
CFL2

Offshore Legislation

12 MAY 1999

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| 1. Time allowed | : Three (3) hours |
| 2. Total number of questions | : Six (6) questions on 3 pages |
| 3. Number of questions to be answered | : Five (5) questions |
| 4. Begin each answer to a new question on a fresh page. | |
| 5. Answer all questions in English . | |

ANSWER FIVE (5) QUESTIONS ONLY

1. (a) Law may be classified into **three** categories, namely public law, private law and international law.

Briefly explain all the following terms:

- (i) public law [2]
 (ii) private law [2]
 (iii) international law [2]

- (b) State and briefly explain any **five** main offshore legislation which are directly applicable to offshore bankers in Labuan. [7]

- (c) Answer “**True**” or “**False**” for all of the following:

- (i) Article 73 (A) of the Federal Constitution empowers a State Legislature to enact laws. [1]
 (ii) All Malaysian laws applicable to commercial banking are inapplicable to Labuan because it is an International Offshore Financial Centre (IOFC). [1]
 (iii) English common law and rules of equity still apply in Malaysia to a certain extent despite there being written laws in existence. [1]
 (iv) The Offshore Banking Act 1990 governs offshore investment banking businesses in Labuan. [1]
 (v) The Banking and Financial Institutions Act 1989 is applicable to offshore banks licensed under the Offshore Banking Act 1990. [1]
 (vi) By virtue of the Offshore Banking Act 1990, an offshore company incorporated under the Offshore Companies Act 1990 may carry on offshore banking business. [1]
 (vii) Section 22 of the Offshore Banking Act 1990 is the secrecy provision relevant to offshore banking business in Labuan. [1]

(Total:20 marks)

2. (a) Define a “power of attorney”. [2]

- (b) Explain the use of an irrevocable power of attorney in banking practice. [2]

- (c) Briefly state how powers of attorney are authenticated. [2]

- (d) State the **four** ways in which a power of attorney may be revoked. [4]

- (e) In relation to the power of attorney, answer “**True**” or “**False**” for all of the following:

- (i) Section 37 of the Labuan Offshore Trusts Act 1996 lays down the application of power of attorney in offshore trusts. [1]
 (ii) Unless the terms of an offshore trust created under the Labuan Offshore Trusts Act 1996 provide to the contrary, a trustee of the said trust may, by power of attorney, delegate his powers. [1]
 (iii) The **two** types of power of attorney commonly used are general power of attorney and limited power of attorney. [1]
 (iv) The Power of Attorney Act 1949 is applicable to Labuan. [1]

- (f) (i) Define and briefly explain the term “contributory negligence”. [2]

- (ii) State the relevant provision of the Civil Law Act 1956 which concerns contributory negligence. [1]
- (g) List the **three** elements which constitute the tort of negligence. [3]
(Total:20 marks)
3. (a) State and briefly explain the **six** basic elements of a legally binding contract. [12]
- (b) In relation to contract law, answer “**True**” or “**False**” for all of the following:
- (i) The Contracts Act 1950 recognises natural love and affection as valid consideration provided certain prerequisites are complied with. [1]
- (ii) According to the fundamental principle of “privity of contract”, a person who is not a party to a contract has the right to sue on the contract. [1]
- (iii) It is possible to deem an agreement as being formed even if the parties involved are still in the stage of negotiation. [1]
- (c) Briefly explain the difference between “misrepresentation” and “fraud”. [2]
- (d) State any **three** instances where specific performance may not be granted by the Court. [3]
(Total:20 marks)
4. (a) List and describe the **three** types of offshore limited partnerships under the Labuan Offshore Limited Partnerships Act 1997. [10]
- (b) In relation to the Labuan Offshore Limited Partnerships Act 1997, explain the following:
- (i) When a limited partner’s liability is the same as that of a general partner. [1]
- (ii) In relation to your answer in (i) above, state any **four** situations to describe when a limited partner’s liability is **not** considered the same as that of a general partner. [4]
- (c) In relation to offshore limited partnerships, answer “**True**” or “**False**” for all of the following:
- (i) Under the Labuan Offshore Limited Partnerships Act 1997, it is possible for a partnership to comprise **two** general partners. [1]
- (ii) The Labuan Offshore Limited Partnerships Act 1997 permits an offshore limited partnership in Labuan to comprise of **three** residents as the sole partners. [1]
- (iii) Only general partners may dissolve an offshore limited partnership by way of notice of dissolution. [1]
- (iv) A limited partner in a Labuan offshore limited partnership can never be a general partner if he so decides later. [1]
- (v) A registered offshore company may be a partner of a Labuan offshore limited partnership. [1]
(Total:20 marks)
5. (a) A large international bank has set up an offshore branch bank (which is **not** an offshore investment bank) in Labuan recently. The expatriate manager of the branch, being new, is not sure of the laws and regulations of Labuan relating to an offshore bank’s conduct of its business.

