Examiner's report

F4 Corporate and Business Law (CYP)
December 2011

General Comments

The examination contained ten questions in total: seven questions testing candidates' knowledge of the law, and three problem-based questions which aimed to test candidates' ability to apply the law. All ten questions were compulsory.

Candidates are advised (i) to attempt all questions on the paper; (ii) to start each question on a new page; and (iii) to pay more attention to the exact wording of each question, focusing each answer to the particular issues involved. A general recitation of legal theory on the relevant topic without reference to the question is of no avail.

Specific Comments

Question One

This was a question on the legal system of Cyprus, and particularly the main functions of the Constitution.

Answers were generally satisfactory with most candidates obtaining at least pass marks. It was satisfactory to observe that candidates were generally familiar with the main functions of the Constitution. However more detailed answers could be provided in order to obtain higher marks. For example, although candidates appeared generally familiar with the concept of separation of powers, many candidates failed to provide an explanation of its application or to clarify the various types of state powers.

Question Two

This was a question on contract law which particularly required candidates to explain and distinguish between (a) terms and representations and (b) conditions and warranties.

Most candidates were able to define each of the above terms, although many failed to provide an explanation on (a) how terms may be distinguished from representations, and particularly on (b) how conditions may be distinguished from warranties. In other words, many candidates provided partial answers, by restricting their responses to the "explanation" of the terms, but not explaining the "distinctions" between them.

Question Three

This question was on particular aspects of agency law.

A common mistake was for candidates to reiterate their general knowledge on agency law, without reference to either of the parts of the question. Such responses were obviously not satisfactory, although partial credit was awarded for including relevant points.

Part (a) of the question required candidates to explain the legal consequences when an agent exceeds his authority. The basic rule that applies when an agent exceeds his authority is that the principal is not bound by the acts of the agent, but the agent remains liable, both to the principal (for breach of authority) and to the third party (for breach of warranty of authority).

It was satisfactory to observe that a lot of candidates were familiar with the principle that even if an agent exceeded his authority, the principal could choose to ratify the agent's (initially unauthorised) act, and in such a case the legal consequences would differ from those explained above. Upon ratification, the principal would become liable and entitled under the contract and the agent would be relieved from liability.

Credit was also provided to candidates who correctly noted that in the case where an agent exceeded his authority in case the of emergency, when the agent had no practical way of communicating with the principal and the action of the agent was reasonably necessary to benefit the principal and the agent was acting in the best interests of the principal, then the principal would be bound by the agent's acts, who would be deemed to be acting as an agent by necessity.

Moreover, credit was awarded to candidates who acknowledged the existence of ostensible authority in a manner relevant to the question asked. Some candidates mentioned that an agent may exceed his authority under circumstances where it appears to others, based on representations made by the principal to third parties, which the agent was acting with authority. In such circumstances, even though the agent may as a matter of fact be acting without authority (or may be exceeding his authority), the principal will still be bound by the agent's acts.

In part (b) mention of any three correct ways of terminating an agency was rewarded accordingly.

Question Four

This question dealt with the concepts of (a) share premium capital and (b) loan capital.

It was satisfactory to see that most candidates were familiar with the above concepts and were able to provide clear responses.

A common mistake was for candidates to note that loan capital related to loans *granted* by a company, rather than loans *obtained* by the company (in the form of debentures or otherwise), and thus erroneously explained the rules relating to the granting of loans to directors, etc. This was obviously misguided and unrelated to the question asked.

Question Five

This was another question with two parts, requiring candidates to explain the rules governing (a) distribution of dividends and (b) reduction of capital.

Part (a) was generally better answered than part (b) of this question. In relation to part (b), most candidates failed to explain that a company may reduce its share capital by, inter alia, extinguishing or reducing liability on shares in respect of uncalled or unpaid capital, cancelling paid-up share capital which is lost or unrepresented by real assets, or paying off paid-up share capital which is in excess of the company's needs. Nonetheless, there were a few candidates who were able to score full marks on both parts of this question.

A common mistake was to mention that private companies have an obligation to declare dividends at least once every two years. There is no such obligation under the Companies Law. Candidates should not be confused with the deemed dividend distribution rules relating to the payment of special contribution for defence tax.

Another clarification for candidates is that even though reduction of capital does require authorisation by the company's articles of association, any provision in the articles may not substitute or replace the requirement to pass a special resolution which is required under the law.

