

CFL2

Offshore Legislation

11 OCTOBER 2000

1. Time allowed : Three (3) hours
2. Total number of questions : Six (6) questions
3. Number of questions to be answered : All 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) Choose the **correct** word from the words in the brackets for each of the following:
- (i) (Private, Public, Tort, International, Contract) law governs the relationship between individuals and the State, and it covers, *inter alia*, criminal law. [1]
 - (ii) (Private, Public, Municipal, International, Trust) law provides for the making of contracts, wills, ownership and transfer of property in Labuan. [1]
 - (iii) Most of the written laws applicable to the offshore banker are in the form of (case law, common law, Constitution, legislation, equity). [1]
 - (iv) The functioning of the system of judicial (comity, discretion, independence, precedents, dependence) is based on the hierarchy of decisions; and inevitably, the hierarchy of the courts. [1]
 - (v) English land law is not applicable in Labuan by virtue of the (Land, Equity, Common, Civil, Private) Law Act 1956. [1]
- (b) When there is a “conflict” of the law applicable between offshore banks and their customers, explain how the law, which is to be applicable, is determined when resolving conflicts between them. [5]
- (c) State **five** of the various persons or bodies (according to the definition in section 2(1) of the Labuan Offshore Financial Services Authority Act 1996 as amended in 1998) who may provide “offshore financial services” in Labuan. [10]
(Total:20 marks)
2. (a) In the context of Labuan International Offshore Financial Centre, briefly explain the meaning of the following terms:
- (i) Investment banking business [5]
 - (ii) Offshore banking business [5]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) The relationship between an offshore bank and a customer is essentially vicarious in nature. [1]
 - (ii) A resident of Malaysia would still be required to comply with the relevant exchange control requirements when transacting with an offshore bank in Labuan. [1]
 - (iii) As a general rule, an offshore bank is permitted to transact business only in currencies other than the Malaysian ringgit. [1]
 - (iv) An offshore bank is not permitted to carry on business in Malaysia other than from Labuan, although some banks are permitted to have marketing offices in Kuala Lumpur. [1]
 - (v) The Labuan Offshore Business Activity Act 1990 is the statute which provides that offshore banks are free from tax. [1]
- (c) State **two** circumstances under which the relationship between an offshore bank and its customer may be terminated. [5]
(Total:20 marks)
3. (a) Describe the legal nature of the relationship between an offshore bank and its customer. [10]

- (b) Fill in the blanks with the **correct word(s)** in each of the following:
- (i) Section 135 of the _____ Act 1950 provides that “a person employed to do any act for another or to represent another in dealings with third persons” are called “agents”. [1]
 - (ii) In the context of the laws governing agencies, the doctrine of “holding out” is also known as the doctrine of _____. [1]
 - (iii) Offshore banks are exempt dealers under the Securities _____ Act 1993 and therefore need not be licensed under this Act when dealing in securities. [1]
 - (iv) Agency may arise by way of ratification by the principal and such ratification is _____, that is, it dates back to the time when the original contract was made by the agent and not from the date of the principal's ratification. [1]
 - (v) When the agent is made a bankrupt, the agent's rights and liabilities are vested in the _____ and, therefore, the agency relationship ceases. [1]
- (c) Briefly state the reasons why the law on agency is relevant to offshore bankers. [5]
(Total:20 marks)
4. (a) State the purpose or objective of the Labuan Offshore Limited Partnership Act 1997 (LOLPA). [5]
- (b) Describe the **three** types of offshore limited partnerships, which may be established under the LOLPA. [5]
- (c) In relation to the **LOLPA**, answer “**True**” or “**False**” for each of the following:
- (i) An offshore limited partnership must be registered with the Labuan Offshore Financial Services Authority (LOFSA) by filing all the necessary documents through a trust company. [1]
 - (ii) There are **three** types of partners in the limited partnership; namely pretended, general and limited partners. [1]
 - (iii) **One** of the ways whereby a limited partnership can be dissolved is by a general partner filing a notice of dissolution with LOFSA. [1]
 - (iv) An offshore limited partnership can have **one** general partner and **one** limited partner. [1]
 - (v) Legal proceedings relating to partners cannot be published and must be held in camera. [1]
- (d) By virtue of section 37 of the Labuan Offshore Trusts Act 1996, unless the terms of the trust provide to the contrary, a trustee may delegate the performance of the trust vested in him by way of “power of attorney”.
Explain the meaning of the term “power of attorney”. [5]
(Total:20 marks)
5. (a) Offshore bankers and their customers enter into contracts. Describe **three** ways in which contracts may be discharged. [10]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) One of the basic elements constituting a contract is proposal. [1]
 - (ii) Capacity, being one of the elements constituting a valid contract, is the ability of a customer to repay the credit facility. [1]
 - (iii) An agreement without consideration is still valid, so long as there is certainty in the contract. [1]