Assuming you are a Labuan-based consultant offering advisory services to offshore banks, advise the branch manager on what the offshore branch bank can and cannot do in the conduct of its business in Labuan.

[10]

- (b) “Customer secrecy or confidentiality is the hallmark and main advantage of an offshore centre, including Labuan; it, therefore, must always be strictly preserved.”

Do you agree with the above statement? Briefly state the reason(s) for your answer. [5]

- (c) Answer “**True**” or “**False**” for all of the following:

(i) All offshore centres in the world carry out the same business. [1]

(ii) The Offshore Companies Act 1990 is not applicable to offshore banks in Labuan, as they are governed by the Offshore Banking Act 1990. [1]

(iii) An individual customer is able to simply walk into an offshore bank and open an account by depositing USD1million in cash. [1]

(iv) A banker-customer relationship may only exist via the customer maintaining a deposit account with the bank. [1]

(v) A banker-customer relationship cannot be terminated if either one of the parties do not agree to the termination. [1]

(Total:20 marks)

6. (a) List and briefly explain any **four** ways in which an agency may arise. [8]

- (b) In relation to agency, answer “**True**” or “**False**” for all of the following:

(i) A person of sound mind and 19 years of age will be liable towards his principal for acts done by him as an agent. [1]

(ii) Y had acted on behalf of Z without Z’s authority or knowledge. Z cannot now elect to ratify Y’s acts. [1]

(iii) The relevant Malaysian legislation on agency is the Contracts Act 1950. [1]

(iv) Section 97 of the Banking and Financial Institutions Act 1989 provides for the secrecy provision for offshore bankers. [1]

(v) An agent is not allowed to open a bank account in his own name in order to deposit and withdraw moneys belonging to his principal. [1]

- (c) Ali employs Benny as his agent to recover RM500 from Cathy. However, due to Benny’s misconduct, the money was not recovered.

(i) Is Ali required to pay remuneration to Benny for his services? Give the reason for your answer.[1]

(ii) Who (Ali or Benny) must be made to bear the loss of the RM500? [1]

- (d) State **five** ways in which an agency can be terminated. [5]

(Total: 20 marks)

OUTLINE ANSWERS

Question 1

- (a) **Answers were of an average level.**
- (b) **Some candidates did not answer to the requirement of the question.**
- (c) **Answers were of an average level.**

