Examiner's report

F4 Corporate and Business Law (MLA)
December 2013

General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. A very small minority of candidates did not attempt each of the questions. In some cases, candidates left one or a part of a question out while there were very few 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 an analysis of the replies 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 well and did identify the requirements of each part of the question given, with respect to particular questions, namely questions 1 and 4, candidates could have answered the questions more directly. Question 1 dealt with rules of interpretation used by the judiciary in Malta. There were candidates who entered into a discussion of the sources of Maltese law instead of dealing solely with the said rules. Likewise, question 4 dealt with contracts, quasi-contracts, torts and quasi-torts and some candidates gave too much detail about contracts detailing the internal and external requisites required for the conclusion of a valid contract and giving sparse detail to quasi-contracts, torts and quasi-torts.

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, but the large majority of candidates scored average marks and more low performers than previous sessions. With more attention to detail and studying harder, candidates would have 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

The question asked candidates to demonstrate their knowledge on the interpretation of laws by the local courts. Interpretation refers to the examination of a particular principle or provision of law with the purpose of ascertaining its meaning and/or applicability with regards to a given set of facts. This refers to an important act carried out by the judiciary.

Interpretation is said to be either doctrinal or authentic. Authentic interpretation is made in the law itself while doctrinal interpretation is that which is made by the judiciary, lawyers, text book writers and the like. Doctrinal interpretation refers to the search for the spirit of the law through its provisions and hence through an in-depth understanding of the provisions. There have been several theories put forward on the interpretation of law which are based on two extremes, namely the will of the legislator and the social requirements at a given moment. The various theories put forward can be divided into four groups: (i) the traditional theory; (ii) the historical school; (iii) the German school of Frei Recht and (iv) the eclectic theory.

Most candidates performed well in this question and explained the various schools of thought and theories proclaimed by them.

Question Two

Question two was also a one part question. This question referred to the distribution of dividends by public and private limited liability companies and the procedure to be adopted in doing so.

In terms of law, subject to the rights of persons holding shares with special rights as to a dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated as paid on the share. All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that it shall rank for a dividend as from a particular date such share shall rank for a dividend accordingly.

Furthermore, the directors of both public and private companies may, from time to time, pay to the members such interim dividends as appear to the directors to be justified by the profits of the company. In such an event the approval of the shareholders for the payment of interim dividends does not appear necessary. As dividend distributions must be justified by the profits, in deciding whether or not to recommend a dividend, reference must be made to the company's annual accounts.

The majority of answers to this question was satisfactory and provided sufficient detail.

Question Three

This question was also a one part question which dealt with the breach of a contract and the consequences resulting therefrom. The vast majority of candidates made reference to the principal and secondary effects of a contract and more particularly to the secondary effects which arise out of a breach of contract. It is held that in order for these effects to come into being, three conditions must be fulfilled, namely: (a) non-performance of the obligation, either absolutely or with regard to the time fixed for its performance; (b) such non-performance must be imputable to the debtor, that is, he must have been either in *dolo* or *culpa*; and (c) such non-performance must be the cause of damages actually sustained.

For the existence of the obligation of making good compensatory or dilatory damages, the following conditions must exist:

(i) that there be non-performance or delay;
(ii) that such be imputable to the debtor; and
(iii) that the damages are real.

Damages are said to be liquidated either by agreement (conventional liquidation); by law (legal liquidation) or by a judgement (judicial). In answering this question, candidates explained the manner in which dames are liquidated by the Maltese courts.

Question Four

Question Four was also a one-part question. The question dealt with contracts, quasi-contracts, torts and quasi-torts. The Civil Code draws a distinction between contracts and quasi-contracts and between torts and quasi-torts. Candidates were expected to explain the difference between each such institute.

In terms of article 960 of the Civil Code, a contract is defined as an agreement or an accord between two or more persons by which an obligation is created, regulated or dissolved. On the other hand, a quasi-contract arises from a voluntary and lawful act of one of the parties, while a tort and quasi-tort arises from a voluntary but unlawful act of the debtor. There are two types of quasi-contracts, namely *negotiorum gestio* and *indebiti solutio*. *Negotiorum gestio* is the management of one or more affairs of another person assumed by a person without being bound to and without a mandate. On the other hand, *indebiti solutio* comes into being when a person, through a mistake, pays what is not due by him under any civil or natural obligation, either because there was never an obligation or because it was already extinguished or because he pays that which is due but not by him or because he pays that which is due but not to the person who receives it.

