempt the negligent driver/owner on the ground that the other driver was guilty of negligence. *(TIU vs. ARRIESGADO, et al., GR 138060, 01 September 2004).*

***Explain the three-fold character of a Bill of Lading.***

A bill of lading operates both as a (1) **receipt** and as a (2) **contract**. It is a contract for the good shipped and a contract to transport and deliver the same as stipulated. It becomes effective upon delivery to and accepted by the shipper. It is also a (3) **document of title**.

***The consignee failed to file a formal notice of claim within 24 hours from receipt of the damaged merchandise as required under Article 366 of the Code of Commerce. Is the filing of a notice of claim a condition precedent to the accrual of a right of action against the carrier for the damages caused to the merchandise?***

The requirement to give notice of loss or damage to the goods is not an empty formalism. The fundamental reason or purpose of such a stipulation is not to relieve the carrier from just liability, but reasonably to inform it that the shipment has been damaged and that it is charged with liability therefor, and to give it an opportunity to examine the nature and extent of the injury. This protects the carrier by affording it an opportunity to make an investigation of a claim while the matter is still fresh and easily investigated so as to safeguard itself from false and fraudulent claims.

The 24-hour claim requirement has been construed as a condition precedent to the accrual of a right of action against a carrier for loss of, or damage to, the goods. The shipper or consignee must allege and prove the fulfillment of the condition. Otherwise, no right of action against the carrier can accrue in favor of the former. *(UCPB GENERAL INSURANCE vs. ABOITIZ SHIPPING CORP., et al., G.R. No. 168433, 10 February 2009)*

***What are the clauses that may be included in a Charter Party?***

They are as follows:

1. **Jason Clause** – a provision which states that in case of maritime accident for which the shipowner is not responsible by law, contract or otherwise, the cargo shippers,

consignees or owners shall contribute with the shipowner in general average *(Pandect of Commercial Law and Jurisprudence, Justice Jose Vitug, 2006ed.)*

2. **Clause Paramount –** a provision which states that COGSA shall apply, even though the transportation is domestic, subject to the extent that if any term of the bill of lading is repugnant to the COGSA or applicable law, then to the extent thereof, the provision of the bill of lading is void *(ibid)*

## CORPORATION LAW

***Explain the CONCESSION THEORY.***

Under this theory, a corporation is a creature without any existence until it has received the imprimatur of the state acting according to law.

***Distinguish between stock and non-stock corporation.***

A stock corporation is one whose capital stock is dividend into shares and authorized to distribute to the holders of such shares dividends. On the other hand, a non-stock corporation is one where no part of its income is distributable as dividends to its members, trustees or officers. *(MANILA INTERNATIONAL AIRPORAT AUTHORITY vs. CA, 495 SCRA 591)*

***What are essential for the existence of a de facto corporation?***

The filing of articles of incorporation **and** the issuance of the certificate of incorporation are essential for the existence of a *de facto* corporation. It has been held that an organization not registered with the Securities and Exchange Commission (SEC) cannot be considered a corporation in any concept, not even as a corporation *de facto*. *(SEVENTH DAY ADVENTIST CONFERENCE CHURCH OF SOUTHERN PHILS., INC. vs. NORTHEASTERN MINDANAO MISSION OF SEVENTH DAY ADVENTIST, INC. GR No. 150416, 21 July 2006)*

***What is a sole proprietorship? Does it enjoy separate personality?***

A sole proprietorship is the oldest, simplest, and most prevalent form of business enterprise. It is an unorganized business owned by one person. The sole proprietor is personally liable for all the debts and obligations of the business.

A sole proprietorship does not possess a juridical personality separate and distinct from the personality of the owner of the enterprise. The law merely recognizes the existence of a sole proprietorship as a form of business organization conducted for profit by a single individual and requires its proprietor or owner to secure licenses and permits, register its business name, and pay taxes to the national government. The law does not vest a separate legal personality on the sole proprietorship or empower it to file or defend an action in court. *(EXCELLENT QUALITY APPAREL, INC. vs. WIN MULTI RICH BUILDERS, INC., G.R. No. 175048, 10 February 2009)*

***Explain briefly the DOCTRINE OF PIERCING THE VEIL OF CORPORATE ENTITY.***

A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend a crime, the law will regard the corporation as an association of persons, or in case of two corporations, merge them into one. *(KOPPEL [PHIL.] INC. vs. YATCO, 77 Phil 496; YUTIVO SONS HARDWARE CO. vs. COURT OF TAX APPEALS, 1 SCRA 160)*

***When should the DOCTRINE OF PIERCING be raised?***

The issue of piercing the veil of corporate fiction should be raised before the trial court. The issue cannot be treated for the first time on appeal.

To allow the petitioner to pursue such a defense would undermine basic considerations of due process. Points of law, theories, issues and arguments not brought to the attention of the trial court will not be and ought not to be considered by a reviewing court, as these cannot be raised for the first time on appeal. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory not ventilated before the trial court. *(ALMOCERA vs. ONG, 18 February 2008)*

***Cite specific cases where the separate identity of the corporation could be pierced.***

1. When the veil of corporate fiction is made as a shield to perpetuate a fraud or confuse legitimate issues such as the relation of employer and employee *(CLAPAROLS vs. CIR, 65 SCRA 613);*
2. When used as a shield for tax evasion *(CIR vs. NORTON & HARRISON CO., 11 SCRA 714);*
3. When used to shield violation of the prohibition against forum shopping *(FIRST PHIL. INTERNATIONAL BANK vs. CA, 252 SCRA 259);*
4. When the separate identity of the corporation is being utilized to violate intellectual property rights of a third person *(UY vs. VILLANUEVA, GR No. 157851, 29 June 2007)*

***Explain the INSTRUMENTALITY RULE.***

Where one corporation is so organized and controlled and its affairs are conducted so that it is, in fact, a mere instrumentality or adjunct of the other, the fiction of the corporate entity of the 'instrumentality' may be disregarded. The control necessary to invoke the rule is not majority or even complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own, and is but a conduit for its principal. It must be kept in mind that the control must be shown to have been exercised at the time the acts complained of took place. Moreover, the control and breach of duty must proximately cause the injury or unjust loss for which the complaint is made. *(CONCEPT BUILDERS vs. NLRC, G.R. No. 108734, 29 May 1996)*

***Explain briefly the DOCTRINE OF RELATION.***

Under this doctrine, when the delay in effecting or filing the amended articles of incorporation for the extension of corporate term is due to an insuperable interference occurring without the corporation's intervention which could not have been prevented by prudence, diligence, and care, the same will be treated as having been effected before the expiration of the original term of the corporation.

***What shares could be deprived of voting rights?***

Section of the Corporation Code explicitly provides that "no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided in this Code", and that "there shall always be a class or series of shares which have complete voting rights. There is nothing in the articles of incorporation or an iota of evidence on record that shows that class "B" shares were categorized as either preferred or redeemable shares. *(CASTILLO, et. al. vs. ANGELES BALINGHASAY, et. al., GR No. 150976, 18 October 2004)*

***Explain the DOCTRINE OF EQUALITY OF SHARES.***

Where the articles of incorporation do not provide any distinction of the shares of stock, all shares issued by a corporation are presumed to be equal and entitled to the same rights and privileges and subject to the same liabilities.

