Answers

1 The question deals with the court structure in Malta and the division into the different courts having different areas of jurisdiction. Candidates are 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.

Civil Jurisdiction

The courts of justice of civil jurisdiction for Malta are either superior or inferior and are exclusively vested with the judicial authority in civil matters. While the jurisdiction of the superior courts is general, that of the inferior courts is limited.

The Superior Courts having jurisdiction in civil cases are:

(a) The Civil Court – As of December 2003, the Civil Court is divided into three sections, the Family Section, the Voluntary Jurisdiction Section and the General Jurisdiction Section. All three sections are presided over by a judge.

The Family Section is assigned those cases falling within the competence of the Civil Court and which relate to matters regulated by:

(i) Titles I, II and IV of the Book First of the Civil Code (rights and duties arising from marriage, filiation and parental authority);
(ii) the Maintenance Orders (Reciprocal Enforcement) Ordinance;
(iii) the Maintenance Orders (Facilities for Enforcement) Ordinance;
(iv) the Marriage Act; and
(v) The Child Abduction and Child Custody Act.

The Voluntary Jurisdiction Section is assigned applications falling within the competence of the Civil Court and which relate to matters regulated by (i) Titles III, V, VI and VII of Book First of the Civil Code (adoption, minority, tutorship and absentees); and (ii) Part II of Book Second of the Code of Organisation and Civil Procedure (mode of procedure before the Civil Court, Second Hall).

The General Jurisdiction Section is assigned all those cases within the competence of the Civil Court but which are not assigned to the other two sections.

(b) The Court of Appeal is the highest Court in Malta and hears appeals from all the other Courts (Courts of First Instance), namely appeals from the Civil Court, First Hall; the Court of Magistrates (Gozo) in its superior jurisdiction; the Court of Magistrates (Malta); and the Court of Magistrates (Gozo) in its inferior jurisdiction. Appeals from the last two courts are presided over by one judge while appeals from the first two courts are presided over by three judges, including the Chief Justice.

(c) The Constitutional Court is deemed to be a court of primary and secondary instance. It is composed of three judges, which include the Chief Justice of the courts. Its jurisdiction is:

(i) to hear cases (as a court of first instance) concerning parliamentary elections and electoral corrupt practices; and as a court of second instance;
(ii) to hear appeals from decisions of The Civil Court, First Hall dealing with fundamental human rights;
(iii) to hear appeals from decisions of any court of original jurisdiction as to the interpretation of the Constitution;
(iv) to hear appeals from decisions of any court of original jurisdiction on questions as to the validity of laws; and
(v) to hear appeals from any question decided by a court of original jurisdiction together with any questions referred to in the above of which an appeal has been made to the Constitutional Court.

The Inferior Courts are:

(a) The Court of Magistrates (Malta). This is a court of first instance presided over by one magistrate having contentious jurisdiction. This court hears cases (i) limited by value of an amount not exceeding €11,646·87; (ii) limited by territory – all persons residing or having their ordinary abode in Malta; and (iii) other cases specifically provided by law; and

(b) The Court of Magistrates (Gozo) is a court of primary and secondary instance, composed of one magistrate. Its jurisdiction is contentious and voluntary. In its inferior jurisdiction it hears cases which would be tried by the Court of Magistrates (Malta); and in its superior jurisdiction it hears cases which would be tried by the Civil Court (excluding causes in respect of violations of the constitutionally protected fundamental human rights). The Court of Magistrates in its superior jurisdiction is now divided into two sections, the Family Section and the General Jurisdiction Section. To the former are assigned those cases falling within the competence of that Court in its Superior Jurisdiction and which are regulated by those matters mentioned earlier in respect of the Family Section of the Civil Court in Malta, while the General Jurisdiction Section shall be assigned those cases falling within the competence of that court in its superior jurisdiction and which are not assigned to the Family Section.

The competence of these courts is limited by territory, referring to all claims against persons residing or having their ordinary abode in Gozo or Comino acting as a court of voluntary jurisdiction and thereby has, within the limits of its local jurisdiction, the same powers as the Civil Court.

Criminal Jurisdiction

The courts of criminal jurisdiction in Malta are the following: the competence of each court depends upon (i) the value of the subject-matter and (ii) the place of commission of the crime.

