

CFL2

Offshore Legislation

13 OCTOBER 1999

1. Time allowed : Three (3) hours
2. Total number of questions : Six (6) questions on 5 pages
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) Legislation is **one** of the **four** constituents of written law in Malaysia.
- (i) State the other **three** constituents of written law. [3]
- (ii) Explain how legislation affect the business of offshore bankers. Your answer should state the various legislation applicable to offshore bankers and their effects on offshore banking business. [7]
- (b) Can arbitration be employed as a means of settlement of disputes which may arise between an offshore bank and a customer? Give reasons for your answer. [7]
- (c) Answer “**True**” or “**False**” for each of the following:
- (i) In Malaysia, the High Courts comprise the High Court of Malaya, the High Court of Sabah and Sarawak and the High Court of the Federal Territory of Labuan. [1]
- (ii) Offshore banking business in Labuan is governed by the Offshore Banking Act 1990. [1]
- (iii) The Exchange Control Notices of Malaysia are not applicable for transactions between offshore banks and residents of Malaysia. [1]
- (Total:20 marks)
2. (a) Answer “**True**” or “**False**” for each of the following:
- (i) A prohibitory injunction is a type of injunction which is a court order requiring something to be done. [1]
- (ii) An injunction is a remedy provided by the common law of England. [1]
- (iii) The legal effect of undue influence is to render the contract voidable at the option of the innocent party. [1]
- (iv) A contract whereby the parties thereto agree to refer disputes to arbitration, instead of the courts, is void as it is an agreement in restraint of legal proceedings. [1]
- (v) The basis of the relationship between offshore bankers and their customers is contractual. [1]
- (b) Ms Elsie Tan was recently employed as an officer of an offshore bank in Labuan. Advise her as to the following torts which she must avoid committing in the course of her work. In doing so, you should advise her on the respective definition, the elements required to establish liability and the defences available, if any, in relation to the following torts:
- (i) professional negligence [5]
- (ii) conversion [5]
- (iii) defamation [5]
- (Total:20 marks)
3. (a) Encik Ali is presently working as an officer in a Malaysian bank licensed under the Banking and Financial Institutions Act 1989 (BAFIA). Encik Ali learns that he may be seconded to work in an offshore bank in Labuan. Advise Encik Ali on the **five** major differences between an offshore bank and a domestic bank licensed under BAFIA. [15]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) The Code of Good Banking Practice is binding and legally enforceable upon offshore banks in Labuan. [1]

- (ii) An offshore limited partnership, once established under the Labuan Offshore Limited Partnerships Act 1997, cannot be subsequently dissolved. [1]
- (iii) Under the Contracts Act 1950, an agent may be indemnified against consequences of all unlawful acts done by the agent in exercise of the authority conferred upon him so long as he has acted in good faith and without negligence. [1]
- (iv) Powers of attorney which are not expressly stated to be irrevocable are revocable. [1]
- (v) A power of attorney is a formal document whereby the “transferor” appoints the “transferee” as his attorney in order to transfer all his rights, title and interests to him. [1]
- (Total:20 marks)
4. (a) Answer “**True**” or “**False**” for each of the following:
- (i) An agreement without consideration is voidable. [1]
- (ii) Forbearance to sue may be considered good consideration. [1]
- (iii) Past consideration is not considered as good consideration under Labuan law. [1]
- (iv) Contract may be discharged by fraud, performance or by breach. [1]
- (v) **One** of the remedies available for breach of contract is damages. [1]
- (b) Offshore bankers owe a duty of care towards their customers. Explain the meaning of “duty of care” in this context. [10]
- (c) Fill in the blanks with the **correct word** in **all** of the following:
- (i) Section 12(1) of the Civil Law Act 1956 provides for _____ negligence in Malaysia. [1]
- (ii) The landmark case on negligence where Lord Atkin laid down the test for the duty of care is the case of _____ v *Stevenson* [1932] AC 562. [1]
- (iii) Fraud is defined in section 17 of the _____ Act 1950 to include acts which are committed with intent to induce another party to enter into a contract. [1]
- (iv) A contract is _____ when there is a change in the circumstances which renders a contract legally or physically impossible of performance. [1]
- (v) Under the explanation to section 74 of the Contracts Act and as stated in *Kabatasan Timber Extraction Co. v Chong Fah Shing*, the party to a contract seeking damages as one of the remedies for breach of contract is under a duty to _____ the loss. [1]
- (Total:20 marks)
5. (a) State the circumstances whereby disclosure of information or documents relating to the affairs or accounts of a customer of an offshore bank is permitted under the Offshore Banking Act 1990. [10]
- (b) Name the following Malaysian statutes (Acts of Parliament):
- (i) The 1996 Act which provides for the creation and recognition of offshore trusts. [2]
- (ii) The 1990 Act which governs the registration and incorporation of offshore banks as offshore companies in Labuan. [2]

