Answers

1 The question asks candidates to explain the two main sources of Maltese law, namely primary and secondary.

The sources of law are divided into primary sources, which are directly and authoritatively sources of law and the secondary sources, which are of an authoritative nature but not necessarily binding but are usually referred to in order to interpret the law, as in the case of judgements and the writings of authoritative text writers.

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 (i) the Civil Code (Chapter 16 of the Laws of Malta), which regulates the relations between persons *inter se*, that is the way persons interact; (ii) the Commercial Code (Chapter 13 of the Laws of Malta), which regulates commercial and trade matters between people; (iii) 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; (iv) 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 (v) 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 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 delegated or 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 Bye-Laws and the Local Council Bye-Laws.

2 **(a)** The question refers to an essential requisite for a valid contract, namely its subject matter, without which a valid contract will not be concluded.

The object of a contract is that which is given rise to by means of the contract, and since the contract aims at creating, regulating or dissolving an obligation or at transferring a real right, it is this which should constitute the subject-matter of contracts. In positive law, by object or subject matter of contracts one means that which one of the parties gives or promises to give or to do or not to do in favour of the other party; and in bilateral contracts that which each of the parties gives or promises to give, to do or not to do in favour of the other.

Anything may form the object of contracts, including the act of man whether positive or negative. All things may therefore form the object, whether movable or immovable, corporeal or incorporeal, present or future, and even the use and the possession of a thing may be the object of a contract just as the thing itself. Even future things, such as future produce may form the object of a contract, and in this regard, we must distinguish according to whether the object which the parties have in mind is the future thing itself or merely an expectancy of the future thing.

As a rule the object of contracts may be anything which is chosen by the parties, because just as the law protects and sanctions the liberty of the citizen in general, it also protects and sanctions this liberty in contracts. Any limitation therefore to the liberty of the contracting parties with regards to the object of the contract is only justified by the necessity of preventing an abuse of such liberty.

The requisites of the object of contracts are the same as those of the object of obligations in general. The object of contracts, therefore, must be possible, lawful, *in commercio*, specified or such that it may be specified, and useful to the creditor.

Possible means physically possible, so that a thing or an act which is physically impossible cannot form the object of a contract.

Lawful means morally, juridically and politically possible, that is, it must not be something which is prohibited by law, or contrary to morality, or to public policy.

The object of a contract must be *in commercio*, it must be apt to form part of the estate of an individual. Things *extra commercium* are those which are destined to be used in a way incompatible with trade; but as soon as such a destination ceases they become again *in commercio* and they may therefore form the object of a contract.

The objects of contracts must be specified because otherwise the debtor could easily evade his obligations by making an illusory performance. Such specification may refer either to a particular thing or to the class to which the object belongs. In the first case the object is said to be certain and determinate, in the second case the object is generic.

Finally, the object of the contract must be useful to the creditor as it is obvious that a person is never interested in the performance of an obligation which is not useful to him. This utility need not be material: a thing which is not useful in itself may have a sentimental value, but it must have at least an indirect influence on the estate of the person and be such that it may be valued in money. However, there is a tendency in foreign doctrine and case law to regard a moral interest in the thing which is the object of the contract as sufficient even if it cannot be valued in money.

(b) The second part of the question relates to the resulting effects from a breach of contract.

The effects of non-performance and of delay are two, (i) they give rise to the obligation of the debtor, who is the defaulter, to make good the damages caused to the creditor through non-performance and delay. (ii) A special effect of *mora* is that the *periculum rei* rests with the debtor in default even though it was previously with the creditor.

For the existence of the obligation of making good compensatory or dilatory damages, the following conditions must exist:

(i) that there be non-performance or delay;
(ii) that such be imputable to the debtor; and
(iii) that the damages are real.

Damages are said to be liquidated either by agreement (conventional liquidation); by law (legal liquidation) or by a judgement (judicial). Conventional liquidation takes the form of an agreement, which foresees and determines the damages beforehand by means of a penalty clause or other similar clause. Legal liquidation arises in the case of dilatory damages in pecuniary obligations and the rate of interest fixed by law. Judicial liquidation is the most frequent of the three, where damage is made good by means of an equivalent sum of money determined by the courts assisted by experts. In most cases indemnification by the forced execution of the obligation is not possible and therefore compensation is awarded. The law determines the amount of damages which the creditor may claim according to whether the debtor has failed to perform his obligation in *culpa* or in *dolus* as one who has failed maliciously should pay larger compensation than one who is merely guilty in *culpa*. However, even though a debtor may have acted maliciously he can only be held responsible for direct damages and not for indirect damages which are not the result of his actions or omissions alone.