(a) The Courts of Magistrates, namely acting as a court of criminal judicature and of criminal inquiry. The Court of Magistrates as a court of Criminal Judicature is composed of one magistrate. Its competence includes:

  (i) the trial of offences called summary offences and those offences carrying a punishment of imprisonment up to a maximum of six months; six months to four years (the Attorney General makes the request to be heard by this court and such request is not opposed by the accused); those which exceed four years but are less than ten years (the accused makes the request to be heard by this court and such request is not opposed to by the Attorney General);
  (ii) the trial of offences carrying a punishment which does not exceed 10 years imprisonment (where, however, the accused may object);
  (iii) trial of offences carrying a punishment of more than six months but less than four years where the consent of both the accused and the Attorney General is necessary. In such cases, the Court of Magistrates as a court of criminal inquiry may be eliminated and convert itself into a Court of Magistrates of criminal judicature;
  (iv) where punishment exceeds six months but is less than four years the accused always has the option to be tried by the jury system before the Superior Courts (the Criminal Court). This does not apply to drugs cases and other cases on the basis of certain Ordinances (e.g. The Drugs Ordinance, The Medical and Kindred Professions Ordinance) which provide otherwise.

  Where the court of magistrates acts as a court of criminal enquiry, this is also presided over by one magistrate. Its competence is to compile evidence, and to determine whether there exist sufficient grounds for an indictment.

(b) The Criminal Court is composed of one judge and nine jurors, a foreman and eight ordinary jurors. Its competence is to:

  (i) hear cases where a bill of indictment is filed by the Attorney General;
  (ii) hear cases carrying a punishment which exceeds 10 years;
  (iii) hear cases where the Attorney General decides to file a bill of indictment notwithstanding that offence carries a punishment which exceeds six months but is less than 10 years;
  (iv) hear cases where although the offence carries a punishment of less than 10 years, the accused objects to be tried by the Magistrates Court of Criminal Judicature and instead elects to be tried by a jury before the Criminal Court.

  While points of fact are determined by the jury, points of law and punishment is determined by the judge.

(c) The Court of Criminal Appeal is composed of three judges which include the Chief Justice of the courts. Its competence is to hear Inferior and Superior Appeals.

2 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 and void; 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 void; and accidental requisites, which include those requisites which exist only if they are agreed upon by the parties. From the above therefore, it is clear that only the essential requisites should be called requisites as they are required for the essence and validity of a contract. The other so-called requisites are, in actual fact, the effects rather than the requisites of a contract.

Another distinction often made in relation to the requisites of a contract is between common requisites, which all contracts require, and particular requisites, which are proper to certain contracts only.

The common 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.

Internal requisites

1. Capacity to contract; AND
2. Consent; AND
3. Subject-matter (or object); AND
4. Lawful consideration (or cause).

External requisites

1. Public deed; OR
2. Private writing.

Normally the form of a contract is free and the parties may use any form they wish, even omitting any type of formality and express their agreement by word of mouth. However, there are cases where the law requires certain conditions and certain formalities by which consent is to be expressed. There are various reasons why the law requires these solemn formalities, such as for example, to warn the parties of the seriousness of the contract or the consequences thereof. The law therefore warrants greater reflection of the part of the parties before entering into the particular transaction. A solemn form also provides tangible evidence of the conclusion and terms of the contract. By requiring registration of a contract, the law is also a means of publicity of the said contract in the interest of the parties thereto but also in the interest of third parties.

The solemn form required by law may either be a public deed or private writing. In terms of article 1232(2) of the Civil Code, a public deed is an instrument drawn up or received, with the requisite formalities, by a notary or other public officer lawfully authorised to attribute public faith thereto. The contracts with regard to which the law imposes the most solemn form, that is, the public deed, are those which relate to the transfer of immovables, whether the title be sale or exchange, and whether the contract constitute an annuity or a donation, or *emphyteusis*, usufruct, or right of habitation. Moreover donation must, subject to prescribed conditions, always be done by means of a public deed even if the object thereof be a movable.

There are those instances where the law is satisfied with the less solemn form, namely a private writing, although even in such cases the parties may choose to make a public deed. In terms of article 1233 of the Civil Code.

'Saving the cases where the law expressly requires that the instrument be a public deed, the transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing:

(i) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;
(ii) any promise of a loan for consumption or *mutuum*;
(iii) any suretyship;
(iv) any compromise;
(v) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural tenements;
(vi) any civil partnership; and
(vii) for the purposes of the Promises of Marriage Law, any promise, contract, or agreement therein referred to.'

A private writing must be either signed by each of the parties or attested by an advocate or a notary according to article 634 of the Code of Organisation and Civil Procedure. The latter lays down that if a person cannot or does not know how to write he must set his mark which must be attested by an advocate or a notary, together with a declaration that such mark has been set in his presence and in the presence of two witnesses who must also set their signature, and together with a declaration that he has personally ascertained the identity of the person setting such signature or mark.

3 **(a)** 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 and the resulting liability arising from the same.

The general rules are drawn from the Civil Code; which rules apply to all persons, including professionals in the exercise of their respective professions. Maltese case law contains a number of judicial decisions on how these general rules are applied to professionals, such as notaries, lawyers and architects. Furthermore, the accountancy profession is also specifically regulated by the Accountancy Profession Act, 1980.