***Would deposit on stock subscription make a person a stockholder of the corporation?***

The deposit on stock subscription is merely an amount of money received by a corporation with a view of applying the same as payment for additional issuance of shares in the future, an event which may or may not happen. The person making a deposit on stock subscription does not have the standing of a stockholder and he is not entitled to dividends, voting rights or other prerogatives and attributes of a stockholder. *(COMMISSIONER OF INTERNAL REVENUE vs. FIRST EXPRESS PAWNSHOP COMPANY, INC., G.R. Nos. 172045-46, 16 June 2009)*

***Which should prevail in the determination of shareholders, the general information sheet or the corporate books?***

The information in the General Information Sheet submitted to the SEC will still have to be correlated with the corporate books of the Company. As between the General Information Sheet and the corporate books, it is the latter that is controlling. *(LAO vs. LAO, G.R. No. 170585, 6 October 2008)*

***Could any stockholder, at his pleasure, pull-out the machines and equipment, following the sale of his shares to a third party?***

NO. The property of a corporation is not the property of its stockholders or members. Under the *trust fund doctrine*, the capital stock, property, and other assets of a corporation are regarded as equity in trust for the payment of corporate creditors which are preferred over the stockholders in the distribution of corporate assets. The distribution of corporate assets and property cannot be made to depend on the whims and caprices of the stockholders, officers, or directors of the corporation unless the indispensable conditions and procedures for the protection of corporate creditors are followed. *(YAMAMOTO vs. NISHINO LEATHER INDUSTRIES, G.R. No. 150283, 16 April 2008)*

***State the requisites that must be established for the legal existence of a subsidiary to be disregarded.***

While a corporation may be a subsidiary of another, it does not necessarily follow that its corporate legal existence can just be disregarded. A subsidiary has an independent and separate juridical personality, distinct from that of its parent company; hence, any claim or suit against the latter does not bind the former, and *vice versa*. In applying the doctrine, the following requisites must be established: (1) control, not merely majority or complete stock control; (2) such control must have been used by the defendant to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or dishonest acts in contravention of plaintiff's legal rights; and (3) the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. *(JARDINE DAVIS, Inc. vs. JRB REALTY, G.R. No. 151438, 15 July 2005)*

***When the corporate mask is removed, is the corporate character thereby abrogated?***

NO. The corporate mask may be removed and the corporate veil pierced when a corporation is the mere alter ego of another. Where badges of fraud exist, where public convenience is defeated, where a wrong is sought to be justified thereby, or where a separate corporate identity is used to evade financial obligations to employees or to third parties, the notion of separate legal entity should be set aside and the factual truth upheld. **When that happens, the corporate character is not necessarily abrogated**. It continues for other legitimate objectives. *(PAMPLONA PLANTATION COMPANY, INC et al. vs. TINGHIL, et al., G.R. No. 159121, 03 February 2005)*

***Can a corporation provide limitations on the voting rights of the members of a non-stock corporation?***

YES. Section 89 of the Corporation Code pertaining to non-stock corporations provides that "(t)he right of the members of any class or classes (of a non-stock corporation) to vote may be limited, broadened or denied to the extent specified in the articles of incorporation or the by-laws." This is an exception to Section 6 of the same code where it is provided that "no share

may be deprived of voting rights except those classified and issued as preferred or redeemable shares, unless otherwise provided in this Code. Hence, **the stipulation in the By-Laws providing for the election of the Board of Directors by districts is a form of limitation on the voting rights of the members of a non-stock corporation as recognized under the aforesaid Section 89.** Section 24 of the Code, which requires the presence of a majority of the members entitled to vote in the election of the board of directors, applies only when the directors are elected by the members at large, such as is always the case in stock corporations by virtue of Section 6. *(LUIS AO-AS, et al. vs. COURT OF APPEALS, et al., G.R. No. 128464, 20 June 2006).*

***Explain the BUSINESS JUDGMENT RULE.***

Questions of policy or of management are left solely to the honest decisions of officers and directors of a corporation, and so long as they act in good faith, their orders are not reviewable by the courts. (*SABER vs. COURT OF APPEALS, G.R. No. 132981, August 31, 2004)*

***In what instances are officers, directors, or trustees personally liable for corporate acts?***

The instances are: when — 1. He assents (a) to a patently unlawful act of the corporation, or (b) for bad faith or gross negligence in directing its affairs, or (c) for conflict of interest, resulting in damages to the corporation, its stockholders or other persons; 2. He consents to the issuance of watered stocks or who, having knowledge thereof, does not forthwith file with the corporate secretary his written objection thereto; 3. He agrees to hold himself personally and solidarily liable with the corporation; or 4. He is made, by a specific provision of law, to personally answer for his corporate action. (*REPUBLIC vs. INSTITUTE FOR SOCIAL CONCERN, FELIPE SUZARA AND RAMON GARCIA, G.R. NO. 156306 January 28, 2005; SOLIDBANK CORPORATION vs. MINDANAO FERROALLOY CORPORATION, et al., G.R. No. 153535, 28 July 2005)*

***What would constitute a patently unlawful act which makes a director personally liable for the obligations of the corporation?***

For a wrongdoing to make a director personally liable for debts of the corporation, the wrongdoing approved or assented to by the director must be a **patently unlawful act**. Mere failure to comply with the notice requirement of labor laws on company closure or dismissal of employees does not amount to a patently unlawful act. Patently unlawful acts are those **declared unlawful by law** which imposes penalties for commission of such unlawful acts. There must be a law declaring the act unlawful and penalizing the act.

**In this case, Article 283 of the Labor Code, requiring a one-month prior notice to employees and the Department of Labor and Employment before any permanent closure of a company, does not state that non-compliance with the notice is an unlawful act punishable under the Code.** There is no provision in any other Article of the Labor Code declaring failure to give such notice an unlawful act and providing for its penalty. *(CARAG vs. NATIONAL LABOR RELATIONS COMMISSION, et al., G.R. No. 147590, April 2, 2007)*

***Explain the DOCTRINE OF APPARENT AUTHORITY.***

When a corporation knowingly permits one of its officers, or any other agent, to act within the scope of an apparent authority, it holds him out to the public as possessing the power to do those acts; and thus, the corporation will, as against anyone who has in good faith dealt with it through such agent, be estopped from denying the agent's authority. *(LAPU-LAPU FOUNDATION vs. CA, 29 January 2004)*

***Is teleconferencing now legally permissible?***

YES. In this age of modern technology, the courts may take judicial notice that business transactions may be made by individuals through teleconferencing. In the Philippines, teleconferencing and videoconferencing of members of board of directors of private corporations is a reality, in light of Republic Act No. 8792. The Securities and Exchange Commission issued SEC Memorandum Circular No. 15, on November 30, 2001, providing the guidelines to be complied with related to such conferences. (*EXPERTRAVEL & TOURS, INC. vs. CA, et al., G.R. No. 152392, 26 May 2005)*

***In case the by-laws could not be filed within the prescribed period, would juridical existence automatically cease?***

NO. A corporation would not *ipso facto* lose its powers for failure to file the required by-laws. *(LOYOLA GRANVILLAS HOMEOWNERS ASSOCIATION vs. CA, 276 SCRA 681)* At the very least, the corporation may be considered a *de facto* corporation whose right to exist may not be inquired into in a collateral manner. *(SAWADJAAN vs. CA, 8 June 2005)*

***Explain the TRUST FUND DOCTRINE.***

Under this doctrine, the capital stock, property and other assets of a corporation are regarded as equity in trust for the payment of the corporate debts. Hence, no disposition of corporate funds to the prejudice of creditors is allowed.

