Answers

1 The question asks candidates to explain primary sources of Maltese law.

Primary sources are directly and authoritatively sources of law and the secondary sources 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, one can 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. As a rule, all laws (whether they are laws to enact, amend or repeal) are passed by a simple majority of the members of the House of Representatives. In certain instances, however, a qualified majority is required such as, for example, to amend the Constitution of Malta. This is due to the importance of the Constitution, in that, this is deemed to be the most important law of the country as it is the framework which enables Malta to have the Rule of Law.

There are two types of primary legislation. The first type of primary legislation includes the five Codes, namely (a) the Civil Code (Chapter 16 of the Laws of Malta) which regulates the relations between persons *inter se*, that is the way persons interact; (b) the Commercial Code (Chapter 13 of the Laws of Malta) which regulates commercial and trade matters between people; (c) the Criminal Code (Chapter 9 of the Laws of Malta) which lays down those acts or omissions which constitute a criminal offence in Malta and lays down the relative punishments; (d) the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which provides for the court structure and the manner in which the courts are administered, the way in which they function and the procedure to be followed during court proceedings; and (e) the Code of Police Laws (Chapter 10 of the Laws of Malta), which lays down the rules and regulations concerning the executive police, it provides for certain minor contraventions, and also provides for those instances where a licence from the police may be required in order to carry out a particular activity.

The second type of primary legislation includes all those other laws enacted by Parliament, which are not incorporated in the aforementioned Codes, and which take the form of either Acts of Parliament or Ordinances. In company law, for example, one speaks of the Companies Act, 1995 and of the Commercial Partnerships Ordinance, 1962. Ordinances are those laws, which were enacted by Parliament in Malta, prior to the country gaining its independence in 1964 whereas Acts are those laws enacted by Parliament and which continue to be enacted since 1964.

Before an Act of Parliament is approved, it goes through three stages, namely what are termed as the First Reading, where the law takes the form of a Bill and during which stage the Bill is presented to Parliament, explaining the purpose behind the piece of legislation; the Second Reading, where all the clauses of the Bill are examined and discussed by the Members of Parliament. At the end of the Second Reading, the legislation is voted upon by all members; and the Third Reading where the signature of the President of the Republic (Presidential assent) is required for the legislation to be formally approved.

Secondary legislation is also referred to as subsidiary legislation. Secondary legislation in Malta takes the form of Legal Notices. Legal Notices are normally enacted to amplify or amend existing legislation. They therefore deal with details which are required to make the law administratively workable (as in the case of Legal Notices providing for forms, fees, requirements for licences, etc) and would normally be deemed to take too much of Parliament's time if such details had to be debated upon as primary legislation would be debated upon. 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. Such power would be exercised by the Minister issuing regulations, having the force of law, by virtue of a Legal Notice.

Bye-laws and statutory instruments are often also deemed to be a form of subsidiary legislation. Both types of instrument must be approved by a central governmental authority (Minister) and are limited in scope to the locality or special area over which they are intended to apply. A typical example of such are the Malta Stock Exchange By-Laws and the Local Council Bye-Laws.

2 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. In contrast, 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.

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. It is the first step in the creation of an obligation from which certain legal effects will ensue, depending on whether or not the contract is ever concluded. Other than being unilateral, an offer is also indivisible, in that it must be considered as a whole and therefore on the basis of the terms and conditions on which it is made.

An offer has to be distinguished from an invitation to treat, where a person is not considered to have made an offer but merely expresses himself to be ready to consider any offers that may be made to him.

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 be valid, it must also be (a) externally manifested; (b) made with the intention of binding the offeror; (c) complete; and (d) made to a particular individual, his agent or to the public.

An offer must be externally manifested and must be addressed to and made known to the person to whom the proposal is being made. In order to be externally manifested, the manifestation shall be either express or tacit. It is, however, held that where a contract has to be formalised by means of a public deed or by means of a private writing, then even the offer must be made in writing.

Once a proposer makes an offer, they must make such offer with the intention not only to create a legal relationship with the person to whom the offer is made but the offeror also undertakes to hold themselves to the contract if this is accepted by the other party. An offer must also be complete and therefore contain all the elements essential for the conclusion of the contract or the contents must be such to render possible their determination.

