

Examiner's report

F4 (MLA) Corporate and Business Law December 2012

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General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. There were only a handful of candidates who did not attempt all the questions. In some cases candidates left one or a part of one question out while there were some others who left more than one question out. This does not appear to have been due to time pressure but due to lack of knowledge of the subject-matter posed in the relative questions. From the answers given the majority of candidates adopted good time management skills allocating an equal amount of time to answering each question as in the majority of cases appropriate detail was given and the length of the answers given were commensurate to the mark allocation of each part of the question.

While with respect to most questions, one concludes from the answers given that candidates did read the questions and identify the requirements of each part of the question given, with respect to particular questions, namely questions 2 and 8, candidates could have answered the questions more directly.

The report will begin with some general brief comments on the overall performance of candidates in this session before going on to look at the questions in the paper in detail. One notes that both positive and negative aspects of performance are given so as to enable candidates to learn from past performers and performance.

In this session there were some high performers, a large number of candidates scored higher than average marks and a smaller majority than previous sessions obtained marks close to the pass mark. As stated in previous sessions, but more so in this session, candidates studied harder and achieved better marks.

Some general indications of good practice to follow:

- candidates must be well prepared for the exam - on all topics and not on what they consider the 'most important';
- candidates need to manage their time effectively;
- candidates must read carefully and understand the requirements of each question;
- keep in mind that the marks that the examiner allocates to each part of the question is indicative of the detail which candidates are required to go into;
- provide concise and complete answers;
- candidates should indicate the question number in the paper on each page of the respective reply;
- start each question on a new page;
- general essay answer format should not be used for problem questions as these will contain little information relating to the specific issues raised in the problem question.



Specific Comments

Question One

This one part question dealt with the court structure in Malta and the division into the different courts having different areas of jurisdiction. Candidates were expected to identify the different courts and refer to the jurisdiction of various courts. The Maltese Courts could be divided between the Superior Courts and the Inferior Courts. A distinction is also made between the courts of first instance and the courts of second instance.

In Malta the courts of first instance are the Civil Courts and the Courts of Magistrates, while the courts of second instance are the Court of Appeal (Civil Jurisdiction), the Court of Appeal (Criminal Jurisdiction) and the Court of Appeal as a Constitutional Court.

Most candidates performed well in this question with some candidates giving both a well written answer as well as a graphical illustration of the manner in which the local courts are structured and the hierarchy and jurisdiction of the various courts.

Question Two

Question 2 was also a one part question. This question referred to the external requisites essential for a valid contract. While candidates were expected to draw a very brief distinction between the external and internal requisites, which are both essential for a valid contract, some candidates did not focus on the requirements of the question. There were candidates who dealt with, in too much length, the internal requisites of a contract. This was clearly not the focus of the question and did not earn candidates extra marks.

Thus, the common essential requisites for a valid contract may be internal and external. While the external requisites refer to the form of a contract, the internal requisites result from the very notion of a contract, namely agreement between the parties.

- | | |
|-------------------------------------|---------------------|
| 1. Capacity to contract; AND | 1. Public deed; OR |
| 2. Consent; AND | 2. Private writing. |
| 3. Subject-matter (or object); AND | |
| 4. Lawful consideration (or cause). | |

Candidates were expected to refer to what is a public deed and a private writing and indicate those instances where a public deed is required so that particular contracts be deemed legally valid and binding on the parties to the same.

Question Three

This question was divided into two parts each carrying equal weighting. This question dealt with the duty of care of the accountant, which is central to local company law in view of the fact that all companies must produce and file audited financial statements.

The first part of the question dealt with how Maltese law regulates the standard of diligence applicable to acts or omissions of a person and the standards to be applied in the performance of contracts. Candidates were expected to make reference to general provisions of law and to the provisions of the Accountancy Profession Act 1980. Most candidates referred to the provisions of the latter Act and to general principles of law on the matter.

The second part of the question dealt with an area which is not specifically provided for at law, namely the liability of accountants and auditors towards third parties. The Accountancy Profession Act does not lay down how liability towards third parties is to be regulated. A specific provision in relation to the issue of a prospectus to

be used by the public when considering the purchase of shares of a listed company, is found in the Companies' Act 1995. Most candidates gave their personal opinion on the matter and referred to general principles of law on third party liability and how action may be taken against defaulting accountants.

Question Four

Question Four was a one-part question. The question referred to a clause which must be included in every memorandum of association of a limited liability company, namely the name clause. Candidates were expected to list down the limitations laid down at law and the policy adopted by the Registry of Companies when considering a name selected by the promoters of a company.

This question was adequately answered by the majority of candidates. A small number dwelt on the other clauses which the Companies Act 1995 stipulates are required to be included in the memorandum of association of a company and for this did not earn extra marks. Extra marks were however earned by those candidates who made reference to case law on the subject matter.

Question Five

This question dealt with a further clause to be inserted in the memorandum of association of every limited company, namely the share capital clause. The first part of the question which had 8 marks assigned to it, required candidates to refer to this clause and to the distinction between the authorised and issued share capital. Candidates were expected to explain that the authorised share capital clause must state the amount of share capital in the convertible currency in which it shall be paid and its division into shares of a fixed amount since Maltese law does not cater for the possibility of no-par value shares, and the issued share capital clause, which, apart from the details mentioned in connection with the authorised share capital must also provide whether the shares are divided into different classes, the amount paid up on each share and the number of shares subscribed to by each shareholder.