***Who are entitled to receive dividends?***

Dividends are payable to the stockholders of record as of the date of the declaration of dividends or holders of record on a certain future date, as the case may be, unless the parties have agreed otherwise. And a transfer of shares which is not recorded in the books of the corporation is valid only as between the parties, hence, the transferor has the right to dividends as against the corporation without notice of transfer but it serves as trustee of the real owner of the dividends, subject to the contract between the transferor and transferee as to who is entitled to receive the dividends. *(COJUANGCO vs. SANDIGANBAYAN, 24 April 2009)*

***Under what conditions could the PCGG vote sequestered shares?***

It is settled that as a general rule, the registered owner of the shares of a corporation, even if they are sequestered by the government through the PCGG, exercises the right and the privilege of voting on them. The PCGG as a mere conservator cannot, as a rule, exercise acts of dominion by voting these shares.

The registered owner of sequestered shares may only be deprived of these voting rights, and the PCGG authorized to exercise the same, only if it is able to establish that (1) there is prima facie evidence showing that the said shares are ill-gotten and thus belong to the State; and (2) there is an imminent danger of dissipation, thus necessitating the continued sequestration of the shares and authority to vote thereupon by the PCGG while the main issue is pending before the Sandiganbayan. *(TRANSMIDDLE EAST (PHILS.) vs. SANDIGANBAYAN, et al., G.R. No. 172556, 09 June2006)*

***Is the issuance of a certificate of merger by the SEC a condition precedent to the transfer of shares of the absorbed corporation to the surviving corporation?***

A merger does not become effective upon the mere agreement of the constituent corporations. As specifically provided under Section 79 of the Corporation Code, the merger shall only be effective upon the issuance of a certificate of merger by the Securities and Exchange Commission (SEC), subject to its prior determination that the merger is not inconsistent with the Code or existing laws. Where a party to the merger is a special corporation governed by its own charter, the Code particularly mandates that a favorable recommendation of the appropriate government agency should first be obtained. **The issuance of the certificate of merger is crucial because not only does it bear out SEC's approval but also marks the moment whereupon the consequences of a merger take place.** By operation of law, upon the effectivity of the merger, the absorbed corporation ceases to exist but its rights, and properties as well as liabilities shall be taken and deemed transferred to and vested in the surviving corporation *(POLIAND INDUSTRIAL LTD. vs. NATIONAL DEVELOPMENT CO., et al., G.R. Nos. 143866 & 143877, 22 August 2005).*

***Determine whether the buyer at execution sale of shares will immediately acquire title thereto.***

It should be restated that since there is no right to redeem personal property, the rights of ownership are vested to the purchaser at the foreclosure (or execution) sale and are not entangled in any suspensive condition that is implicit in a redemptive period. xxx There is no valid reason why the buyers at execution sale of petitioner's shares of stock should be prevented from obtaining title to the same. The pendency of a case involving the parties does not affect the registrability of the shares of stock bought at execution sale, although the registration is without prejudice to the proceedings to determine the liability of the parties as against each other. *(LEE vs. HON. TROCINO, et al., G.R. No. 164648, 19 June 2009)*

***Should dead members of a non-stock corporation be counted for quorum and voting purposes?***

In a non-stock corporation, membership is personal and non-transferable unless the articles of incorporation or by-laws states otherwise. Section 91 states that termination extinguishes all the rights of a member of the corporation, unless otherwise stated in the articles of incorporation. Hence, dead members are not to be counted in determining the requisite vote in corporate matters or the requisite quorum in the members' meeting. *(TAN vs. SYCIP, 499 SCRA 216, 17 August 2006)*

***Are the requirements for termination of membership in a non-stock corporation required to be provided in the Articles of Incorporation?***

Section 91 of the Corporation Code provides:

> SEC. 91. Termination of membership.—Membership shall be terminated in the manner and for the causes provided in the articles of incorporation or the by-laws. Termination of membership shall have the effect of extinguishing all rights of a member in the corporation or in its property, unless otherwise provided in the articles of incorporation or the by-laws. (Emphasis supplied)

Clearly, the right of a non-stock corporation to expel a member may be established in the by-laws alone. It need not be provided for in the articles of incorporation. *(VALLEY GOLF AND COUNTRY CLUB vs. VDA. DE CARAM, G.R. No. 158805, 16 April 2009)*

***What are the conditions for the penal provision under Section 144 of the Corporation Code to apply in case of violation of a stockholder's right to inspect the corporate books/records as provided for under Section 74 of the Corporation Code?***

(1) A director, trustee, stockholder or member has made a prior demand in writing for a copy of excerpts from the corporation's records or minutes;

(2) Any officer or agent of the concerned corporation shall refuse to allow the said director, trustee, stockholder or member of the corporation to examine and copy said excerpts;

(3) If such refusal is made pursuant to a resolution or order of the board of directors or trustees, the liability under this section for such action shall be imposed upon the directors or trustees who voted for such refusal; and,

(4) Where the officer or agent of the corporation sets up the defense that the person demanding to examine and copy excerpts from the corporation's records and minutes has improperly used any information secured through any prior examination of the records or minutes of such corporation or of any other corporation, or was not acting in good faith or for a legitimate purpose in making his demand, the contrary must be shown or proved. *(ANG-ABAYA vs. ANG, G.R. No. 178511, 4 December 2008)*

***What are the requisites for filing a derivative suit?***

The requisites for filing a derivative suit are as follows:

a) The party bringing suit should be a shareholder as of the time of the act or transaction complained of, the number of his shares not being material;
b) The party has tried to exhaust intra-corporate remedies, i.e., he has made a demand on the board of directors for the appropriate relief but the latter has failed or refused to heed his plea;
c) The cause of action actually devolves on the corporation, the wrongdoing or harm having been, or being caused to the corporation and not to the particular stockholder bringing the suit. *(FILIPINAS PORT SERVICES, INC., et al. vs. Go, et al., G.R. No. 161886, March 16, 2007);*
d) No appraisal rights are available for the act/s complained of; and
e) The suit is not a nuisance or harassment suit *(Sec.1, Rule 8, Interim Rules of Procedure for Intra-Corporate Controversies)*

***When is exhaustion of intra-corporate remedies excused as a requirement for derivate suit?***

While it is true that the complaining stockholder must satisfactorily show that he has exhausted all means to redress his grievances within the corporation; such remedy is no longer necessary where the corporation itself is under the complete control of the person against whom the suit is being filed. The reason is obvious: a demand upon the board to institute an action and prosecute the same effectively would have been useless and an exercise in futility. *(HI-YIELD REALTY, INC. vs. COURT OF APPEALS, G.R. No. 168863, 23 June 2009)* Note, though, that in *YU, et al. vs. YUKAYGUAN, et al., G.R. No. 177549, 18 June 2009,* the Supreme Court held that exhaustion of intra-corporate remedies cannot be dispensed with even if the company is a family corporation. There is nothing in the pertinent laws or rules supporting the distinction between, and the difference in the requirements for, family corporations *vis-à-vis* other types of corporations, in the institution by a stockholder of a derivative suit.