Finally, an offer must be made to a particular person, their agent or to the public. In the case of an offer made to the public, the other contracting party is not determinable when the offer is made but will become such when a member of the public expresses their acceptance. Offers to the public can take various forms and use various means, such as by means of catalogues or advertisements. Such offers are not binding unless they have been expressly declared to be so; they only amount to an invitation to treat. An offer to the public can take place by means of the display of goods in shops, shop-windows, or exhibitions. Similar displays of goods constitute an offer binding the person exhibiting them if they are accompanied by an indication of the price and all other conditions of the sale. In such cases, the offer is deemed to be complete even where the person exhibiting the goods does not specify the quantity available for sale. Accordingly, due its completeness, once the said exhibition of goods constitutes a valid offer, the offeror may not refuse to sell such exhibited goods to any member of the public, who accepts his offer. Sales by auction and by means of vending machines are also considered to be offers to the public.

3 This question seeks to test the candidates' understanding of the doctrine of privity of contract.

A fundamental principle of contract law is that a contract only binds the parties to it (and their heirs). Therefore, third parties, namely all those persons who are not parties to a contract either personally, or indirectly through an authorised representative, are not deemed bound by it.

A Roman-Law principle, which is still applicable today, is that an obligation is strictly a personal relationship which does not give rise to any relations except between the persons who partake in such an 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 relationship 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/her own name, bind or stipulate for any one but for himself/herself. 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 his/her own name but as an agent or representative of other persons, such a person shall not be bound by such a contract; but only the persons he/she is representing shall be bound. Similarly, such person shall not stipulate for himself/herself but in favour of the person whom he/she represents; the will of the latter is implicit in mandate or in lawful representation and is presumed in *negotiorum gestio*. The latter is a quasi-contract, where the interested person finds himself/herself bound without having done anything, and the person who receives something which is not due certainly has no intention of binding himself to return it.

The principle described above does, however, suffer certain limitations both with regards to promises of the performance of an obligation by a third party and to stipulations for the benefit of a third party.

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. This provision deals with the promise of performance of an obligation by a third party. However, the effect of such a promise is never that of binding the third party who has not consented to the performance of an obligation nor that of binding the promiser who has not promised something to be done by them. The effect of this promise is of someone who promises *de rato* and assumes an obligation which must be fulfilled by them and which consists in effectively procuring what the third party is bound to perform. The latter is sufficient to render the contracting party liable for damages to the other party in the event that the third party refuses to perform the obligation. They shall be responsible in damages, even if the defect of ratification is not due to their fault but to the fault of the third party because until they obtain the ratification, they are considered not to have performed the obligation. Once the third party ratifies the obligation, then the promiser is free from liability as the obligation undertaken shall be deemed performed.

The second limitation to the principle that an obligation is only binding on the contracting parties arises in the case of stipulations made for the benefit of third parties. Article 1000 of the Civil Code provides that it shall also be lawful for a person to stipulate for the benefit of a third party, when such stipulation constitutes the mode or condition of a stipulation made by them for their own benefit, or of a donation or grant made by them to others; and the person who has made any such stipulation may not revoke it, if the third party has signified their intention to avail themselves thereof. 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. An example of such a stipulation is where A and B agree that B give C a gift and in the event that B does not give C the gift, B will pay A a penalty of Lm100. The object of the stipulation is that B give A the Lm100 as compensation for non-fulfilment of the contract between A and B. The

amount stipulated by A is a stipulation in their favour which they have an interest in receiving. The obligation that B give C a gift is only a condition and therefore a secondary object to the contract.

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. Thus, if A agrees to transfer to B their business activity and A binds B to improve the working conditions of certain of their employees as part of the consideration for the transfer, the interest of A, as the party who stipulates, arises from the fact that they have agreed to a lesser consideration than they would have agreed to, had they not imposed this obligation on the transferor.

Article 1000 also makes reference to a donation or grant made to others. This arises when there is an alienation of something or the payment of a sum of money by the person who stipulates to the promiser, together with some condition imposed on such promiser in favour of a third party. Donations accompanied by burdens in favour of third parties are typical examples, as are all bilateral contracts by which the person who stipulates sells, exchanges, grants on lease or in any way transfers anything to the promiser by imposing, as a total or partial consideration of what they give, the performance of some obligation for the benefit of a third party. A typical example of this is a life assurance policy made for the benefit of a third party.