A tort and quasi-tort is an unlawful and unjust act, whether positive or negative, whether due to *dolus* or *culpa*, which causes damage to the person or to the property of another person. It is a cause of obligations as a person causing damage is bound to make good such damage to the injured party. In dealing with torts and quasi-torts, a distinction is made between direct and indirect responsibility. The former is responsibility for one's own acts, which include both torts and quasi-torts according to whether the person causing the injury is in *dolus* or in *culpa*. Indirect responsibility, on the other hand, is responsibility for acts done by others or for damage caused by animals or any other object for which one is responsible.

Many candidates dwelt too long, in answering this question, to contracts and gave a detailed explanation of the requisites for a valid contract, which was unnecessary, and others failed to give adequate information on torts and quasi-torts. In view of this candidates failed to score high marks in this question.

Question Five

This question dealt with employment law and more particularly with the requirement for each employer to provide its employees with a statement of the basic terms and conditions of employment in the absence of a written contract of employment. Legal Notice 431 of 2002 entitled Information to Employees Regulations, 2002 provides for such information. Where a written contract of employment has been signed between the employer and the employee, the employer shall deliver to the employee a signed copy of the agreement within eight working days from the date of the contract. Where no written contract of employment has been signed between the employer and the employee, and/or where the written contract does not cover all or some of the information required to be notified to the employee by these Regulations, the employer shall be bound to give or send to the employee a letter of engagement or a signed statement within eight working days from the commencement of employment and which shall include the following information:

(i) the name, registration number and registered place of business of the employer and the identity card number, sex and address of the employee and the place of work (if there is no fixed place of work, it should be stated that

the employee will be employed at various places together with the registered place of business and if there is no registered place of business, the domicile of the employer is to be stated);
(ii) the date of commencement of employment;
(iii) the period of probation;
(iv) normal rates of wages payable;
(v) the overtime rates of wages payable;
(vi) the normal hours of work;
(vii) the periodicity of wage payments;
(viii) in the case of a fixed term contract of employment, the expected or agreed duration of the contract period;
(ix) the paid holidays, and the vacation, sick and other leave to which the employee is entitled;
(x) the conditions under which fines may be imposed by the employer;
(xi) the title, grade, nature or category of the work for which the employee is employed;
(xii) the notice periods to be observed by the employer and the employee should it be the case;
(xiii) the collective agreement, if any, governing the employee's conditions of work; and
(xiv) any other relevant or applicable condition of employment.

While the vast majority of candidates gave satisfactory answers to this question and mentioned the main conditions to be included in the statement, in the main not all conditions were mentioned by the candidates.

Question Six

This question was a one part question dealing with a particular aspect of company law, namely the rights and duties of partners in partnerships *en nom collectif* and *en commandite*.

A partnership *en nom collectif* may be formed by two or more partners, operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners, provided that at least one of the partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members. On the other hand, a partnership *en commandite* operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners, called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution, of one or more partners, called limited partners, provided that at least one of the general partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members.
Particular rights and obligations are vested in, and undertaken by, the unlimited partners of partnerships *en nom collectif* and the unlimited partners of partnerships *en commandite*. Likewise there are duties undertaken by such partners. On the other hand, the rights and obligations of the limited partners are different. In fact in the management of the partnership, there are cases where the rights of the limited partners are limited, while in other cases, the limited partners are released from some of the duties of the general partners.

Answers to this question were satisfactory clearly showing that candidates were aware of the various rights and obligations vested in the partners. Better marks could have been awarded if more detail was given.

Question Seven

Question seven was also based on provisions of the Companies Act, 1995. Again this was a one part question dealing with ordinary and extraordinary resolutions taken by the shareholders of both private and public companies.

Decisions at general meetings are taken by way of resolutions. Resolutions may be of two kinds, ordinary and extraordinary resolutions. In terms of Article 135 Companies Act, which deals principally with resolutions taken

in public companies, a resolution is an extraordinary resolution where two conditions are complied with. The said conditions are, namely, that:

(i) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given; and

(ii) (ii) it has been passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51%, or such other higher percentage as the memorandum or articles may prescribe, in nominal value of all the shares entitled to vote at the meeting. On the other hand, an ordinary resolution is one which is passed by a member or members having the right to attend and vote holding in the aggregate shares entitling the holder or holders thereof to more than 50% of the voting rights attached to shares represented and entitled to vote at the meeting, or such other higher percentage as the memorandum or articles may prescribe.

The vast majority of candidates gave satisfactory answers to this question providing adequate detail and making reference to the relevant statutory provisions.

Question Eight

Question eight was a two part question dealing with capacity under contract law. The facts referred to a person being of a particular age in order to be deemed capable to enter into particular transactions.