***In an Agreement, the foreign company's activities in the Philippines were confined to: (1) maintaining a stock of goods solely for the purpose of having the same processed by another company; and (2) consignment of equipment with such company to be used in the processing of products for export. Do these acts amount to "doing business" in the Philippines?***

NO. By and large, to constitute "doing business", the activity to be undertaken in the Philippines is one that is for profit-making. Under Section 1 of the Implementing Rules and Regulations of the Foreign Investment Act, the foregoing activities do not constitute doing business. *(AGILENT TECHNOLOGIES SINGAPORE (PTE) LTD. vs. INTEGRATED SILICON, GR 154618, 14 April 2004)*

***Would participation in a bidding for the development and operation of a modern marine container terminal constitute doing business in the Philippines for which a license must be secured?***

Participating in the bidding process constitutes "doing business" because it shows the foreign corporation's intention to engage in business here. The bidding for the concession contract is but an exercise of the corporation's reason for its existence. xxx it is the performance by a foreign corporation of the acts for which it was created, regardless of the volume of business, that determines whether a foreign corporation needs a license or not. *(HUTCHISON PORTS PHILIPPINES LIMITED vs. SBMA, GR 131367, 31 August 2000; EUROPEAN RESOURCES AND TECHNOLOGIES, INC, et al. vs. INGENIEUBURO BIRKHAHN, et al., G.R. No. 159586, 26 July 2004)*

***Petitioner is engaged in the importation and exportation of lace products. On several occasions, respondent purchased lace products from the petitioner with the instruction to deliver the purchased goods to a Hong Kong based company. Upon receipt of the goods in Hong Kong, the products were considered sold. The Hong Kong based company, in turn, had the obligation to deliver the lace products to the Philippines. Determine whether the petitioner is doing business in the Philippines.***

It is not doing business in the Philippines. To be doing or "transacting business in the Philippines", the foreign corporation must actually transact business in the Philippines, that is, perform specific business transactions within the Philippine territory on a continuing basis in its own name and for its own account. Actual transaction of business within the Philippine territory is an essential requisite for the Philippines to acquire jurisdiction over a foreign corporation and thus require the foreign corporation to secure a Philippine business license. If a foreign corporation does not transact such kind of business in the Philippines, even if it exports its products to the Philippines, the Philippines has no jurisdiction to require such foreign corporation to secure a Philippine business license. *(B. VAN ZUIDEN BROS. LTD. vs. GTVL MANUFACTURING INDUSTRIES, INC., G.R. No. 147905, May 28, 2007)*

***Does the engagement of a Filipino national to run a foreign company's premixed concrete operations in the Philippines amount to "doing business"?***

YES. The act of negotiating to employ a Filipino national to run a foreign company's pre-mixed concrete operations in the Philippines are managerial and operational acts in directing and establishing commercial operations in the Philippines. These are not mere acts of a passive investor. *(PIONEER INTERNATIONAL vs. HON. GUADIZ, G.R. No. 156848, 11 October 2007)*

***What are the general tests to determine whether a foreign corporation is doing business in the Philippines?***

**Substance Test** – whether the foreign corporation is continuing the body of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another.

**Continuity Test** – continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in the progressive prosecution of, the purpose and object of its organization *(AGILENT TECHNOLOGIES SINGAPORE (PTE) LTD. vs INTEGRATED SILICON, GR 154618, 14 April 2004)*

***Do the powers of a foreign corporation's resident agent include the authority to execute a certification against forum-shopping on behalf of its principal?***

NO. This is because while a resident agent may be aware of actions filed against his principal (a foreign corporation doing business in the Philippines, being the one authorized to receive services and other legal processes on its behalf), such resident may not be aware of actions initiated by its principal, whether in the Philippines against a domestic corporation or private individual, or in the country where such corporation was organized and registered, against a Philippine registered corporation or a Filipino citizen. (*EXPERTRAVEL & TOURS, INC. vs. COURT OF APPEALS and KOREAN AIRLINES, G.R. No. 152392, 26 May 2005)*

***Where the insured (a foreign corporation doing business without license) is incapacitated to sue before the Philippine courts, would it follow that its insurer, in exercising its subrogation rights, would also suffer from such incapacity?***

NO. Rights inherited by a subrogee pertain only to the obligations not to capacity. Incapacity of the insured will not affect the capacity of the insurer exercising its right of subrogation because capacity is personal to its holder. It is conferred by law and not by the parties. *(LORENZO SHIPPING vs. CHUBB & SONS, 8 June 2004)*

***Would a pending intra-corporate case against an officer preclude the filing of a criminal action against the said officer?***

The filing of the civil/intra-corporate case before the SEC (now RTC) does not preclude the simultaneous and concomitant filing of a criminal action before the regular courts; such that, a fraudulent act may give rise to liability for violation of the rules and regulations of the SEC cognizable by the SEC itself, as well as criminal liability for violation of the Revised Penal Code cognizable by the regular courts, both charges to be filed and proceeded independently, and may be simultaneously with the other.

A dispute involving the corporation and its stockholders is not necessarily an intra-corporate dispute cognizable only by the Securities and Exchange Commission. Nor does it *ipso facto* negate the jurisdiction of the Regional Trial Court over the subject cases. It should be obvious that not every conflict between a corporation and its stockholders involves corporate matters that only the SEC can resolve in the exercise of its adjudicatory or quasi-judicial powers." The better policy in determining which body has jurisdiction over a case would be to consider not only the relationship of the parties but also the nature of the questions raised in the subject of the controversy. (*PEOPLE vs. FERNANDEZ and HAJIME UMEZAWA, GR No. 149403, 04 March 2005)*

***State the requisites for the creation of a management committee.***

The requisites for the creation of a management committee, to wit: **(1)** an imminent danger of dissipation, loss, wastage or destruction of assets or other properties of respondent corporation; and **(2)** paralysis of its business operations which may be prejudicial to the interest of the parties-litigants, petitioners, or the general public.

In the case at bar, the records show that there has been no slack in the business operations of the corporation. Further, mere possibility without proof of abusing corporate positions and dissipation of assets and properties of the corporation is not a valid ground for the appointment of a management committee/receiver. *(SY CHIM vs. SY SIY HO, G.R. No. 164958, 27 January 2006)*

***Explain the SERIOUS SITUATION TEST.***

In appointing a receiver, the court should consider whether the company's financial situation is serious and whether there is a clear and imminent danger that it will lose its corporate assets if a receiver is not appointed. *(PRYCE CORPORATION vs. COURT OF APPEALS, G.R. No. 172302, 04 February 2008)*

***Does the misconduct of directors or officers justify the appointment of a receiver?***

Misconduct of corporate directors or other officers is not a ground for the appointment of a receiver where there are one or more adequate legal action against the officers, where they are solvent, or other remedies. The appointment of a receiver for a going corporation is a last resort remedy, and should not be employed when another remedy is available. Relief by receivership is an extraordinary remedy and is never exercised if there is an adequate remedy at law or if the harm can be prevented by an injunction or a restraining order. Bad judgment by directors, or even unauthorized use and misapplication of the company's funds, will not justify the appointment of a receiver for the corporation if appropriate relief can otherwise be had. *(AO-AS vs. CA, G.R. No. 128464, 20 June 2006)*

***Discuss the effect/s of the creation of a management committee.***

The appointment will result in suspension of all actions against the corporation, the avowed objective of which is to enable such management committee or rehabilitation receiver to effectively exercise its powers free from any judicial or extra-judicial interference that might unduly hinder or prevent the rescue of the distressed company. (*TYSON'S SUPER CONCRETE, INC., et al. vs. COURT OF APPEALS, et al., G.R. No. 140081, 23 June 2005)*

