

Examiner's report

F4 Corporate and Business Law (MLA)

June 2010

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General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. Few candidates did not attempt all the questions. 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 allocated the same amount of time to the answering of 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.

From the answers given one could note that candidates did read the question and identify the requirements of each part of the question. The instances where most candidates failed to do so was in relation to questions 1 and 2. With respect to question 1 some candidates based their answers on the sources of Maltese law rather than on rules of interpretation while with respect to question 2 candidates either only made reference to the internal requirements or made reference to both the internal and external requisites of a contract while the question only referred to the external requirements.

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 few high performers and in the majority candidates obtained average marks with many just managing to reach the pass mark. This is evidence that with a little more effort better marks can be achieved. The principal reason for the under performance of candidates is lack of adequate preparation for the examination with many replies not having sufficient detail to be afforded higher 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 question dealt with the interpretation of laws by the local courts and candidates were required to examine the different schools of thought on the matter. The importance of the different schools of thought is to determine which is that applied locally. 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.

All candidates attempted this question. Many candidates however made reference to sources of Maltese law rather than to the rules of interpretation of Maltese laws. Those which referred to the rules and to the different schools of thought gave very satisfactory answers.

Question Two

This question was also a one part question which specifically dealt with one aspect of contract law, namely the external requisites. Contractual requisites can be classified into essential requisites, namely those which are so intimately connected with the contract that in their absence the contract is null; natural requisites, which include those requisites which are so intimately connected with the contract that they subsist until they are excluded by the parties, but without which the contract would not be rendered null; and accidental requisites, which include those requisites which exist only if they are agreed upon by the parties. Essential requisites 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. These are requirements which must be complied with in order for a valid contract to come into place.

The majority of candidates attempted this question. Many answers given to this question were satisfactory. Few candidates restricted their answers to the internal essential candidates while others referred to both the internal and external requirements.

Question Three

The question dealt with breach of contract. There are three principal effects of obligations, namely (i) the principal effects; (ii) secondary or accessory effects; and (iii) subsidiary or auxiliary effects.

The secondary effects are those which arise out of breach of contract. Candidates were to refer to the three conditions which 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.

The question was worded in a straightforward manner and all candidates who attempted this question did understand its requirements and gave satisfactory answers.

Question Four

This question 4 was also a one part straightforward question and dealt with one aspect of employment law. The question dealt with the provisions of the Employment and Industrial Relations Act 2022, which deals with the termination of definite contract of employment.

Contracts for a definite period may be terminated, either (i) at the lapse of the fixed period which is agreed upon between the parties; (ii) by either party, during probation; (iii) by either party, for any reason whatsoever, provided that the penalty stipulated at law is paid; or (iv) by either party, for a good and sufficient cause.

The majority of candidates who answered this question answered it well and made reference and explained adequately most, if not all, the instances in which definite contracts of employment may be terminated and the resulting effects.

Question Five

This question was also a one part question and dealt with the institute of mandate as regulated by the provisions of the Civil Code.

Mandate is a contract whereby a person gives to another the power to do something for him. The contract is not perfected until the mandatary has accepted the mandate. Every mandate must have for its object something lawful which the mandator might have done himself. Candidates were expected to make reference to the rights and obligations of both parties to a mandate relationship.

Answers to this question were, in the majority, satisfactory though perhaps lacking in some detail.

Question Six

This question was a very straightforward question and required candidates to deal with the dissolution of partnerships *en commandite* and *en nom collectif*. In answering this question candidates were to make reference to the relative provisions of the Companies Act and detail the procedure to be followed in each case.

- In terms of Article 35 of the Companies Act, a partnership *en nom collectif* is dissolved -
 - (a) where the period, if any, fixed for its duration expires;
 - (b) if, subject to the provisions of Article 21 of the Act (which deals with the reduction of contribution of the partners), all the partners so agree;
 - (c) if the partnership is adjudged bankrupt;
 - (d) if, subject to the provisions of Article 21 of the Act, in the opinion of the court, there exist grounds of sufficient gravity to warrant dissolution;
 - (e) if the number of partners is reduced below two and remains so reduced for more than six months; and
 - (f) in such other cases for which provision is made in the deed of partnership.

An ordinary partnership *en commandite*, besides being determinable for any of the causes which bring about the dissolution of a partnership *en nom collectif*, is dissolved if no general partners or limited partner remains unless within six months the partner who has ceased to be a partner is substituted.

Most candidates gave detailed answers to this question.

