TWENTY FIVE YEARS OF BANKING LAW (1988 – 2013) IMPORTANT EVENTS AND CURRENT ISSUES

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Introduction

While the theme of this volume is about Growth and the Future, this article concentrates on the preceding years of banking law development in the country. The premise is that history repeats itself. Attention is drawn to the seminal Banking Act of 1988 and the package of the highly favourable "parate" and debt recovery legislation that followed. Mention is made of the Presidential Commission on Banking and Finance of the early 1990"S and another spate of legislation between 2002-2006 which included the Financial Transactions Reporting Act. The article also covers topics such as nominations, abandoned property, deposit, insurance, customer charter, white collar crime and the financial ombudsman scheme. Remarkably the study shows an absence of litigation and case-law over the past 25 years.

The Banking Act of 1988

First and foremost in the twenty five year survey comes the Banking Act No. 30 of 1988 which came into operation on 25 August 1988. This legislation may be described as the most important modern statute governing banks and banking business in Sri Lanka. Basically the Act provides for the Monetary Board and the Central Bank of Sri Lanka to approve and grant licences to carry on banking business and also contains several provisions for the regulation and control of such businesses.

It is noteworthy that the Banking Act of 1988 had been preceded nearly forty years before by the Monetary Law Act No. 58 of 1949 which had (after the country's independence in 1948) established the Monetary Board and the Central Bank. Interestingly, the *legal entity* is the Monetary Board and not the Central Bank. Legal actions if any have to be filed against the Monetary Board and not the Central Bank. The Supreme Court cases clearly establish this position. In other countries (eg. India, Australia) the term Central Bank is not used. Rather, the term used is Reserve Bank. As an anecdote, in Sinhalese, the term Central Bank means "Madyama Bankuwa" like Central Province. It was Professor G.P. Malalasekera who had said "never mind, use the term "Maha Bankuwa" for Central Bank. People will accept it ! So it has been.

Parate Execution Laws. Recovery of Loans by Banks (Special Provisions) Act of 1990

Parate execution laws and procedures are one of the most important features of banking activity in the past 25 years. “Parate” means immediate or instant. These laws first enacted in 1990 provide and enable lending banks to speedily sell the mortgaged property of their defaulting debtors without the normal long drawn out process of a mortgage action. Not a working day passes without one noticing a parate resolution of a bank’s board of directors appearing in a newspaper. This publication in a newspaper is a compulsory requirement. The Commercial High Court of Colombo is fairly inundated with such cases where defaulting debtors attempt (in many instances, unsuccessfully) to get the bank’s auction of their land stayed and some settlement entered. The majority of the reported case law on banks and banking since 1990 upto date is on “Parate Execution” cases.

Supreme Court Narrows Down “Parate Execution” by Banks

In 2005, in a Five – Judge Supreme Court decision headed by the then Chief Justice, Sarath Silva (with one dissent of Justice Shirani Bandaranayake) the Court refused to recognize that any property mortgaged other than by the borrower will be subject to parate execution. In other words, third party mortgages would be excluded from the right to parate execution. This judgment was delivered in the case of *Chelliah Ramachandran* v *Hatton National Bank* Supreme Court Appeal Nos 5 and 9/2004 – S.C. Spl Leave No. 32 & 33, decided on 1 April 2005).

Bankers understood the above decision to mean that the Supreme Court will narrow down the reach of parate execution. Other Supreme Court decisions supporting this view were (i) *Anandasiva and 12 others as Petitioners* v *Hatton National Bank & 3 others as Respondents* with Sri Lanka Bankers Association (Guarantee) Ltd acting as Intervenient Petitioner (S.C. Appeal No 5), (ii) *C. Ukwatte and another as Petitioners* v *DFCC Bank and another as Respondent* (S.C. Spl.LA No 31/2004), (iii) *M.D. Karunawathie and 5 others as Petitioners* v *DFCC Bank and another* as Respondents (S.C. Spl.LA No 32/2004).