- (a)
 - (i) Public law regulates the relationship between an individual and the State. The most prominent example of this law is the Malaysian Federal Constitution. It is the supreme law of Malaysia and it provides the fundamental rights or liberties of Malaysian citizens. It also governs the relationship between the Federal Government and State Governments.
 - (ii) Private law is also known as civil laws. It governs the relationship between individuals. Examples of a private law are the law of contract, law of tort and law of trust.
 - (iii) International law is a set of laws which outlines the principles and rules of conduct which the States themselves feel bound to observe and consequently do observe in their relations with each other. International law may be classified into public and private international law. Public international law regulates the relationship between one State and another State or international organisation while private international law is a part of municipal laws.
- (b) The legislation applicable to offshore bankers are as follows:
 - (i) Offshore Companies Act 1990 – sets out the legal framework for the incorporation, registration and administration of offshore companies or foreign offshore companies in Labuan.
 - (ii) Offshore Banking Act 1990 – provides the licensing and regulation of persons carrying on offshore banking business.
 - (iii) Labuan Offshore Business Activity Tax Act 1990 – empowers the government to impose, assess and collect tax on offshore business activities carried on by offshore companies in or from Labuan.
 - (iv) Income Tax Act 1967 – shall apply in respect of an offshore banking business carried on by an offshore bank which is a branch of the Malaysian bank or transactions carried on with Malaysian residents unless as permitted under the Offshore Banking Act 1990.
 - (v) Exchange Control Act 1953 – regulates dealings with Malaysian residents, Ringgit or Ringgit instruments, flow of funds into the domestic market through credit facilities obtained offshore and designation of offshore entities as non-residents.
 - (vi) Constitution (Amendment) (No.2) Act 1984 – extends or amends laws applicable to Labuan after its declaration as a federal territory.
 - (vii) Labuan Offshore Securities Industry Act 1997 – provides for the regulation of securities in Labuan and the establishment of a facility for the listing thereof on an exchange.
- (c)
 - (i) False
 - (ii) False
 - (iii) True
 - (iv) True
 - (v) False
 - (vi) True
 - (vii) True

Question 2

- (a) **Most candidates were able to define a “power of attorney”.**
- (b) **Generally, a poorly answered question.**
- (c) **Answers were of an average level.**
- (d) **Answers were of an average level.**
- (e) **A well-answered question.**
- (f) **Answers were of an average level. Quite a large percentage of candidates were not aware of the Civil Law Act provision.**
- (g) **Candidates were able to list the three elements required in this question.**

- (a) A formal instrument by which a person (“donor”) empowers another person (“donee”) to represent him, or act on his behalf in accordance with the terms as provided in the instrument.
- (b) The irrevocable or unconditional power of attorney will empower a bank to deal or dispose off the securities, which were pledged in order to secure credit facilities by the bank, without further reference to the donor.
- (c) A power of attorney must be made in writing, signed, witnessed and registered with a competent authority.
- (d) The power of attorney may be revoked by:
 - **Notice of revocation by the donor**
The maker (donor) of the power of attorney may issue a notice to the recipient (donee) to revoke the power of attorney. The donee ceases to have the authority to bind the donor with effect from the date of receipt of the notice.
 - **Notice of renunciation by the donee**
The donee may issue a notice of renunciation to the donor. The donee ceases to have the authority to bind the donor with effect from the date of receipt of the notice.
 - **Effluxion of time, frustration or impossibility of performance**
The power of attorney will not be enforceable if it is impossible to comply with its terms or, the performance of its terms is frustrated by the occurrence of certain supervening events or, the time stipulated in its terms has lapsed.
 - **Operation of law**
When the execution of the terms of the power of attorney is prohibited by law, it is deemed to be revoked.
- (e)
 - (i) True
 - (ii) True
 - (iii) True
 - (iv) False
- (f)
 - (i) Contributory negligence is a possible defence available to the defendant if the defendant can prove that the plaintiff has contributed to an extent to the negligence of the defendant, thereby resulting in the damage suffered. If the defendant succeeds in proving contributory negligence, whatever damages awarded to the plaintiff will be apportioned or reduced accordingly.
 - (ii) Section 12 of the Civil Law Act 1956 is the relevant provision applicable to contributory negligence.
- (g) The three elements of negligence are as follows:
 - (i) A defendant has a duty of care to the plaintiff;
 - (ii) A defendant has breached that duty of care; and
 - (iii) A plaintiff suffered consequential damage arising from the defendant’s breach.

Question 3

- (a) **Generally, candidates were able to state the basic elements correctly. However, many candidates failed to correctly provide the brief explanation thereto.**
- (b) **Answers were of an average level.**
- (c) **Answers were of an average level.**
- (d) **Most candidates were unable to state the three instances in this question.**

(a) To form a legally binding contract, the following six elements must exist:

- **Offer or proposal**

Section 2(a) of the Contracts Act 1950 (CA) defines offer as, when a person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to act or abstinence, he is said to make a proposal.

