INSTRUCTIONS:

1. This paper consists of TEN (10) pages. Please ensure that you have all of the pages.
2. Please note that Section A and Section B are compulsory. There is, however, a choice between Section C and Section D.
3. Please note the marks allocated for each question and apportion your time accordingly.
4. Please note that this question paper must be handed in together with your answer booklet. Under no circumstances will your answers be marked if this question paper is not submitted therewith.
5. Please note that the multiple choice questions must be answered in your answer booklet and not on this question paper.

SECTION A (10 MARKS)

Please select the most appropriate answer from the options provided.

1.1 Which of the following statements is/are correct?

i According to the case of Standard Bank of SA Ltd v Minister of Bantu Education 1966 (1) SA 229 (N) a savings account may give rise to a bank-customer relationship for the purposes of the Bills of Exchange Act.

ii A current account without an overdraft facility does not constitute a credit facility for the purposes of the National Credit Act.

iii A fixed deposit receipt/ fixed deposit certificate is a negotiable instrument.

(A) Statement i only
(B) Statement ii only
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
1.2 Which of the following statements is/are correct?

i According to the case of *Nedbank v Pestana* 2009 (2) SA 189 (SCA), a bank may not unilaterally reverse a credit transfer under any circumstances.

ii In the case of *Diner's Club SA (Pty) Ltd v Singh and another* 2004 (3) SA 630 (D), the court upheld a clause in a contract between the credit card issuer and the cardholder which placed the risk of loss or unauthorised use squarely on the cardholder.

iii Where there is an agreement between the debtor and creditor to accept payment by stop order, the stop order creates a *vinculum juris* between the creditor and the bank.

(A) Statement i only  
(B) Statements i and ii  
(C) Statements ii and iii  
(D) Statements i, ii and iii  
(E) None of the above options

1.3 Peter draws a cheque in favour of ‘Cash or Order’ and issues the cheque to Zuraida. Zuraida specially indorses the cheque in favour of Kwami and hands the cheque to him. The cheque is stolen from Kwami by Junaid. Which of the following statements is/are incorrect?

i Junaid would not qualify as the holder of the instrument but will nevertheless have title to sue should the cheque be dishonoured.

ii In the event of the cheque being dishonoured, Zuraida cannot be sued in terms of the cambial obligation as she is a transferor by delivery.

iii In the event of the cheque being dishonoured, and Junaid deciding to sue Peter in terms of the cambial obligation, Peter cannot raise the defence of no delivery as Junaid may qualify as a holder in due course.

(A) Statement i only  
(B) Statements i and ii  
(C) Statements ii and iii  
(D) Statements i, ii and iii  
(E) None of the above options
1.4 A draws a cheque in favour of ‘B or order’ and issues the cheque to B. B then indorses the
cheque in favour of C and hands the cheque to C. C then indorses the cheque in favour of D
and hands it to D who in turn indorses the cheque in favour of E and hands it to E. E then
indorses the cheque in favour of F and delivers it to him. Which of the following statements
is/are correct?

i. It is not possible for F to negotiate the cheque to D as the Bills of Exchange Act prohibits
the negotiation of a cheque back to a prior indorser.

ii. It is possible for F to negotiate the cheque back to D, and in the event of the cheque
being dishonoured, D will be able to sue any one of A, B, C, E or F for the full amount of
the debt.

iii. If the cheque was crossed and marked ‘not negotiable’ then it would not have been
possible for B (i.e. the named payee) to have negotiated the cheque further.

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options

1.5 A owes money to B for goods which B sold and delivered to him pursuant to a contract of sale.
A issues a cheque in favour of B in payment of the debt. Which of the following statements
is/are incorrect?

i. If the cheque is dishonoured then B may elect to sue A either in terms of the cambial
obligation or in terms of the contract of sale save in circumstances where the parties
have agreed that the taking of the cheque will amount to a novation of the underlying
debt.

ii. Although it is possible for B to sue A in terms of the contract of sale (in the event of the
cheque being dishonoured) he will be precluded from doing so if he has in the interim
negotiated the cheque to C.

iii. If the cheque is dishonoured, B would be precluded from suing A on the cheque in
circumstances where he has retained possession of the cheque but has ceded his rights
in terms of the contract of sale to C.

(A) Statement ii only
(B) Statement iii only
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
1.6 X draws a cheque in favour of ‘P or order’ for the amount of R 1 000, 00 and issues the cheque to P. P specially indorses the cheque in favour of Q and hands the cheque to Q. Q then hands the cheque to Z. The cheque in question is dishonoured as a result of the drawer having countermanded payment. Which of the following statements is/are incorrect?

i Z will not qualify as the holder and will therefore be precluded from suing on the instrument.

ii Even if Z qualified as the holder of the instrument, he will not be able to sue X without first giving him notice of dishonour.

iii If Q, upon receiving the cheque from P, had indorsed the cheque ‘Pay Z, R 500, 00’ and delivered the cheque to Z, then Z would qualify as the holder in these circumstances.

