

CFL2

Offshore Legislation

12 OCTOBER 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) In relation to the Labuan Offshore Limited Partnership Act 1997 (LOLPA), answer the following questions:
- (i) What are the purposes of LOLPA? [3]
 - (ii) Explain **one** main advantage of LOLPA. [2]
 - (iii) Who must be made as one of the partners in an offshore limited partnership? [3]
 - (iv) What does section 41 of LOLPA provide for? [2]
- (b) What is the taxation provision amount for an offshore trust which carries on offshore trading activity? Your answer should include the relevant sections and statute that govern the taxation provision. [4]
- (c) State **three** advantages of using an offshore centre. [3]
- (d) Name **three** Acts that govern the offshore banking business in Labuan. [3]
- (Total:20 marks)
2. (a) (i) In relation to a banker-customer relationship, list the rights of:
- (aa) a customer [2]
 - (bb) a banker [2]
- (ii) How can a banker-customer relationship be terminated? [2]
- (b) (i) Explain what a trust company is. [3]
- (ii) State **one** primary role of a trust company. [1]
- (c) What are the registration requirements (if any), for powers of attorney, including powers of attorney in relation to land matters, in the following jurisdiction?
- (i) Labuan [2]
 - (ii) Peninsula Malaysia [3]
- (d) In relation to the law of tort, fill in the blanks with the **correct** word(s) for each of the following:
- (i) The second element required in a negligence suit is a breach of the duty of care owed to the plaintiff by the defendant. The test used for the standard of care is that of a _____ [1]
 - (ii) Tort is a _____. [1]
 - (iii) The tort of defamation seeks to protect a person's _____. [1]
 - (iv) The tort of _____ has been described as "a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession". [1]
 - (v) Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is deemed _____. [1]
- (Total:20 marks)

3. (a) Fill in the blanks with the **correct** word(s) for each of the following:
- (i) _____ is the law that governs the rights and duties of all individuals. [1]
 - (ii) The _____ only hears appeals against the decision of the subordinate courts where the amount in dispute exceeds RM100,000. [1]
 - (iii) The Federal Court is the final court of _____ in Peninsula Malaysia. [1]
 - (iv) An action or suit involving motor vehicle accidents will be heard and determined by the _____ even if the amount in dispute may exceed RM250,000. [1]
 - (v) Offshore banking services are carried out by _____. [1]
- (b) Name **three** elements essential to prove professional negligence. [3]
- (c) State **five** prohibitions relating to the misuse of information in financial institutions. [5]
- (d) In relation to the Anti-Money Laundering Act 2001 (AMLA), answer “**True**” or “**False**” for each of the following statements:
- (i) The application of AMLA is limited to tangible properties or interest held in Malaysia only. [1]
 - (ii) Pursuant to section 3 of AMLA, the definition of “financial institution” includes persons licensed under the Securities Industry Act 1983. [1]
 - (ii) AMLA states that reporting institutions are under obligation to maintain records for six years from the date the account is closed or a transaction is completed or terminated. [1]
 - (iv) Section 2 of AMLA states that AMLA is applicable even to serious foreign offences or unlawful activities whether committed in the past or even in the future. [1]
 - (v) AMLA came into force on 15 January 2001. [1]
 - (vi) The serious offence definition under AMLA does not include offences under the Penal Code such as kidnapping and robbery. [1]
 - (vii) The provisions under section 20 of AMLA override the secrecy obligation imposed by any other written law. [1]
- (Total:20 marks)
4. (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 the 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 **three** types of offshore trust. [3]
- (Total:20 marks)

5. (a) Fill in the blanks with the **correct** word(s) for each of the following:

- (i) Where an agency is created by appointment in writing, it is known as an _____ appointment. [1]
- (ii) An agent who has not been paid any commission for his services, is entitled to retain goods or any other properties of the principal in his possession until the amount due to him has been paid or accounted to him. This is known as the right of _____. [1]
- (iii) The doctrine of the _____ is where an agency is not disclosed and the agent acts as if he is the principal. [1]
- (iv) A _____ is a letter written by a customer authorising a certain person to operate his bank account. [1]
- (v) The law of agency is governed by the _____. [1]

(b) Encik Ahmad is going overseas for a year and will need someone to look after his financial matters for him. Encik Ahmad knows that he can create an agency whereby he can appoint someone to act as his agent. He is now thinking of appointing Mr Maniam to act as his agent in several matters especially in managing his funds held in the bank.

