

CFL2

Offshore Legislation

8 OCTOBER 2003

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) (i) Name and briefly describe the sources of written law in Malaysia. [8]
(ii) Give a brief definition of unwritten law. [2]
- (b) (i) List **six** situations in which a power of attorney may be revoked involuntarily. [6]
(ii) How is the process of authentication of a power of attorney in Malaysia? [4]
(Total:20 marks)
2. (a) In relation to the Labuan Offshore Trusts Act 1996 (LOTA), answer “**True**” or “**False**” for each of the following statements:
- (i) Pursuant to section 37(7) of LOTA, the donor is bound by and is liable for all acts or defaults of the donee, done or purportedly done under the power of attorney as if they were his own acts or default. [1]
- (ii) Section 37 of LOTA allows a trustee of an offshore trust to delegate his powers by way of a power of attorney (unless prohibited by the terms of the trust). [1]
- (iii) For offshore bankers, the statutory provisions relating to powers of attorney are found in LOTA. [1]
- (iv) Section 41 of LOTA contains the relevant provisions for confidentiality in relation to trusts. [1]
- (v) Section 42(8) of LOTA states that where two or more trustees are liable in respect of a breach of trust, their liability shall be joint and several. [1]
- (b) State **four** parties that are involved in the setting up of a trust. In your answer, give brief descriptions on the roles and functions of each party. [8]
- (c) Describe how an offshore trust may be rendered invalid and unenforceable in Labuan. [4]
- (d) Name any **three** types of offshore trust that can be set up in Labuan. [3]
(Total:20 marks)
3. (a) Mr Thomas Ng will be going overseas for an extended period and he needs someone to look after his business and financial affairs while he is away. Mr Ng has heard of the term “agency” but is unsure what it means and how to appoint an agent. Mr Ng has now come to you for advice on the following:
- (i) What is an agency? [2]
- (ii) How can an agent be appointed by a principal? In your answer, explain to Mr Ng the best way for him to appoint an agent and give your reason why you think that is the best way for Mr Ng to appoint an agent. [5]
- (iii) Explain briefly to Mr Ng **two** ways how he can appoint someone to look after his bank accounts while he is away. [4]
- (b) After careful contemplation of your earlier advice, Mr Ng now returns to see you because he is still troubled by certain doubts. Mr Ng is worried that the agent may do something wrong while Mr Ng is away overseas or go beyond his authority in some way or other.
- (i) Explain to Mr Ng how a principal is affected by fraudulent acts of his agent. [3]
- (ii) The general rule is that an agent has a duty not to delegate his authority as the relationship between a principal and his agent is a personal one.
- State the exceptions to the above general rule. [6]
(Total:20 marks)

4. (a) In relation to the law of tort, fill in the blanks with the **correct** word(s) for each of the following:
- (i) The law of tort is a branch of _____ law. [1]
 - (ii) In establishing negligence, an element that must be satisfied is that the damage suffered by a plaintiff must not be too _____. [1]
 - (iii) The test for professional negligence is judged by the ordinary _____ man exercising and professing to have that special skill. [1]
 - (iv) _____ is the tort which protects a person's reputation. [1]
 - (v) _____ is the compensation which the court may grant to the plaintiff if all the elements of negligence are on the part of the defendant and have been successfully proven. [1]
- (b) (i) The Anti-Money Laundering Act 2001 (AMLA) provides for the offence of money laundering.
State the **three** other main provisions of AMLA. [3]
- (ii) What offences does section 2 of AMLA apply to? [3]
- (c) (i) What is a void contract? [2]
- (ii) State any **five** types of contracts/agreements which are void. [5]
- (iii) Briefly explain the term "right of restitution". [2]
- (Total:20 marks)

5. (a) In relation to offshore partnership, answer the following questions:
- (i) List the main advantages of creating a limited partnership under the Labuan Offshore Limited Partnership Act 1997. [3]
 - (ii) Who has the only authority to bind a partnership of any legal obligation? [1]
 - (iii) What are the rights of a limited partner? [5]
 - (iv) What is the minimum number of partners required? [1]
 - (v) What is the maximum number of partners allowed? [1]
 - (vi) State who must act as one of the partners in an offshore limited partnership. [3]
- (b) (i) In relation to a banker-customer relationship, list the rights of:
- (aa) A banker [2]
 - (bb) A customer [2]
- (ii) How can the banker-customer relationship be terminated? [2]
- (Total:20 marks)

