Examiner's report

F4 Corporate and Business Law (MLA)
June 2013

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 a 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 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 6, candidates could have answered the questions more directly. Question 2 dealt with offer as an essential requirement for the conclusion of a valid contract as opposed to an invitation to treat, a variance of an offer. There were candidates who entered into a discussion of all essential requirements for a valid contract instead of dealing with offer. Likewise, question 6 dealt with an increase in share capital for a consideration in kind where candidates were expected to detail the procedure to be followed. In the majority of cases, little importance was given to the procedure.

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 which was rather disappointing in comparison, especially, with 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 explain the primary sources of Maltese law. Primary sources are directly and authoritatively sources of law and the secondary sources which are of an authoritative nature but not necessarily binding but are usually referred to in order to interpret the law, as in the case of judgements and the writings of authoritative text writers.

In explaining what are the primary sources of law candidates were expected to distinguish between primary legislation and secondary legislation. Primary legislation refers to laws enacted by Parliament. Parliament is the only body which is vested with the right to enact, amend or repeal laws. There are two types of primary legislation. The first type of primary legislation includes the five Codes, namely the Civil Code, the Commercial Code, the Criminal Code, the Code of Organisation and Civil Procedure and the Code of Police Laws. The second type of primary legislation includes all those other laws enacted by Parliament, which are not incorporated in the afore-mentioned Codes, and which take the form of either Acts of Parliament or Ordinances. Ordinances are those laws which were enacted by Parliament in Malta prior to 1964 whereas Acts are those laws enacted by Parliament and which continue to be enacted since 1964.

Secondary legislation is also referred to as subsidiary legislation. Secondary legislation in Malta takes the form of Legal Notices. Legal Notices are drafted and brought into force by the Ministers in accordance with any enabling powers which may be vested in them in terms of the primary legislation. In fact in most Acts of Parliament one finds provisions which vest the particular Minister responsible with the power to make regulations for the purpose of carrying into effect the provisions of the Act. Bye-laws and statutory instruments are often also deemed to be a form of subsidiary legislation.

Most candidates performed well in this question and amplified sufficiently on both primary and secondary legislation clearly indicating the manner in which legislation is enacted into Maltese legislation.

Question Two

Question two was also a one part question. This question referred to an offer as part of the requisites essential for a valid contract. Candidates were also expected to draw out a distinction between an offer and an invitation to treat.

An offer or proposal is a unilateral act as it is made by the proposer to one or more contracting parties or to the public at large. It is the manifestation of the will and intention of one of the contracting parties to enter into an obligation with one or more parties. An offer is deemed to be of a transitory nature, in that, once the offer is accepted the offer loses its individuality in the unity of the contract. On the other hand, if the contract is not concluded the offer loses its significance and ceases to have juridical existence.

In order for an offer to produce legal effects it must also be (i) externally manifested; (ii) made with the intention of binding the offeror; (iii) complete; and (iv) made to a particular individual, his agent or to the public.

The majority of answers to this question were satisfactory but several lacked detail. Higher marks could have been scored had candidates referred to the requirements for a valid offer and explained them. Similarly, while most candidates explained what generally constituted a valid offer, difficulties were noted in providing satisfactory answers on what constituted an invitation to treat and how this differed to an offer.

Question Three

This question was also a one part question dealing with the concept of privity of contract. While there were a small number of candidates who were not prepared for this question, the majority were aware of the concept and provided an explanation. However, the latter did lack detail in most cases with candidates not making direct reference to the relative legal provisions.

A fundamental principle of contract law is that a contract only binds the parties to it (and their heirs). This principle can be found under article 999 of the Civil Code which provides that a person cannot by a contract entered into in his own name, bind or stipulate for anyone but for himself. Furthermore, article 1001 provides that contracts shall only be operative as between the contracting parties, and shall not be of prejudice or advantage to third parties except in the cases established by law.

Accordingly, if a person does not act in their own name but as agent or representative of other persons, such person shall not be bound by such contract; but only the persons they are representing shall be bound. Article 999(2) of the Civil Code provides that a person can bind themselves in favour of another person, to the performance of an obligation by a third party; but in any such case if the third party refuses to perform the obligation, the person who bound themselves or promised the ratification shall only be liable to the payment of an indemnity.

It can be held that there are two cases in which stipulations made for the benefit of a third party constitute the mode or condition of a stipulation made in one's favour. The first case is when the promise to the benefit of a third party is a secondary object of the contract; where the principal object is the payment of a penalty to the person who stipulates, in case the obligation is not performed. The second case when stipulations made for the benefit of a third party constitute the mode or condition of a stipulation made in one's favour, is when a contract has two considerations. In such a case, the person who stipulates adds to the obligation of the other party towards them another obligation in favour of a third party.

Question Four

Question four was also a one-part question. The question dealt with the contents which are required in terms of the Companies Act 1995 in order for a memorandum of association to be validly drawn up. In terms of article 68 of the Companies Act, a company shall not be validly constituted under the Act unless a memorandum of association is entered into and subscribed by at least two persons, and a certificate of registration is issued in respect thereof.

The memorandum of association contains the essential and basic conditions upon which alone a company is allowed to be registered; it is the document which informs third parties dealing with the company what are its objects, its sphere of activity and its capital. Article 69 of the Companies Act lays down the contents for a valid memorandum. Most candidates listed, and some gave a brief explanation, of the contents of a valid memorandum of association.

Question Five

This question was a two part question and dealt with partnership law. The first part dealt with the contents for a valid partnership deed, while the second part dealt with the procedure to be followed were changes are to be effected to the contents of a partnership deed.