Question Seven

This question was divided into two parts. The first part of the question dealt with the role of the Registrar of Companies. The second part of the question dealt with the role of the promoter. The vast majority of candidates gave satisfactory answers to the first part of the question and were able to detail what the Registrar does in particular in relation to the registration of companies.

Locally, an office which has, at times, been assimilated to that of a regulator is the Registrar of Companies. In fact, his role has evolved so much, in Malta particularly through the enactment of the Companies Act, that his office is seen to be more than merely that of the person with whom documents are registered.

On the other hand, answers to the second part of the question were not as satisfactory. This is perhaps due to the fact that the role of the promoter does not feature in the Companies Act. A feature absent from both UK and local company legislation is provision for the promoter of a company. The term 'promoter' can be widely interpreted to include several persons and since this is not legislatively defined recourse has to be had to case-law. In one UK case, the judge defined it to include 'one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish the purpose.' Since before its incorporation a company cannot be said to exist, there must be somebody to act on its behalf. However, a more comprehensive definition was given in *Emma Silver Mining Company v. Lewis & Son* (1879), where it was held that the duties of the promoter go further than the registration of a company, in that, after registration a promoter is held to owe fiduciary duties to the company.

Question Eight

This question is divided into two parts, with the first part having 7 marks allocated to it and the remaining 3 marks allocated to the second part of the question. The first part of the question dealt with a members' voluntary winding up and the preparation of a declaration of solvency. Candidates were expected to determine whether on the basis of the facts given they were of the opinion that the company can be placed into liquidation voluntarily and whether the directors could prepare a declaration of solvency. Consequently, candidates were expected to

provide an analysis of the facts. Candidates could have scored higher marks if greater detail was given and if this analysis was given more importance. There were also those candidates who did not adequately explain the nature of a members' voluntary winding up as against a creditors' winding up. Some answers also lacked an analysis of when a declaration of solvency should be drawn up.

The second part of the question expected candidates to detail those instances in which a company can be wound up by the court. Most candidates did not provide complete answers and failed to mention all instances.

Question Nine

This question dealt with the duties of directors in terms of the provisions of the Companies Act. In particular, the first part of the question which had 8 marks allocated to it, dealt with the duty to disclose interests by a director. In the exercise of their powers and duties, directors are said to owe fiduciary duties to the company. In fact, directors must act honestly and in good faith in the best interests of the company. Thus, they must not exercise the powers conferred upon them for purposes different from those for which they were conferred; they must not misuse their powers; they must not restrict their discretion as to how they shall act; and that, without informed consent of the company, they must not place themselves in a position in which their personal interests conflict with those of the company. To avoid such conflicts from arising, the law provides for measures of disclosure.

An important fiduciary duty which is statutorily imposed on directors is that they must not create conflict between the duties they owe to the company and their personal interests and those they owe to others. In terms of law, where a director is in any way interested, whether directly or indirectly, in a contract or proposed contract with the company he is to declare the nature of his interest to the other directors, either at the meeting at which the question of entering in the contract is first taken into consideration, or, if the director was not at that date so interested in the said contract or proposed contract, at the next meeting of the directors held after he became so interested. Any director who fails to declare such interest shall be liable to a fine of Eur 2,320.

Most candidates gave satisfactory answers to this part of the question clearly showing that they were conversant with the provisions of law on the subject matter.

The second part of the question dealt with a simple practical question as to what action may be taken against a director who has failed to comply with the disclosure requirement. Most candidates gave satisfactory answer to this part of the question.

Question 10

This question was again divided into two parts with 7 marks being allocated to the first part and 3 marks to the second part. The question dealt with the provisions of the Prevention of Financial Markets Abuse Act Cap476.

In order to determine any liability of the director, candidates were to refer to the provisions of the said Act. In terms of the Act an officer or employee of a company, who is reasonably expected to have access to unpublished price sensitive information. This is defined in Article 2(1) of the Act as "*information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, including information regarding any takeover offer for a company, and which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions.*"), in relation to securities of such company, is prohibited from using that inside information in the trade of those financial instruments on a recognised stock exchange. While most candidates were able to show an understanding of the role of a tipper and tippee, higher marks could have been scored if a proper analysis of the statutory provisions in relation to the given facts was made.



The second part of the question related to the acts of another figure mentioned in the given facts and again, through an analysis of the facts and provisions of the Act, candidates had to give a brief reply as to what action, if any, could be taken against this person for breach of law. Answers given were satisfactory.