In the case of the accountant and his client, there is a contractual relationship of some type or other, but no such relationship exists between the accountant and the third party who might suffer damages as a result, for instance, of relying on faulty accounts prepared by the accountant.

This leads to the question as to whether the accountant owes a duty of care to third parties other than to his clients under the law of tort. If the accountant knows or can reasonably foresee that other persons may rely on his work, he could be held liable in tort for damages resulting from his negligence.

The determination of liability towards third parties will depend upon the actual role assumed by the accountant or auditor.

Where the accountant reports on accountancy matters in a prospectus issued for public subscription, the answer is straightforward.

But what is his position when he gives advice solely to his client, or better still, if he issues a clear disclaimer to third parties in the advice? Disclaimers are not watertight in all instances and could be considered as having limited effect. It is a rule of public policy which does not allow one to exonerate himself from gross negligence or fraud.

(b) The liability of accountants and auditors towards third parties is however not clearly provided for under Maltese law. The Accountancy Profession Act, 1980 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, is found in the Companies Act 1995.

In a local case, in the note of submissions of the parties, both the plaintiff and defendant in the case agreed, on the basis of English case-law, that the duty of care owed by the accountant to third parties does not extend to strangers who, without their knowledge or consent, relied on their accounts.

In fact, the above contrasts sharply with current trends whereby auditors are being sued by third parties who would have relied on the audited financial statements so as to decide whether to do business with that particular entity or otherwise. (cases in point: the US firm KPMG in the Enron case, the local Priceclub case against Deloitte, the Parmalat Case where the partners of the Italian Grant Thornton member firm were sued for damages; and more recently, PWC was sued because of the Madoff scandal).

In providing other services, accountants may carry out a role which is specifically governed by special laws such as the Companies Act which clearly impose statutory responsibilities, as in the role of a liquidator, in this instance he would be open to liability towards third parties who may suffer damages through his negligence or non-observance of the formal or substantive duties under those special laws, and an action in tort may arise.

Another example is where an accountant or a firm of accountants contribute to the issue of a prospectus. Here he is by law held liable towards third parties who suffer damages upon relying on such prospectus wherein an untrue statement is later revealed. A specific provision in the Companies Act 1995 is to the effect that the persons who are responsible for or who have authorised the issue of a prospectus shall be jointly and severally liable for any damage sustained by a person subscribing for shares or debentures on the faith of that prospectus, by reason of any untrue statement contained therein.

In terms of the Accountancy Profession Act 1980, in the case of a partnership of accountants, partners are jointly and severally responsible for the actions and omissions of each and every one of them in the performance of their duties, the

maintenance of the required professional standards and conduct, and generally in the fulfillment of their obligations under the law. They are also held to be jointly and severally liable for any resulting loss or damage. This liability subsists notwithstanding the partner's retirement or death or his ceasing to be a partner.

In terms of the Accountancy Profession Act 1980, criminal action may be taken against persons within the profession who have breached their professional duty. Thus, in terms of article 12 of the Act every person who acts or omits to act in breach of his professional duty as accountant or auditor, shall, if such act or omission amounts to dishonesty or serious misconduct, be liable on conviction to imprisonment for a period of not less than one year and not exceeding five years, and the court may also inflict on such person a fine (*multa*) not exceeding €58,234·33. The Accountancy Board is also authorised to take action against defaulting professions and impose administrative fines. Such measures can even result in the suspension or cancellation of warrants.

4 In the case of limited companies, s.70(4) Companies Act 1995 provides a company cannot be registered with the same name as that which is already being used by another commercial partnership or so nearly similar that in the opinion of the Registrar it can create confusion. It is to be noted, however, that in practice the policy is that where companies form part of the same group, an exception shall be made, provided that the acceptance of the company which already exists, shall be received by the Registrar of Companies, confirming that the new company be allowed to be registered with a name similar to its name. An interesting case in this regard is *Attard noe* v *Vindrame noe* (1992) where the plaintiff, in representation of a company called 'Sea Sped Shipping Limited' sued the defendant to change the name of his company 'Sea Speed Limited' since this created confusion and was misleading. The First Court held that although the names of both companies were so phonetically and visually similar, since the parties carried on different types of business, this could not create confusion. It appears, however, that if both companies carried on the same line of business the Court would have held that this would have been confusing. The Court of Appeal reversed this decision on the basis of the amendments to the relevant provision of the Commercial Partnerships Ordinance. It held that whereas a physical individual can use his name in business, even though this could create confusion but provided he does not do so with a fraudulent intent, in the case of a company its name is invented and thus one should try not to create confusion in the market. In this case, however, there is no need to prove bad faith but merely the confusion. An alternative name, therefore, had to be chosen. On these grounds the defendant company, which was registered three years after the plaintiff company, was ordered to change its name.