A partnership shall not be validly constituted unless a deed of partnership is entered into and signed and a certificate of registration is issued in respect thereof. Article 14 of the Companies Act lists down the contents of a deed of partnership of a partnership en nom collectif.

The law also makes specific provision when particular changes to the deed are to be made. Thus, for example, in the case of changes relating to the administration or the representation of a partnership, the relative instrument shall specify the name and residence of the person or persons entrusted with the said administration or representation. Where the change relates to the extension of the period fixed for the duration of a partnership, the partner or partners having the administration or representation of the partnership shall deliver a notice of extension to the Registrar. Where a partner ceases to be a partner or where a person becomes a new partner, notice to that effect, must be delivered to the Registrar. Any assignment of interest in whole or in part of any partner shall require the prior consent in writing of all the other partners. Where the change relates to the name of the partnership, the Registrar shall issue a certificate of registration altered to meet the circumstances of the case. All the changes mentioned above shall take effect when so registered with the Registrar of Companies. In the case of the changes relating to certain other changes, these shall not be operative until three months from the date of publication of the statement made by the Registrar.

While the vast majority of candidates gave satisfactory answers to the first part of the question, the same was not the case with respect to the answers to the second part of the question. As noted above, the law makes reference to particular changes and what needs to be done in each case. Few candidates made specific reference to these changes and to the particular procedure.

Question Six

This question was a one part question dealing with a particular aspect of the share capital of a limited liability company, namely an increase in the issued share capital for a consideration in kind.

Articles 85 of the Companies Act, 1995 provides that any increase in the issued share capital of a company shall be decided upon by an ordinary resolution of the company. The law provides for the issue of shares either in cash or for a consideration other than cash. The latter case is regulated by Articles 73 and 74 of the Act. In terms of Article 73, the consideration for the acquisition of shares in a company whether on the original subscription or a subsequent issue, may only consist of assets capable of economic assessment, and furthermore, future personal services and in general any undertakings to perform work or supply services may not be given by way of consideration. Where shares are issued other than on original subscription for a consideration other than in cash, the full consideration shall be transferred within five years from the date of the decision to issue the shares.

A report on any consideration other than in cash must be drawn up before the shares are issued by one or more experts who are independent of the company and approved by the Registrar and delivered to the Registrar for registration before the company is registered or before the shares are issued. In terms of article 74, a company shall not acquire, within two years of its authorisation to commence business, any asset belonging to a person who subscribed the company's memorandum or who is a member of the company for a consideration which is equivalent to at least one tenth of the issued capital of the company unless certain conditions are satisfied.

Answers to this question were satisfactory clearly showing that candidates were aware of the procedure to be followed when an increase in capital was for a consideration in kind. 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. This was a two part question, with the first part dealing with the definition of an officer of a company and the second part with the duties and powers of the company secretary.

In terms of the definition section under the Companies Act, 1995, an officer of a company is said to include a director, manager, or company secretary, but does not include an auditor. The importance of the role of the company secretary is seen in the requisites which the law provides that each person appointed to hold such post must possess. In terms of the Companies Act, 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 to keep by the board of directors. In addition, the company secretary is to ensure that proper notices are given of all meetings; and is to ensure that all returns and other documents of the company are prepared and delivered to the Registrar in accordance with the requirements of the Companies Act. Furthermore, as an officer of the company, the company secretary can be held to be just as responsible as the other officers of the company.

The vast majority of candidates gave very satisfactory answers to both parts of the question providing adequate detail.

Question Eight

Question eight was a one part question dealing with employment law. The facts referred to particular aspects such as probation, due protection on the receipt of wages and redundancy.

Probation is a term not defined in our law. The law merely provides that the first six months of a worker's employment shall be probationary employment unless both parties agree on a shorter period of probation. The law dedicates a whole chapter to the protection of wages. The reason for this protection being afforded to employees is obvious, in that, receipt of wages is a fundamental right of every worker. The relative provisions contain rules which are intended to ensure that an employee receives his wages personally and in full. Contracts of employment for an indefinite period may be terminated on grounds of redundancy provided that the notice stipulated at law is given by the employer to the employees whose employment is being so terminated. Redundancy is not defined in our law. Industrial practice has interpreted it to include: (i) excess of supply and (ii) lack of profitability.

This question was 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 two parts and both dealt with the contract of mandate.

The relationship between principal and agent are mainly regulated under Maltese law in virtue of the provisions found in the Civil Code on mandate. 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. The vast majority of candidates thus correctly concluded that Mr Smith may appoint his friend as a mandatary.

The second part of the question deals with the possible abuse of power by a person vested with authority. A mandatary cannot do anything beyond the limits of the mandate he has been given. Most often a mandatory is vested with wide powers in order to carry out of the mandate. He may institute legal proceedings; make and prosecute appeals; make proof by reference to the oath of his adversary; take the oath *in litem* or the suppletory oath; enforce judgments both on movable and immovable property; make a demand for the issue of precautionary acts including those for the issue of which an application or declaration on oath is required; make demand for the personal arrest of the debtor of the mandator, where such demand is required; and do any other thing which the mandator might do personally, notwithstanding that such powers have not been expressly given in the mandate. Most answers given to this part of the question were satisfactory and detailed.

Question Ten

The last question was divided into two parts and dealt with prevention of money laundering. In the first part of the question candidates were expected to determine whether one of the protagonists of the facts of the case could be held liable of the offence of money laundering in terms of the provisions of the Prevention of Money Laundering Act 2004. Therefore, an analysis of the provisions of the relative Act was required and in the majority of answers candidates gave satisfactory answers and applied their knowledge of the law to the facts of the case.

Reference had again to be made to the provisions of the law in determining the obligations of a Subject Person. Here again candidates were requested to voice their personal opinion and candidates answering this question did so.