Question Six

This question was on employment law. A common error in both parts (a) and (b) was to merely provide the meaning of contracts of service and contracts of services (part (a)) and the meaning of lawful and unlawful dismissal (part (b)).

However, the question clearly asks for an analysis of the *importance* of distinguishing between the above.

Thus in part (a) the importance in distinguishing between contracts of service and contracts for services (and thus between employees and independent contractors) lies in the relevant treatment of employees and independent contractors under the law. For example, employees are afforded protection under the terms of the Termination of Employment Law; moreover there is different treatment with regards to state benefits, taxation, vicarious liability and others, as outlined briefly in the model answers. In part (b) the importance of the distinction between lawful and unlawful dismissal lies in the consequences and rights (if any) afforded to the employee and corresponding obligations of the employer.

Question Seven

This was a straight forward question on the rules and regulations governing "insider dealing" in Cyprus.

A noteworthy clarification is that possession of inside information is not a crime in itself, as some candidates appeared to believe. The basis of what is referred to as "insider dealing" is not only the possession of unpublished information that may affect the value of financial instruments, but the *dealing* in financial instruments on the basis of access to such information.

Question Eight

This was the first problem-based question which raised interesting points pertaining to the law of contracts.

It was satisfactory to note that many candidates realised the anticipatory nature of Brian's breach of contract, and the choice that Melanie had at the time to either accept the repudiation and claim damages for breach of contract and attempt to mitigate her loss by, for example, engaging other contractors who might be in a position to finish the work on time, or else to continue with the contract and wait until the time of delivery. Instead, it was provided that Melanie agreed with Brian's request for additional payment essentially in exchange of his promise to fulfil an already existing contractual obligation owed to Melanie on the basis of their initial agreement. Although the question whether a promise to fulfil an already pre-existing contractual obligation constitutes sufficient consideration may be disputable, the Contract Law Cap. 149 provide that a subsequent modification of a contract, provided it was entered into freely and without undue influence or duress, will be upheld as a valid contract.

Credit was also awarded to candidates who mentioned that Melanie may be liable to compensate frustrated clients for any losses suffered, including perhaps damages for mental distress, given that the nature of the agreement between Melanie and her clients warrants the award of damages for disappointment. Such damages may in turn be recoverable by Melanie from Brian provided that these are not considered to be too remote. However it is unlikely that Melanie will be entitled to damages for *her own* mental distress from Brian, given that the commercial nature of the agreement between Melanie and Brian does not justify such an award.

A common error was for candidates to dwell on whether time of completion was a condition or a warranty in the contract between Brian and Melanie, so as to clarify whether Melanie could terminate the contract on the basis of the breach of such term by Brian. On the basis of the facts provided, Brian finished his work on 15 June 2011. Therefore the contract was executed and as such there was no room for termination. Similarly, there was no question of claiming specific performance under these circumstances.

Question Nine

This was another problem-based question which related to the obligation, if any, of the directors to declare dividends, the rules in relation to convening of general meetings by the shareholders and the rules relating to removal of directors.

Many candidates believed that CyCo Ltd was under an obligation to declare dividends and therefore John could convene an extraordinary general meeting on the basis of his holding of more than 10% of the issued share capital of the company for the purpose of proposing an ordinary resolution for approving dividend declaration. Similarly, other candidates believed that John could "force" the directors to declare interim dividends or recommend a declaration of dividends at the next annual general meeting.

An interesting approach was followed by other candidates who suggested that John could convene an extraordinary general meeting for the purpose of proposing an amendment to the the articles of association of the company so that declaration of dividends may be decided upon by the shareholders, without any obligation not to exceed the directors' recommendation, and credit was duly awarded accordingly.

Question Ten

This was the final problem-based question which related to the rules on ultra vires transactions and amendment of the objects-clauses in the memorandum of association, which are both regulated by the Companies Law.

Some candidates rightly observed that amendment of the memorandum of association with expansion of the objects of the company will not have retrospective effect, so that the initial agreement for the purchase of land in Ukraine will not thereafter be deemed "intra vires".

Most candidates missed the point that the objects could be amended in this case because Dan was interested to expand the geographical area of the company's operations, which is one of the reasons permitting amendment of the objects-clauses pursuant to section 7 of the Companies Law.

Another common error was to mention that, even though the act of entering into a contract for the purchase of land in Ukraine was "ultra vires", the company could ratify the director's actions in general meeting. The question whether the "ultra vires" transaction binds the company is regulated by section 33A Companies Law which was enacted with a view of protecting innocent third parties.