In the UK case of *The British Diabetic Association* v *The Diabetic Society* (1995) it was held that the words 'Association' and 'Society' are very similar in form and in derivation of meaning and could therefore be confusing.

Furthermore, the law provides that a company cannot be registered with a name which, in the opinion of the Registrar, is offensive or otherwise undesirable. In this case the Registrar is to consider the business or proposed business of the company, the protection of the names of persons who are not connected with the company, and the names of the members in the case of a private company. A similar provision exists in the UK and in fact from the case *R* v *The Registrar of Companies, ex p. H.M. Attorney General* (1980) it appears that the Registrar had refused to register Miss St Claire's company with names such as 'Prostitute Ltd' and 'Hookers Ltd'. Although the case was concerned with the lawfulness or otherwise of the company's objects, it appears to be the only case wherein it has been reported that the Registrar exercised his discretion not to register a company with an undesirable name.

Finally, since the law allows a person to reserve, for a period of three months, a name in respect of a company still in formation, no person can register a company with a name which has been reserved by somebody else.

Although, subject to the above restrictions, a company may be designated by any name, the law lays down further criteria and restrictions which are to be followed when choosing a name for a company and which depend on the status and nature of the company. Thus, whereas in the case of a public company the name of the company should end with the words 'public limited company' or 'plc', the name of a private company must end with the words 'private limited company', 'limited' or 'Ltd'. In this regard, Prof Cremona states that although the word 'company' need not be included at the end of the company name, the word 'limited' must be so included. He does not agree with English text writers who opine that the word 'limited' is a misnomer as it is the liability of the shareholders which is limited and not the company's liability for its debts. In fact he contends that the insertion of the word 'Limited' is prescribed by law with a view to ensure that third parties dealing with the company are fully aware that its members' liability is limited to the extent of any unpaid share capital.

Furthermore, the names of investment companies with variable share capital, this, or its abbreviation (SICAV), should be inserted at the end (together with the letters 'plc' if it is a public company), whereas in the case of investment companies having a fixed share capital, this, or its abbreviation (INVCO), should also be indicated in the name. It is submitted that the reasoning behind these rules is so as to enable a third party to immediately determine the type of company he is dealing with as soon as he sees the name. In fact, if a person trades or carries on business under any of the above mentioned names or titles (as well as names containing the word 'trustee' when it is not in possession of the licence or warrant to so act issued by the regulatory authority) shall be liable to a penalty.

5 **(a)** One of the essential features of the memorandum of association is that this provides for a share capital clause. This is generally made up of two parts: the nominal or authorised share capital clause, which 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.

Since not all the share capital of the company has to be issued, one must distinguish between the authorised share capital and the issued share capital of the company. The authorised share capital is the total amount of capital which the company is authorised to issue by its memorandum. Since the purpose of the authorised capital is to set a limit of issued capital, the authorised share capital is, in the strict juridical sense, not capital in that it merely represents an authority to create new capital up to its limit by the issue of shares. On the other hand, the issued capital is that which is actually being paid.

Thus, that part of the authorised share capital actually subscribed to by the shareholders is the issued capital. As the authorised share capital need not be fully subscribed to initially or all at once, further issues of capital may be made. However, since the authorised capital sets the limit of capital available for issue, the issued capital may never exceed the authorised capital.

(b) The Companies Act lays down the minimum authorised share capital requirements for both private and public companies. Thus, article 72 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 €1,164. In both cases, the share capital must be subscribed to by at least two persons, except in the case of a private exempt company having a single member in which case the share capital shall be fully subscribed to by such single member.

The issued share capital may be partly paid up and partly unpaid (uncalled). As is the case with the authorised share capital, the law lays down the minimum amount of share capital which is to be issued and paid up. Thus, where the authorised share capital of the company is equal to the minimum amount stipulated, it shall be fully subscribed to (issued) and in cases where it exceeds such minimum, at least that minimum must be subscribed to. Furthermore, in the case of a public company at least 25% of the issued share capital must be paid up on the signing of the memorandum and in the case of a private company this must be at least 20% paid up on the signing of the memorandum.

6 **(a)** A declaration of solvency shall have no effect unless (a) it is made within the month immediately preceding the date of the passing of the extraordinary resolution for dissolution and consequential voluntary winding up of the company, and is delivered to the Registrar of Companies for registration together with the notice of the said resolution and (b) it contains 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.

Furthermore, when the court has ordered that the company be wound up voluntarily, the court shall, before making the winding up order, require the directors of the company to make the declaration of solvency within such time as it may establish.