However, later Supreme Court decisions lifted the “Corporate Veil” and permitted parate execution of third party mortgages where the so called third party mortgagor was a director of the debtor company (obligor) who fully owned and controlled it: see *People’s Bank* v *Yashoda Holdings Ltd and Kasthuriarachchi* (2011) B.L.R. 59.

More recently, in 2011, our Parliament passed amending legislation under which “Parate Execution” will not be permitted in the case of loans under Rs. 5 million.

Debt Recovery (Special Provisions) Act No 2 of 1990 as Amended by Debt Recovery (Special Provisions) (Amendment) Act No 9 of 1994.

This is the second statute which came as part of a package with the parate execution law. It also gives extraordinary power to banks. This statute applies to all “lending institutions” as defined in Section 30 of the Act. The term includes all licensed commercial banks and finance companies and specialized financial institutions. The statute provides a very easy summary procedure for the recovery of overdue debts. The term ‘debt’ is also given a wide definition in Section 21 of the Act (as amended).

While under Section 22 of the Act, no money specified as a *penalty* for default or delay in payment of a debt can be recovered by a lending institution under these special procedures, the Roman – Dutch Law rule prohibiting the recovery of interest in excess of the principal sum lent has been abolished by this legislation. Even the Civil Law Ordinance of 1852 prohibited the recovery of interest in excess of the principal sum lent, but section 18 of the Amended Act No 2 of 1990 permits the recovery of interest in excess of the principal sum lent.

Supreme Court rejects extension of Parate Execution Recovery by Banks

In July 2003, the Ministry of Finance had gazetted two amending bills entitled (i) Recovery of Loans by Banks (Special Provisions) (Amendment) Bill to amend the parent Act No. 4 of 1990 and (ii) Debt Recovery (Special Provisions) (Amendment) Bill to amend that parent Act No. 2 of 1990.

The objective of the first amendment was basically as follows:-

(i) to prevent the borrower, mortgagor or any claimant from making an application to Court to invalidate a resolution of the Bank’s Board authorizing the sale of the property. This clause would also enable banks to exercise parate execution rights in respect of syndicated loans.

(ii) To identify the borrower more clearly in order to avoid any doubt.

(iii) To extend the scope given to banks to exercise the right of parate execution in respect of a mortgage property, to include a third party mortgage.

(iv) To enable all ‘specialised banks’ and *ûnance companies* supervised by the Central Bank to exercise ‘parate execution’ similar to Commercial Banks.

The objective of the second amendment was basically as follows :

(i) To reduce the monetary limit from Rs. 150,000/- to Rs.50,000/= for debt recovery actions under that statute.
(ii) To create new offences for issuing cheques without funds to meet them and for better methodsof implementing the prosecution of such offences.

However, it is significant to note that both amendments after gazetting, were challenged before the Supreme Court and the Court held that both amendments needed a two-thirds majority in Parliament if they were to be enacted. Hence, both amendments were not proceeded with and did not enter the statute book. The Supreme Court decisions (Bench of Five Judges) is contained in the judgment entitled *Kusumin Kirthy Kumari* v *The Attorney-General* Supreme Court decision (SC) No. 22/2003 delivered on 26 August 2003.

Presidential Commission on Finance and Banking (1991)

A modern landmark in Sri Lanka's banking development (which many bankers have forgotten) was the establishment of a Presidential Commission on Finance and Banking by President R Premadasa on 21st December 1990. (see Gazette Extraordinary No.643/7 of 2 January 1991). The Chairman of the eight member Commission was M.R.P.Salgado. The Commission issued *nine* interim reports as follows:-

(1) First Interim Report — 31 March 1991 covering its main tasks, credit to the poor and issues of skilled manpower.

(2) Second Interim Report- 31st July 1991 on allocating resources into priority or weaker sectors and channeling credit to the poor.

(3) Third Interim Report- 21st February 1992 on debt recovery legislation.

(4) Fourth Interim Report-27th March I992 on the National Savings Bank.

(5) Fifth Interim Report — 22 July 1992 on Development Banks and other Institutional Source of Medium and Long Term Funds.

(6) Sixth Interim Report- 31st August 1992 on Finance Companies.