The main effect of a stipulation made in favour of a third party is that of binding the promiser in favour of the party who stipulates. Until they accept the stipulation made in their favour, the third party does not acquire any right and until they accept the stipulation, the person who stipulates has the right to revoke the obligation imposed on the promiser. Furthermore, as this is the implicit or explicit intention of the person who stipulates, the acceptance shall not deprive them of the right of revoking the stipulation in favour of the third party at any moment.

4 The question requests candidates to state 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, 1995 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.

Thus, for a company to come into existence, the Registrar of Companies must issue a certificate of incorporation which signifies that that particular company has satisfied the requirements at law and from the date of the certificate or from such other date which may be provided for, the company may commence activity. For such a certificate to be issued, the main requirement is that the promoters or future shareholders of the company submit to the Registrar the documents which provide for the corporate structure of the company, through the memorandum of association.

Whereas it is a *sine qua non* condition that the memorandum of association be drawn up and filed, there is no legal requirement to draw up and file articles of association.

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, 1995 lays down the contents for a valid memorandum. With the exception of a clause on the duration of the company, all the other clauses are required at law. Thus, the memorandum should contain clauses as follows:

- it should state whether the company is a public company or a private company;
- the name and residence of each of the subscribers thereto;
- the name of the company;
- the registered office in Malta of the company;
- the objects of the company;
- the amount of share capital with which the company proposes to be registered (hereinafter referred to as 'the authorised capital'),
- the division thereof into shares of a fixed amount,
- the number of shares taken up by each of the subscribers and the amount paid up in respect of each share;
- the number of the directors,
- the name and residence of the first directors and,
- where any of the directors is a body corporate, the name and registered address or principal office of the body corporate,
- the manner in which the representation of the company is to be exercised,
- and the name of the first person or persons vested with such representation;
- the name and residence of the first company secretary or secretaries; and
- the period, if any, fixed for the duration of the company.

5 **(a)** The purpose of this question is for the candidates to state what must be included in a deed of partnership of both partnerships *en nom collectif* and partnerships *en commandite*. The candidates are also required to explain the procedures used to effect changes to the deeds of partnership.

In order to register any type of commercial partnership, the Companies Act, 1995 provides for the documents which must be filed with the Registrar of Companies in order to ensure due registration. In the case of a partnership *en nom collectif* and

en commandite, a deed of partnership must be filed, while in order to register a company the memorandum of association must be filed.

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. In terms of article 14 of the Companies Act, 1995 the deed of partnership of a partnership *en nom collectif* must include the details listed hereunder:

(a) the name and residence of each of the partners;
(b) the partnership name;
(c) the registered office in Malta of the partnership;
(d) the objects of the partnership, that is to say, whether the objects are trade in general or a particular branch of trade, and in the latter case, the nature of the trade. If any objects are omitted or excluded from the deed, such may not be used against third parties;
(e) the contribution of each of the partners, specifying the value of the respective contribution of every partner;
(f) the period, if any, fixed for the duration of the partnership.

The deed may, and often does, contain clauses other than those provided above and which normally relate to the partnership, as for example clauses on the representation and administration of the partnership, and the admission of new partners. All such clauses are deemed valid and binding on the partners, provided they are not contrary to law, morality or public policy.

In terms of article 55 of the Companies Act, 1995 the deed of partnership of a partnership *en commandite* or limited partnership, in addition to the particulars prescribed by article 14, shall specify which of the partners are general partners and which of them are limited partners, and in default the partnership shall resolve itself into a partnership *en nom collectif*.

Unless otherwise provided in the deed of partnership, any alteration or addition to the deed may only be made with the unanimous consent of the partners. Furthermore, any alteration or addition to the deed shall be made in writing and duly signed by the partners authorised to make that change. The change shall not take effect (except in the case of reduction of contribution and dissolution before the period fixed for dissolution) unless and until the relative instrument or, where such instrument is a public deed or a private writing enrolled in the records of a notary public, an authentic copy thereof is delivered to the Registrar for registration and is registered by them.

The law makes specific provision when particular changes to the deed are to be made. Thus, 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, if such period is expressly provided for in the deed, the partner or partners having the administration or representation of the partnership shall, notwithstanding that provision in the deed, deliver a notice of extension of the period of duration to the Registrar for registration and such extension shall not take effect unless and until the said notice is delivered to the Registrar and is registered by them.