***Are labor claims likewise suspended upon the creation of a management committee or appointment of a receiver?***

The law is clear: upon the creation of a management committee or the appointment of a rehabilitation receiver, all claims for actions "shall be suspended accordingly." No exception in favor of labor claims is mentioned in the law. *(LINGKOD MANGGAGAWA SA RUBBERWORLD, et al. VS. RUBBERWORLD (PHILS.) INC., et al., G.R. NO. 153882, JANUARY 29, 2007)*

***Are actions suspended regardless of the stage of proceedings?***

The suspension of all actions for claims against the corporation embraces all phases of the suit, be it before the trial court or any tribunal or before this Court. No other action may be taken, including the rendition of judgment during the state of suspension. It must be stressed that what are automatically stayed or suspended are the proceedings of a suit and not just the payment of claims during the execution stage after the case had become final and executory. *(GARCIA, ET AL. VS. PHILIPPINE AIRLINES, INC., G.R. No. 164856, August 29, 2007)*

***Are non-pecuniary claims also stayed with the creation of a management committee or appointment of a receiver?***

When a corporation is taken over by a rehabilitation receiver, all creditors stand on equal footing, not anyone should be given preference by paying ahead of other creditors. All claims whether pecuniary or not. The Interim Rules on Corporate Rehabilitation define a claim as referring to all claims, demands of whatever nature or character against the debtor or its properties, whether for money or otherwise. The definition is so encompassing, there are no distinctions or exemptions. *(SOBREJUANITE vs. ASB, G.R. No. 165675, 30 September 2005)*

***Is enforcement of maritime lien also affected by the suspension order?***

PD 902-A mandates that upon appointment of a management committee, rehabilitation receiver, board or body, all actions for claims against corporations, partnerships or associations under management or receivership pending before any court, tribunal, board or body shall be suspended. PD 902-A does not make any distinction as to what claims are covered by the suspension of actions for claims against corporations under rehabilitation. No exception is made therein in favor of maritime claims. Thus, since the law does not make any exemptions or distinctions, neither should we. *Ubi lex non distinguit nec nos distinguere debemos.*

The issuance of the stay order by the rehabilitation court does not impair or in any way diminish a creditor's preferred status. The enforcement of its claim through court action was merely suspended to give way to the speedy and effective rehabilitation of the distressed shipping company. Upon termination of the rehabilitation proceedings or in the event of the bankruptcy and consequent dissolution of the company, the creditor can still enforce its preferred claim upon the company. *(NEGROS NAVIGATION vs. COURT OF APPEALS, 10 December 2008)*

***Does a petition for rehabilitation require prior filing of petition for suspension of payment?***

A corporation may have considerable assets but if it foresees the impossibility of meeting its obligations for more than one year, it is considered as technically insolvent. Thus, at the first instance, a corporation may file a petition for rehabilitation—a remedy provided under Sec. 4-1 of the Rules of Procedure on Corporate Recovery.

When Sec. 4-1 mentioned technical insolvency under Sec. 3-12, it was referring to the definition of technical insolvency in the said section; it was not requiring, therefore, a previous filing of a petition for suspension of payments. *(PNB vs. COURT OF APPEALS, G.R. No. 165571, 20 January 2009)*

***Does the approval of the Rehabilitation Plan violate the creditors' right to non-impairment of contracts?***

Section 6 [c] of P.D. No. 902-A provides that "upon appointment of a management committee, rehabilitation receiver, board or body, pursuant to this Decree, all actions for claims against corporations, partnerships or associations under management or receivership pending before any court, tribunal, board or body shall be suspended."

The approval of the Rehabilitation Plan and the appointment of a rehabilitation receiver merely suspend the actions for claims against respondent corporations. A creditor's preferred status over the unsecured creditors relative to the mortgage liens is retained, but the enforcement of such preference is suspended. Considering that enforcement of loan (including preference) is merely suspended, there is no impairment of contracts, specifically its lien in the mortgaged properties. *(ibid)*

***Decide whether receivership will excuse the Company from complying with the reinstatement order of the Labor Arbiter.***

Case law recognizes that unless there is a restraining order, the implementation of the order of reinstatement is ministerial and mandatory. This injunction or suspension of claims by legislative fiat partakes of the nature of a restraining order that constitutes a legal justification for respondent's non-compliance with the reinstatement order. The Company's failure to

exercise the alternative options of actual reinstatement and payroll reinstatement is therefore justified. Such being the case, the Company's obligation to pay the salaries pending appeal, as the normal effect of the non-exercise of the options, did not attach.

While reinstatement pending appeal aims to avert the continuing threat or danger to the survival or even the life of the dismissed employee and his family, it does not contemplate the period when the employer-corporation itself is similarly in a *judicially monitored* state of being resuscitated in order to survive. *(GARCIA vs. PHILIPPINE AIRLINES, INC., G.R. No. 164856, 20 January 2009)*

***Does the SEC have jurisdiction over the liquidation of a dissolved corporation?***

SEC's jurisdiction does not extend to the liquidation of a corporation. While the SEC has jurisdiction to order the dissolution of a corporation, jurisdiction over the liquidation of the corporation now pertains to the appropriate regional trial courts. This is the correct procedure because the liquidation of a corporation requires the settlement of claims for and against the corporation, which clearly falls under the jurisdiction of the regular courts. *(CONSUELO METAL CORPORATION vs. PLANTERS DEVELOPMENT BANK, G.R. No. 152580, 26 June 2008)*

***Does the SEC have the power to collect fees for examining and filing of articles of incorporation and by-laws?***

The authority of the SEC to collect and receive fees as authorized by law is not in question. Its power to collect fees for examining and filing articles of incorporation and by-laws and amendments thereto, certificates of increase or decrease of the capital stock, among others, is recognized. Likewise established is its power under Sec. 7 of P.D. No. 902-A to recommend to the President the revision, alteration, amendment or adjustment of the charges which it is authorized to collect. *(SEC vs. GMA NETWORK, INC., G.R. No. 164026, 23 December 2008)*

## SECURITIES REGULATION CODE

***Under what conditions may the SEC issue a cease and desist order?***

There are two essential requirements that must be complied with by the SEC before it may issue a cease and desist order: **First**, it must conduct proper investigation or verification; and **Second**, there must be a finding that the act or practice, unless restrained, will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public. *(SECURITIES AND EXCHANGE COMMISSION vs. PERFORMANCE FOREIGN EXCHANGE CORP. G.R. 154131, 20 July 2006)*

Hence, a mere clarificatory conference undertaken by the SEC cannot be considered a proper investigation or verification process to justify the issuance of a CDO. It was merely an initial

stage of such process considering that after the SEC issued the CDO, it sought verification from the Bangko Sentral ng Pilipinas on the nature of the respondent's business activity. *(Ibid.)*

***Is the CDO valid even if signed by only one SEC commissioner?***

NO. The SEC is a collegial body composed of a Chairperson and four (4) Commissioners. In order to constitute a quorum to conduct business, the presence of at least three (3) Commissioners is required.

The issuance of the *CDO* is an act of the SEC itself done in the exercise of its original jurisdiction to review actual cases or controversies. It should be clear now that its power to issue a *CDO* cannot, under the SRC, be delegated to an individual commissioner.