(7) Seventh Interim Report- 4th November 1992 on Commercial banks and other Deposit Taking Establishments.

(8) Eighth Interim Report -20th November 1992 on the Capital Market.

(9) Ninth Interim Report – 28th December 1292 the Central Bank of Sri Lanka.

Some of the recommendations of this Presidential Commission on Finance and Banking have been implemented by the enactment of legislation. The Reports contain valuable data and interesting reading.

Evidence (Special Provisions) Act No 14 of 1995

This legislation which came after the "parate" law was intended to cover the loopholes in the traditional law of evidence which did not, upto then, recognize *computer evidence* simply because computers were of recent origin. The legislation made computer evidence admissible in litigation and banks and other financial institutions breathed a sign of relief. Today, more modern legislation on electronic transactions which we refer to later has made this Amendment of 1995 somewhat redundant.

Other Important Legislation in the 25 Year period and their Coverage

Needless to emphasise legislation is paramount and no bank or banker is above the law and cannot disregard legislation. If he does do so, he does so at his peril. Set out below in Table 1 is the more important post 2000 legislation enacted in Sri Lanka that has a bearing on the banking financial and monetary system.

The above legislation and any amendments to them are of vital importance to those engaged in business and commerce, especially institutions delivering financial services such as banks. The legislation, as will be noticed from their dates of enactment, is new and is in keeping with global trends. Western countries had enacted similar legislation into their statute books some years back. Like in many other matters, Sri Lanka, took its own time. Slowly but surely the legislation came. When the above legislation was enacted, a series of public seminars were conducted by the financial sector to create awareness about them and their effect on conducting business etc. I can recall attending and participating at many of them. What is significant is that the above legislation made "new law" which was far ahead of the traditional laws bankers were used to.

Table 1 – Recent Legislation of Importance to Financial Institutions

1) The Monetary Law (Amendment) Act No 32 of 2002
2) Information and Communication Technology Act No 27 of 2003
3) The Banking (Amendment) Act No 2 of 2005
4) Financial Transactions Reporting Act No 6 of 2006
5) Prevention of Money Laundering Act No 5 of 2006
6) Convention on the Suppression of Terrorist Financing Act No 25 of 2005
7) Payment and Settlement Systems Act No 28 of 2005
8) Electronic Transactions Act N 19 of 2006
9) Computer Crimes Act No 24 of 2007
10) Companies Act No 7 of 2007
11) Intellectual Property Act No 36 of 2003
12) Consumer Affairs Authority Act No 9 of 2003
13) Payment Devices Frauds Act No 30 of 2006
14) The Business Finance Act of 2011

Monetary law and Banking Act Amendments

Banks and financial institutions are well aware of the amendments introduced by the above mentioned Monetary Law (Amendment) Act of 2002 and the Banking (Amendment) Act of 2005. By the former the Central Bank's focus was changed to "economic and price stability" and its "expertise and efficiency" was strengthened and a larger Monetary Board created. The legislation also saw to improving the Central Banks flexibility and effectiveness of monetary and exchange rate policy and improved its capability to manage the payments and settlements system.

The Banking Act amendments of 2005 were also significant. The Central Bank got new powers to investigate banks, cancel banking licences, got wider control of off-shore banking, imposed mandatory publication of financial statements by the banking industry in newspapers, insisted that directors of banks', including the CEO's be fit and proper persons ensuring soundness of banking etc. Also significant was the new definition of "deposit" and the prohibition of pyramid schemes which were beginning to entrench themselves in the country. It was at that time alleged that some officers in financial institutions were promoting such pyramid schemes.

Legislation relating to Money Laundering, Terrorist Financing and Financial Transactions Reporting

The above three statutes should be read together. Some local bankers think that these statutory provisions were required to meet the LTTE terrorism and now (after May 2009) that threat has been defeated that this legislation is no longer of importance. This is not so because this legislation was not enacted because of the LTTE. It was a global response to curb money laundering from international drug trafficking and international terrorism which was activated by the 9/11 terrorist attacks in New York. The IMF, the World Bank and ADB etc also would not like to assist and fund countries that did not have this legislation in their statute book.