The second part of the question, which had 2 marks assigned to it, required candidates to indicate the minimum share capital required at law for both a private limited liability company and in respect of a public limited company. Thus, article 72 Companies Act provides that in the case of public companies, this must be at least €46,588 whereas in the case of private companies it must be at least €164.

Question Six

This question, albeit a two part question, dealt with the declaration of solvency. A distinguishing feature between a members' voluntary winding up of a company and a creditors' voluntary winding up of a company is the preparation or otherwise of a declaration of solvency. Upon the proposal to dissolve and wind up a company voluntarily, the directors of the company, or in the case of a company having more than two directors, the majority of the directors, may, at a meeting of the directors make a declaration of solvency.

The first part of the question required candidates to state when the declaration is to be prepared. The declaration of solvency is a declaration indicating that the directors have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding 12 months from the date of dissolution as may be specified in the declaration.

The second part of the question required candidates to indicate the contents of the said declaration. Of essence is that the directors indicate that the debts would be able to be paid within 12 months. Also the declaration must contain a statement of the company's assets and liabilities made up to a date not earlier than the date of the declaration by more than three months.

Answers to this question were satisfactory clearly showing that candidates were aware of the requirement of a declaration of solvency in the event that a company is voluntarily wound up.

Question Seven

Question seven was also related to a situation when a company met difficulties and was placed into liquidation. The question was a one part question referring to the corporate recovery procedure.

The Companies Act 1995 provides for a corporate recovery procedure which may apply in certain circumstances. In terms of the said Act, where the directors of a company become aware that the company is unable to pay its debts or is imminently likely to become unable to pay its debts, they shall, within 30 days from when the fact became known to them, duly convene a general meeting of the company by means of a notice to that effect for a date not later than 40 days from the date of the notice for the purpose of reviewing the company's position and of determining what steps should be taken to deal with the situation, including consideration as to whether the company should be dissolved or, where applicable, whether the company should make a company recovery application. The vast majority of candidates gave very satisfactory answers to this question providing adequate detail.

Question Eight

Question eight was a two part question providing for a case requiring candidates to analyse the essential requisites for a valid contract arising out of the provisions of the Civil Code. The first part of the question required candidates to refer to the concept of the privity of contract.

From the facts given candidates were expected to conclude that it was James who has contracted with the second hand car dealer and not his father. Therefore, James' father was not in any way bound to the car dealer despite the promise which he made to James that he would pay the purchase price of the car. The contractual arrangement was between James and the car dealer exclusively. A fundamental principle of contract law is that a contract only binds the parties to it (and their heirs). Third parties, that is all those persons who are not parties to a contract, either personally or indirectly through an authorised representative, are not bound by it. This is based on the principle of privity of contract.

The second part of the question expected candidates to refer to consent as an essential internal requisite necessary for a valid contract. The consent of the parties entering into a contract is of essence, without which a contract cannot be said to be concluded validly. The parties in the case under consideration appear to have negotiated the purchase and sale of a particular thing. There was the volition of both parties to enter into the transaction which volition existed both internally and externally. However, while James was under the impression that he was to acquire a second hand car which was 8 years old, the second hand car dealer consciously sold James a car which was 15 years old. Therefore in actual fact candidates were expected to conclude that there was no unison of wills, in that, both parties did not agree on the same thing. James could therefore claim that his consent was vitiated on the basis of an error.

It can be added that candidates made a better application of law to the given facts in the second part of the question.

Question Nine

This question was divided into three parts all dealing with the directors and their role. The first question expected candidates to explain the concept and role of a shadow director, in that, when a shareholder dictates to a director

how to manage a company the shareholder is assuming the role and responsibility of a director. In terms of law, a director is said to include any person occupying the position of director of a company by whatever name he may be called, carrying out substantially the same functions in relation to the direction of the company as those carried out by a director. Only a small majority of candidates clearly understood the scope of this part of the question.

The second part of the question was adequately answered to by candidates. This referred to the granting of loans by companies. However candidates would have earned more marks had they made specific reference to the pertinent legal provision. Thus, the Companies Act 1995 (subject to certain exceptions) provides under article 144 o Companies Act, that it shall not be lawful for a company to make a loan to any person who is its director or a director of its parent company, or to enter into any guarantee or provide any security in connection with a loan made to such a person as aforesaid by any other person.

The last part of the question refers to the duties of a director and specifically to the duty of a director to attend board meetings. Replying to this question allowed candidates a measure of personal opinion expression which was forthcoming. Candidates were expected to conclude that that if a director does not take an active role in the management and administration of a company, namely by not attending board meetings, a director cannot be said to be able to exercise his duties in terms of law.

Question Ten

The last question was divided into two parts and referred to the employment of Maria and hence dealt with employment law. The first part of the question expected candidates to express their opinion on whether they would advise Maria to request that her employment be regulated by a fixed- term contract of employment or by an indefinite contract of employment. In expressing their opinion, candidates were expected to substantiate their opinion and give reasons for their preference. Answers to this first part of the question were satisfactory and detailed.

The second part of the question referred to whether an employee is bound to disclose certain facts to his/her prospective employer. Here again candidates were requested to voice their personal opinion and candidates replying to this question did precisely so.