Any director making a declaration of solvency without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration, shall be guilty of an offence and liable on conviction to a fine (*multa*) of not more than €46,588 or to imprisonment for a term not exceeding three years or to both such fine and imprisonment; and if the debts of the company are not paid or provided for in full within the period stated in the declaration, it shall be presumed, until the contrary is shown, that the director did not have reasonable grounds for this opinion.

However, if during the liquidation process, the liquidator is, at any time after a declaration of solvency is made, of the opinion that the company will not be able to pay its debts within the period stated in the said declaration, he shall forthwith summon a meeting of the creditors, and shall lay before the meeting a statement of the assets and liabilities of the company and the provisions relating to a creditors voluntary winding up shall apply. If the liquidator fails to take such action, he shall be liable to a penalty.

(b) 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 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.

7 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.

A company recovery application may be made to the court requesting it to place the company under the company recovery procedure and to appoint a special controller to take over, manage and administer the business of the company for a period to be specified by the court. The appointment shall be for a period of not more than 12 months but may be extended for a further 12-month period.

A company recovery application is made by means of an application which may be made by the company by means of an extraordinary resolution, by the directors following a decision of the board, or by creditors of the company representing more than half in value of the company's creditors.

On the hearing of an application, the court may, after examining all the circumstances and the options that are available, either dismiss the application or issue a company recovery order, acceding thereto and placing the company under the company recovery procedure. In the order, the court shall (i) appoint an individual to act as a special controller and to carry out such functions and powers as the court may entrust to him in the administration and management of the property and business of the company; (ii) fix such reasonable remuneration of the special controller, as the court may consider appropriate; (iii) determine the period, not exceeding ten working days from the making of the company recovery order, within which the company shall deposit a sum of money in court or offer other suitable guarantee or other appropriate arrangement, which, in the opinion of the court, is sufficient to cover the remuneration, and charges of the special controller.

The court shall appoint as the special controller an individual who it has ascertained enjoys proven competence and experience in the management of business enterprises, is qualified and willing to accept the appointment, and has no conflict of interest in relation to his appointment. For so long as the special controller holds office, the fact of his appointment to such office and his full name together with his residential or business address shall be clearly indicated in all the business letters, order forms, invoices and any other documents of the company.

During the period that a corporate recovery procedure order is in force, the company shall continue to carry on its normal activities under the management of the special controller. The special controller shall take into his custody or under his control all the property of the company and he shall from then onwards be responsible to manage and supervise its activities, business and property. The special controller must examine the assets, affairs and business performance of the company and shall ascertain and verify whether there is a reasonable expectation of the company's recovery and continuation as a viable going concern, in whole or in part, and he shall submit an initial report thereon to the court not later than two months from the date of his appointment.

8 **(a)** From the facts given, it is James who has contracted with the second-hand car dealer and not his father. Therefore, James' father is 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 is between James and the car dealer exclusively. A fundamental principle 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.

A principle of Roman Law which is still applicable, is that an obligation is a strictly personal relationship which does not give rise to any relations except between the persons who take part in such obligation. Thus, with respect to third parties, a contract is a *res inter alios acta* and accordingly *tertio neque prodest nocet*. Contracts result from the consent given by the contracting parties and cannot therefore be deemed to produce any effects beyond the relations existing between those who gave their consent. 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 any one but 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.

Provided that all requisites are present for the contract between the car dealer and James to be valid, then the car dealer may claim payment from James, which James shall be obliged to pay.

(b) 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 and void; 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 void; and accidental requisites, which include those requisites which exist only if they are agreed upon by the parties.

The 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.

One of the internal requisites which must be present for a contract to be deemed valid is consent. The consent of the parties entering into a contract is of essence, without which a contract cannot be said to be concluded validly.

Consent is the will between the contracting parties to create, regulate or dissolve an obligation. For consent to exist two acts of volition must exist, namely the promise of one party and the acceptance of the other. If only one exists then there is no consent. One must also distinguish promise and acceptance from proposal and answer. The latter are two moments of consent, of which proposal is that part of consent which precedes the answer. On the contrary, promise need not precede acceptance nor need acceptance precede the promise. Thus, consent is the concourse of the identical wills of the parties, duly formed and made known.

When consent is made known this must conform with the internal act of volition; otherwise there is deformity in consent. Such a defect may be either voluntary or involuntary. It is voluntary when one of the parties deliberately declares an intention which actually does not correspond to their true intention, that is, simulation. Involuntary deformity may be due to duress.

Furthermore, both parties must be agreeing to the same thing for consent to be valid. Thus, there must be identity between the acts of volition of the contracting parties. Disagreement is therefore always an obstacle to consent when this refers to some

substantial element, which is important with regards to the benefit or burden which the parties intend to derive or assume by the contract. If the disagreement does not affect the burden or benefit, then it is indifferent and does not affect consent.