***Explain the Mandatory Close Out Rule.***

The rule vests upon a broker or dealer, the obligation, not just the right, to cancel or otherwise liquidate a customer's order, if payment is not received within three days from the date of purchase. The word "shall" as opposed to the word "may," is imperative and operates to impose a duty, which may be legally enforced. *(ABACUS SECURITIES CORPORATION vs. AMPIL, G.R. No. 160016, 27 February 2006)*

***How may violations of the Securities Regulation Code be pursued?***

A criminal charge for violation of the Securities Regulation Code is a specialized dispute. Hence, it must first be referred to an administrative agency of special competence, i.e., the SEC. Under the doctrine of primary jurisdiction, courts will not determine a controversy involving a question within the jurisdiction of the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the specialized knowledge and expertise of said administrative tribunal to determine technical and intricate matters of fact. The Securities Regulation Code is a special law. Its enforcement is particularly vested in the SEC. Hence, all complaints for any violation of the Code and its implementing rules and regulations should be filed with the SEC. Where the complaint is criminal in nature, the SEC shall indorse the complaint to the DOJ for preliminary investigation and prosecution. *(BAVIERA vs. PAGLINAWAN, GR No. 168380, February 8, 2007)*

***What does tender offer mean? When does it apply?***

A tender offer is an offer by the acquiring person to stockholders of a public company for them to tender their shares therein on the terms specified in the offer. The Tender Offer Rule applies also in an indirect acquisition arising from the purchase of shares of a holding company of the listed firm. Tender offer is in place to protect minority shareholders against any scheme that dilutes the share value of their investments. It gives the minority shareholders the chance to

exit the company under reasonable terms, giving them the opportunity to sell their shares at the same price as those of the majority shareholders.

Under existing SEC Rules, the 15% and 30% threshold acquisition of shares under the foregoing provision was increased to thirty-five percent (35%). It is further provided therein that mandatory tender offer is still applicable even if the acquisition is less than 35% when the purchase would result in ownership of over 51% of the total outstanding equity securities of the public company. Whatever may be the method by which control of a public company is obtained, either through the direct purchase of its stocks or an indirect means, mandatory tender offer applies. *(CEMCO HOLDINGS INC. vs. NATIONAL LIFE INSURANCE COMPANY, G.R. No. 171815, August 7, 2007)*

***Can the RTC order the conduct of a stockholders' meeting in connection with an intra-corporate dispute under its jurisdiction?***

Yes. The RTC now has the power to hear and decide the intra-corporate controversy and concomitant to said power is the authority to issue orders necessary or incidental to the carrying out of the powers expressly granted to it. Thus, the RTC may, in appropriate cases, order the holding of a special meeting of stockholders or members of a corporation involving an intra-corporate dispute under its supervision *(YUICO vs. QUIAMBAO, 513 SCRA 208, 29 January 2007)*

***What is an intra-corporate controversy?***

An intra-corporate controversy is one which "pertains to any of the following relationships: (1) between the corporation, partnership or association and the public; (2) between the corporation, partnership or association and the State in so far as its franchise, permit or license to operate is concerned; (3) between the corporation, partnership or association and its stockholders, partners, members or officers; and (4) among the stockholders, partners or associates themselves.

***What is an election contest?***

An election contest refers to any controversy or dispute involving title or claim to any elective office in a stock or non-stock corporation, the validation of proxies, the manner and validity of elections, and the qualifications of candidates, including the proclamation of winners, to the office of director, trustee or other officer directly elected by the stockholders in a close corporation or by members of a non-stock corporation where the articles of incorporation or by-laws so provide.

***Can the SEC pass upon the validity of proxies in relation to election controversies?***

NO. This power has been withdrawn from the SEC by the SRC and transferred to the regular courts. Questions relating to the proper solicitation of proxies used in election are now cognizable by the regular courts. However, the power of the SEC to regulate proxies remains extant and could very well be exercised when stockholders vote on matters other than the election of directors. *(GSIS vs. CA, G.R. No. 183905, 16 April 2009)*

***State the reason for the prohibition against insider trading.***

The intent of the law is the protection of investors against fraud committed when an insider, using secret information, takes advantage of an uninformed investor. Insiders are obligated to disclose material information to the other party or abstain from trading the shares of his corporation.

The duty to disclose is based on two factors: first, existence of a relationship giving access, directly or indirectly to information intended to be available only for a corporate purposes and not for the personal benefit of anyone and second, the inherent unfairness involved when a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. *(SEC vs. INTERPORT RESOURCES CORPORATION, et al., G.R. No. 135808, 6 October 2008)*

***What is a fact of special significance for purposes of insider trading?***

A fact of special significance maybe (a) a material fact which would be likely, on being made generally available, to effect the market price of a security to a significant extent, or (b) one which a reasonable person would consider especially important in determining his course of action regard to the shares of stock. *(ibid)*

## BANKING LAWS

***What degree of diligence are banks required to observe?***

Since the banking business is impressed with public interest, of paramount importance thereto is the trust and confidence of the public in general. Consequently, the highest degree of diligence is expected, and high standards of integrity and performance are even required, of it. By the nature of its functions, a bank is under obligation to treat the accounts of its depositors with meticulous care, always having in mind the fiduciary nature of their relationship. *(CITIBANK, N.A. vs. SPOUSES LUIS AND CARMELITA CABAMONGAN, et al., G.R. No. 146918, 02 May 2006)*.

Banks handle daily transactions involving millions of pesos. By the very nature of their works the degree of responsibility, care and trustworthiness expected of their employees and officials

is far greater than those of ordinary clerks and employees. Banks are expected to exercise the highest degree of diligence in the selection and supervision of their employees. *(ibid)*

Thus, the Court held that the bank was negligent when it allowed the pre-termination of the account despite noticing the discrepancies in the signature and photograph of the person claiming to be the concerned depositor. Further the required waiver document has not been notarized contrary to the standard procedure designed to protect the bank. *(ibid)*

The bank was also found negligent and thus could not be considered a mortgagee in good faith it appearing that it had knowledge that the respondent was in the United States at the time her SPAs were allegedly executed, yet, it did not question their due execution. *(CHINA BANKING VS. LAGON 11 JULY 2006)*

The Court also emphasized that banks cannot merely rely on certificates of title in ascertaining the status of mortgaged properties; as their business is impressed with public interest, they are expected to exercise more care and prudence in their dealings than private individuals. Indeed, the rule that persons dealing with registered lands can rely solely on the certificate of title does not apply to banks. *(URSAL vs. COURT OF APPEALS 14 October 2005)*

***What is the relationship between the depositor and the bank with respect to the amount deposited by the former with the latter?***

The contract between the bank and its depositor is governed by the provisions of the Civil Code on simple loan. There is a debtor-creditor relationship between the bank and its depositor. The bank is the debtor and the depositor is the creditor. The depositor lends the bank money and the bank agrees to pay the depositor on demand. The savings deposit agreement between the bank and the depositor is the contract that determines the rights and obligations of the parties. *(BPI vs. FIRST METRO, G.R. No. 132390, December 8, 2004)* Failure of the Bank to honor the time deposit is failure to pay its obligation as a debtor and not a breach of trust arising from a depository's failure to return the subject matter of the deposit. Thus, the relationship being contractual, mandamus is not an available remedy since mandamus does not lie to enforce the performance of contractual obligations. *(LUCMAN vs. MALAWI, et al., G.R. No. 158794, December 19, 2006)*

***How does DOSRI violation differ from estafa?***

A DOSRI violation consists in the failure to observe and comply with procedural, reportorial or ceiling requirements prescribed by law in the grant of a loan to a director, officer, stockholder and other related interests in the bank, i.e. lack of written approval of the majority of the directors of the bank and failure to enter such approval into corporate records and to transmit a copy thereof to the BSP supervising department. The elements of abuse of confidence, deceit, fraud or false pretenses, and damage, which are essential to the prosecution for estafa, are not elements of a DOSRI violation. *(SORIANO vs. PEOPLE OF THE PHILS., et al., G.R. No. 159517, 30 June 2009)*

***Respondents, as directors and officers of a bank, were accused of engaging in unsafe, unsound, and fraudulent banking practices, more particularly, acts that violate the prohibition on self-dealing. In question was the manner with which the directors have handled the affairs of the bank, in particular, the fraudulent loans and dacion en pago authorized by the directors in favor of several dummy corporations known to have close ties and are indirectly controlled by the directors. Decide whether the case is within the jurisdiction of the BSP or regular court.***

The allegation call for the examination of the allegedly questionable loans. Whether these loans are covered by the prohibition on self-dealing is a matter for the BSP to determine. These are not ordinary intra-corporate matters; rather, they involve banking activities which are, by law, regulated and supervised by the BSP.