6. (a) Name the **five** Acts that govern offshore banking in Labuan. [5]
- (b) Answer "**True**" or "**False**" for each of the following statements:
- (i) In principle, an offshore bank is not permitted to transact business in "Ringgit Malaysia". [1]
 - (ii) Offshore banks need not be licensed when dealing in securities pursuant to the Securities Industry Act 1983. [1]
 - (iii) An offshore bank is not allowed to carry on business in Malaysia except from Labuan and Kuala Lumpur. [1]
 - (iv) Customers of offshore banks are not allowed to deposit cash into their accounts. [1]
- (c) Fill in the blanks with the **correct** word(s) for each of the following:
- (i) Offshore banking services are carried out by _____. [1]
 - (ii) Section 15 of the Offshore Banking Act prohibits an offshore bank from providing the service of a _____. [1]
 - (iii) The Anti-Money Laundering Act 2001 came into force on _____. [1]
- (d) (i) Name the Acts that govern the incorporation and registration of trust companies in the Labuan International Offshore Financial Centre. [2]
- (ii) Briefly compare and contrast a "trust" with a "company". [6]

- END OF QUESTION PAPER -

OUTLINE ANSWERS

Questions 1

While candidates generally answered most of the topics well they were not able to describe the sources of written law in detail. While the position of donor and donee is similar to that of a principal and an agent, candidates must know where the similarities lie and the differences between them.

1. (a) (i) Written law consists of the following:
 - **The Federal Constitution**
The Federal Constitution is the supreme law of the country and any law passed by Parliament, which is inconsistent with the Federal Constitution shall be, to the extent of such inconsistency, void.
 - **State Legislation**
An Enactment is legislation made by the State Legislature. The legislative assembly is known as the Dewan Undangan Negeri. All Enactments passed by the State Assembly are submitted for the assent of the Sultan or the Yang Di Pertua Negeri before they become law.
 - **Legislation**
Legislation are laws made by Parliament, in the form of an Act of parliament or Statute. Legislation becomes law only after a formal process in both the Houses of Parliament and upon receipt of the Royal Assent.
 - **Subsidiary Legislation**
Pursuant to the Interpretation Act 1967, “subsidiary legislation” is defined as any proclamation, rule, regulation, order, notification, by-law or other instruments made under any ordinance, enactment or other lawful authority and having legislative effect.
- (ii) Unwritten law is defined as law which is non-legislative or statutory, i.e. not enacted by the legislature and not codified in the Constitution.
- (b) (i) Involuntary revocation of a power of attorney occurs in the following 6 situations:
 - Result of death
 - Mental incapacity of the donor
 - Mental incapacity of the donee
 - Effluxion of time
 - Execution of the authority
 - Frustration or impossibility
- (ii) **Process of Authentication**
A power of attorney must be made by deed. This means it must be signed by the donor in the presence of a witness attesting to his signature or is signed at the donor’s direction in his presence and the presence of two witnesses who attest to his signature.

Questions 2

Generally all candidates were able to answer this question satisfactorily. However, candidates had difficulty in answering the question on how an offshore trust may be rendered invalid and unenforceable.

2. (a) (i) True
(ii) True
(iii) True
(iv) True
(v) True
- (b) Generally, there are four parties involved in setting up a trust:
- **Settlor**
A settlor is a person who creates the trust and includes a person who provides trust property to the trust. In essence, the settlor is disposing off the legal title to the property to the trustee.
 - **Beneficiary**
A beneficiary is the person entitled to benefit under the trust or entitled to exercise discretion to distribute the property held in the trust. Generally there are two categories of beneficiaries. Capital beneficiaries are those entitled to the capital of the trust at a future date. Income beneficiaries are those individuals entitled only to the income of the trust.
 - **Trustee**
A trustee is a person appointed to act as a trustee of a trust to whom a property has been transferred. He holds the legal title to the property held under the trust but generally holds no beneficial interest in the trust.
 - **Protector**
A protector is a person appointed to act on behalf of the settlor in protecting the interest of the settlor and may be granted wide powers. The protector links the settlor and the trustee. His powers, as a watchdog include the ability to terminate the services of the trustee and appoint a new one.
- (c) 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.
- (d) Choose any 3 of the following trusts:
- Purpose trust
 - Charitable trust
 - Trading trust
 - Finance trust
 - Personal trust
 - Protective trust
 - Discretionary trust

Questions 3

Candidates' overall performance in this question was poor. They were unable to answer part (b) (ii) of the question.

3. (a) (i) An agency is the relationship that is created between the principal and his agent who is authorised to act for the principal or represent him in his dealings with a third party.
- (ii) An agent may be appointed in any one of the following ways:
- **Express appointment** – by the principal either in written or oral form:
 - **Implied appointment** – whereby the law infers the creation of an agency by implication when a person by his words or conduct holds out another person as having authority to act for him.
- Mr Ng is hereby advised that the best method to engage an agent would be to give **express authority in written form** for example by way of a power of attorney. This method safeguards the principal as he can specifically outline or state the matters in which he wishes the agent to act on his behalf.
- (iii) Mr Ng can give a mandate or a power of attorney to his agent to operate his bank account. This is the preferred method of appointment for the banks because supporting documents can then evidence the appointment of the agent and the powers held by the agent can be assessed. Alternatively, Mr Ng may simply have a written letter with instructions to the bank to accept the signature of a third party on the account and this will suffice in appointing an agent.
- (b) (i) Where the acts of fraud are committed by the agent in the course of their business, the principal is bound. However, if the agent commits fraudulent acts outside of his authority, then the principal is not affected by the fraud.
- (ii) The exceptions to the general rule of delegation are:
- Where the principal approves or consents to the delegation of the authority
 - Where it is presumed from the conduct of the parties that the agent shall have power to delegate his authority
 - Where the custom or practice of the trade or business permits delegation
 - Where the nature of the agency is such that delegation of the authority to another person is necessary to complete the business
 - In case of necessity or an unforeseen emergency
 - Where the act to be done is purely ministerial or clerical and does not involve the exercise of discretion