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options

1.7 Darren draws a cheque in favour of ‘Stephanie or order’ for the sum of R 1 000. Stephanie, who is a minor, increases the amount to R 10 000 and negotiates the instrument to Rowen (who does not realise that Stephanie is a minor). Which of the following statements is/are incorrect?

i If the instrument is dishonoured, Rowen’s attempts to sue Darren on the instrument can be thwarted by the defence of lack of capacity.

ii If the instrument is dishonoured, Darren can avoid any liability to Rowen on the basis of a material alteration even if Rowen qualifies as a holder in due course.

iii If Rowen indorses and delivers the cheque to Peter and the instrument is subsequently dishonoured, Rowen if sued by Peter, can raise the defence of material alteration.

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
1.8 Which of the following statements is/are correct?

i  Provided that the requirements stipulated in the section are met, s 58 of the Bills of Exchange Act provides protection to a drawee bank which pays out on an order cheque in which the drawer’s signature is forged.

ii  Every holder in due course is a holder and every holder is a holder in due course.

iii  A banks which pays cash over the counter on an unindorsed or irregularly indorsed cheque will not be entitled to the protection provided by s 83 of the Bills of Exchange Act (as amended).

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options

1.9 Which of the following statements is/are incorrect?

i  A ‘not transferable’ cheque does not fall within the ambit of the protection provided by s 83 of the Bills of Exchange Act.

ii  According to the Bills of Exchange Act, a natural person may sign by making a mark instead of writing out his/her full name and surname.

iii  A drawee bank which acts negligently may still be entitled to the protection provided by s 58 of the Bills of Exchange Act if it otherwise complies with the provisions of the section.

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
1.10 Which of the following statements is/are incorrect?

i A bank which negligently supplies an incorrect or inaccurate banker's reference to a third party can incur delictual liability to the third party on the basis of negligent misstatement or negligent misrepresentation.

ii According to the decision of *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA), a bank is under a duty to disclose any shortcomings in its security system to a customer who rents a safety-deposit box from the bank even where this was not material to the customer's decision to enter into the contract for the hire of the safety-deposit box.

iii The case of *Commissioner, South African Revenue Service and another v ABSA Bank Ltd and another* 2003 (2) SA 96 (W) constitutes authority for the proposition that a bank cannot incur delictual liability to a third party for negligently opening a bank account in circumstances where it does not act in the capacity as collecting bank.

(A) Statement iii only
(B) Statement ii only
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
R draws a cheque on ABSA Bank dated 30 November 2009 in favour of ‘X or order’ for the amount of R 18000, 00 and issues the cheque to X. X specially indorses the cheque in favour of Y and delivers the cheque to him. Y appends his signature to the back of the cheque (without writing any further words thereon) and hands the cheque to Z who hands the cheque to P. P inserts the words ‘Pay S’ above Y’s signature on the back of the cheque and hands the cheque to S who hands the cheque to Q. In light of the above facts, answer the following questions:

1.1 Explain whether Q is the holder of the instrument and explain what rights he has in respect of the instrument. (5 marks)

1.2 Assume that the instrument is subsequently dishonoured and that Q is entitled to sue on the instrument. Explain whether Q would be entitled to sue the following parties:

   1.2.1. P (2 marks)
   1.2.2. Z (3 marks)

1.3 You are approached by R (i.e. the drawer of the cheque). Advise your client fully on the legal position in each of the following separate instances:

   1.3.1 R informs you that he countermanded payment and Q now wants to sue him on the dishonoured cheque bearing the amount of R 18 000, 00. (5 marks)

   1.3.2 R informs you that he countermanded payment but ABSA Bank overlooked the countermand and paid Q the amount of R 18 000, 00 on 28 November 2009. ABSA Bank subsequently debited his account in the amount of R 18 000, 00. (10 marks)
QUESTION 2 (8)

2.1 Explain the difference between a ‘credit transfer’ and a ‘debit transfer’. (4 marks)
2.2 Explain what you understand by the term ‘EFTPOS’ (2 marks)
2.3 Explain the effect of the following marking on the face of a particular cheque: (2 marks)

ACCOUNT PAYEE ONLY

QUESTION 3 (12)

Explain the legal position in each of the following separate instances:

3.1 Mr Dirk Swart is a practicing attorney who runs his practice in Pietermaritzburg. He holds his trust current account and trust savings account at CSI Bank. Unfortunately, Mr Swart is presently under investigation by the Kwazulu-Natal Law Society and CSI Bank subsequently receives a letter from the Council of the Law Society requesting a certificate of balance in respect of the accounts held at the bank by Mr Swart. Explain whether the bank is allowed to provide the Law Society with the requisite information in light of the duty of confidentiality which it owes to its customer. (4 marks)

