

CFL2

Offshore Legislation

13 APRIL 2005

1. Time allowed : Three (3) hours
2. Total number of questions : Six (6) questions
3. Number of questions to be answered : Five (5) questions [20 marks each]
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) Name the High Courts in Malaysia. [2]
- (b) Name **three** types of unwritten law that are applicable to offshore bankers. [3]
- (c) Fill in the blanks with the **correct** word(s) for each of the following:
- (i) The _____ is the highest court of appeal in Malaysia. [1]
- (ii) An action for the recovery of an amount exceeding RM250,000 will be heard and determined by the _____ Court. [1]
- (iii) The _____ is the supreme statute of the country. [1]
- (iv) The Court of Appeal strictly performs the function of an _____ court. [1]
- (v) The practice of the court following its previous decision or a decision previously made by a judge in a similar situation is called the _____ . [1]
- (d) Briefly describe **five** rights of an agent as specified in the Contracts Act 1950. [10]
(Total:20 marks)
2. (a) Describe the circumstances where an offer and acceptance may be revoked. [4]
- (b) In relation to contract law, answer “**True**” or “**False**” for each of the following statements:
- (i) The only remedy available for a breach of contract is damages. [1]
- (ii) Past consideration is good consideration in Malaysia. [1]
- (iii) Acceptance of an offer must be expressed and cannot be implied. [1]
- (iv) A revocation of an offer need not be communicated to be effective. [1]
- (v) An agreement can be considered legally formed even if the parties are still negotiating. [1]
- (vi) Section 19(1) of the Contracts Act 1950 states that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. [1]
- (c) State **five** torts that are relevant to bankers. [5]
- (d) What are **five** elements required to prove professional negligence? [5]
(Total:20 marks)
3. (a) What is the purpose of the Companies Act 1965 and the Labuan Trust Companies Act 1990 in relation to trust companies? [4]
- (b) Briefly explain **three** types of offshore trust. [6]
- (c) How can an offshore trust be terminated? [3]
- (d) What is the life span of an offshore trust? [3]
- (e) Describe how an offshore trust may be rendered invalid and unenforceable in Labuan. [4]
(Total:20 marks)

4. (a) What is the required composition of partners in an offshore limited partnership? [2]
- (b) Who has the only authority to bind the partnership of any legal obligation? [1]
- (c) State **three** conditions for a partnership to be dissolved by an order of Court. [3]
- (d) Fill in the blanks with the **correct** words(s) for each of the following:
- (i) _____ is the Act that governs offshore limited partnerships. [1]
- (ii) _____ is the Act that provides for the requirements of record-keeping and reporting of suspicious transactions. [1]
- (iii) _____ governs the registration and incorporation of offshore banks in Labuan. [1]
- (iv) _____ governs the offshore banking business in Labuan. [1]
- (e) (i) State the statutory body responsible for the supervision of the offshore financial industry in Labuan. [3]
- (ii) What is the general criteria needed to conduct offshore banking business in Labuan? [7]
- (Total:20 marks)

5. (a) What are **five** major differences between onshore banking business (governed by the Banking and Financial Institutions Act 1989) and offshore banking business in the International Offshore Financial Centre in Labuan (governed by the Offshore Banking Act 1990)? [10]
- (b) In relation to the Anti-Money Laundering Act 2001 (AMLA), answer “**True**” or “**False**” for each of the following statements:
- (i) Section 2 of AMLA states that AMLA is applicable even to foreign serious offences or unlawful activities. [1]
- (ii) Section 3 of AMLA provides for some important definitions. In this section, the definition of “financial institution” even covers an institution licensed under the Money-Lender’s Act 1998. [1]
- (iii) AMLA came into force on 15 January 2001. [1]
- (iv) Serious offences under AMLA is extended to certain offences under the Penal Code such as kidnapping, robbery and human trafficking. [1]
- (v) AMLA puts an obligation on the financial institutions to maintain records for 6 years from the date an account is closed or a transaction is completed or terminated. [1]
- (vi) The provisions under section 20 of AMLA override the secrecy obligation imposed by any other written law. [1]
- (c) In relation to the Code of Good Banking Practice, state **four** exceptions where a bank may disclose its customers’ information. [4]
- (Total:20 marks)

6. (a) What is contributory negligence? [2]
- (b) Briefly explain **four** ways in which a power of attorney may be revoked. [8]
- (c) When is a contract voidable? [5]
- (d) (i) Who can act as an offshore bank in Labuan? [3]
- (ii) State the section and statute that support your answer to (d)(i) above. [2]
- (Total:20 marks)

- END OF QUESTION PAPER -

OUTLINE ANSWERS

The comments given in the boxes below indicate the areas of weaknesses the examiners have identified and their advice to future candidates.

Question 1

- Candidates could not explain the legal concepts and principles involved in this question.