Finally, there must be concourse between these wills. Therefore, a proposal does not bind the person making it but can be withdrawn unless accepted by the other party.

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 eight years old, the second hand-car dealer consciously sold James a car which was 15 years old. Therefore in actual fact, there was no unison of wills, in that, both parties were not agreeing on the same thing. James can therefore claim that his consent was vitiated on the basis of an error.

The defects of an act of volition, whether with reference to a contract or to any other voluntary act, are error, fraud and violence.

Error is the deformity between an idea and its object; it is a false notion of a thing. In order that error may be deemed to vitiate consent, it must be determining and excusable. It is determining and substantial when the person who gives his consent would not have given it had he known the truth, that is, had he a correct idea of the thing. Otherwise, that is if he would have equally consented even if he had a correct idea of the thing, the error would be indifferent, since the person who consents cannot say that he would not have done so had he known the truth. The error in the case under consideration can be said to be both determining and substantial, in that, had James known that the car was 15 years old he probably would not have agreed to pay the price that was agreed upon.

Moreover, the error must be excusable, otherwise James would simply have to blame himself, and it should not be lawful for him to evade the execution of the contract and to deprive the other party of the advantages acquired by means of the contract. Of essence is that even error of law may vitiate consent if it is determining, that is, if it is the sole and principal cause.

The most important kind of error is error of fact. Error of fact is any error which does not refer to a provision of the law and includes errors with regard to the nature of the contract, with regard to the object of the contract, to the motives which induce a person to enter into a contract and to the person of the contracting party.

In the case under consideration, James could claim that there was an error which referred to the object of the contract, in that, in his mind he agreed to purchase a car which was eight years old when in actual fact it was much older.

The error could, however, also have been an error which referred to the quality of the thing. In this regard, one can distinguish between substantial error and accidental error, that is, according to whether the error refers to a substantial or to an accidental quality of the object. Error *concomitans* included any error with regard to all other qualities of the thing. This distinction is accepted under our law in terms of article 976 of the Civil Code which provides that an error of fact shall not void the contract unless it affects the substance itself of the thing which is the subject matter of the agreement. This provision is particularly relevant to the case under consideration, as the error was such that it affected the substance of the contract, in that, in view of such error James no longer wanted to purchase the thing which the dealer gave him. It is interesting to note that the criterion upon which we distinguish between substantial and accidental qualities is not that of Roman law, because we now adopt a subjective criterion which depends upon the way in which the parties, and especially that party who has been deceived, have considered such quality. The reason is that a quality which is not important for one person may be for another, and may also be important with regards to the purpose for which such person has acquired the thing.

Fraud is another defect of consent and is fundamental to the case under consideration. James can claim that the dealer knew exactly what he wished to purchase and he deceived him in agreeing to sell him something which was different.

Fraud is deemed to be that artifice, deceipt or simulation which is made use of by one of the contracting parties in order to deceive the other and to induce him to enter into the contract. In order that it may be deemed to invalidate consent, the fraud (i) must consist in fraudulent artifices or machinations; (ii) must be grave and (iii) must be determining and practised by the other party.

Fraudulent artifices are all those means which are made use of with the knowledge that they are false and which are apt to make an individual mistake one thing for another.

Dolus is grave when the machinations are such as to operate on a reasonable person, and they must exceed that sort of simulation which is usual in commerce and which is therefore allowed. *Dolus* is determining when it has such an influence on the mind of the contracting party as to deceive him and induce him to consent, when, without these artifices he would not have consented. If the *dolus* is not apt to have such an effect, it is known as accidental *dolus*.

However, what is essential is that as is provided under article 981 of the Civil Code, in order to bring forward such a claim the fraud must be proved and not presumed. Therefore James may bring forward a claim that the contract was null and void but must bring forward evidence of the fraudulent intent.

9 (a) 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. In view of this definition being so vague, it is therefore possible to be a director in legal terms, while being described as a manager or chief executive, for example, and equally companies may describe employees as technical directors, which does not make them directors in the legal sense.

It is to be noted that the law does not provide for a definition of a shadow director but only extends liability for certain offences to such persons in accordance with whose directions or instructions the directors are accustomed to act. It is to be noted that our law stopped short of describing such persons and omitted the qualification existing under the UK Insolvency Act whereby a person is not deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity. Shadow directors therefore, as opposed to *de facto* directors, shall be held liable as directors in the case of criminal offences, fraud and other offences committed by officers of the company in the course of winding up and in the case of personal liability for wrongful trading.

According to a UK text writer, the reason for introducing this concept is to prevent the people who really exercise control from sheltering behind a puppet board, while according to another text writer this concept is designed to prevent the easy evasion of legal liabilities and responsibilities through such obvious manoeuvres. Shadow directors differ from *de facto* directors because they do not purport to act as directors but on the contrary claim not to be directors and hide behind those who are.