Of the above three statutes, the most invasive to banks and financial institutions is the Financial Transactions Reporting Act of 2006 (FTRA).

- FTRA provides for the setting up of a Financial Intelligence Unit (FIU) as a national central agency to receive, analyse and disseminate information in relation to Money Laundering and the Financing of Terrorism. The FIU is set up in the Central Bank of Sri Lanka.

- The FTRA obliges institutions to report to the FIU cash transactions above a value prescribed (Rs. One Million). The term "institutions" covers a wide array of persons and entities.

- The Act also obliges institutions to report to the FIU all electronic fund transfers above such sum as prescribed by the regulations.

- All *suspicious* transactions also have to be reported to the FIU irrespective of their magnitude.

- FTRA also requires an institution covered by the Act to appoint a Compliance officer who would be responsible for the institution's compliance with the Act.

- The opening and operating of accounts under a fictitious name is made an offence under the FTRA.

- FTRA makes "tipping-off" an offence (eg. pre warning a suspect of an impending investigation).

- In terms of the FTRA, persons making reports under the Act are protected from civil or criminal liability and the banker's duty of confidentiality will not apply in such cases.

Fictitious bank accounts prohibited

One major change that occurred in other countries because of these new laws was an end to fictitious and anonymous bank accounts and similar accounts in other financial institutions such as finance companies. These were popularly called "Mickey Mouse" or "Donald Duck" accounts where the true identity of the 'real customer' is not disclosed. Section 2 of our FTR Act now prohibits any account to be opened or maintained without proper identification of the customer or in a fictitious or anonymous name.

Legislation on Payments and Settlements, Information & Communication Technology, Electronic Transactions and Computer Crimes.

The above mentioned statutes (see Table 1) dealing with these subjects — which were long overdue in Sri Lanka – will have a radical and day to day impact on our banking and financial institutions. Today, the computer, the internet, electronic transactions, will change the face of banking as never before and staff will have to equip themselves with knowledge of this. The Payments and Settlement legislation also enables Lanka Clear — our Cheque Clearing House — to clear images of cheques. This may necessitate even changes to the Summary Procedure Provisions of our Civil Procedure Code where currently the actual cheque has to be annexed to the plaint filed in Court.

Electronic Transaction legislation must be studied, section by section of the statute to see to what extent contract law has been developed by it by the recognition of *e-mails* and *digital signatures* etc. The Computer Crimes Act of 2007 will be a boon to financial institutions in preventing and prosecuting "hackers" and those who attempt to abuse the IT system. As a simple illustration (which I relate to my banking law students at the Postgraduate Institute of Management) in January 2008, a 28 year old joss stick manufacturer who was a customer of a suburban branch of a State Bank had abused the Cheque Imaging and Transaction System (CITS) and misappropriated about Rs. 14 million. No doubt the fraud was soon discovered but all the money could not be recovered (see *Island* of 30th January 2008). What is important to remember is that technology and electronic aids have pluses and minuses. The minuses are risk factors.

A New Banking Act ?

About the year 2005, a new comprehensive Banking Act was proposed to replace the existing Act enacted in 1988. The provisions of the new Act were also published in the Central Banks website and a few seminars held to discuss it at one or two of which the writer also participated. Its objective was to be an Act to replace the Banking Act, No 30 of 1988, consolidating and strengthening the provisions governing the licensing, regulation and supervision of commercial banks and specialized banks in line with best standards and practices recognized as such by the international community of banking supervisors, in order to support the economic development of Sri Lanka through a safe and sound banking system so as to promote public confidence in the banking system, to protect bank customers including depositors and to reduce financial crime, as well as to provide for connected matters. This statement is taken from its preamble. However, for some reasons, this objective has not been pursued and no meaningful steps have been taken to pass a new Banking Act. Perhaps other issues got higher priority.

"Bouncing" Cheques , Credit Cards Scams and "White Collar" Crime

The above three areas are connected because they are all based on criminal intention and activity. All three are also on the increase and hurting the banking and financial sector.