Delay has the effect of burdening the debtor with the *periculum rei* even though it may have been at the charge of the creditor. The debtor in delay remains obliged to pay damages even though the thing may have perished during the delay, unless he can prove that the thing would have equally perished if he had delivered the thing to the creditor without delay.

3 All employment relationships must be regulated by a contract of employment. Where no such contract is entered into, the employer must provide the employee with a letter upon commencement of employment containing certain information.

The Employment and Industrial Relations Act, 2002 vests the Minister with the right to issue regulations relative to the information to be given to employees on commencement of employment. Accordingly, Legal Notice 431 of 2002 entitled Information to Employees Regulations, 2002 provides for such information.

Where a written contract of employment has been signed between the employer and the employee, the employer shall deliver to the employee a signed copy of the agreement within eight working days from the date of the contract.

Where no written contract of employment has been signed between the employer and the employee, and/or where the written contract does not cover all or some of the information required to be notified to the employee by these Regulations, the employer shall be bound to give or send to the employee a letter of engagement or a signed statement within eight working days from the commencement of employment and which shall include the following information:

(a) the name, registration number and registered place of business of the employer and the identity card number, sex and address of the employee and the place of work (if there is no fixed place of work it should be stated that the employee will be employed at various places together with the registered place of business and if there is no registered place of business, the domicile of the employer is to be stated);

(b) the date of commencement of employment;

(c) the period of probation;

(d) normal rates of wages payable;

(e) the overtime rates of wages payable;

(f) the normal hours of work;

(g) the periodicity of wage payments;

(h) in the case of a fixed term contract of employment, the expected or agreed duration of the contract period;

(i) the paid holidays, and the vacation, sick and other leave to which the employee is entitled;

(j) the conditions under which fines may be imposed by the employer;

(k) the title, grade, nature or category of the work for which the employee is employed;

(l) the notice periods to be observed by the employer and the employee should it be the case;

(m) the collective agreement, if any, governing the employee's conditions of work; and

(n) any other relevant or applicable condition of employment.

If any of the above information is regulated by any law, regulation, national standard order, sectoral regulation order or collective agreement, the information may, where appropriate, be given in the form of a reference to the laws, regulations, orders or collective agreements governing that same information.

Where an employer engages a person under a contract for service as an outworker, he shall provide the employee with a signed statement showing:

(a) the name, registration number and registered place of business of the employer and the identity card number and address of the employee;

(b) the rate to be paid for the work; and

(c) any special conditions regulating the contract.

4 In terms of law, a company has a separate legal personality which is distinct from that of its shareholders.

Lifting the veil means when action is taken rendering the shareholders of a limited liability company liable for their actions despite the fact that their liability is normally deemed to be limited to the unpaid part of the issued capital of the company. Such action is taken when the acts of the shareholders are serious enough to warrant personal action being taken against them.

Although it is often stated that a company is shielded in its corporate shell in view of its separate legal personality, in actual fact the affairs of a company are never completely concealed from view. In fact, the law requires that although third parties do not have a right to attack the members personally, they are entitled to view who is behind the company, its directors and mode of management, in view of the public nature of the company's statutory documents. In such situations however one does not have to go as far as lifting the veil but merely peeping behind the veil may be sufficient to serve the purpose of information-seeking. This distinction is made by text writers who contend that mere peeping is said to be deemed necessary to get information on the persons who control the company, as are the shareholders and the directors, and also information on the nature of the company.

A further categorisation is made when referring to penetrating the veil, in which case the courts reach through the veil and attack the controlling shareholders personally. The purpose of penetrating the veil is to impose upon the shareholders' responsibility for the company's acts or to establish their direct interest in the company's assets. In the main, these instances arise out of the law. The first statutory inroad to the concept of separate judicial personality arises out of the requirement that each company must be subscribed to by at least two members (except in the case of private exempt single member companies).