It is well-settled in both law and jurisprudence that the Central Monetary Authority, through the Monetary Board, is vested with exclusive authority to assess, evaluate and determine the condition of any bank, and finding such condition to be one of insolvency, or that its continuance in business would involve a probable loss to its depositors or creditors, forbid bank or non-bank financial institution to do business in the Philippines; and shall designate an official of the BSP or other competent person as receiver to immediately take charge of its assets and liabilities.

The Corporation Code, however, is a general law applying to all types of corporations, while the New Central Bank Act regulates specifically banks and other financial institutions, including the dissolution and liquidation thereof. As between a general and special law, the latter shall prevail – *generalia specialibus non derogant. (ARCENAS, JR. vs. HON. MARELLA, G.R. Nos. 168332/169053, 19 June 2009)*

***Would the period to foreclose a real estate mortgage be interrupted if the mortgagee bank were to be placed under receivership?***

NO. xxx Foreclosure of mortgages is part of the receiver's/liquidator's duty of administering the bank's assets for the benefit of its depositors and creditors. **The ten-year prescriptive period would not be interrupted if the mortgagee bank were to be placed under under receivership**. The Monetary Board's prohibition from doing business should not be construed as barring any and all business dealings and transactions by the bank. **Foreclosure is not among those activities which banks are prevented from doing for it is consistent with the purpose of receivership proceedings,** i.e., to receive collectibles and preserve the assets of the bank in substitution of its former management, and prevent the dissipation of its assets to the detriment of the creditors. *(SPS. LARROBIS vs. PHILIPPINE VETERANS BANK, G.R. No. 135706, October 1, 2004)*

***The Monetary Board issued a Resolution ordering the liquidation of Philippine Veterans Bank. A number of employees accepted their separation pay while the others chose to question***

***their separation. Subsequently, Congress enacted RA 7169 authorizing the reopening of the bank. The affected employees are now claiming that RA 7169 effectively nullified the earlier resolution of the Monetary Board and in effect, also nullified their termination.***

Upon implementation of the Monetary Board resolution and prior to the passage of R.A. No. 7169, the Bank had already ceased to exist. Its subsequent rehabilitation was not an ordinary rehabilitation. R.A. No. 7169 had to be passed as a legislative fiat to breathe life into the Bank. While it is true that the Bank used its old name, a new law had to be enacted to restructure its outstanding liabilities. xxx

The enactment of R.A. No. 7169 did not, therefore, nullify the subject resolution of the Monetary Board which earlier placed the Bank under liquidation and caused the termination of employment of the petitioners. The Bank's subsequent rehabilitation did not, by any test of reason, "revive" what was already a dead relationship between the petitioners and the Bank. *(CORNISTA-DOMINGO vs. NLRC, 17 October 2006)*

***Does Section 30 of RA 7653 (The New Central Bank Act) require a current and complete examination of the bank before it can be closed and placed under receivership?***

No. From the words used in Sec. 30, RA 7653 no longer requires an examination before the issuance of a closure order. Where the words of a statute are clear, plain and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation. The Court cannot look for or impose another meaning on the term "report" or to construe it as synonymous with "examination."

The absence of an examination before the closure of a bank did not mean that there was no basis for the closure order. Needless to say, the decision of the Monetary Board and the Central Bank, like any other administrative body, must have something to support itself and its findings of fact must be supported by substantial evidence. But it is clear under RA 7653 that the basis need not arise from an examination as required in the old law.

The purpose of the law is to make the closure of a bank summary and expeditious in order to protect public interest. This is also why prior notice and hearing are no longer required before a bank can be closed. *(RURAL BANK OF SAN MIGUEL, INC. vs. MONETARY BOARD, G.R. No. 150886, 16 February 2007)*

***Discuss the effects of a bank closure.***

The bank's closure did not diminish the authority and powers of the designated liquidator to effectuate and carry on the administration of the bank. The bank liquidator is allowed to continue receiving collectibles and receivables or to pay off creditor's claims and other transactions pertaining to the normal operations of the bank. Among these transactions are the prosecution of suits against debtors for collection and the foreclosure of mortgages. The bank is

allowed to collect interests on its loans while under liquidation, provided that the interests are legal. In fine, the interest rate on the loan agreed upon between the parties is not excessive or unconscionable; and that during the closure of respondent bank, it could still function as a bonding institution, hence, could continue collecting interests from petitioners. *(BACOLOR vs. BANCO FILIPINO SAVINGS AND MORTGAGE BANK, G.R. No. 148491, 08 February 2007)*

***Does the liquidation of a bank require a prior tax clearance?***

No. The liquidation of a bank is undertaken according to Sec. 30 of the New Central Bank Act. The said provision lays down the proceedings for receivership and liquidation of a bank. It is silent as regards the securing of a tax clearance from the BIR. The omission cannot compel the Court to apply by analogy the tax clearance requirement of the SEC since the dissolution of a corporation by the SEC is totally different from the receivership and liquidation of a bank by the BSP.

There are substantial differences in the procedure for involuntary dissolution and liquidation of a corporation under the Corporation Code, and that of a banking corporation under the New Central Bank Act, so that the requirements in one cannot simply be imposed in the other. *(IN RE: PETITION FOR ASSISTANCE IN THE LIQUIDATION OF THE RURAL BANK OF BOKOD (BENGUET), INC. (RBBI), PHILIPINE DEPOSIT INSURANCE CORPORATION (PDIC) vs. BUREAU OF INTERNAL REVENUE (BIR), G.R. No. 158261, 18 December 18, 2006)*

***Are trust accounts also protected under RA 1405 (Bank Secrecy Law)? May trust accounts be examined in connection with a plunder case without violating the law?***

RA 1405 is broad enough to cover trust accounts because the term “deposit” as used in RA 1405 is to be understood broadly and not limited only to accounts which give rise to a creditor-debtor relationship between the depositor and the bank. If the money deposited under an account may be used by banks for authorized loans to third persons, then such account, regardless of whether it creates a creditor-debtor relationship between the depositor and the bank, falls under the category of accounts which the law precisely seeks to protect for the purpose of boosting the economic development of the country.