In the case of "dud" cheques or those issued without funds in the account, in late 2007 our Central Bank said that more than Rs. 550 million worth of cheques are returned daily. (see *Financial Times* Sunday 21st October 2007) "One out of Ten cheques in Lanka Bounce" (Sunday Island 27th January 2008). Any prosecution need not be under the Penal Code provisions for "cheating"; Surely, the Police are aware that Section 25 of Debt Recovery (Special Provisions) Act No 2 of 1990 contains provisions to punish such offenders. But, the issue is, why cannot the banks themselves put a stop to those who issue "bouncing" cheques. All they have to do is to cancel the bank account of such customers. This is what happens in many foreign countries. Nip it in the bud.

Credit Card Scams

Similarly as regards "credit card scams", today not a week passes without a news item about such scams. "Credit Card Scam Busted" said *The Nation* of 25th May 2009; Senior Police Officers on the Pay List of Credit Cards fraud Mastermind" said the *Daily Mirror* of 20th June 2008. "Lankan Forgers Linked to Card Scam in UK" said the Daily News of 11th January 2008. These are but examples. What this writer wishes to emphasis is that here also our law enforcement officers need not resort to the Penal Code provisions to tackle this problem. Many of them may not be aware of the new Payment Devices Fraud Act No. 30 of 2006 which our Parliament brought into operation on 18th July 2006. This all-embracing legislation was mooted by our banks and in fact drafted "in -house" by our banking industry. It covers not only fraudulent credit cards, but all payment devices and includes new concepts like "traffic data", "skimming", "fraudulent applications" and "fraudulent merchant applications". The banks and financial institutions should create greater awareness of this legislation and its coverage.

"White Collar Crime"

At a special Press Conference as reported in the Sunday Island of 9th August 2009, the Senior DIG (Crimes) stated that there is "a phenomenal increase in white collar crimes in Sri Lanka" Many of the participants at this APB's 25th Anniversary Convention must be aware of how a senior executive of a leading foreign bank in Sri Lanka misappropriated over Rs. 100 million on the basis that he was, on behalf of the bank, buying and selling American dollars (Daily News 17th January 2008). Then, there was also the case of the Senior Branch Manager of a private bank who had together with others misappropriated Rs.77 million from the bank. (Island 29th January 2008). More recently, the female Accountant of a leading private IT Educational Institution forged the signature of the authorized signatories to over forty cheques over a period of sixteen months and misappropriated over Rs. 40 million. It was later found that she had also fabricated her Sri Jayawardenapura University degree certificate to get her employment. (Daily Mirror 6th August 2008). Another not so-well known case is where a female employee of a leading private bank who was in charge of safe deposit lockers had got duplicate keys of customers cut and pilfered cash and certificates of deposit from the safety boxes.

Such white collar crime is not only continuing - but increasing and the real number and the stolen amounts are not known because many institutions hide the incidents to avoid publicity. CEO's of banks and financial institutions should take heed of this trend and take appropriate measures to <u>prevent</u> white collar crime.

'Pramuka', 'Sakvithi', 'Danduwan', 'Golden Key' Debacles

Although today everyone talks about it and the newspapers continue to give front page or leading coverage to the "Golden Key" collapse which commenced in October 2008, one cannot forget the repercussions of the "Pramuka" failure in 2002 - where 14,000 small time depositors lost their deposits. It is also regretted that the Central Bank has not yet - published a report as to why and how <u>Pramuka</u> failed. In this writer's view this is a must. In any foreign country such a report would have been issued within an year or two of the collapse. The public are entitled to even a post-mortem report !.

After <u>Pramuka</u> came Sakvithi, where an unregulated finance company failed and the Sakvithi owner/CEO initially fled abroad like the <u>Pramuka</u> boss. Then came <u>Danduwan</u>, also an unregulated finance company mainly operating in the south. The <u>Danduwan</u> saga has died down in the media at least - because the owner/CEO, <u>Danduwan Mudalali</u> was murdered some years back !. While the court case relating to his murder is featured in the media, there is nothing very much about the loss of deposits.