The first line of section 2 (c) of the CA calls the person making the proposal the “promisor”.

- **Acceptance of the proposal**

Section 2 (b) of the CA provides that when the person to whom the offer is made signifies his assent thereto, the proposal is said to have been accepted. The proposal then becomes a promise.

Section 2(c) of the CA calls the person accepting the proposal the “promisee”.

- **Intention to create legal relations**

The parties must have the intention to create legal relations. However, where agreements merely represent family arrangements, there is no intention to create legal relations imputed.

- **Consideration**

Section 2 (d) of the CA defines consideration as when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration of the promise.

- **Certainty**

The terms of a contract must be capable of being ascertained. Otherwise, the contract will be void.

- **Capacity**

The parties entering into contract must be legally competent to contract.

Section 11 of the CA states that every person is competent to contract if he/she has attained the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

- (b) (i) True
(ii) False
(iii) False

(c) The basic difference between fraud and misrepresentation is that in case of fraud the person making the representation does not, himself, believe in the truth of the representation. In misrepresentation, the person believes that the representation made by him to be true.

(d) Specific performance may not be granted where:

- (i) damages will provide adequate remedy – Section 20(1)(a) of the Specific Relief Act;
- (ii) the terms of the contract are uncertain – Section 20(1)(c) of the Specific Relief Act;
- (iii) there has been delay in instituting the action;
- (iv) there is an evidence of fraud;
- (v) to do so would require constant supervision of the court;
- (vi) the contracts are for personal services.

Question 4

- (a) **Answers were of an average level.**
- (b) **(i) Generally, a well-attempted question.
(ii) Many candidates failed to provide the correct answer to this question.**
- (c) **Answers were of an average level.**

- (a) The Labuan Offshore Limited Partnership Act 1997 (LOLPA) allows three types of offshore limited partnership to be established, namely:
- (i) **An offshore professional partnership** which can only be formed by a professional who carries on practice in accounting; actuarial science; engineering or law. The professional who forms the partnership must have in force professional indemnity insurance cover for not less than the prescribed amount with an insurer approved by LOFSA;
 - (ii) **An offshore project partnership** which shall be established solely for the purpose of undertaking the project or business specified in the partnership agreement. The partnership agreement of the partnership shall provide that the partnership shall be dissolved after the completion of the project and all of the partners must be a body corporate; and
 - (iii) **An offshore general limited partnership** which may be formed by any person for any lawful purpose.
- (b) (i) A limited partner is not liable as a general partner unless the limited partner participates in the management of the partnership.
- (ii) The following acts do not amount to a limited partner as participating in the management of the partnership:
- Being a contractor, agent or employee of the partnership. Being a director, shareholder or officer of a corporate general partner;
 - Consulting and advising a general partner on the activities of the partnership;
 - Investigating, reviewing, approving or being advised on accounts or affairs of the partnership;
 - Acting as surety or guarantor for the partnership;
 - Approving or disapproving an amendment to the partnership agreement;
 - Voting on the following:-
 - dissolution of partnership;
 - dealings in assets of the partnership
 - creation or renewal of obligation
 - change in the nature of activities of the partnership
 - change in partners
 - transactions in which the general partners have conflict of interest with the limited partners.
- (c) (i) False
(ii) False
(iii) True
(iv) False
(v) True

Question 5

- (a) **Answers were of an average level.**
- (b) **Generally, not well-answered.**
- (c) **Answers were of an average level.**

- (a) The following is a list of the “dos and don’ts” of an offshore bank in Labuan in the conduct of its business:

DOs

- An offshore bank is permitted to transact business only in currencies other than the Malaysian ringgit. An offshore bank may however defray its administrative and statutory expenses (e.g. staff salaries, taxes and local bills) in ringgit.
- An offshore bank may deal with Malaysian residents subject to Exchange Control Regulations and other restrictions.
- An offshore bank shall appoint an auditor annually.
- An offshore bank shall submit its financial statements together with the Auditor's report to LOFSA within three months after the close of each financial year.
- A banker has the right to charge interest on loans or other credit facilities granted or advanced by it to the customer.
- A banker may also levy commission or charge on services rendered to customers.