The number of shareholders may be reduced below two in a number of situations, as in the case of buy-outs or where shares are cancelled and forfeited by a shareholder for failure to pay his call on the unpaid part. If a company (not being a single member company) continues to exist over a period of time with only one member, there is a possibility that such a company be dissolved. Thus, the Companies Act, 1995 provides that when the company continues to trade for more than six months having less the statutory minimum number of shareholders the court shall dissolve the company and furthermore the remaining shareholder shall be held personally and unlimitedly liable for the company's obligations and such liability shall continue to be borne from the lapse of the six months to the dissolution of the company or until such time as the default is remedied. It is to be noted that after the lapse of six months, the court is obliged to allow the company a further period of 30 days to remedy the default. With the imposition of personal liability on the remaining shareholder which arises after the lapse of the six month period, the separate personality concept is not destroyed but the corporate veil is lifted.

Offences under the Companies Act, 1995, such as fraudulent and wrongful trading, also give rise to situations where the culprits are held personally and unlimitedly responsible for their acts and are therefore considered as further statutory inroads to the separate juridical personality doctrine. Fraudulent trading arises where, in the course of the winding up of a company, it appears that business was carried on with the intent to defraud the creditors of the company or any other third party or for any other fraudulent purpose, in which case the court may, upon the application of either the official receiver, liquidator, creditor or member, impose personal liability without any limitation of liability on those who have been a party to the fraud. This provision can be said to be very wide for a number of reasons.

Thus, the courts may impose unlimited liability on the persons it holds responsible, with no prescribed limitation on the quantum of the compensation that would have to be paid, in that, this may be set at a higher amount than that which was actually involved in the fraud, and with no limitations as to the persons who may be held so responsible, as the court can impose liability on any person who has been involved in the fraudulent trading. Also the list of persons who may bring forward a claim is wide, in that, this may be done not only by the creditors who have been defrauded but by all the creditors of the company. Furthermore, liability, as in the case of a Maltese non-single member company continuing to trade with less than two members, may be imposed for all the debts and other liabilities of the company. Finally, the said provision does not only impose civil liability and personal liability but also criminal liability, in creating an offence punishable with a fine and/or imprisonment. On the other hand, the provision on fraudulent trading may not be seen as effective, in that, in the first place this can only be invoked when the company is in the course of winding up, and secondly, this can only be invoked in cases of fraud which require a heavy onus of proof to be satisfied by the plaintiff alleging the fraud.

Wrongful trading applies in the case of an individual who, before the winding up, was a director of the company, and knew or ought to have known that there was no reasonable prospect that the company could not avoid being declared insolvent; provided that liability is avoided where the person concerned took every step to minimise the potential loss of the creditors on the assumption that he is a reasonably diligent person having the general knowledge, skill and experience expected of a person occupying his same post. One notes that personal and unlimited liability can, in the case of both fraudulent and wrongful trading, be imposed upon those persons on whose directions or instructions the board of directors act or are accustomed to act, in other words, the shadow director.

Personal, joint and several liability is also assumed by persons who were directors (or shadow directors) of a company in the 12 months preceding its winding up and who are prohibited, up to two years from the date when its name is struck off the register, from doing any of the following: (a) to be a director of a company that is known by a name which is the same or similar to that which was placed into insolvent dissolution and of which they were a director (b) to in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company; or (c) to in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on under such a prohibited name.

A further statutory inroad concerns groups of companies, which, in the norm constitutes a judicial inroad. In fact, it is only in very exceptional circumstances that company law provides that a group of companies be deemed as a legal person. Although every company within a group is a separate legal person, in the case of the preparation of financial statements, the auditing of accounts and the publication thereof, besides the preparation of the same by every company, the group must prepare final and consolidated accounts or group accounts.

While the above-mentioned legal provisions pose no 'unexpected surprises' to members of companies, in that they are specifically provided for in the law and are only open to legal interpretation, from an analysis of foreign case-law, the same cannot be said of the many instances in which a member of a company may be held unlimitedly liable for the debts of the company. Aside from the cases of liability towards involuntary creditors, there have been numerous cases where unlimited liability is imposed. As held by some text-writers, shareholders of limited liability companies require understandable guidelines in this area. In this regard however, others contend that one cannot rationalise the cases except under the broad legal categories under which they fall. These, for example, include agency, fraud, group enterprise, trusts, tort, enemy and tax.

5 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.

(a) 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, the deed of partnership of a partnership *en nom collectif* must include the details listed hereunder:

(i) the name and residence of each of the partners;
(ii) the partnership-name;
(iii) the registered office in Malta of the partnership;
(iv) 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;
(v) the contribution of each of the partners, specifying the value of the respective contribution of every partner;
(vi) 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*.