Then came "Golden Key" - perhaps, the greatest crash (upto date) in Sri Lanka's financial history. 'Golden Key' with a debt of about Rs. 26 billion has about eight thousand depositors - some well-known names with large deposits. Though its "depositor base" is not large and non-rural based (and therefore not felt throughout the country), the cascading or "ripple effect" of its crash has reverberated through the entire "non-bank" financial sector of the island. People began to lose faith in finance companies and high interest paying deposit taking institutions. Even the regulated/supervised institutions were affected and for the ûrst time senior management of Golden Key found themselves in remand and at Welikada jail. Breaking all norms of company law, even a Board meeting was held in jail — no doubt authorized by the court. The Golden Key fallout which has not yet ended — was a "wake-up "call to the country's ûnancial institutions and should be carefully studied - not for what happened but how such "financial tsunamis" can be averted.

Fundamental Rights Issues

In the few years there have been some momentous decisions handed down by our Supreme Court on Fundamental Rights applications filed by individuals of which banks are fully aware. These decisions would have been discussed more than once in the Board Rooms of our banks and financial institutions. Here reference is made to the John Keells/Lanka Marine Services case, the Waters Edge judgment, the Petroleum Corporation's Oil Hedging contract with several banks and more recently the de-privatization and the "judicial re-nationalization" of Sri Lanka Insurance Corporation. What is significant is that many years ago no one - not even lawyers would have dreamt that such judicial determinations were possible in the way they happened.

With the retirement of the former Chief Justice (Mr. Sarath Silva) one may argue that this trend will not continue but one cannot be sure. Lawyers have now got the "feel" for this type of Fundamental Rights applications and one never knows for what cause they will be resorted to.

Revision of Banking Manuals

Staff of Banks are expected to be conversant with the Manual of operations of the bank they work in. Many bank employees consider the manual to be their *bible* (for banking purposes !) and equate the manual with "law". Some (many) practicing bankers take the view that there is no difference between banking practice and banking law. In their view, the two are synonymous and the difference relates only to terminology. Such a view however, is unacceptable. Banking practice is not invariably or *ipso facto* banking law. The cases show that there can be differences between (i) a regular, day to day practice followed by a bank and (ii) banking practices which the courts have recognised as constituting as custom or usage of bankers'. While banking customs are derived from the *practice* of bankers, not all matters of practice have been judicially recognized as banking usage or custom. The practice in different banks may also differ. The banking (financial) industry ombudsman also recognises only *good* banking practice.

"Customary Banking Practices"

As stated earlier, English law applies to "banks" and "banking business". Section 86 of our Banking Act of 1988 in defining "banking business" speaks of *customary banking practices*. In June 2008, as a guide to our judiciary, the Association of Professional Bankers of Sri Lanka (APB) published in a booklet *thirty four* areas ofactivity engaged in by banks which are regarded as "customary banking practices" and which should, therefore, be governed by English Law. At the APB's request, this writer compiled this publication which was launched by Senior Supreme Court Judge Mr. Justice Saleem Marsoof at a public event in Colombo. This compilation of "customary banking practices" in 2008 was a landmark event because no other country has done so.

Nominations in Bank Accounts

Another little known development in banking law is the provisions enabling "Nominations" to any bank account other than current accounts. This was done by an amendment in 1993 to Section 544 of our Civil Procedure Code. Because this legal entitlement is in the Civil Procedure Code some bankers are not fully conversant with it. Now, any customer can nominate any person of his choice to be the beneficiary of the assets of that account other than current accounts (eg. Savings account or ûxed deposit) and such nomination takes precedence even over a Last Will of that customer. Public awareness must be created about this nomination because banks as a matter of routine get customers to sign such nominations without advising them of their effect.

For instance, a customer may nominate a person known to him for convenience, but never intending that the nominee should beneû't over his natural heirs.

Bank's Duty on Dormant Accounts

On the other hand, a good legislative provision is the provision in the Banking Act of 1988 relating to Dormant Accounts or Abandoned property of customers. These are accounts not operated for over *ten* years. From 2008, the Central Bank of Sri Lanka has, *for the first time*, activated these statutory requirements, and now, all banks must report to the Central Bank of Sri Lanka such assets (balances). The public would have seen newspaper advertisements of banks on this topic. In other countries, this is done every year. Because, the statute applies to accounts that are not operated for ten years; so every year the ten-year rule will apply to such accounts. Up to 2008, one wonders what happened to monies in such dormant accounts for the previous years before 1988 when this requirement became law !