Other duties and responsibilities to be observed by an offshore bank include the maintenance of strict secrecy over the affairs of its customers, appointment of an approved auditor annually and the submission to LOFSA of regular statistics and information relating to its business in Labuan.

DON'Ts

- An offshore bank is not permitted to carry on business in Malaysia other than from Labuan.
- An offshore bank shall not open offices in any place in Malaysia except Labuan. However, some banks have been permitted by LOFSA to have a marketing office in Kuala Lumpur.
- Offshore banks are not allowed to open offices in Labuan or outside Malaysia without the prior consent of LOFSA.
- An offshore bank is not permitted to operate checking accounts for its clients. This is to avoid the problem of having to clear cheques across national borders.
- An offshore bank is not allowed to undertake foreign exchange transactions, including remittances, with or on behalf of residents that are not authorised banks.
- In its dealings with customers, an offshore bank is prohibited from opening an account for a customer whose identity is not known to the offshore bank.
- As noted above, an offshore bank is prohibited from dealing or transacting any business in Malaysian ringgit. However, the exceptions are purchase and sale of foreign currency against the ringgit including currency swaps. Such activities are normal offshore banking activities that could include transactions denominated in ringgit, and as such, will be permitted by the Controller of Foreign Exchange.

- (b) Yes. It is also the most important duty owed by an offshore bank to his customer. Confidentiality of relations and dealings between the offshore banker and its customers is paramount not only in maintaining the banker's reputation but also in complying with legal requirements. **But** this is slowly being eroded in the face of mounting global demand for more transparency in banking transactions. The rising demand for more transparency arose mainly as a result of global vigilance against money laundering activities.

The importance of confidentiality in offshore banking business is highlighted in Section 21 of the Labuan Offshore Financial Securities Act, which says, "nothing in the Act shall authorise the Minister or the Authority to inquire into the identity, accounts and affairs of any particular customer of the offshore bank".

It is also provided in the Labuan Offshore Financial Securities Act that no director or officer of any offshore bank shall divulge information relating to the affairs of a customer unless it is authorised by the customer. Moreover, it is normally encoded in the individual offshore bank's code of good practice for its employees that the employees are not allowed either during or after employment with the bank to provide information to third parties about the activities of the bank's customers.

But confidentiality is not sacrosanct, an offshore bank may also be compelled to disclose information under certain specific circumstances, such as when the disclosure is in the interest of the internal security of Malaysia, or where there is a strong suspicion of fraud (now in amended LOFSA Act). Disclosure of customers' information, however, can be effected by way of an order of the High Court. The order can be applied by:

- (i) an interested party if a customer is dead, bankrupt or in the case of a company being wound up;
- (ii) public officer in the course of investigating an offence; or
- (iii) the Authority, supported by a certificate given by the relevant Minister that the disclosure is in the interest of Malaysia's financial or economic well-being or internal security.

Customer confidentiality is so important that although the Authority is empowered to conduct an examination of the offshore bank, such examination is limited to just verifying the accuracy of information submitted regularly by the bank to the Authority. However, under the amended LOFSA Act, offshore banks may be required to submit specific information where there is strong suspicion of fraud or other wrongdoings. LOFSA can also share these information with home monetary authorities or the Police.