1. (a) High Court of Malaya and High Court of Sabah and Sarawak.
- (b) Unwritten law that is applicable to offshore bankers comprises the following:
- English law
 - Judicial decisions of the superior courts
 - Customary law
- (c) (i) Federal Court
- (ii) Sessions
- (iii) Federal Constitution
- (iv) appellate
- (v) doctrine of precedent
- (d) Give any five of the following:
- The Agent has a right to retain all monies due

An agent may retain all monies due to himself, out of any sums received on account of the principal in the business of the agency, in respect of advances made or expenses properly incurred by him in conducting such business and/or for any remuneration as may be payable to him for acting as an agent. – section 170 of the Contracts Act 1950.
 - Agent's right to remuneration

In the absence of any contract, payment for the performance of any act is not due to the agent until the completion of the act. Nevertheless, an agent may detain monies received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold or even despite the fact that the sale may not be actually complete. - section 172 of the Contracts Act 1950.
 - Agent not entitled to remuneration for business misconducted

An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business that he has misconducted. It must be noted that such an agent will then have to compensate the principal for the loss. - section 173 of the Contracts Act 1950.
 - The Agent has a right of lien over his principal's goods in his possession.

Subject to any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal which has been received by the agent until the amount due to himself for commission, disbursements and services rendered in respect of the same has been paid or accounted for to the agent. - section 174 of the Contracts Act 1950.

- The Agent has a right to be indemnified for acts done in the exercise of his authority

Agent to be indemnified against consequences of lawful acts. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him. - section 175 of the Contracts Act 1950.

- Agent to be indemnified against consequences of acts done in good faith

Where one person employs another to do an act, and that agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, even if it causes an injury to the rights of third persons. - section 176 of the Contracts Act 1950.

- The Agent has a right to compensation for injury caused by the principal's neglect

The principal must make compensation to his agent in respect of injury caused to the agent by the principal's neglect or want of skill. - section 178 of the Contracts Act 1950.

Question 2

- Candidates focused on one word or topic in the question and wrote irrelevant answers not required by the question. Some of the candidates answered only parts of the questions.

2. (a) An offer and acceptance can be revoked in any of the following circumstances:

- By the proposer communicating the notice of revocation to the party whom he made the offer to;
- If the time for acceptance as prescribed in the offer has lapsed or, if no time is prescribed, by lapse of a reasonable time;
- The failure by the person accepting the offer to fulfil a condition precedent to acceptance; or
- The death or mental disorder of the proposer provided this fact comes to the knowledge of the acceptor before the acceptance.

(b) (i) False

(ii) True

(iii) False

(iv) False

(v) False

(vi) True

(c) (i) The following torts are relevant to bankers:

- negligence,
- professional negligence,
- conversion,
- defamation, and
- libel.

- (ii) The elements required to prove professional negligence are:
- The negligence is committed in the ordinary course of business or professional affairs;
 - The professional's client or third party seeks information, advice or other professional services from him;
 - The professional is not under a contractual or fiduciary obligation to give the information or advice;
 - The information or advice is given in circumstances in which a reasonable man so asked would know that he was being trusted or that skill/judgement was being relied on; and
 - The professional chooses to give that information or advice i.e. there is no disclaimer or a clear qualification showing that the responsibility is not accepted.

Question 3

- Candidates could not explain the types of offshore trusts and how an offshore trust could be terminated.
- Candidates could not describe how an offshore trust might be rendered invalid and unenforceable in Labuan, but instead gave answers related to power of attorney.

3. (a) The existence of the Companies Act 1965 and the Labuan Trust Companies Act 1990 is solely to assist the incorporation and registration of trust companies in Labuan by residents and non-residents and to provide specific services relating to a trust company.
- (b) Three types of offshore trusts:
- **Trading Trust**
A trust that permits the trust property or funds to be used for the conduct of a business by the trustee as tax planning vehicles. It is also called a commercial trust. The trustees are usually limited liability companies.
 - **Protective Trust**
A trust that in protecting the settlor's interest and intention, may make the interest of the beneficiaries in the trust property, or in any income or capital of such property be terminated or restricted from being alienated or disposed.
 - **Discretionary Trust**
A trust that permits the trustee to administer the trust in any way he deems best for the benefit of the beneficiaries. The trustee has wide powers of investment.
- (c) The offshore trust may be terminated by all the beneficiaries, all of whom must not be minors or legally disabled. The trustee shall distribute the trust property among the beneficiaries within a reasonable time and in accordance with the terms of the trust.
- (d) The lifespan of an offshore trust is up to a maximum of 100 years from the date of creation. This is called the perpetuity period and it is the maximum period that an offshore trust can exist for.
- (e) An offshore trust shall be invalid and unenforceable in Labuan where it requires, purports or encourages the doing of an act which is an offence under the laws of Malaysia. If the act is punishable as a criminal offence and unlawful under the laws of another country or jurisdiction, it is also an offence and unlawful in Malaysia if it is carried out in Malaysia.

Further, where a trust is created and appears as a valid trust but there is in fact no intention on the part of the settlor or trustee to carry out the terms of the trust in accordance with the trust deed. This is known as a sham trust and will also be held as invalid and unenforceable.

Question 4

- Candidates could not state the conditions for a partnership to be dissolved by a court order.
- Candidates explained the framework of offshore banking, instead of stating the general criteria required for conducting offshore banking business.
- Candidates repeated their answers in different parts of the question.