Central Bank's Credit Card operational Guidelines

Banks are the issuers of credit cards in Sri Lanka, led by HSBC and Standard Chartered. Of significance to theCredit Card industry is that in 2010 the Central Bank issued a set of important rules and procedures entitled Credit Card Operational Guidelines. These Guidelines were issued under the Payment and Settlement Act No 28 of 2005 (referred to earlier) and the Regulations made under that Act entitled Service Providers of Payment Card Regulations No 1 of 2009 of 31st July 2009.

Other Reform Initiatives by Central Bank

As part of its role to maintain confidence in the Financial System, the Central Bank has initiated therecent regulatory reforms such as Deposit Insurance and the Customers Charter.

Deposit Insurance

In terms of the newly established Sri Lanka Deposit insurance Scheme Regulations, LCB's, LSB's and RFC's are required to contribute to a Fund and the deposits held by LCBs, LSBs and RFCs are now entitled to the benefit of deposit insurance up to a sum of Rs.200,000/- per depositor. The Fund could also be utilised to grant advances to member institutions who have a severe liquidity crisis where such advance would prevent financial panic to the institution or as a whole.

Customer Charter

The Central Bank recently directed all banks to adopt a "Code of Conduct on Customer Protection". The Charter must help customers understand financial products / services, have a Key Facts Documentation, not mislead the public in advertising, must display certain information at branches, and ensure that customers are sent periodic statements regarding transactions and balances. The Charter will also enable customers to access and fully understand the terms and conditions of their rights and obligations.

As a Regulator, the Central Bank of Sri Lanka has done well. We have not had any major banking collapses. The Pramuka Bank collapse in 2002 was the last of recent origin. Despite, the "Golden Key" fiasco, the Central Bank of Sri Lanka stepped in and prevented any run on Seylan Bank. The Seylan Bank is now once again on a sound footing and doing well. True, a number of non - supervised financial enterprises failed - *Sakvithi*, *Danduwam* and then came *Golden Key* — but to lay the blame for all these failures on the Central Bank of Sri Lanka is not fair. These were risky financial enterprises paying interest far above the normal possible rates. The depositors in these institutions should have known this. Also, Golden Key was not an institution supervised by the Central Bank which periodically, by public notices, informs the general public of Institutions supervised by them. When the Central Bank publishes such notices naming the financial institutions supervised by them, they are indirectly saying all other financial institutions in question are not supervised and hence may be risky This is the clear message.

Also it is important to note that one cannot take legal action against the Central Bank of Sri Lanka for loss of deposits in unsupervised institutions. In England the Courts have rejected such legal claims against the Bank of England which is the Regulator in that country. Similarly, our Supreme Court has held that our Central Bank (Monetary Board) cannot be sued for loss of deposits in failed, unsupervised financial institutions.

The Business Finance Act of 2011

This Act which was passed by Parliament on 21st September 2011, provides (i) for licensing of persons who carry on finance business, (ii) the repeal of the Finance Companies Act and (iii) that no person other than a person licensed to carry on finance business or an exempted business shall accept deposits.

The term "deposits" is defined to mean "the sum of money paid on terms under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed to by and on behalf of the person making the payment and the person receiving it..."

The new Act gives a new definition of the term "deposit" and also provides a limitation on the use of the terms "finance", "financing" or "financial" as part of the name of any person other than a RFC.

Statute on Microfinance (just enacted)

This legislation provides for the establishment of a Microfinance Regulatory and Supervisory Authority and the regulation of "microfinance business". Henceforth, it would only be companies, NGOs, societies and co-operative societies who would be permitted to carry on "microfinance business" under the law. The Authority would have extensive powers with respect to making rules on operational matters similar to the CBSL in relation to RFCs. There will also be restrictions on the businesses which could be carried out by a registered microfinance institution.