(b) 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 him.

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 him.

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 he shall thereby become liable for all the obligations of the partnership, even if incurred before the date at which he becomes 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 question 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. According to a UK text writer, 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 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 The share capital in a limited liability company must be subscribed to by at least two members other than in the case of a single member company. Decisions of shareholders are either classified as extra-ordinary resolutions or ordinary resolutions.

Except where the Companies Act, 1995 expressly requires powers to be exercised by the company in a general meeting, the division of such powers depends on the provisions of the company's memorandum and articles. Usually, however, the articles authorise the board of directors to exercise all the powers of the company, which neither the said Act nor the express provisions of the memorandum or articles require to be exercised by the company in a general meeting.

A general meeting is one at which, if properly convened and duly constituted, resolutions binding the company and all its members may be passed. A general meeting is, therefore, distinguished from meetings of classes of members, which may only pass resolutions binding on the particular class concerned.

Decisions at general meetings are taken by way of resolutions. Resolutions may be of two kinds, ordinary and extra-ordinary resolutions. In terms of article 135 of the Companies Act which deals principally with resolutions taken in public companies, a resolution is an extra-ordinary resolution where two conditions are complied with. The said conditions are, namely that:

(a) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extra-ordinary resolution and the principal purpose thereof has been duly given; and

(b) it has been passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51%, or such other higher percentage as the memorandum or articles may prescribe, in nominal value of all the shares entitled to vote at the meeting.

If one of the aforesaid majorities is obtained, but not both, another meeting shall have to be convened within 30 days, in accordance with the provisions for the calling of meetings, to take a fresh vote on the proposed resolution.

At the second meeting the resolution may be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting. However, if more than half in nominal value of all the shares having the right to vote at the meeting is represented at that meeting, a simple majority in nominal value of such shares so represented shall suffice.

However, in the case of a private company, a resolution shall nonetheless be deemed an extra-ordinary resolution, where the following two conditions are complied with, namely that:

(a) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extra-ordinary resolution and the principal purpose thereof has been duly given; and

(b) it has been passed by a number of members having the right to attend and vote at any such meeting holding in the aggregate not less than 51% in nominal value of the shares conferring that right or such other higher percentage as the memorandum or articles may prescribe.

As a rule one may state that any question, whether it comes within the meaning or ordinary or special business, may be determined by an ordinary resolution except where an extra-ordinary resolution is required. Decisions which the law provides require extra-ordinary resolutions include decisions to alter the memorandum and articles of association of a company except in the case of alterations excluded under article 79; decisions whereby a company acquire its own shares; decisions whereby class rights are varied; decisions to change the currency in which the share capital is designated; decisions to voluntarily wind up a company or to have the company wound up by the court; decisions to nominate and remove a liquidator; decisions to convert a commercial partnership; and decisions relating to the amalgamation and division of companies.

On the other hand, an ordinary resolution is one which is passed by a member or members having the right to attend and vote holding in the aggregate shares entitling the holder or holders thereof to more than 50% of the voting rights attached to shares represented and entitled to vote at the meeting, or such other higher percentage as the memorandum or articles may prescribe.

It is also pertinent to note that where decisions are consented to by all the shareholders of a company and such consent is expressed by all in writing, the percentages required for the passing of ordinary and extra-ordinary resolutions, as detailed above, and the need to hold a meeting are of no relevance. Thus, a resolution signed by all the shareholders for the time being entitled to receive notice of and attend and vote at general meetings shall be considered as valid and effective as if the same had been passed at a general meeting duly convened and held.

8 **(a)** The Companies Act, 1995 provides for two principal offences for which directors can be held liable in the case where the company continues to trade when in financial difficulty and such company is subsequently dissolved, namely fraudulent and wrongful trading. The main differing feature between the two offences is the intention to defraud, which must be found to exist in order to hold a person liable for fraudulent trading.

Where it appears that a person who was a director (including a shadow director) and who knew or ought to have known prior to the dissolution that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency, such person shall be held liable for wrongful trading. This provision can be said to concern in principal two persons, namely the liquidator, who has to bring forward the application before the court, and the director or directors against whom the action is brought.

On the other hand, if in the course of winding up, it appears that any business of the company has been carried on with the intent to defraud creditors of the company or any other person or for any fraudulent purpose, the court may declare that any persons who were knowingly parties to the carrying on of the business, be held liable for fraudulent trading.

