Examiner's report

F4 Corporate and Business Law (CYP)
December 2010

General Comments

The examination contained ten questions in total: seven questions testing candidates' knowledge of the law, and three problem-based questions which aimed to test candidates' ability to apply the law. All ten questions were compulsory.

Candidates are advised (i) to attempt all questions on the paper; (ii) to start each question on a new page; and (iii) to pay more attention to the exact wording of each question, focusing each answer to the particular issues involved. A general recitation of legal theory on the relevant topic without reference to the question is not rewarded.

The overall performance of candidates was satisfactory.

Specific Comments

Question One

This was a question on the jurisdiction of the District Courts, the Supreme Court of Cyprus, and the European Court of Human Rights.

Answers to this question were not generally satisfactory, although a few candidates managed to perform well.

Common errors included (i) stating that the District Courts have jurisdiction to hear the *unimportant* cases, whereas the Supreme Court has jurisdiction to hear the *important* cases; (ii) confusing the European Court of Human Rights with the European Court of Justice.

Candidates should clarify that the European Court of Human Rights is a supra-national court, established by the European Convention on Human Rights, which provides legal recourse of last resort for individuals who allege violation of their human rights by a country who is party to the Convention. The European Court of Human Rights may also hear inter-state applications relating to violations of human rights which are protected by the Convention and its Protocols.

The European Court of Justice (ECJ) is distinct from the European Court of Human Rights. However, all members of the EU are also members of the Council of Europe and have signed the European Convention on Human Rights, and as a result the ECJ may often refer to caselaw of the European Court of Human Rights, treating the European Convention on Human Rights as though it was part of the EU legal system.

Question Two

This was a question on the tort of negligence and in particular required identification of the theory and practical examples of the existence of a duty of care.

In part (b) marks were obviously awarded for correctly identifying relationships in which a duty of care arises, even though such relationships were not included in the model answers. However, stating various examples where a duty of care arises between a professional during the course of exercising one's profession and a client, were treated as one relationship where a professional duty of care exits (e.g. doctor/patient, lawyer/client, etc).

This question clearly related to the tort of negligence, and therefore stating in part (a) that a duty of care exists where this is stipulated in the relevant contract between the parties was not a relevant response.

Question Three

This question was generally well answered. The consequence of separate distinct personality is fundamental to company law, and it was encouraging to see that most candidates were comfortable with the relevant ideas.

In part (a), marks were awarded for correctly identifying and explaining additional reasons illustrating the importance of the distinct legal personality of a company (e.g. the ability of a company to sue and be sued in its own name; the ability of a company to acquire property in its own name; the concept of perpetual succession, etc).

- Candidates should note that a director engaging in activities which may constitute insider dealing is not treated as an example of lifting the corporate veil, where such activity is exercised by the director in his own capacity and not on behalf of the company.

Question Four

- This question was generally well-answered, particularly in relation to part (a).
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- The most common error in part (a) was to focus on the *importance* of the distinction of a contract of service and a contract for services, which was clearly beyond the scope of the question. The question required candidates to *explain* and *distinguish* between contracts of service and contracts for services.

Part (b) was not generally as well-answered as part (a) and a lot of candidates appeared to be unfamiliar with the meaning of constructive and/or summary dismissal.

Question Five

Part (a) of the question was generally answered in a satisfactory manner with most candidates correctly explaining the procedure relating to the calling of an annual general meeting.

Answers to part (b) of the question were not as well-answered as part (a).

A common error in part (b) was to state that the court's approval is a pre-requisite for altering class rights. However, candidates should note, firstly, that the procedure for altering rights attached to any class of shares is set out in the memorandum or articles of association, where such variation may be authorised, subject to the consent of a specified proportion of the holders of the issued shares of that class, or the sanction of a resolution passed at a separate meeting of the holders of those shares. Table A provides that, unless otherwise provided by the terms of issue of the shares of a particular class, class shares may be varied with the consent in writing of the holders of 75% of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class.