- (iii) Offshore banks are exempt dealers under this 1993 Act which means that offshore banks need not be licensed under this Act when dealing in securities. [2]
 - (iv) This 1990 Act (as amended) is the main legislation governing offshore banking business in Labuan. [2]
 - (v) This 1950 Act provides for the law on agency; that is, the law governing agents and their principals. [2]
- (Total:20 marks)

6. (a) In relation to offshore trusts, fill in the blanks with the **correct word** in all of the following:
- (i) A _____ is a person who makes a trust and includes a person who provides trust property to the trust. [1]
 - (ii) A _____ is a person entitled to benefit under a trust or entitled to exercise discretion to distribute property held in trust. [1]
 - (iii) A _____ is a person who holds legal title to the property settled in the trust, but generally has no beneficial interest in the trust. [1]
 - (iv) A _____ has various powers and is appointed to act on behalf of the settlor, much as a “watchdog”, which may include the ability to terminate the services of the trustee and to appoint a new one. [1]
 - (v) A _____ trust is a type of offshore trust in Labuan that, in order to protect 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. [1]
- (b) Explain how an offshore trust may be created; and whether registration of the offshore trust, under the Labuan Offshore Trusts Act 1996, is necessary. [10]
- (c) Name the **two** statutes (Acts of Parliament) which apply and provide for the incorporation and registration of trust companies in Labuan. [2]
- (d) List any **three** types of services normally rendered by trust companies in Labuan. [3]
- (Total:20 marks)

OUTLINE ANSWERS

Question 1

Wrong answers were provided when asked to state three other constituents of written law other than legislation and on “various” legislation applicable to offshore bankers and their effects on offshore banking business.

- (a) (i) The other 3 constituents of written law are:
- Federal Constitution
 - State Constitutions
 - Subsidiary legislation
- (ii) Legislation are laws made by the Parliament in the form of Acts of Parliament or statutes. Offshore legislation affects the business of offshore bankers to a large extent.

Among the various legislation applicable to offshore bankers are:

- Offshore Companies Act 1990
- Offshore Banking Act 1990
- Labuan Offshore Business Activity Tax Act 1990 (LOBATA)
- Labuan Offshore Financial Services Authority (LOFSA) Act 1996; and
- Labuan Offshore Securities Industry Act 1998.

Their effects on offshore banking business are:

- The Offshore Companies Act 1990 sets out the legal framework for the incorporation, registration and administration of offshore companies and foreign offshore companies in Labuan.
 - The Offshore Banking Act 1990 (Amendment Act 1996) governs offshore banking business in Labuan. The Act regulates the operations of persons carrying on offshore banking business in the Federal Territory of Labuan. It covers matters such as licensing and duties and responsibilities of licensed offshore banks.
 - The profits of offshore banks are taxed under the LOBATA.
 - The LOFSA Act establishes the LOFSA which is the statutory body solely responsible for the supervision of the offshore financial industry in Labuan.
 - The Labuan Offshore Securities Industry Act 1998 provides for offshore banks to act as custodians for mutual funds and for the administration of public funds in or from within Labuan.
- (b) Yes, arbitration can be employed as a means of settlement of disputes that may arise between an offshore bank and a customer. In fact, one of the usual forms used in the settlement of conflicts is arbitration. Arbitration can be defined as a settlement of dispute by an appointment of an arbitrator which is agreed to by the parties to the contract.