- (iv) A void contract is an agreement not enforceable by law. [1]
- (v) Terms of a contract may be implied either by natural love and affection or forbearance. [1]
- (c) A banker erroneously credited Mr Tom's cash deposit into Mr Jerry's account. Mr Tom is now claiming for damages from his banker for negligence and conversion.
- Explain what is "conversion" and state the elements constituting conversion. [5]
(Total:20 marks)
6. (a) In relation to offshore trusts, describe the powers **and** duties of each of the following:
- (i) Trustee [5]
- (ii) Protector [5]
- (b) In the creation of an offshore trust, the settlor may provide the trustee with a "letter of wishes". State the purpose of a "letter of wishes". [5]
- (c) In relation to **offshore trust**, state the terms which fit the following descriptions:
- (i) The maximum period an offshore trust can exist or the life span of an offshore trust, is up to a maximum of **100** years from the date of creation. [2]
- (ii) A means by which the state authority imposes control over an individual's power to make testamentary dispositions. [2]
- (iii) A trust, sometimes called a "commercial trust", that permits the trust property or funds to be used for the conduct of a business by the trustee as a tax planning vehicle. [1]
(Total:20 marks)

OUTLINE ANSWERS

Question 1

Generally, the candidates attempting this question gave satisfactory answers for part (a), where they were required to choose the correct word to describe various terms in the Malaysian law. The candidates, however, lost marks for parts (b) and (c). They failed to answer part (b) correctly, as they seem to lack knowledge on resolving conflicts of the law. Meanwhile for part (c), candidates failed to read the question properly and provided answers that were irrelevant, i.e. they only stated the legislation instead of naming the “persons or bodies” listed in the LOFSA Act 1996 that may provide the “offshore financial services”.

1. (a) (i) Public
(ii) Private
(iii) legislation
(iv) precedents
(v) Civil
- (b) When resolving disputes between offshore banks and their customers and there is a “conflict” of the law involved, the law applicable will be determined in the contractual agreement entered into by the offshore bank and their customers. Thus, where the agreement specifies the choice of law and country of jurisdiction, then such specification would become part of the terms and conditions of the agreement and these would apply accordingly.

On the other hand, where the agreement does not specify the choice of law and country of jurisdiction, then the parties would be governed by the laws of the country where the agreement was executed. The Offshore Banking Act 1990 does not provide the mechanism for resolving conflicts.

- (c) Five of the various persons or bodies who may provide “offshore financial services” in Labuan are:
- (i) an offshore company or foreign offshore company registered under the Offshore Companies Act 1990;
- (ii) any domestic company or foreign company registered under the Labuan Trust Companies Act, 1990;
- (iii) any person licensed or registered, as the case may be, under the Offshore Banking Act 1990, the Offshore Insurance Act 1990 or any other law relating to offshore financial services;
- (iv) an offshore limited partnership established under the Labuan Offshore Limited Partnership Act 1997;
- (v) a fund established or a fund manager licensed or a fund administrator registered under the Labuan Offshore Securities Industry Act 1998; and

Question 2

A generally well answered question. However, most candidates lost marks when they failed to state the types of businesses provided when explaining the meaning of investment banking business and offshore banking business. Candidates should have provided their answers in relation to the definitions in the relevant offshore legislation.

