

**CFL2**

# **Offshore Legislation**

**5 APRIL 2006**

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 law of trust, briefly explain the following terms:
- (i) Letter of wishes [2]
  - (ii) Forced heirship rules [2]
  - (iii) Perpetuity period [2]
- (b) (i) Who can terminate an offshore trust? [2]
- (ii) What will happen if such an offshore trust is terminated? [2]
- (c) What is the role of a protector? In your answer, state at least **two** powers granted to a protector. [5]
- (d) State **three** duties of a trustee of an offshore trust pursuant to the Labuan Offshore Trust Act 1996. [5]
- (Total:20 marks)
2. (a) State **three** categories of law. [3]
- (b) (i) What does private law govern? [2]
- (ii) List **three** laws that come under private law. [3]
- (c) Name the central authority that creates law in Malaysia. [2]
- (d) What are **two** main sources of Malaysian law? [2]
- (e) State **three** advantages of using an offshore centre. [3]
- (f) Name **five** legislation that are applicable to offshore bankers. [5]
- (Total:20 marks)
3. (a) Briefly explain **three** types of offshore limited partnership that can be established under the Labuan Offshore Limited Partnerships Act 1997 (LOLPA). [9]
- (b) (i) Briefly explain how legal proceedings are held to determine the rights of a partner under LOLPA. [3]
- (ii) A partnership may be dissolved by an order of court upon the application by a partner. Under what circumstances will the court grant such an order? [3]
- (c) Fill in the blanks with the correct word(s) for each of the following:
- (i) LOLPA came into force on \_\_\_\_\_. [1]
  - (ii) An offshore limited partnership can have a maximum of \_\_\_\_\_ partners. [1]
- (d) Explain the secrecy provision of offshore banking.
- Under what circumstances is an offshore bank compelled to disclose customer-related information? [3]
- (Total:20 marks)

4. (a) Briefly explain how an agency can be created. [5]
- (b) (i) Explain the doctrine of the undisclosed principal. [8]
- (ii) Fill in the blanks with the correct word(s) for each of the following:
- (aa) An agency created in writing is known as an \_\_\_\_\_ appointment. [1]
- (bb) An agent who acts as if he is a principal, and does not disclose that he is an agent, applies the doctrine of \_\_\_\_\_. [1]
- (cc) The \_\_\_\_\_ governs the law of agency. [1]
- (c) What is the difference between “apparent authority” and “actual authority” of an agent? [4]  
(Total:20 marks)
5. (a) How is an offshore trust taxed? State the requirements of their trading activity, if any. [4]
- (b) Answer “**True**” or “**False**” for each of the following:
- (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 still be considered to have been 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) The general rule in Malaysia is that contracts made by minors are void.  
List **three** exceptions to the above rule. [3]
- (d) State **two** ways in which a contract may be discharged. [3]
- (e) Explain the terminology “right of restitution”. [4]  
(Total:20 marks)

6. (a) Describe how powers of attorney are made (authenticated and executed) in Peninsula Malaysia. [7]
- (b) (i) State **three** elements of negligence. [3]
- (ii) What is the difference between “damage” and “damages”? [3]
- (iii) One of the series of torts relevant to bankers is the tort of professional negligence. State at least **three** elements that are required to prove professional negligence. [3]
- (c) 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, financial institutions also cover an institution licensed under the Money-Lender’s Act 1998. [1]
- (iii) AMLA came into force on 15 January 2001. [1]
- (iv) 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]
- (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 had poor knowledge of the concepts tested.

1. (a) (i) A letter of wishes is a confidential communication from the settlor to the trustee indicating the settlor's preferences as to how he would wish the trustee to manage and deal with the trust property. It allows the settlor to retain some influence over the trustees.
- (ii) Forced heirship is a means by which the state authority imposes control over an individual's power to make testamentary dispositions. In such cases an individual's spouse or children are entitled by law to at least a fixed share of his estate upon death.
- (iii) The perpetuity period is the maximum period for which an offshore trust can exist. In other words, it is the lifespan of an offshore trust, which is a maximum of 100 years from the date of creation. This perpetuity period may be specified in the trust instruments although earlier termination is possible.
- (b) (i) An offshore trust can be terminated by all the beneficiaries, wherein there must not be any minors or legally disabled persons.
- (ii) The trustee shall then distribute the trust property among the beneficiaries within a reasonable time and in accordance with the terms of the trust.
- (c) The role of a protector is to oversee the trustee in the exercise of the latter's duties and in the management of the property. It is a control mechanism afforded to the settlor who has given up legal ownership of the property but may retain some influence over the trustees. The role of a protector is akin to a watchdog role.
- The Labuan Offshore Trust Act 1996 (LOTA) specifically deals with the appointment of a protector and sets out the protector's duties in respect of the trust (where the trust deed is silent on this). The powers granted to a protector are mainly as follows:
- To veto certain specified trustee powers by means of a provision in the trust deed that the trustee powers cannot be exercised without prior consent of the protector, and
  - To appoint and remove trustees.
- (d) The LOT A contains express provisions on the duties of a trustee. The duties include:
- To ensure that the trust property is vested in him or is under his control,
  - To preserve and enhance the value of the trust property, and
  - To disclose any illegal activities suspected in relation to trusts.

**Question 2**

- Candidates were unable to name the central authority that creates law in Malaysia.