- (b) (i) False
 (ii) False
 (iii) False
 (iv) False
 (v) False

Question 6

- (a) **A well-answered question.**
 (b) **Answers were of an average level.**
 (c) **A well-attempted question.**
 (d) **Answers were of an average level.**

- (a) An agency may arise in the following manner:
- (i) **By express appointment by the principal**
- Written form e.g. power of attorney
 - Oral form e.g. spoken words
- (ii) **By implied appointment by the principal**
- By implication is when a person by his words or conduct holds out another person as having the authority to act for him.
- (iii) **By ratification by the principal**
- If an act is done by a person on behalf of another but without the latter's knowledge or authority, the latter may elect to ratify or disown the act.
- (iv) **By necessity, i.e. by operation of law in certain circumstances**
- An agency of necessity may be created if it is impossible to get the principal's instruction, it is to prevent a loss to the principal, and it is acted in good faith.
- (v) **By the doctrine of estoppel or "holding out"**
- If the principal by his words and conduct allows a third party to believe that a particular person is his agent even when he is not, and the third party relies on it to the detriment of the third party, he will be estopped or precluded from denying the existence of that person's authority to act on his behalf.
- (b) (i) True
 (ii) False
 (iii) True
 (iv) False
 (v) False
- (c) (i) No, because Benny has committed a misconduct.
 (ii) The loss must be borne by Benny.
- (d) **Termination of Agency**
 In short, agency may be terminated by;
- the act of the parties; or
 - by operation of law.

Termination by the act of the parties

- (i) The authority of an agent may be terminated by mutual consent or revocation by the principal or renunciation of the agency by the agent.
- (ii) When both parties desire and agree that the agency shall be terminated, the agency is terminated.
- (iii) The principal may revoke the authority of the agent at any time before it has been exercised to bind the principal.
- (iv) Where the agency is for an indefinite duration, the agent can terminate the agency by giving reasonable notice of termination to the principal (Section 159, Contracts Act). If reasonable notice is given, the agent will no longer be liable to the principal and he can claim reimbursement for all his services and expenses up to the date of the termination of his agency.
- (v) Where the agency is for a definite or fixed period of time, the agent cannot terminate the agency before the expiry of that period without just cause. Otherwise, he will be liable to the principal for damages for any loss caused by the premature termination of the agency (Section 158, Contracts Act). However, the court will not order specific performance of the contract of agency.
- (vii) Revocation or renunciation of the agency may be expressed or implied by the conduct of the principal or agent as the case may be.

Termination by operation of law

An agency may be revoked by operation of law in any of the following circumstances:

- (i) **When the contract of agency has been performed**
This can happen when an agency is created for a single specific transaction and the transaction is completed. (Section 154, Contracts Act)
- (ii) **Upon the expiry of the period fixed in the contract of agency**
If an agency is created for a fixed period, the agency is terminated at the expiry of that period whether or not the business or transaction has been completed.
- (iii) **Upon the death of the principal or the agent**
As a general rule, agency comes to an end when the principal or the agent dies. An agency, which is terminated by the death of the principal, is effective only when the agent has notice of the principal's death. (Section 161, Illustration C, Contracts Act)

Exception

An exception to this general rule is where the agent has an interest in the property, which forms the subject matter of the agency. In such a case, when the principal dies, the agent may continue to exercise authority; and if the agent dies, the authority passes to the agent's personal representatives.

Section 162 of the Contracts Act goes on to provide that when the principal dies, the agent must take all reasonable steps to protect and preserve the interests entrusted to him.

- (iv) **When the principal or agent becomes insane**
Since an insane person is not capable to enter into a valid contract to appoint an agent or act as one, agency is terminated by such insanity.

When the principal becomes insane, the agent is bound to take all reasonable steps to protect and preserve his principal's interests.
- (v) **When the principal or agent becomes insolvent or is made a bankrupt**
Upon insolvency, a person's rights and liabilities are vested in the Official Assignee and, therefore, the agency relationship ceases.
- (vii) **Upon happening of an event which renders the agency unlawful**
An agency contract, like any other contract, may be discharged by frustration. Thus, when an event happens which renders the agency unlawful, the agency is terminated.

Example

In *Stevenson v. Aktiengesellschaft Fur Cartonnagen Industrie* where an outbreak of war made the principal enemy alien, it was held that the agency was terminated.

Candidates may choose any five(5) of the above.