The absence of clarity and of a definition have given rise to uncertainty as to who is to be considered as a shadow director. In a 1994 UK case, *Re Hydrodam (Corby) Ltd*, the question arose as to whether two directors of a parent company could be regarded as shadow directors of a subsidiary. It was here held that for someone to be a shadow director, four things had to be shown, namely:

(i) those who are the proper directors of the company;
(ii) that the person directed the directors how to act in relation to the company;
(iii) that the directors acted in accordance with his instructions; and
(iv) that they were accustomed so to act.

Therefore, from the facts given in view of the fact that the shareholders are actually dictating to the directors what they should do renders the shareholders accountable as directors. Hence the shareholders are seen to take on the role of shadow directors.

(b) In terms of article 144 Companies Act, 1995, 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. However, some exceptions are provided for. Financial assistance may be granted with the approval of the company given at a general meeting, to provide any such person as aforesaid with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company. Also, assistance may be granted (i) in the case of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons, to anything done by the company in the ordinary course of that business; and (ii) to make to any director of the company any payment by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, without particulars with respect to the proposed payment, including the amount thereof, being disclosed to members of the company and the proposal being approved by the company in a general meeting.

(c) The Companies Act 1995 does not provide for a list of the powers vested in directors, but merely provides that the business of a company shall be managed by the directors who may exercise all such powers of the company, to the exclusion of those which in terms of the Companies Act 1995 or the memorandum and articles of the company, are required to be exercised by the company in the general meeting.

To counter the wide powers vested in directors are their duties, which can be divided into managerial duties, administrative duties, duties which are applicable in cases of insolvency and fiduciary duties. In fact, it shall be the duty of the directors of a company to promote its well-being and they shall therefore be responsible for its general governance and its proper administration and management as well as for the general supervision of its affairs

In particular, but without prejudice to any other duty assigned to them by the memorandum or articles of association or by the Act or any other law, the directors of a company shall be obliged to exercise the degree of care, diligence and skill which would be exercised by a reasonably diligent person having the knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by or entrusted to that director in relation to the company, and the knowledge, skill and experience that the director has.

As part of their administrative duties, all officers (including directors) are to ensure observance and compliance with the provisions of the Companies Act 1995, in that, anything required to be done by a company under any of its provisions shall be deemed to be required to be done by the officers of the company.

In the exercise of the above-mentioned 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 fetter 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.

It is clear 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.

10 (a) The main difference between contracts for a fixed period and those for an indefinite period is the manner in which contracts may be terminated. Contracts for a definite period may be terminated, either:

(i) At the lapse of the fixed period;

(ii) By either party during probation. The first six months of employment shall be probationary employment unless both parties agree for a shorter period. During probation either party may terminate the employment at will without giving any reason for doing so. The only limitation laid down is that if employment is terminated during probation and employment has continued for more than one month, a week's notice has to be given. In the case of a contract of service, or of an industrial agreement, in respect of employees holding technical, executive, administrative, or managerial posts and whose wages are at least double the minimum wage for that year, such probationary period shall be of one year unless otherwise specified in the contract or agreement, which wording seems to imply that probation can be increased to any period;

(iii) By either party for any reason provided that the penalty stipulated at law is paid; or

(iv) By either party for a good and sufficient cause, in which case no penalty shall be payable.

Where the employer dismisses an employee, before the expiration of the time stipulated in the contract, the employer would have to pay the employee half of the full wages that would have accrued to the employee in respect of the remainder of the definite period. Therefore, while Maria's employer may terminate her employment after 18 months he would have to pay her the stipulated penalty. If, however, employment is terminated for a good and sufficient cause, this penalty shall not be payable.

Both definite and indefinite contracts of employment may be terminated for a good and sufficient cause. The Employment and Industrial Relations Act, 2002 does not define what shall constitute a good and sufficient cause for termination of employment. The Act merely provides for a list of cases which cannot be considered as a good and sufficient cause.

Indefinite contracts may be terminated:

(i) by either party during probation;

(ii) by the employee for any reason whatsoever, provided that the required notice is given as prescribed by law;

(iii) by the employer on grounds of redundancy, provided that the required notice is given. Redundancy is not defined in our law. An employee whose employment is terminated on grounds of redundancy shall be entitled to re-employment if the post formerly occupied by him is again available within a period of one year from the date of termination of employment, in which case he cannot be re-employed at conditions which are less favourable than those to which he would have been entitled if his contract had not been terminated. Furthermore, any person so re-employed shall be considered to have continued in his employment notwithstanding the termination on grounds of redundancy. The 'last in first out rule' must be applied by employers terminating employment on grounds of redundancy. The employer has to terminate the employment of that person who was last engaged in the class of employment effected by such redundancy. If the last person employed in that class is related to the employer, then that person, who was employed before him, shall be declared redundant; or

(iv) by either party for a good and sufficient cause.