Where a partner ceases to be a partner or where a person becomes a new partner, notice to that effect, specifying the name and residence of any new partner, must, within one month, be delivered to the Registrar for registration by the partner or partners having the administration or the representation of the partnership. Any assignment of interest in whole or in part of any partner shall, unless otherwise provided in the deed of partnership, require the prior consent in writing of all the other partners. Furthermore, when a person becomes a partner of an existing partnership, they shall thereby become liable for all the obligations of the partnership, even if incurred before the date at which they become a partner.

Where the change relates to the name of the partnership, the Registrar shall enter the new name on the register in place of the former name and 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 the matters listed hereunder, such changes shall not be operative until three months from the date of publication of the statement made by the Registrar:

(i) the reduction of the contribution of a partner (other than personal services);
(ii) the dissolution of a partnership prior to the lapse of the fixed duration;
(iii) the reduction of the fixed duration; and
(iv) any assignment by a partner of all his interest in the partnership.

6 The question refers to the issued share capital of a limited liability company. In terms of law, the capital may be increased or reduced. An increase in capital may be in cash or in kind. The questions refers to the latter and candidates are required to detail the procedure which must be followed in order to increase the share capital for a consideration in kind.

The most common form of alteration of share capital, other than by reduction, is the increase in share capital. It has been held that an increase of capital does not imply a further issue of shares; it merely increases the authorised and not the issued or allotted capital. The issue of shares is done later. It thus appears, that when the issued share capital of the company is less than its authorised share capital, the issuing of new shares up to the amount of the authorised share capital does not really constitute an increase in share capital.

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. In this case, it is presumed that not all the authorised share capital of the company has been issued and that the increase being made falls within the limit of the authorised share capital of the company. If the increase

in share capital is to exceed the authorised share capital of the company, it is submitted that one of the conditions of the memorandum is being altered and thus an extraordinary resolution would be required.

Rather than going through the formality of holding a general meeting for the purpose of increasing the issued share capital of the company, the law provides that the memorandum or articles may permit the general meeting to authorise by ordinary resolution the board of directors to issue shares up to a maximum amount as may be specified in the same memorandum and articles, which authorisation shall be for a maximum period of five years, renewable for further periods of five years each. Furthermore, if such permission is not contained in the company's memorandum or articles, the same authority may be given to the board of directors by an extraordinary resolution.
Where an increase in the issued share capital is not fully taken up, the issued share capital shall be increased by the amount of subscriptions received only if the conditions of the issue so provide.

It is to be noted that where the company has different classes of shares, the resolution of the general meeting or the authorisation required for the increase in the issued share capital shall be subject to a separate vote for each class of shareholders whose rights are affected by that resolution or authorisation.

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. The expert's report shall contain at least a description of each of the assets comprising the consideration as well as the methods of valuation which have been used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value, and, where applicable, to the premium on the shares to be issued for them.

The report must be delivered to the Registrar for registration before the company is registered or before the shares are issued, as the case may be; and, in default, the Registrar shall accordingly refuse to register the company or the return of the allotments of the shares so issued, and, in the latter case, the issue shall be considered null and void.

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 to 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 the following conditions are satisfied:

(a) the asset to be received by the company, and any consideration other than cash to be given by the company, shall have been valued by one or more experts who are independent of the company and approved by the Registrar;
(b) a report shall have been made to the company during the six months immediately preceding the date of the agreement;
(c) the terms of the agreement shall have been approved by ordinary resolution; and
(d) not later than the giving of notice of the meeting at which the resolution is proposed, copies of the resolution and of the report shall have been circulated to the members of the company entitled to receive notice of the meeting and, if the person with whom the agreement in question is proposed to be made is not then a member of the company so entitled, to that person.

The report must be delivered to the Registrar for registration at the same time as it is circulated. If the company fails to comply with this subsection, every officer of the company who is in default shall be liable to a penalty.

Where a company enters into an agreement in contravention of the above provision and either (a) the person with whom the company made the agreement has not received the expert's report required for compliance with the conditions of this provision; or (b) there has been some other contravention of this provision which that person knew or ought to have known amounted to a contravention, the company shall be entitled to recover from that person any consideration given by it under the agreement, or an amount equal to the value of the consideration at the time of the agreement, and the agreement, so far as not carried out, shall be void.