2. (a) (i) Investment banking business is defined in the Offshore Banking Act 1990, as the business (conducted in any currency other than the Malaysian ringgit) of:
- providing credit facilities;
 - providing consultancy and advisory services relating to corporate and investment matters or making and managing investments on behalf of any person;

- undertaking foreign exchange transactions, interest rate swaps, dealings in derivative instruments or any other similar risk management activities;
 - other business as may be approved by the Minister.
- (ii) Offshore banking business is defined in the Offshore Banking Act 1990, to include the businesses of:
- receiving deposits on current account, deposit account, savings account, or any other account as may be specified by the Authority;
 - providing credit facilities;
 - offshore investment banking business;
 - Islamic banking business;
 - building credit business, credit token business, development finance business, leasing business or factoring business.

All the above businesses can be conducted in any currency other than the Malaysian ringgit.

- (b) (i) False
(ii) True
(iii) True
(iv) True
(v) False
- (c) Two circumstances whereby the legal relationship between an offshore bank and its customer is terminated are:
- by mutual agreement between the offshore bank and the customer; and
 - by unilateral act whereby either the customer (eg. by withdrawing all his monies and instructs the bank to close his account) or the offshore bank gives reasonable notice to the customer to terminate the account.

Question 3

Candidates were unable to describe the legal nature of the relationship between an offshore bank and its customer. Some of the answers given were too brief and contained few points that were insufficient, for the 10 marks allocated to that sub-question. However, some of them managed to perform well in the second part of the question, which tested their knowledge on law on agency.

3. (a) The legal nature of the relationship between an offshore bank and its customer is basically contractual in nature. Thus contractual terms may be expressed (in writing or oral) or implied (for instance, by the courts or by customs or practice of bankers).

Under this contractual relationship, the banker-customer relationship may be that of debtor-creditor. Where the customer places a deposit in the bank, the bank is the debtor and the customer is the creditor. The position is reverse in a loan situation, in the granting of credit facilities to its customer, the banker is the creditor and its customer is the debtor.

The nature of the banker's relationship with its customer can also be said to be that of principal and agent. The banker often acts as the customer's agent and obeys instructions of or acts on behalf of the customer.

Additionally, the relationship may be described as being fiduciary in nature. The offshore bank should act in good faith and with reasonable care in its dealings with its customer and should not abuse its more advantageous position as banker. For instance, the offshore banker should be guided by the Code of Good Banking Practice when dealing with its customers.

- (b) (i) Contracts
(ii) estoppel
(iii) Industry
(iv) retrospective

- (v) Official Assignee
- (c) The law on agency is relevant to bankers as the relation between the offshore banker and its customer may be said to be based on agency. Bankers act as agents for their customers and act upon the lawful instructions given by their customers.

Bankers may also be dealing with agents who operate the accounts on behalf of their principals, example through mandates or powers of attorney. There may also be instances where a person is carrying on a business as an agent and the principals are residents in another country. Sometimes, negotiable instruments may be signed by agents. In these circumstances, some legal implications may arise and the law on agency comes into play.

Question 4

This direct question on Labuan Offshore Limited Partnership Act 1997 (LOLPA) was attempted by all and most of them managed to secure above 60% of the overall mark for this question. An easy question for those who were well prepared for the examination.

4. (a) The purpose or objective of the Labuan Offshore Limited Partnership Act 1997 (LOLPA) provides for the establishment, regulation and dissolution of an offshore limited partnership and for matters connected with the operations of a partnership.

The LOLPA therefore provides a new form of investment vehicle to the offshore players. Thus apart from establishing offshore companies, offshore players may form offshore limited partnerships in Labuan. LOLPA allows investors to have limited liabilities if they are not involved actively in the operation of partnerships.

- (b) The three types of offshore limited partnerships are:
- offshore professional partnership which can only be formed by professionals who carry on practice in accounting, actuarial science, engineering or law;
 - offshore project partnerships which are established solely for the purpose of undertaking the project or business specified in the partnership agreement which would provide that the partnership will be dissolved after the completion of the project and all the partners must be a body corporate; and
 - offshore general limited partnerships formed by any person for any lawful purpose.
- (c) (i) True
(ii) False
(iii) True
(iv) True
(v) True
- (d) A power of attorney is a formal instrument by which one person empowers another to represent him, or act in his stead, for certain purposes. In other words, it is a formal document whereby the donor appoints the donee as his attorney to act on his behalf. Such powers of attorney may confer general powers or limited powers. Powers of attorney may also be revocable or irrevocable in nature.