In relation to the above scenario, answer the following:

- (i) What is meant by the terminology “agency”? [2]
- (ii) Who can act as a principal? [2]
- (iii) Advise Encik Ahmad **five** ways in which an agency can be created. [5]
- (iv) Recommend the best way for Encik Ahmad to create an agency that suits his needs and state why you have chosen that method. [6]

(Total:20 marks)

6. (a) Fill in the blanks with the **correct** word(s) for each of the following:

- (i) A trust that is created for the advancement of human rights and fundamental freedom is called a _____ trust. [1]
- (ii) _____ is the means by which the state authority imposes control over an individual's power to make testamentary dispositions. [1]
- (iii) A trustee with wide powers of investment would be a trustee of a _____ trust. [1]
- (iv) A protective trust mainly protects the interest of the _____. [1]
- (iv) An offshore trust may be validly created outside Labuan International Offshore Financial Centre if the settlor nominates _____ as the proper law of the trust. [1]
- (vi) An offshore trust will not be taxed if it carries on purely offshore _____ activities. [1]

- (b) (i) Define “contract” under the Malaysian law. [1]
- (ii) What are **six** basic elements of a contract? [6]
- (iii) The general rule in Malaysia is that contracts made by minors are void.
State **three** exceptions to the above rule. [3]
- (c) Fill in the blanks with the **correct** Act for each of the following:
- (i) The provisions of the _____ do not apply to licensed offshore banks including those which are owned by the Malaysian banks. [1]
- (ii) The _____ provides for the requirements of record-keeping and reporting of suspicious transactions. [1]
- (iii) The _____ governs the registration and incorporation of offshore banks in Labuan. [1]
- (iv) The _____ governs the offshore banking business in Labuan. [1]
- (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 principles examined in this question.
- Candidates are advised to practise the past year question papers and look at the available outline answers.

1. (a) (i) The Labuan Offshore Limited Partnerships Act 1997 (LOLPA) provides for the establishment, regulation and dissolution of an offshore limited partnership and includes matters connected with the operations of a partnership.
- (ii) The main advantage of the LOLPA is that it allows the partners/investors to have limited liability if they are not actively involved in the operation of partnerships. The LOLPA allows any person, even residents of Malaysia, to form an offshore partnership for any lawful purpose.
- (iii) Under the LOLPA at least one of the following must be a partner of offshore limited partnership:
- 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.
- (iv) Section 41 of the LOLPA provides that any legal proceedings relating to the determination of rights of a partner shall be held in camera and no details of the proceedings shall be published.
- (b) An offshore trust carrying on any offshore trading activity will be taxed respectively at the rate of 3% of the net income or a fixed sum of RM20,000, whichever is elected. This taxation provision is governed by Sections 4 and 7 of the Labuan Offshore Business Activity Tax Act 1990.
- (c) Three advantages of using an offshore centre:
- Tax efficient,
 - Confidentiality, and
 - Easy administration.
- (d) The three Acts are:
- The Offshore Banking Act 1990;
 - The Offshore Companies Act 1990; and
 - The Labuan Offshore Business Activity Tax Act 1990.

Question 2

- Candidates answered only parts of the question. Answers given were brief and insufficient.

2. (a) (i) (aa) 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.
- (bb) A banker has the following rights:
- To charge interest on loans or other credit facilities granted or advanced by the bank to the customer; and
 - To levy commission or charge on services rendered to the bank's customers.
- (ii) The banker-customer relationship can be terminated by:
- mutual agreement between the two parties; or
 - unilateral act whereby either party gives a reasonable notice to terminate.
- (b) (i) A trust company is a domestic company established under the Companies Act 1965. However it is required to be registered under the Labuan Trust Companies Act 1990.
- (ii) They have a supervisory role over the offshore company in maintaining integrity.
- (c) (i) Labuan
- In Labuan, the Powers of Attorney Act 1949 does not apply. There is no legal requirement for powers of attorney to be registered with the High Court. However, Section 98 of the Sabah Land Ordinance requires that all powers of attorney in relation to land must be properly attested and the power of attorney must be filed in the Land Office concerned.
- (ii) Peninsula Malaysia
- Section 4 of the Powers of Attorney Act 1949 requires all powers of attorney made within Peninsula Malaysia to be deposited in the High Court. In addition, if the powers of attorney relate to land, the powers of attorney need to be registered with the relevant Land Registry or Land Office.
- (d) (i) reasonable person
- (ii) civil wrong
- (iii) reputation
- (iv) conversion
- (v) void

Question 3

- Candidates could not state the elements to prove professional negligence.
- Candidates were unable to state the prohibitions relating to misuse of information in financial institutions.