The provisions of article 74 shall, however, not apply:

(a) where it is part of the company's ordinary business to acquire, or arrange for other persons to acquire, assets of a particular description, to an agreement entered into by the company in the ordinary course of its business for the transfer of an asset of that description to it or to such person, as the case may be; or
(b) to acquisitions made by the company at the instance or under the supervision of the court; or
(c) to stock exchange acquisitions.

7 **(a)** In terms of the section 2 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.

In turn, the law does offer a definition of a director which 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. Therefore, one may be considered to shoulder the same responsibilities as a company director without actually being appointed as such. A company secretary is defined as a person being an individual who holds the office of a company secretary in terms of article 138 of the Companies Act, 1995. One notes, however, that the law does not offer a definition of a manager.

By way of exclusion from the definition of an officer, an auditor is defined as a person who is an individual who holds a warrant to act as auditor issued under the Accountancy Profession Act 1980 or is a partnership of auditors duly registered under the said Act.

(b) As seen above, a company secretary is deemed to be an officer of the company.

The first company secretary is appointed by the promoters of the company, while all subsequent company secretaries are appointed by the board of directors of the company. The directors of a company shall have the power to remove the company secretary and shall appoint another individual in his stead within 14 days from the date of his removal. In the event that the post of company secretary becomes vacant, the directors shall, within 14 days from the date when the post becomes vacant, appoint another individual to fill the post of company secretary.

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 a post must possess. Thus, the law lays down general requisites which the company secretary must possess and in this regard provides that it shall be the duty of the directors of a company to take all reasonable steps to ensure that the company secretary is an individual, who appears to them to have the requisite knowledge and experience to discharge the functions of company secretary.

In selecting the person who shall hold the post of company secretary, it is to be noted that any person deemed to have the requisite knowledge and experience may be appointed to hold such post provided that no company (other than a private exempt company) shall have as company secretary its sole director or have as sole director of the company a body corporate, the sole director of which, is company secretary to the company.

A person may not be appointed company secretary if he is:

- interdicted or incapacitated or an undischarged bankrupt;
- convicted of crimes affecting public trust, theft or fraud;
- a minor;
- disqualified by the courts for breach of certain provisions of the Companies Act; or
- the auditor of the company.

In terms of the Companies Act, 1995 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 (as for example, the annual return which is to be filed with the Registrar of Companies on an annual basis) and other documents of the company are prepared and delivered to the Registrar in accordance with the requirements of the Companies Act, 1995.

As an officer of the company, the company secretary can be held to be just as responsible as the other officers of the company. In fact, the law provides that anything required to be done by a company under the Companies Act, 1995 is deemed to be required to be done by the officers of the company, other than those matters which fall exclusively within the duties of a particular officer. While the law prohibits a company from indemnifying its officers against liabilities attached to them in respect of negligence or breach of duty, a company may purchase insurance cover for its officers against such liabilities.

8 Probation is a term not defined in our Maltese employment 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. Therefore, even if no mention is made to probation, the first six months of employment shall always be probationary.

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. The wording of the relative provision can be interpreted to mean that probation can be increased to any period.

The most important element about probation is that during such time 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.

It has often been questioned whether the period, which may be stipulated allowing an employee to adapt to a new post following promotion, be deemed to be a period of probation. It is held that since the law makes no mention of such probation and therefore there are no time-limits laid down in this regard, whether or not such a period may be provided for is based on agreement reached between the employer and employee. What is certain, however, is that if the employer feels that the employee is not fit for the new post, they cannot terminate their employment as they would have been able to do so during probation on commencing employment, but can only take the necessary steps so that the employee revert to their previous post. On the basis of the legal provisions and of the facts given one can conclude that Jack's employment can be terminated, given that he has only been working for a month and hence he is still on probation.

The Employment and Industrial Relations Act (EIRA), 2002 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 law contains rules which employers must observe in relation to the payment of wages. The following are the rules which Peter could bring forward to his employer for non observance.