2. (a) Law can be classified into the following three categories:
- Public law
  - Private law
  - International law
- (b) (i) Private law or civil law governs the law affecting the rights and duties of individuals.
- (ii) Three laws that are covered under this are:
- law of contract,
  - law of tort, and
  - trust law.
- (c) By the provision of Article 73(A) of the Federal Constitution, Parliament has the authority to create laws in Malaysia.
- (d) The two main sources of Malaysian law are:
- written law
  - unwritten law
- (e) Three advantages of using an offshore centre:
- Tax efficient
  - Confidentiality
  - Easy administration
- (f) The five legislation that are applicable to offshore bankers:
- The Offshore Companies Act 1990
  - The Offshore Banking Act 1990
  - The Labuan Offshore Business Activity Tax Act 1990
  - The Labuan Offshore Financial Services Authority Act 1996
  - The Labuan Offshore Securities Industry Act 1998

**Question 3**

- Candidate had poor knowledge of the concepts tested.
- They wrote more than what was required by the question, i.e., answers were not proportionate to the allocated marks.

3. (a) The Labuan Offshore Limited Partnership Act 1997 allows three types of offshore limited partnerships to be established.
- An offshore professional partnership which can only be formed by a professional who carries on practice in accounting, actuarial science, engineering or law. The professional who forms the partnership must have in force professional indemnity insurance cover for not less than the prescribed amount with an insurer approved by LOFSA
  - An offshore project partnership that shall be established solely for the purpose of undertaking the project or business specified in the partnership agreement. The partnership agreement shall provide that the partnership be dissolved after the completion of the project and all the partners must be a body corporate
  - An offshore general limited partnership that may be formed by any person for any lawful purpose.
- (b) (i) 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.
- (ii) In granting an order to dissolve the partnership, the court must be satisfied that either:
- 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; or
  - that it is equitable to dissolve the partnership.
- (c) (i) 1 August 1997
- (ii) 20
- (d) The offshore bank is required under the Offshore Banking Act 1990 to protect and withhold all information of its offshore banking clients.

An offshore bank may be compelled to disclose customer-related information when disclosure is in the interest of the internal security of Malaysia.

#### **Question 4**

- Answers given by candidates were brief and not proportionate to the allocated marks.
- Candidates are advised to practise the past year papers.

4. (a) An agency can be created in any one of the following ways:

- By the acts of the parties:
  - Express appointment by the principal  
θ express appointment may be in written or oral form
  - Implied appointment by the principal  
θ Where the law can infer 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
- By ratification by the principal;
- By the doctrine of estoppel or holding out; or
- By necessity / by operation of law in certain circumstances.

(b) (i) The doctrine of the undisclosed principal applies where the principal of an agency is not disclosed. This occurs when the agency is not disclosed and the agent acts as if he is the principal.

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract. But the contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been the principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that he would not have entered into the contract, if he had known who the principal was in the contract, or if he had known that the agent was not a principal.

- (ii) (aa) express  
(bb) undisclosed principal  
(cc) Contracts Act 1950

(c) An agent's authority may be classified into actual and apparent authority. Actual authority is that which is expressly given by the principal to the agent orally or in writing, or implied from the express authority given from the circumstances of the case, the custom or usage of trade or the situation and conduct of the parties.

On the other hand, apparent or ostensible authority is not expressly given by the principal but which the law regards the agent as possessing although the principal has not consented to his exercising such authority.

### Question 5

- Candidates showed poor understanding of the concepts tested.
- They answered only parts of the question.

5. (a) An offshore trust is usually taxed at either 3% of the net income or a fixed sum of RM20,000, whichever they choose. The offshore trust must be carrying on an offshore trading activity to qualify for this tax provision.
- (b) (i) False  
(ii) True  
(iii) False  
(iv) False  
(v) False  
(vi) True
- (c) 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
- (d) Contracts may be discharged by (Give any two of the following):
- performance of the contract
  - by breach – where one party decides not to comply with the terms of the contract
  - frustration – when there is a change in the circumstances which renders a contract legally or physically impossible of performance.
- (e) Pursuant to section 66 of the Contracts Act 1950, when an agreement is found to be void or when a contract becomes void, the person who received any advantage under such an agreement or contract is bound to restore it to the other party or to pay adequate compensation for the same. The basis for this right is founded upon the doctrine of unjust enrichment.

### Question 6

- Answers given by candidates were brief and not proportionate to the allocated marks.
- They wrote on types of negligence, instead of elements of negligence.

6. (a) Process of Authentication

A power of attorney must be made by deed. It must be signed by the donor in the presence of a witness attesting to his signature or is signed at his direction in his presence and the presence of two witnesses who attest to his signature. This process is called the authentication of a power of attorney.

Execution of Powers of Attorney in Peninsula Malaysia

If a power of attorney is executed in Peninsula Malaysia, the power of attorney instrument must be authenticated in the form set out in the First Schedule of the Powers of Attorney Act 1949 by virtue of Section 3(1)(a) Powers of Attorney Act 1949, by either:

- a magistrate;
- a justice of peace;
- a land administrator;
- a notary public;

- a commissioner for oaths;
  - an advocate and solicitor; or
  - an officer acting in the course of his employment, of a company carrying on the business of banking in Peninsula Malaysia and incorporated by or under any written law in force in Peninsula Malaysia.
- (b) (i) The elements of negligence are:
- a legal duty of care on the part of the defendant towards the plaintiff,
  - breach of that legal duty of care, and
  - damage suffered by the plaintiff as a result of the breach.
- (ii) The term “damage” refers to loss or injury that a plaintiff suffers as a result of the defendant’s breach of the duty of care owed to the plaintiff. “Damages” is the compensation, which is granted by the court to the plaintiff if all the elements of negligence on the part of the defendant are successfully proven.
- (iii) The elements required to prove professional negligence are (Give any three of the following):
- 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.
- (c) (i) True  
(ii) False  
(iii) False  
(iv) True