The notice period shall begin to run from the working day next following the day on which notice is given. On receiving notice from the employer, the employee shall have the option to either continue working for the employer until the notice period expires or, at any time during the notice period require the employer to pay him a sum equal to half the wages that would be payable to him in respect of the unexpired notice period. On receiving notice from the employee, the employer may either allow the employee to continue to work for him until the notice period lapses or, at any time during the notice period, decide to pay the employee a sum equal to the wages that would have been payable in respect of the notice period.

Where the employee fails to give notice as aforesaid, he shall be liable to pay the employer a sum equal to half the wages that would be payable in respect of the notice period, and if the employer fails to give notice, he shall be liable to pay the employee a sum equal to the wages that would have been due to him in respect of the notice period. No notice need be given where employment is terminated for a good and sufficient cause.

In view of the fact that an employee may terminate an indefinite contract of employment at will, as against the position of the employer who can only terminate on grounds of redundancy and for a good and sufficient cause, Maria should opt for an indefinite contract of employment.

(b) There is no obligation at law to disclose details about past employment relations. However, it is normal for prospective employees to present a curriculum vitae. Therefore, Maria should not omit her past employment history and the details of a past employment where she was employed. If she does and her new employer finds out this omission and the cause of termination was serious enough such that had he known of such he would not have employed her, this may be deemed a good and sufficient cause of termination of her new employment.

Maria is not obliged to disclose to her new employer that she is soon to get married. If she does not disclose such fact and upon getting to know of such her employer decides to terminate her employment, this may be deemed discriminatory and an unjustified cause for termination

Fundamentals Level – Skills Module, Paper F4 (MLA)
Corporate and Business Law (Malta) **December 2012 Marking Scheme**

This marking scheme is given as a guide to markers in the context of the suggested answer. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned conclusions are provided. This is particularly the case for essay based questions where there will often be more than one definitive solution.

1 The question seeks to test the candidates' knowledge on the manner in which the courts are structured.

6–10 Answers will provide a detailed explanation of the court structure, outlining the various courts and their limits of jurisdiction.

3–5 Answers in this band will provide less detail that those awarded marks falling in the upper band.

0–2 Extremely poor answers that show either no or very little knowledge of the subject area.

2 This question requires candidates to explain the external requisites for a valid contract.

6–10 Thorough explanation of the requisites.

0–5 Weaker answers showing little or a scanty explanation of the requisites.

3 This question seeks to test the candidates' knowledge on the provisions at law which deal with the professional standard of care of accountants and the resulting action which may be taken for breach of duty.

7–10 Answers will give a detailed overview of the relative legal provisions.

4–6 A sound understanding of the area, although perhaps lacking in detail.

0–3 No or very little knowledge of the subject area.

4 This question deals with the name clause.

6–10 A clear explanation of the name clause as stipulated at law.

0–5 Little to less detail than will be provided in answers falling in the upper band.

5 This question deals with two clauses which must be inserted in the memorandum of association of a limited liability company in terms of the Companies Act 1995.

7–10 Answers will give a detailed explanation of both clauses and distinguishing between the two types of share capital.

4–6 Less detailed answers to both parts of the question.

0–3 Very little detail or perhaps not even dealing with both parts of the question.

6 This question deals with the declaration of solvency required in a liquidation process and to explain when this is required and the nature of its contents.

6–10 A clear explanation of the nature and scope of the declaration.

0–5 Little to less detail than will be provided in answers falling in the upper band.

7 The question deals with the provisions on corporate recovery and the procedure which would apply in such case.

6–10 Candidates demonstrate a good understanding of the corporate recovery procedure.

0–5 Little to reasonable detail given in answering the question.

8 This question tests the candidates' knowledge on contract law, in particular on consent being an essential characteristic for a valid contract and on the principle of privity of contract.

7–10 Candidates awarded such marks will have a sound knowledge of the subject matter covered by the question and be able to answer the question giving sufficient detail.

4–6 Candidates show that they are aware of the relative legal requirements but providing little detail on the scope.

0–3 Candidates demonstrate poor knowledge of the subject matter.

9 This question deals with the role of a shadow director, the granting of loans to directors, and the duties of directors.

6–10 A clear explanation of all areas of law covered by the three questions.

0–5 Little to less detail than will be provided in answers falling in the upper band.

10 The question deals with employment law and contracts of employment and requires candidates to distinguish between definite and indefinite contracts.

7–10 Candidates earning these marks will clearly explain the different types and the differences between them.

4–6 Good treatment of the information required.

0–3 Poor answers given with no differences mentioned.