(a) An employee is to receive his wages personally. The general rule is that wages are to be paid directly to the employees to whom they are due. Exceptions, however, do exist, namely (i) as may otherwise be provided by any law or (ii) in virtue of an order made by a competent court or (iii) where the employee or employer concerned agree to the contrary. Thus, the law permits payments to be made to dependants of the employee by virtue of a court order or payments out of one's wages to be made to charities as agreed upon with the employee;

(b) No condition may be imposed as to the place in which, the manner in which or the person/s with whom, any wages are to be paid or spent. In the event that any such term be included in a contract of service, such provision shall be deemed null and void;

(c) Wages may not be attached or assigned. Garnishee orders against salaries may not be issued unless the creditor is suing for maintenance. In such case, a garnishee order may be issued against part or the balance of one's wages which exceed Lm698 a month unless the employee proves to the court that the wages which are attached are needed for their subsistence or for the maintenance of their family.

However, the law goes on to provide that wages may be attached to ensure payment of maintenance due to the wife, minor, incapacitated child or ascendant of the employee, without providing a limit which the employee must receive notwithstanding the maintenance order;

(d) An employee is entitled to receive full wages without any deductions. No deductions can be made by way of interest, charge or discount because wages are paid in advance. There are, however, three exceptions in this regard, namely where deductions are permitted by (i) provisions in the EIRA or any other law, e.g. tax, national insurance, fines, schemes, deductions where an employee does not work full hours; (ii) lawful court order (seen above); and (iii) trade union agreements (usually relate to union membership fees).

A deduction allowed by law relates to fines. Where the contract or written statement specify in detail the fines to which the employee may become liable in respect of an act or omission and the terms of such have been previously approved by the Director of Labour, fines may be deducted from wages.

Where an employee works less than he should, a fine shall not be imposed but a deduction may be made from his wage. Where an employee is suspended and during such period the employer does not pay him or pays him less, then such deduction is deemed to be a fine, that is the above rules should apply; whether privileged or hypothecary. Provided that the maximum shall never exceed six months' minimum wage;

(e) Wages are to be paid at regular intervals. These cannot exceed four weeks in arrears. Where employees are paid commissions or share of profits, a settlement of accounts must be made at least once a year;

(f) An employee also has the right to receive four payments a year by way of statutory bonuses. In addition to his salary, the employee is currently also entitled to be receive four payments a year payable in March, June, September and December of each year by way of bonuses and payments to compensate workers for cost of living increases as declared by government in its annual budget.

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. Excess of supply is when the firm is producing more than the market can absorb and lack of profitability may be encountered where an entity is producing and has to sell at prices higher than the consumer is willing to pay.

An employee whose employment is terminated on grounds of redundancy shall be entitled to re-employment if the post formerly occupied by them is again available within a period of one year from the date of termination of employment, in which case they cannot be re-employed on terms which are less favourable than those to which they would have been entitled if their contract had not been terminated. Furthermore, any person so re-employed shall be considered to have continued in their employment notwithstanding the termination on grounds of redundancy.

Of importance to note is that where an employer intends to terminate the employment of an employee on grounds of redundancy, they would have to terminate the employment of that person who was last engaged in the class of employment affected by such redundancy (last in first out). The only exception lies in the case of the last employee being engaged being related to the employer by consanguinity or affinity up to the third degree, where the employer may, instead of terminating the employment of such person, terminate that of the person next in turn.

Furthermore, redundancy must be genuine and not fictitious (the employer cannot bring about a situation leading to redundancy).

If all of the above conditions are met, Mark's employment may be terminated on grounds of redundancy.

9 (a) The relationship between principal and agent is mainly regulated under Maltese law by 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 them. The contract is not perfected until the mandatary has accepted the mandate. Every mandate must have for its object something lawful which the mandator could have done themselves.

A mandate can be granted by a public deed, by a private writing, by letter, verbally, or even tacitly. The acceptance on the part of the mandatary may also be tacit, and may be inferred from acts. Mandate is gratuitous, unless there is a stipulation to the contrary. Furthermore, a mandate may be either special, if it is for one matter or for certain matters, only; or general, if it relates to all the affairs of the mandator.

Therefore, Mr Smith may appoint his friend as his attorney to act for, and on his behalf, in the sale of his property in Malta.

(b) A mandatary cannot do anything beyond the limits of the mandate he has been given. Most often and therefore it is assumed even in the case under consideration, a mandatary is vested with wide powers in order to carry out the mandate. They may institute legal proceedings; make and prosecute appeals; make proof by reference to the oath of their adversary; take the oath *in litem* or the suppletory oath; enforce judgements 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.