By virtue of Section 2 of the Arbitration Act 1952, in the event of the parties to a written agreement agree to submit present or future differences to arbitration, by way of an arbitration clause, arbitration applies.

However, Section 34 of the Arbitration Act 1952 provides that the Act does not apply to arbitration held under The Convention on the Settlement of Investments Disputes between States and Nationals of Other States 1965 or the United Nations Commission on International Trade Law Arbitration Rules and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

Thus, arbitration can be employed as a means of settlement of disputes that may arise between an offshore bank and a customer so long as the contract entered between them provides for it expressly.

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

Question 2

Good answers were given in Question 2(a) as this was a simple “True” or “False” question. On the topic of Law of Tort, good answers were provided on professional negligence but answers were poor for conversion and defamation.

- (a) (i) False
(ii) False
(iii) True
(iv) False
(v) True
- (b) (i) Professional negligence is where if one is engaged in a transaction in which he holds himself out as having professional skill, the law expects him to show the average amount of competence associated with the proper discharge of the duties of that profession or trade or calling; and if he falls short of that and injures someone consequently, he is not behaving reasonably.

Negligence is judged by the test of the ordinary skilled man exercising and professing to have that special skill.

The elements required to prove professional negligence are:

- The negligence is committed in the ordinary course of business or professional affairs;
 - The professional’s clients or a 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 or judgement was being relied on; and
 - The professional chooses to give that information or advice. There is no disclaimer or a clear qualification showing that responsibility is not accepted. (If there is such a disclaimer then there is a defence on this ground.)
- (ii) Conversion can be defined as a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owners’ right of possession.

The elements required to establish liability are:

- Proof of the defendant’s conduct which amounts to a denial of the plaintiff’s rights or the assertion of inconsistent rights;
- Wilful and wrongful interference with the plaintiff’s goods.

The defences available are:

- Failure to inform the bank of forgery – estoppel. See *Greenwood v Martins Bank*.

- *Ex turpi causa non oritur actio* – a right of action will not arise from a base cause. See *Thackwell v Barclay's Bank*.
 - Plaintiff has himself to blame. See *London Joint Stock Bank v Macmillan and Arthur*.
- (iii) Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him.

The elements of defamation are:

- The words were defamatory
- The words referred to the plaintiff
- The words were published

The defences available for defamation are:

- Justification (or the truth)
- Fair comment
- Privilege

Question 3

Answers on the five major differences between an offshore bank and a domestic bank licensed under Banking and Financial Institutions Act 1989 (BAFIA) were average.

- (a) The five major differences between an offshore bank and a domestic bank licensed under BAFIA lie basically in their nature of businesses carried out and their respective operations.

First, offshore banks generally cannot conduct business transactions in ringgit. Exceptions are where such transactions are for the purpose of defraying administrative costs, providing ringgit financial guarantees and investments in ringgit assets. Domestic banks conduct their business transactions in ringgit.

Secondly, as a general rule, offshore banks are not allowed to deal with residents of Malaysia unless the residents have obtained the permission of the Controller of Foreign Exchange to do so. On the other hand, domestic banks can deal with residents of Malaysia generally.

Thirdly, customers of offshore banks are not allowed to deposit cash into their accounts; whereas, customers of domestic banks are permitted to transact in cash and to deposit cash into their accounts.

Fourthly, offshore banks, unlike domestic banks, cannot provide current account (or cheque writing) services to their customers.

Lastly, offshore banks are governed by the Offshore Banking Act 1990 and are taxed under the Labuan Offshore Business Activity Tax Act 1990; whilst, domestic banks are governed by the Banking and Financial Institutions Act 1989 and are taxed under the Income Tax Act 1967.