Question 5

A question attempted by all candidates was a three-part question on contracts. Candidates attempting this question on “contracts” were unable to provide satisfactory answers. The first part tested candidates’ knowledge on the ways in which contracts may be discharged. Most of the candidates provided completely wrong answers. Most of the candidates did not read the question properly or did not have the relevant knowledge needed to answer this question. Similarly, candidates lost marks for the third part, when they failed to explain the “elements constituting conversion”.

5. (a) Three ways in which a contract may be discharged are:
- frustration;

- performance; and
- by breach.

A contract is frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. Section 57(2) of the Contracts Act provides that a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Cases on frustration include *Maritime National Fish Ltd v Ocean Trawlers Ltd.*, *Berney v Tronoh Mines* and *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd*.

A contract may be discharged by performance. As a general rule, performance must be exact and precise and should be in accordance with what the parties had promised. Section 38(1) of the Contracts Act 1950 provides that parties to a contract must either perform or offer to perform their respective promises, unless such performance has been dispensed with by any law.

Contracts may also be discharged by breach. Where one of the parties indicates to the other either by conduct or in clear terms an intention not to go on with the contract, the party is said to have repudiated or renounced the contract. A refusal to perform a contract may occur before the time for performance is due (anticipatory breach), or during the time of performance itself. A refusal to perform a contract when performance is due would amount to a discharge.

Like refusal to perform, a party may put an end to the contract if the other has disabled himself from performing either before the time due for performance or during the time of performance. A contract is discharged only if the disability to perform is brought about through the fault of the party concerned. If the disability is caused through the occurrence of some other events, beyond the control of the parties, the contract may be discharged through frustration.

- (b) (i) True
(ii) False
(iii) False
(iv) True
(v) False
- (c) “Conversion” is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner’s right of possession.

The elements constituting conversion are that:

- the defendant’s conduct is proven to amount to a denial of the plaintiff’s rights or the assertion of inconsistent rights; and
- there was willful and wrongful interference with the plaintiff’s goods.

Question 6

Another badly answered question was on offshore trust. Many of the candidates could not state the relevant terms and gave answers that were completely wrong.

6. (a) (i) Subject to the terms of the trust concerned and the Labuan Offshore Trusts Act (LOTA), a trustee has all the powers of a beneficial owner in relation to the trust property. He/she must exercise his/her powers in the interest of the beneficiaries and in accordance with the terms of the trust.

There are express provisions in the LOTA on the duties of the trustee. Generally, he/she must exercise them with due diligence and to the best of his/her ability and skill giving regards to duty of care. Among his/her duties are the duties to ensure that the trust property is vested in him/her or is under his/her control, to preserve and enhance the value of the trust property and to disclose any illegal activities suspected in relation to the trusts.

- (ii) The powers of the protectors may be specified in the trust deed and in the absence of such provision, the Labuan Offshore Trusts Act (LOTA) sets out the protectors' relationship and duties in respect of the trust. The powers granted to protectors are to veto certain specified trustee powers by means of a provision in the trust deed that these trustee powers cannot be exercised without the prior consent of the protector and to appoint and remove a trustee.

Protectors are appointed by settlors who may still want to retain some "influence" over the trustees even though these settlors have given up legal ownership. The duties of protectors are basically to act as a control mechanism and to oversee the trustee in the exercise of his duties, and in the management of the property.

- (b) The purpose of having a "letter of wishes" is for the settlor to retain some "influence" over the trustees. The letter of wishes is basically a confidential communication from the settlor to the trustee indicating his preferences as to how he would wish the trustee to manage and deal with the trust property.

The Labuan Offshore Trusts Act (LOTA) states that the trustee may have regard to the letter of wishes when exercising any functions conferred upon him by the terms of the trust.

- (c)
 - (i) "perpetuity period"
 - (ii) "forced heirship"
 - (iii) "trading" trust.