However, where a person has been employed to do something in the ordinary course of their profession or calling, without any express limitation of power, such person shall be presumed to have been given power to do all that which they think to be necessary for the carrying out of the mandate, and which, according to the nature of the profession or calling aforesaid, may be done by them. In the facts given, we are not informed if the friend was appointed by virtue of their profession.

Insofar as the obligations of the mandatory are concerned, of essence is that a mandatary is bound to carry out the mandate so long as they are vested therewith, and in the case of non-performance they shall be answerable for damages and interest. They are also bound to conclude any matter, which they may have commenced before the death of the mandator, if delay might be prejudicial.

A mandatary is answerable not only for fraud, but also for negligence in carrying out the mandate. Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving remuneration.

The mandatary, unless expressly exempted by the mandator, is bound to render to the latter an account of their management and of everything they have received by virtue of the mandate, even if what they have received was not due to the mandator.

Furthermore, a mandatary owes interest on the sums which, without the authority of the mandator, they have applied to their own use, from the day on which they have made such use, and on any other sum in which they shall remain a debtor, from the day on which they are put in default, saving, in both the aforesaid cases, the usages of trade. This may be relevant in the event that the friend may have utilised the proceeds from the sale of the property for their own personal use.

A mandator, on the other hand, is also bound to carry out the obligations contracted by the mandatary in accordance with the powers which they have given them. Thus, they are not liable for what the mandatary has done beyond such powers, unless they have expressly or tacitly ratified it.

Both parties also have a right to terminate the mandate. Thus, the mandator may revoke the mandate whenever they choose and a mandatary may renounce the mandate by giving notice of their renunciation to the mandator. In the case under consideration, Mr Smith may terminate the mandate to safeguard his rights but may still chose to take action against his friend for having abused of his powers.

10 (a) Malta's prevention of money laundering regime is summed up in two statutory instruments, namely the Prevention of Money Laundering Act (Act XIX of 1994, as amended) and the Prevention of Money Laundering and Funding of Terrorism Regulations, 2008.

The existing Regulations, which were subsequently amended by Legal Notice 328 of 2009, serve to implement the provisions of the Third EU Directive, bringing Malta in line with the minimum prevention of money laundering standards implemented on a pan-European level.

The Prevention of Money Laundering Act, 1994 makes a clear distinction between the offence of money laundering and the underlying criminal activity in order to ensure that the offence of money laundering may subsist even in the absence of a judicial finding of guilt for the criminal activity from which the property or other proceeds are derived.

The material element of the offence must consist in any of the following actions and must be accompanied by the associated intentional element as indicated below:

- Converting or transferring property, with the knowledge that such property is derived from criminal activity or participation in such activity, for the purpose of concealing or disguising the origin of the property or assisting a person involved in criminal activity.
- Concealing or disguising the true nature, source, location, disposition, movement, right over or the ownership of property with the knowledge that such property is derived from criminal activity or any participation therein.
- Acquiring property with the knowledge that such property is derived from criminal activity or any participation therein.

– Retaining without reasonable excuse property with the knowledge that such property is derived from criminal activity or any participation therein.
– Any attempt at or complicity in any of the above matters or activities.

Money laundering offences may be committed by any person including companies or other legal persons.

From the facts given, it is clear that James can be held liable for money laundering, in that, he received the goods being fully aware that such were derived from a criminal activity (i.e. theft) and assisted in selling them and sharing in the proceeds thereof.

(b) The Regulations impose a number of duties on the subject person, namely: identification and customer due diligence, internal record keeping, internal and external reporting and employee instruction and training. John as an accountant falls under the definition of a Subject Person in terms of the Prevention of Money Laundering and Funding of Terrorism Regulations 2008. As a Subject Person, John has to follow the duties provided in the regulations,

Identification is necessary when a business relationship is going to be formed or every time a transaction is carried out, and must be made as soon as reasonably practical after contact is first made with the applicant for business. Satisfactory evidence of the applicant's identity, established on the basis of documents, data or information obtained from a reliable and independent source, must be produced and this must be verified to ensure that the applicant is indeed who he claims to be. If the applicant is acting on behalf of another person, both persons must be identified.