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

Question 4

The question on “duty of care” was poorly answered. Wrong answers were provided when asked to provide some basic terminology, which clearly showed lack of effort in preparation for this examination.

- (b) Offshore bankers must not be negligent in the discharge of their duties. This is mainly because offshore bankers owe a duty of care towards their customers. Lord Wright in *Lochgelly Iron and Coal Co. v Mc.Mullan*, defined negligence as a tort which consists of a legal duty of care towards the plaintiff and there is a breach of this duty of care by the defendant, thereby causing damage to the plaintiff.

Whether or not the defendant owes to the plaintiff a duty of care depends on the test of reasonable foresight, the “neighbour” principle. Under this test, a duty of care exists if it was reasonably foreseeable that the plaintiff would be injured as a consequence of the defendant’s acts or omissions – *Donoghue v Stevenson*.

In *Haley v London Electricity Board*, it was held that a plaintiff need not be identifiable specifically by the defendant. It is sufficient if the plaintiff is one of a class of persons within the area of foreseeable injury.

Thus, offshore bankers owe a duty of care towards their customers as a consequence of their banker-customer relationship; and they should not breach this duty of care. Otherwise, they may be held liable for damages for their negligence.

- (c) (i) contributory
(ii) Donoghue
(iii) Contracts
(iv) frustrated
(v) mitigate

Question 5

The question on the permitted disclosures under the Offshore Banking Act 1990 was poorly handled. There was a lack of basic knowledge on the various offshore legislation.

- (a) The importance of confidentiality in offshore banking business is enshrined in Section 21 of the Offshore Banking Act 1990. The circumstances whereby disclosure of information or documents relating to the affairs or accounts of a customer of an offshore bank is permitted under the Offshore Banking Act 1990 are:
- (i) When such disclosure is in the interest of the internal security of Malaysia; or
 - (ii) When an order is granted by the High Court by application made by:
 - an interested party if a customer is dead, bankrupt or in the case of a company, being wound up;
 - a public officer in the course of investigating an offence;
 - the Labuan Offshore Financial Services Authority (LOFSA), 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.
- (b) (i) Labuan Offshore Trusts Act 1996
(ii) Offshore Companies Act 1990
(iii) Securities Industry Act 1993
(iv) Offshore Banking Act 1990
(v) Contracts Act 1950

Question 6

This question was not attempted.

- (a) (i) settlor
(ii) beneficiary
(iii) trustee
(iv) protector
(v) protective
- (b) The Labuan Offshore Trusts Act 1996 (LOTA) governs the creation and recognition of offshore trusts in the Labuan International Offshore Financial Centre (IOFC) and is administered by the Labuan Offshore Financial Services Authority (LOFSA). The various types of offshore trusts include purpose trusts, charitable trusts, trading trusts, finance trusts, personal trusts, protective trusts and discretionary trusts.

Among the requirements for a trust to be an offshore trust created in the IOFC are that the settlor is a non-resident of Malaysia at the time of the creation of the trust, the property does not involve any immovable land in Malaysia and the beneficiaries are non-residents.

An offshore trust may be created by a will or other instruments or agreements in writing including a trust deed and a unilateral declaration of trust.

Strictly speaking, the registration of the offshore trust is not required; but a provision exists for optional registration thereof by submitting a statement containing certain particulars regarding the trust. Any subsequent changes thereto must be notified to the LOFTA in a prescribed form within one month of the change and shall not have effect until it is registered.

With the registration, a certificate of registration will be issued. Under the LOTA an offshore trust may also be validly created outside Labuan if the settlor has nominated the LOTA as the proper law of the trust.

- (c) (i) Companies Act 1965
(ii) Labuan Trust Companies Act 1990
- (d) The types of services normally rendered by trust companies in Labuan are:
- (i) Trust services – trustee for offshore trusts
(ii) Secretarial services
(iii) Corporate, management, accounting and company management services
(iv) Other services such as executor of a will and administration of estates.