3.2 Mr Tom Jones has a current account at CSI Bank which presently reflects a credit balance of R 10 000, 00. Tom also has an overdraft facility with the bank which was granted under the cover of a deed of suretyship. The aforesaid suretyship has subsequently been withdrawn. Tom draws a cheque in favour of the Msunduzi Municipality in the amount of R 10 800, 00. Explain whether CSI Bank is obliged to honour the cheque in these circumstances. (5 marks)

3.3 Mr Hardluck is a client of CSI Bank. On Friday, 13 September 2009, Mr Hardluck attempted to withdraw money from an ATM machine at CSI Bank. Unfortunately, his card got stuck in the machine and, after seeking the assistance of various personnel in the bank, he was finally able to retrieve his card (although he did not make the desired withdrawal). At the end of the month, Mr Hardluck receives a bank statement which indicates that his account was debited in the amount of R 4 000, 00 on 13 September 2009. An aggrieved Mr Hardluck subsequently reports the matter to the Ombudsman for Banking Services. The Ombudsman makes a recommendation to the effect that CSI Bank should reimburse Mr Hardluck for any loss which he has suffered as the bank was not entitled to debit his account in these circumstances. Explain whether CSI Bank is legally bound by the recommendation made by the Ombudsman (you can assume for the purposes of this question that CSI bank is subject to the jurisdiction of the Ombudsman for Banking Services). (3 marks)
SECTION C  (20 marks)

QUESTION 1  (10)

‘The bank becomes the owner of all moneys deposited in its customer’s current and can use such money immediately for its own purposes, to the exclusion of the rights of any third parties’

Critically discuss the above statement in light of the case of Joint Stock Co Varvarinskoye v ABSA Bank Ltd and Others 2008 (4) SA 287 (SCA)

AND

QUESTION 2  (10)

Explain whether X can qualify as a holder in due course in each of the following separate instances. For the purposes of this question you need only mention the element/elements which might be in issue.

2.1 X is in possession of a cheque drawn in favour of ‘Y or order’. The cheque was drawn by Z in favour of Y and subsequently negotiated to X by Y. Although the cheque in question was intended to be post-dated, Z’s computer system which generated the cheque was unable to do this. As a result thereof, the date which appeared on the cheque was the date on which the cheque was generated. However, prior to issuing the cheque to Y, Z altered the date to reflect the intended date for payment and signed the alteration in question. X acquired the cheque in good faith and for value.

(5 marks)

2.2 X is the payee of a post-dated cheque. The cheque is issued to him by Y pursuant to a valid contract of sale of sale between the parties.

(3 marks)

2.3 X is in possession of a cheque drawn in favour of ‘Y or order’. The cheque was drawn by Z in favour of Y in payment of a debt stemming from the sale of pirated DVDs, and was subsequently negotiated to X by Y. X knows that Y sells pirated DVDs among other goods and is aware of the circumstances under which the cheque was issued.

(2 marks)
SECTION D  (20 marks)

QUESTION 1  (10)
Write a note in you critically discuss South Africa’s Code of Banking Practice. Your answer should cover the following:
• Is there a need for a Code of Banking Practice?
• Are the provisions of the Code of Banking Practice legally enforceable?
• Can a provision of the Code of Banking Practice be construed as forming a tacit term in the relationship between the bank and its customer?
• What role does the Ombudsman for banking services play in enforcing the Code of Banking Practice?

AND

QUESTION 2  (4)
Peter Poonsamy receives an order cheque from one of his debtors. The cheque is made payable to ‘Pieter Moonsamy’. Explain whether he will qualify as the holder of the cheque. Assume that Peter wishes to negotiate the cheque to Jack Daniels in payment of a debt which he owes. What must Peter do in order to validly negotiate the cheque to Jack?

AND

QUESTION 3  (6)
You are approached for legal advice by X. He advises you that on 10 June 2005, he drew a cheque on behalf of Y in favour of ‘Z or order’. The cheque was drawn pursuant to a contract of sale between Y and Z. Although Y’s name appears with X’s signature on the face of the cheque, there are no words inscribed on the cheque indicating that X was signing in a representative capacity. The cheque was subsequently dishonoured but Z only serves the summons on X on 10 August 2009. X requires advice on whether Z is precluded from suing on the cheque in light of the fact that the underlying debt has prescribed. Furthermore, X requires advice on whether he can incur personal liability as he did not qualify as his signature when he signed the cheque. It is common cause that X was duly authorised to sign the cheque on behalf of Y.