Secondly, the relevance of a court order in the context of alteration of class rights arises as a result of the provisions of section 70 Companies Law Cap. 113, which provides that the holders of not less in the aggregate than 15% of the issued shares of that class, who did not consent to or vote in favour of the resolution for the variation, may apply to the court to have the variation cancelled. In *such a case*, the variation will not have effect unless and until confirmed by the court.

Question Six

This was a question on the importance of object clauses in the memorandum of association of a company and the doctrine of ultra vires and its application in Cyprus.

Answers to parts (a) and (b) of this question were often amalgamated into a single answer. Marking was lenient so that if the correct answers were identified in either part of the question, relevant marks were allocated accordingly.

A common error was to state that a company may *ratify* an ultra vires transaction entered into by its directors, who are thus relieved from any personal liability.

However, candidates should note that there is no room for ratification by the company of an ultra vires transaction. The effect of section 33A Companies Law Cap. 113 is, however, that a company is bound by a transaction entered into by its officials, even if it is beyond its objects as stated in its memorandum of association, unless such officials acted beyond the powers conferred, or allowed to be conferred, on them by the law, or unless the relevant third party knew, or under the circumstances could not have ignored, that such act was beyond the company's objects.

Question Seven

This question was on money laundering and in particular how it affects the practices of auditors and lawyers.

It was encouraging to see that most candidates were familiar with the relevant procedures that should be adopted by professionals during the course of rendering services to their clients, as well as with the existence and role of the Unit for Combating Money Laundering ('MOKAS'), and the penalties available for failing to comply with the relevant laws and regulations.

Overall, candidates performed well on this question.

Question Eight

- This was perhaps the least successfully answered question out of the problem-based questions. It was an interesting scenario combining various legal matters in issue, such as the establishment of an agency relationship between Dina and Elias and the existence of actual authority in this regard, the exceeding of Elias' authority and the consequential option available to Dina to ratify or reject Elias' unauthorised act, the breach of warranty by Elias and the effect of undisclosed agency to Chloe's rights and obligations, coupled with Chloe's breach of her contract with Elias.

A common error was to state that Dina could claim EUR500 from Elias. However, if Dina chooses to ratify Elias' actions, then Dina will have an obligation to pay the total amount of EUR1,500 to Chloe, as well as to provide reasonable remuneration to Elias (as agent) for his services. If, on the other hand, Dina chooses not to ratify Elias' action, who clearly exceeded his actual authority, then Dina will have no obligation to pay any amount to Chloe, and could, theoretically, sue Elias for any damages suffered as a result of the fact that he exceeded the authority given to him – however, such damages will not automatically equal EUR500.

Some candidates restricted their answers to a mere recitation of the general theory on agency law. Limited marks were awarded in such cases, where there was no attempt to apply the law to the specific facts of the question.

Two other common errors were: (i) some candidates thought that unless authority was given *in writing*, then it could not be express authority (a statement which is obviously untrue), and (ii) no issue of damages for mental distress arises, although a few candidates believed this to be the case.

Question Nine

This was a question on raising loan and share capital. There were quite a few candidates who provided extensive answers, covering matters beyond the main issues identified in the model answers.

Some of the suggested ways of raising funds for ABC Ltd included the issuing of debentures, making of loans, whether unsecured or secured by granting mortgages or floating charges over the hotels, obtaining overdraft facilities, selling the hotels, issuing shares whether at par, at a premium or at a discount, making calls for any unpaid share capital, allotting shares to specific interested third parties (without offering such shares to the public - given that ABC Ltd was a private company, an offer to the public for the subscription of its shares or debentures would be prohibited).

Candidates should note that reduction of capital is *not* a method of financing the company, but is rather a method of returning money to the shareholders (in the form of capital return, rather than declaration of dividends).

Question Ten

This question 10 was two-fold and involved the application of section 178 of the Companies Law Cap. 113, as well as the issue of breach by a director of his fiduciary duties owed to the company.

This was perhaps the best-answered question out of the problem-based questions and most candidates performed well.

The rules relating to the removal of directors were apparently well-known to most candidates, who were comfortable to provide an adequate application of the law to the specific facts. Moreover, most candidates acknowledged the breach of fiduciary duties on behalf of George, who exhibited a clear conflict of interest in engaging into discounted sales with a company in which he had a direct personal interest.