Questions 4

Candidates performed poorly in most parts of the question especially those relating to void contracts and rights of restitution. Candidates need to at least know the main provisions of Anti-Money Laundering Act 2001 (AMLA) because it provides the measures against money laundering, the forfeiture of property and the requirement of record keeping.

4. (a) (i) civil
(ii) remote
(iii) skilled
(iv) Defamation
(v) Damages
- (b) (i) The 3 other main provisions of the AMLA are:
- the measures to be taken for the prevention of money laundering
 - the forfeiture of property derived from or involved in money laundering
 - the requirements of record-keeping and reporting of suspicious transactions by reporting institutions
- (ii) Section 2 of the AMLA applies to:
- Serious offences, foreign serious offences or unlawful activity either in the past or future.
- or**
- Any movable or immovable tangible or intangible property or interest therein (worldwide)
- (c) (i) A void contract is an agreement that is not enforceable by law because the consideration or object of that agreement is unlawful.
- (ii) Any 5 of the following:
- agreements without consideration;
 - an agreement in restraint of marriage;
 - an agreement in restraint of trade;
 - an agreement in restraint of legal proceedings;
 - an agreement with uncertain meaning; and
 - an agreement by way of wager.
- (iii) When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such an agreement or contract is bound to restore it or to pay adequate compensation for the same to the person from whom he received it.

Questions 5

All candidates, who attempted this question, generally answered well. However, part (a) (iv) was a challenge to them. Their answers showed that they were not sure as to who should be included as a partner in an offshore limited partnership.

5. (a) (i) The main advantages of creating a limited partnership under the Labuan Offshore Limited Partnerships Act 1997 (LOLPA):
- It allows investors to have limited liabilities if they are not actively involved in the operation of the partnerships.
 - It also allows any person (including residents of Malaysia) to form an offshore partnership for any lawful purpose.
- (ii) The general partner of the offshore limited partnership.
- (iii) The rights of a limited partner include:
- access to full information on the affairs of the partnership;
 - making an inspection on the partnership;
 - making a demand for the return of contribution:
 - on dissolution of the partnership;
 - at the time specified in the partnership agreement;
 - after he has given 6 months notice; or
 - not be liable to creditors of the partnership.
- (iv) 2. A partnership shall consist of not less than two partners.
- (v) 20. A partnership shall not have more than 20 partners.
- (vi) One of the partners of an offshore limited partnership must be:
- A registered offshore company;
 - A trust company acting as trustee or nominee of a non-resident; or
 - A non-resident. The registered address of the partnership shall be the registered office of a trust company.
- (b) (i) (aa) A banker has the right to:
- charge interest on loans or other credit facilities granted or advanced by the bank to the customer; and
 - levy a commission, fee or charge on services rendered to its customers.
- (bb) A customer has the following rights:
- The implied right to repayment for money held in his accounts; and
 - The right to be supplied with a statement of account.
- (ii) The banker customer relationship may be terminated by:
- mutual agreement between the two parties; or
 - a unilateral act whereby either party gives a reasonable notice to terminate.

Questions 6

The candidates performed well in this question, although part (d) (ii) was a challenge as some were unsure of the similarities and differences between a “trust” and a “company”.

6. (a) The Acts are:
- The Offshore Banking Act 1990
 - The Offshore Companies Act 1990
 - The Labuan Offshore Business Activity Tax Act 1990
 - The Labuan Offshore Financial Services Authority Act 1996
 - The Labuan Offshore Securities Industry Act 1983
- (b) (i) True
(ii) True
(iii) False
(iv) True
- (c) (i) Labuan offshore banks
(ii) checking/current account
(iii) 15 January 2002
- (d) (i) Incorporation of Labuan trust companies – The Companies Act, 1965 and
Registration of Labuan trust companies – The Labuan Trust Companies Act, 1990.
- (ii) A trust and a company both have a separation of records and beneficial ownership. However, a trust can be differentiated from a company because under a trust, the trustees are charged with the fiduciary duties to administer the assets in the best interest of the beneficiaries.

In contrast, in the case of a company there is no ownership of assets on behalf of a third party. The assets of a company are held by, in the name of and for the benefit of the company itself. The fiduciary duties of the directors are to the company and not to the shareholders.