Financial Ombudsman Scheme

I now turn to the Financial Ombudsman Scheme which was commenced in 2003 which, in my view, has been a tremendous success. When you appreciate that it is a free service to customers, the success is more meaningful. I am also happy and proud to record that I was responsible (together with Mr. Gaston Gunawardene, the then Secretary General of the Bankers Association of Sri Lanka) for setting up the scheme. I recommended it to the Central Bank of Sri Lanka in 2002 when I was working as a Consultant there. After some hesitation, the banking industry agreed. It was then to be called the "Banking Ombudsman", but since other supervised financial institutions like finance companies, leasing companies and primary dealers alsowanted to join, it was ultimately called the Financial Ombudsman's Scheme.

Every year, about three to four hundred customers come before the Financial Ombudsman for some relief. The procedure is not complex and inquiries are held without lawyers, and equitable decisions are given. The banks and other financial institutions who have joined the scheme support it and are anxious to ensure that it continues as a Success.

No significant and judicial decisions on Banking

A book Published by me entitled Casebook on the Law of Banking and Cheques in Sri Lanka, shows that we do not have any major issues in the area of banking.

From the time of the Civil Law Ordinance of 1852, it was the English law that clearly applies to banks and banking issues in the Island. Some doubts about the application of Roman-Dutch Law to banking was cleared by a Bench of Five Judges of our Supreme Court in the famous case of *De Costa* v *Bank of Ceylon* decided in 1969. In that case, the Bank of Ceylon was successfully sued for liability for conversion of a negotiable instrument as a Collecting Bank. Here, five Judges of our Supreme Court gave several interesting judgments on how the English Law of Banking came to be applied in Sri Lanka. All the judgments run into a total of about seventy pages. By reading and understanding the judgments delivered in that case, one will get a good idea of banking law and its application in Sri Lanka.

Roman - Dutch Law is however, our Common Law. Although it now applies only in two out of over 190 countries in the world (South Africa and Sri Lanka), any activity outside the "business of banking" (for example, guarantees and safe custody) will be governed by Roman-Dutch Law. However, in practice after the decision in *De Costa* v *Bank of Ceylon*, there has been no conflict for bankers between English and Roman-Dutch Law. Both laws have existed "in harmony" and the diversity of our country's legal system has not caused concern to bankers. However, we must always remember that Roman-Dutch law can apply to a <u>transaction with a bank</u> as opposed to a <u>banking transaction</u>.

Very recently in *Indian Bank* v *Acuity Stock Brokers (Pvt) Ltd* (2011) Bar Association Law Reports p 255 a Three Judge Supreme Court Bench (with Justice Suresh Chandra delivering the judgment) applied Roman-Dutch Law to a document given by the respondent stock-broker to the appellant bank. The trial judge had taken the view that English Law applied and since there was no "consideration" the document was unenforceable. In reversing the trial judge's findings, Justice Suresh Chandra said that merely because a transaction was with a bank does not make it a banking transaction and in this case the document was governed by Roman-Dutch law.

A very interesting unreported case of breach of bank secrecy was that filed by the famous film actor Gamini Fonseka against the People's Bank. Mr. Fonseka sued the People's Bank for divulging information from his file in the bank which he alleged the "Ravaya" paper had used to defame him. He succeeded. Because of his demise we do not know what happened to the Bank's appeal against District Court judgment.

I conclude this review of 25 years of banking law development (1988 – 2013) with a quote from the famous English banker of the 19th Century Mr James Gilbart which may appeal to the members of the APB. Gilbart said:-

"To be a good banker requires some intellectual and some moral qualiûcations. A banker need not be a man of talent but he should be a~ man of wisdom. Talent, in the sense in which the word is ordinarily used implies a strong development of someone faculty of the mind. Wisdom implies the due proportion of all the faculties. A banker need not be a poet or a philosopher, a man of science or of literature—an orator or a statesman. He need not possess any one remarkable quality by which he is distinguished from the rest of mankind. He will possibly be better without any of these distinctions. It is only necessary that he should possess a large portion of that practical quality which is called common sense."