However, there are exceptions on the protection under RA 1405: **(1)** the examinations of bank accounts is upon order of a competent court in cases of bribery or dereliction of duty of public officials, and **(2)** the money deposited or invested is the subject matter of litigation. The first exception applies since the plunder case pending against the petitioner is analogous to bribery or dereliction of duty and the second, because the money deposited in petitioner’s bank accounts form part of the subject matter of the same plunder case. *(EJERCITO vs. SANDIGANBAYAN AND PEOPLE OF THE PHILIPPINES, G.R. No. 157294-95, 30 November 2006)*

***When a co-depositor inquires into the deposit, does he need the written consent of the other depositor?***

A co-payee in a check deposited in a bank is likewise a co-depositor. No written consent therefore of the other co-payee is needed in an inquiry of the deposits by the said co-depositor. *(CHINA BANKING CORPORATION vs. COURT OF APPEALS, G.R. No. 140687, 18 December 2006)*

***Can a foreigner own capital stock in a rural bank?***

No. Section 4, Republic Act No. 7353, provides that with the exception of shareholdings of corporations organized primarily to hold equities in rural banks as provided for under Section 12-C of Republic Act No. 337, as amended, and of Filipino-controlled domestic banks, the capital stock of any rural bank shall be fully owned and held directly or indirectly by citizens of the Philippines or corporations, associations or cooperatives qualified under Philippine laws to own and hold such capital stock. *(BULOS, JR. vs. KOJI YASUMA, G.R. No. 164159, July 17, 2007)*

***Explain the dragnet clause or blanket mortgage clause?***

A dragnet clause is one which is specifically phrased to subsume all debts of past and future origins. Such clauses are "carefully scrutinized and strictly construed." Mortgages of this character enable the parties to provide continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security on each new transaction. A "dragnet clause" operates as a convenience and accommodation to the borrowers as it makes available additional funds without their having to execute additional security documents, thereby saving time, travel, loan closing costs, costs of extra legal services, recording fees, *et cetera*. *(PRODUCERS BANK OF THE PHILS. vs. EXCELSA INDUSTRIES, Inc., G.R. No. 152071, 8 May 2009)*

***Machang Realty was incorporated to hold and purchase real properties in trust for Pigue Bank. This was conceived by Pigue Bank in view of the limit on a bank's allowable investments in real estate to 50% of its capital assets. In the implementation of the trust agreement, Pigue Bank sold to Machang Realty some of its real properties while the latter simultaneously leased to the former the properties for 20 years. Eventually, Machang repudiated the trust, claimed the titles for itself and demanded payment of rentals, deposits and goodwill, with a threat to eject Pigue Bank. Pigue Bank filed a complaint for reconveyance of the properties against Machang Realty. Will the case prosper?***

The agreement between the parties adverted to as an implied trust is contrary to law. Thus, while the sale and lease of the subject property is genuine and binding upon the parties, the implied trust cannot be enforced even assuming the parties intended to create it. xxx "the courts will not assist the payor in achieving his improper purpose by enforcing a resultant trust for him in accordance with the 'clean hands' doctrine." Pigue Bank cannot thus demand reconveyance of the property based on its alleged implied trust relationship with Machang Realty.

The parties being in pari delicto, thus, no affirmative relief should be given to one against the other. Pigue Bank should not be allowed to dispute the sale of its lands to Machang Realty nor should Machang Realty be allowed to further collect rent from Pigue Bank. The clean hands doctrine will not allow the creation nor the use of a juridical relation such as a trust to subvert, directly or indirectly, the law. Neither party came to court with clean hands; neither will obtain relief from the court as the one who seeks equity and justice must come to court with clean hands. *(TALA REALTY, et al. vs. COURT OF APPEALS, 7 April 2009)*

## INTELLECTUAL PROPERTY

***Explain the DOCTRINE OF SECONDARY MEANING.***

A word or phrase originally incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article was his product. *(LYCEUM OF THE PHILS. vs. CA, 219 SCRA 610)*

***If the mark "GALLO" has been registered for wine products, would its use on cigarette products constitute an infringement of trademark?***

NO. The goods are different from each other. There are (1) substantial differences on the trademark itself applying the dominancy and holistic test, (2) they are of different channels of trade, (3) they have different qualities and purpose, (4) there is a marked difference on the price of goods.

It is well settled by jurisprudence that a trademark registration can only extend to those items that are included in the certificate. *(MIGHTY CORPORATION and LA CAMPANA FABRICA DE TABACO, INC. vs. E. & J. GALLO WINERY and THE ANDRESONS GROUP, INC., G.R. No. 154342. July 14, 2004 citing Sterling Products International Inc. vs. Farbenfabriken Bayer (27 SCRA 1214 [1969])*

***Explain the DOCTRINE OF EQUIVALENTS.***

The *doctrine of equivalents* provides that an infringement also takes place when a device appropriates a prior invention by incorporating its innovative concept and, although with some modification and change, performs substantially the same function in substantially the same way to achieve substantially the same result. *(SMITH KLINE BECKMAN CORPORATION vs. CA, et al., G.R. No. 126627, 14 August 2003)*

***State the elements of unfair competition.***

The essential elements of an action for unfair competition are (1) confusing similarity in the general appearance of the goods and (2) intent to deceive the public and defraud a competitor. The confusing similarity may or may not result from similarity in the marks, but may result from other external factors in the packaging or presentation of the goods. The intent to deceive and defraud may be inferred from the similarity of the appearance of the goods as offered for sale to the public. Actual fraudulent intent need not be shown. *(IN-N-OUT BURGER, INC. vs. SEHWANI, INC., G.R. No. 179127, 24 December 2008)*

***Does an infringement case constitute a prejudicial question to an unfair competition case?***

NO. There is no prejudicial question since the two actions- an action for infringement and unfair competition – are independent of each of other. The basis of an action for unfair competition is fraud, while that of infringement, the fact of registration.

At any rate, there is no prejudicial question if the civil (infringement) and criminal (unfair competition) action can, according to law, proceed independently of each other. Under Rule 111, Section 3 of the Revised Rules on Criminal Procedure, in the cases provided in Articles 32, 33, 34 and 2176 of the Civil Code, the independent civil action may be brought by the offended party. It shall proceed independently of the criminal action and shall require only a preponderance of evidence. *(SAMSON vs. HON. REYNALDO B. DAWAY, et al., G.R. Nos. 160054-55. 21 July 2004)*

***What are the two types of confusion arising from the use of similar or colorable imitation marks?***

Section 22, IPC covers two types of confusion: a) **confusion of goods** (product confusion), "in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that he was purchasing the other" and b) **confusion of business** (source or origin confusion), "though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff, and the public would then be deceived either into that belief or into the belief that there is some connection between the plaintiff and defendant, which, in fact, does not exist." (*MCDONALD'S CORPORATION, et al. vs. L.C. BIG MAK BURGER, INC., et al.,G.R. No. 143993, August 18, 2004)*

***Does the exemption provided by RA 623 apply even to large scale manufacturing?***

YES. RA 623, as amended by R.A. 5700 or "An Act to Regulate the Use of Duly Stamped or Marked Bottles, Casks, Kegs, Barrels and other similar Containers" was meant to protect the intellectual property rights of the registrants of the containers and prevent unfair practices and fraud on the public. However, Section 6 of the said Act specifically allows the re-use of such bottles as containers for "sisi", "patis", "bagoong", and other native products.

The law did not distinguish between small scale and large scale manufacturing. Hence, notwithstanding that the native products are produced on a large scale, the re-use of registered bottles still comes within the exception provided by the law. *(TWIN ACE HOLDINGS CORP. vs. RUFINA AND COMPANY (G.R. No. 160191, 08 June 2006)*

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