Financial institutions therefore cannot keep anonymous accounts or other types of accounts where the owner is not identified and known. Identification is mandatory before conducting a one-off transaction equal to, or in excess of, €15,000. The implementation of the provisions of the Third EU Directive has introduced new provisions which cater for scenarios where simplified customer due diligence may be undertaken by the subject person in certain specific circumstances, including those where the applicant for business is similarly subject to prevention of money laundering legislation in another EU Member State or in another reputable jurisdiction; where the applicant is listed on a regulated market within the EU; in respect of 'pooled accounts'; in respect of certain public authorities or bodies; and in respect of any other applicant for business representing a low risk of money laundering or the funding of terrorism.

Similarly, the Regulations require the Subject Person to conduct enhanced customer due diligence based on a risk-sensitive basis and in situations which, by their nature, can present a higher risk of money laundering or the funding of terrorism, such as where the applicant for business is not physically present for identification purposes.

Subject persons are also required to pay special attention to any threat of money laundering or funding of terrorism that may arise from new or developing technologies, or from products or transactions that might favour anonymity, and take such measures as shall be appropriate to prevent their use in money laundering or funding of terrorism.

The training of employees is required to ensure that there is awareness among staff about the importance of money laundering policies and regulations and to encourage cooperation with the authorities, namely the Financial Intelligence Analysis Unit with regards to reporting suspicious transactions promptly.

A subject person is obliged to designate a reporting officer who will determine whether the facts reported to him raise a suspicion of money laundering or funding of terrorism. Records of identity and records of all business transactions carried out by subject persons must be kept for at least five years from the date on which the relevant financial business or relevant activity was completed.

Fundamentals Level – Skills Module, Paper F4 (MLA)
Corporate and Business Law (Malta) **June 2013 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 analysis based questions where there will often be more than one definitive solution.

1 The question asks candidates to demonstrate their knowledge on the primary sources of local law.

6–10 Answers will provide a thorough explanation of the sources of Maltese law, clearly expounding on the principal sources, giving examples.

3–5 Answers in this band will provide less detail than the answers earning marks in the higher band.

0–2 Poor answers giving very little detail on the subject matter.

2 The question deals with two aspects of contract law, namely an offer and an invitation to treat.

8–10 Full detail given on both aspects of contract law.

5–7 Reasonable treatment of the aspects, giving less detail than in the above band.

0–4 Unbalanced answer merely dealing briefly with either of the two aspects of the question.

3 This question requires candidates to explain the doctrine of privity of contract.

6–10 Thorough explanation of the doctrine.

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

4 This question deals with the contents of the memorandum of association of a limited liability company. Candidates are expected to refer to the relative provision of the Companies Act 1995 and state the details which must be inserted therein.

5–10 Full detail of all the required contents of the memorandum.

0–4 Weaker answers providing an incomplete detail of the requisites.

5 The purpose of this question is to test the candidates' knowledge on partnership deeds, their contents and an explanation of the manner in which such a deed may be amended. Marks will be awarded depending on the level of detail given.

6 The question deals with capital requirements under the Companies Act 1995. The question requires candidates to explore the procedure to be followed when the issued share capital is increased for a consideration in kind.

5–10 Thorough explanation of all the capital requirements, the procedure to be followed when the shareholders of a company wish to increase the share capital of the company, reference to the expert's report and other documents required in order to place the said increase into effect.

0–4 Weaker answers providing less detail on the procedure for an increase in capital.

7 This question seeks to test the candidates' knowledge on the officers of a limited liability company. The question is divided into two parts, with one dealing with the definition of a company officer and the other more specifically with the role and duties of a company secretary.

7–10 Answers must make specific reference to the relative provisions of law with regards to both parts of the question and provide adequate detail.

4–6 A sound understanding of the subject area of company officers and company secretary, although perhaps lacking in detail.

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

8 This question tests the candidates' knowledge on three aspects of employment law: probation, protection of wages and redundancy.

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

4–6 Candidates show that they are aware of the relative legal provisions.

0–3 Candidates demonstrate poor knowledge of the subject areas covered.

9 The question deals with mandate relationships and the rights and duties of both parties to such a relationship.

7–10 Candidates earning these marks will deal with all aspects of the relationship.

4–6 Reasonable information given on the said rights and obligations.

0–3 Very brief answer given.

10 The question deals with money laundering and particular aspects of the local legislation. Marks will awarded on the basis of the candidates' ability to relate the provisions of the Act to the questions posed. Marks will be awarded not only on the candidates' ability to refer to the relevant offences of which the persons may be held liable but also on their ability to put forward arguments in favour and/or against why such liability should be impugned.