3. (a) (i) Civil law
- (ii) High Court
- (iii) appeal
- (iv) Sessions Court
- (v) offshore banks
- (b) Give any three elements essential to prove professional negligence:
- 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.
 - 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.
- (c) Give any five prohibitions on misuse of information:
- Staff will not make use of or copy or remove any information obtained in the course of business, for the direct or indirect benefit of themselves or of any other persons.
 - Staff should not use information of the bank or its customers to benefit themselves or confer an advantage on themselves or any other persons.
 - Staff in possession of confidential information will not use it for the benefit of themselves, their spouses, parents or children in the following ways:
 - To influence any customer or any third party in dealing in any transaction;
or
 - To communicate such information to any customer.
 - These prohibitions continue even after the member of staff ceases to be employed by the bank.

- (d) (i) False
- (ii) True
- (iii) True
- (iv) True
- (v) False
- (vi) False
- (vii) True

Question 4

- No comments were given for this question.

4. (a) (i) True
- (ii) True
- (iii) True
- (iv) True
- (v) True

- (b) The four parties involved in the setting up of 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 of 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) Give any 3 of the following types of trusts:

- Purpose trust
- Charitable trust
- Trading trust
- Finance trust
- Personal trust
- Protective trust
- Discretionary trust

Question 5

- Candidates had poor knowledge of agency.
- Answers given by candidates were brief and not proportionate to the allocated marks.

5. (a) (i) express
- (ii) lien
- (iii) undisclosed principal
- (iv) mandate
- (v) Contracts Act 1950
- (b) (i) The terminology agency is used to describe the relationship that is created between a principal and his agent who is authorised to act for the principal or represent him in his dealings with a third party.
- (ii) Any person who is eighteen years old or above and who is of sound mind may be a principal - (Section 136, Contracts Act 1950)
- (iii) Give any five 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
 - Ratification – agency by this method can arise in one of two ways:
 - An agent who was duly appointed exceeds his authority, or
 - A person who has no authority to act for the principal has acted as if he has such authority.
 - In any of the above situations, the principal can either accept or reject the contracts so made. Where the principal chooses to accept the contract, such

acceptance is called ratification. Ratification may be expressed or implied. It is to be noted that ratification is retrospective

- By Necessity – 3 conditions must be fulfilled:
 - It is impossible for the agent to get the principal's instruction;
 - The agent's action is necessary in the given circumstances in order to prevent loss to the principal; and
 - The agent of necessity must have acted in good faith.
 - By Estoppel – where the principal has by his words or action allowed a third party to believe that that particular person is his agent even when he is not, and the third party relies on this fact to the detriment of the third party, the principal will be estopped or precluded from denying the existence of that person's authority to act on his behalf.
- (iv) Encik Ahmad 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. Alternatively, Encik Ahmad can 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. This method safeguards the principal as he can specifically state the matters in which he wishes the agent to act on his behalf. Furthermore, as Encik Ahmad needs an agent to manage his funds in the bank, this is the preferred method of appointment for the banks because the appointment of the agent can then be evidenced by supporting documents and the powers held by the agent can be assessed.

Question 6

- Candidates were unable to answer questions relating to offshore trusts.
- They were also unable to state the exceptions to the rule that contracts made by minors are void.

6. (a) (i) charitable
- (ii) Forced heirship
- (iii) discretionary
- (iv) settlor
- (v) Labuan Offshore Trusts Act 1996 (LOTA)
- (vi) non-trading
- (b) (i) A contract is an agreement enforceable by law – Section 2(b) of the Contracts Act 1950.
- (ii) The six basic elements that constitute a contract are as follows:
- an offer or proposal;
 - acceptance of that offer/proposal;
 - an intention to create legal relations;
 - consideration;
 - certainty of the terms; and
 - capacity of the parties.

- (iii) A minor can enter into a contract in any one of the following exceptions:
 - It is a contract for necessities;
 - It is a contract of scholarship;
 - It is a contract of insurance.

- (c)
 - (i) Banking and Financial Institutions Act 1989
 - (ii) Anti-Money Laundering Act 2001
 - (iii) Offshore Companies Act 1990
 - (iv) Offshore Banking Act 1990