The first part of the question concerned a minor being emancipated to trade. A minor who reaches the age of 16 may be emancipated to trade and hence also be a shareholder of a limited liability company. In this case, he shall be deemed to be a major with regard to obligations contracted by him for the purpose of his trade and he can therefore also charge, alienate or hypothecate his property without further formality. If a person is under nine years of age, any contract they enter into is null, that is, the incapacity is absolute. In terms of Article 968, any contract entered into by a person who has not the use of reason, or is under the age of seven years is null. If they are between 9 and 14 years of age, then a contract entered into by such person is only valid insofar as it relates to obligations entered into by the other person in their favour. The obligations undertaken by the child are null. Thus it is called 'a lame contract' and the minor can institute an action in court to rescind the contract if it has been executed. Whereas if they are called upon to perform the contract, they can plead the legal exception of minority. The other contracting parties cannot take these courses of action. During the third stage, that is between 14 and 18 years of age (the age bracket John falls within); the law distinguishes between whether the child is subject to paternal authority or tutorship. In the first case, they remain in the same condition in which they were during the second stage (between the age of 9 and 14) and in the second case, they are, as a rule, deemed capable of contracting but they can impugn the contract, whatever it is, on the grounds of lesion. However, the consent of the court is required for such a child to alienate or hypothecate immovable property.

Both parts of this question were answered particularly well with candidates analysing the given facts and applying their knowledge of the law to the given facts. Answers were also well structured and detailed.

Question Nine

This question is divided into three parts and deal with aspects of company law, namely company officers and liability of shareholders.

The first question dealt with the carrying out of activities by the director which are not covered by the company's activities as detailed in its statutory documents. The memorandum of association of a limited liability company provides for the activities a company can undertake. A company, through its directors, must carry out activities falling within the provisions of the objects clause and should it wish to extend its activities, it must amend its objects clause accordingly. Therefore, the director could not in terms of the company's memorandum of

association carry out the activities he was pursuing and the fact that he continued to do so may result in the shareholders taking action against him for any losses the company may have suffered as well as exercising their right of removal.

The second part of the question referred to the powers shareholders may exercise against directors. The power of removal vested in the hands of shareholders is said to strike a balance between the directors' powers of management on the one hand, and the shareholders' powers of control on the other. Thus, provided the directors exercise their powers of management in the best interests of the company as a whole, they will not suffer interference from the shareholders who will be content to leave the running of the company to them. However, if the shareholders are dissatisfied with the conduct of the company's affairs as in the case under consideration where the director is carrying out activities which were not decided upon by the shareholders and most probably without the shareholders being aware that the director is so undertaking these activities, they can exercise the ultimate power of control by the removal of the directors.

The third part of the question referred to the duties of a company secretary. In terms of law, the company secretary shall be responsible for keeping:
– the minute book of general meetings of the company;
– the minute book of meetings of the board of directors;
– the register of members;
– the register of debentures; and
– such other registers and records as the company secretary may be required.

Answers given to all parts of the question were satisfactory, in particular answers given to the third part of the question.

Question Ten

The last question was divided into three parts with the first and second parts dealing with shareholder rights and the third question with the procedure to be followed in order for a shareholder to pledge his shares in a company.

The first part deals with the variation of class rights. As a rule, the articles of association provide for the variation of class rights. Regulation 3 of Part 1 of the First Schedule to the Companies Act, 1995 provides that if at any time the share capital is divided into different classes of shares, the change of any shares from one class into another or the variation of the rights attached to any class (unless otherwise provided by the terms of issue of the shares) may be made with the consent in writing of the holders of three-fourths of the issued shares of that class, and the holders of three-fourths of the issued shares of any other class affected thereby, or by an extraordinary resolution passed at a separate general meeting of the holders of the issued shares of that class and of any other class affected thereby. However, any such similar provision in the memorandum or articles is subject to the rules provided for under Section 116 Companies Act, 1995 which provides that if the memorandum or articles contain a provision authorising either the change of any shares in the company from one class into another, or the variation of the rights attached to any class of shares in the company, such change or variation shall be subject to the consent of a specified proportion of the holders of the issued shares of that class and of any other class affected thereby, or to the sanction of a resolution passed at a separate meeting of the holders of those shares and of the holders of any other shares affected thereby. Most answers to this part of the question lacked sufficient, and in-depth, detail.

The second part of the question dealt with the rights attached to redeemable, non-voting preference shares and the rights which such vested in the holder thereof. The last part of the question dealt with the pledging of shares. Shares may, unless otherwise provided in the memorandum or articles of the company or under the conditions of issue of those shares, be pledged by their holder in favour of any person as security for any obligation. The pledge of shares must be done by means of an instrument in writing entered into between the pledgor and the pledgee.

However, in the case of a private company, shares may not be pledged unless the memorandum or articles of the company specifically so provide. Satisfactory answers were given to both the second and third parts of the question.