4. (a) An offshore limited partnership must comprise of not less than **two** partners and not more than 20 partners of whom at least one is a general partner and one a limited partner.
- (b) The general partner of an offshore limited partnership has the only authority to bind the partnership of any legal obligation.
- (c) The conditions are:
- the partnership has been conducted contrary to the terms of the agreement.
 - the partnership has been conducted in a manner that is “oppressive” to the limited partner.
 - it is equitable to dissolve the partnership.
- (d) (i) The Labuan Offshore Limited Partnerships Act 1997
- (ii) The Anti-Money Laundering Act 2001
- (iii) The Offshore Companies Act 1990
- (iv) The Offshore Banking Act 1990
- (e) (i) The Labuan Offshore Financial Services Authority or otherwise known as LOFSA is the statutory body solely responsible for regulating and supervising the offshore financial industry in Labuan. LOFSA as the regulator is also responsible for the issuance of business licences, such as the offshore banking licence.
- (ii) The general criteria needed to conduct offshore banking business in Labuan:
- It is a well established bank of international standing in the top 200 range with minimum tier-1 capital of US\$1 billion for international banks and US \$500 million for regional or domestic banks;
 - It has been given a good rating by established international rating agencies;
 - It has an excellent track record of financial performance;
 - It demonstrates a high expertise in international finance and foreign exchange;
 - There is no adverse report or announcement on it in any reliable news sources;
 - It is effectively supervised by a strong home monetary authority; and
 - It is committed to a functional full-fledged operation in Labuan.

As part of its supervisory role, LOFSA exercises stringent vetting of applicants for offshore banking licences. Therefore, even though applicants may satisfy all of the above requirements, it does not automatically mean a granting of the said licence. In addition, every offshore bank in Labuan is required to secure a guarantee from its parent bank and provide an undertaking to LOFSA that it will comply with the financial obligations and requirements imposed, as well as meet all its liabilities in respect of its offshore banking business.

Question 5

- Candidates wrote irrelevant answers on the Code of Good Banking Practice instead of writing on specific exceptions as required by the question.
- Candidates are advised to understand the question and answer as per its requirements.

5. (a) Five major differences between onshore and offshore banking are as follows:

Item	Onshore	Offshore
Currency	Business transactions are conducted in Ringgit	Business transactions are not allowed to be conducted in Ringgit (most transaction are conducted in US Dollars) <u>Exceptions:</u> <ul style="list-style-type: none"> • Defraying administrative costs • Providing ringgit financial guarantees • Investment in ringgit assets
Dealings with residents of Malaysia	There are no restrictions on dealings with residents of Malaysia except for those provided pursuant to the Banking and Financial Institutions Act 1989.	Generally, offshore banks are not allowed to deal with residents of Malaysia unless the residents have obtained the permission of the Controller of Foreign Exchange (the onus is on the residents to obtain permission before transacting with offshore banks.)
Cash deposits	Customers can transact in cash and deposit cash into their accounts.	Customers are not allowed to deposit cash into their accounts.
Checking accounts	Bank can provide checking account services to their customers.	Section 15 of the Offshore Banking Act 1990 prohibits the service of checking accounts.
Regulatory framework	Governed by the Banking and Financial Institutions Act 1989 and taxed under the Income Tax Act 1967.	Governed by the Offshore Banking Act 1990 and taxed under the Labuan Offshore Business Activity Tax Act 1990. Offshore banks are deemed residents for tax purposes. Banks are taxed at the rate of 3% of chargeable profits or RM20,000 per annum at their election.

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

- (c) The four exceptions are:
- where a bank is legally compelled to do so
 - where there is a duty to the public to disclose
 - where the interests of a bank requires disclosure
 - where disclosure is made at the request, or with the consent of the customer

Question 6

- There are no examiner's comments for this question as none of candidates who registered for this subject attempted this question in the April 2005 examination sitting.

6. (a) Contributory negligence is a defense available to a defendant if the plaintiff has contributed in any way to the negligence of the defendant, thereby resulting in the damage suffered. If the defendant succeeds in proving contributory negligence, the damages awarded to the plaintiff will be apportioned and reduced accordingly.
- (b) A power of attorney may be revoked in any one of the following ways:
- by notice of revocation by the donor when the donor decides to revoke the power given.
 - by notice of renunciation by the donee when the donee does not want to act as the attorney.
 - by effluxion of time, frustration or impossibility of performance where the attorney cannot perform a task or the power of attorney is for a limited time and has expired.
 - by operation of law - when prohibited by law, where it is illegal or where there is a court order.
- (c) A contract is voidable when the consent to the said agreement is caused by any one or more of the following elements:
- Coercion,
 - Undue influence,
 - Fraud,
 - Misrepresentation, or
 - Mistake.
- (d) (i) The following persons can act as an offshore bank in Labuan:
- An offshore company that is incorporated under the Offshore Companies Act 1990 (OCA).
 - A foreign offshore company which is incorporated outside Labuan but must be registered under section 21 of the OCA.
 - A Malaysian bank licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983.
- and all these persons must hold a valid licence issued by the Minister of Finance to carry on offshore banking business.
- (ii) Section 4 of the Offshore Banking Act 1990.