While in the case of fraudulent trading an application can be made by the official receiver, the liquidator or any creditor or contributory of the company, in the case of wrongful trading action can only be taken by the liquidator. Therefore, action on the basis of the provisions of fraudulent and wrongful trading against the directors of Sparks Limited can be taken once the court upheld the application to dissolve the company for its inability to pay its debts.

(b) The principal issue that a liquidator must assess in considering a wrongful trading action are, first, whether and precisely when the directors should have concluded that there was no reasonable chance of the company avoiding insolvent liquidation. UK cases seem to suggest that the courts take a broad approach to predict insolvency. On the assumption that the directors have the financial information that would be available to them if the statutory accounting requirements are complied with, the directors should be able to predict insolvent liquidation. Pinpointing the precise date at which the prediction should have been made is probably more difficult to establish. While a cash flow crisis on top of mounting losses and liabilities will lead to an inevitable conclusion as will withdrawals of credit by major suppliers, the loss of a major customer or contract or the date on which disastrous accounting figures should have been available to the board indicating soaring debt and losses are close indications. However, insolvency is probably predictable long before a cash flow crisis leads to an actual failure to pay current debts. In an English case, the court held that the company was probably likely to fail from the very beginning as it was not objectively a viable business proposition. However, to conclude that the directors should have predicted insolvent liquidation from the very beginning would impose too strict a test. The courts thus tend to give directors the benefit of the doubt in such circumstances and not choose too early a time for liability to run.

Having verified that the company went into insolvent liquidation and the directors should have known that there was no reasonable prospect that the company would avoid dissolution due to insolvency, the liquidator need prove no more, for the burden of proof shifts on to the directors to prove that there was no wrongful trading or that, knowing that the company could not avoid dissolution due to insolvency, they took every step to minimise the loss of the creditors.

For a director to know and be able to predict financial difficulties he should always have adequate financial information at his disposal, as for example, having monthly management accounts. However, having adequate information is of no use if no proper formal structure for decision-making exists within the company, which therefore requires regular board meetings and these being properly minuted. If financial difficulty is identified, then urgent professional advice should be sought from the company's auditors or independent consultants. In addition, a specialist report from an insolvency practitioner may be necessary to consider the alternative courses of action.

The course of action which the directors may take in encountering financial difficulties would probably be commenced with trying to reach agreements with the major creditors and obtain supplies on credit from the small unsecured creditors. Those providing finance may request floating securities over the assets of the company together with high rates of interest, which would assist the company in continuing to do business.

An alternative would be to cease trading, even though this may not necessarily be the best way to protect the creditors' interests. This would necessitate implementation of formal insolvency proceedings, which should be done as soon as possible to prevent enforcement of debts by creditors starting proceedings for settlement, to minimise trading losses and to bring trading expenses, like wages, rent, purchases, to a minimum.

When dealing with the liability of a director, in the case of wrongful trading, their conduct (that is, the facts which he ought to know or ascertain insofar as the insolvency is concerned, the conclusions which he ought to reach and the steps he ought to take to minimise the loss of the creditors) is made subject to two tests: the general knowledge, skill and experience a person carrying out his functions should objectively have and the general knowledge, skill and experience that he actually has. According to these standards he ought to keep himself informed, reach conclusions as to the company's prospects, and take steps to minimise the loss of the company's creditors. The implications of this provision should not be underestimated, in that it imposes an objective test, with a subjective element, on all directors especially when compared to the subjective criteria usually adopted in determining the level of skill and care expected of directors.

Liability for wrongful trading shall however not be imposed where the director, knowing that there was no reasonable prospect that the company would avoid being dissolved due to insolvency, took every step he ought to minimise the potential loss of the creditors of the company.

As held by a UK text-writer, the central requirement for the offence of fraudulent trading is 'the carrying on of business with the intent to defraud creditors' where, as held in a case, the test of the intent will only be satisfied where there is actual dishonesty, involving, according to current notions of fair trading among commercial men, real moral blame. Although this is held to be a strict standard, the test will be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. Furthermore, 'any persons who were knowingly parties to the carrying on of the business' may be held liable for fraudulent trading. It has been held that this involves taking at least some active part in the management of the company. Thus, the company secretary who merely carries out the administrative functions of such an office would probably be excluded as he has no part in the management; nor can creditors, who press for payment, be held so liable merely because they know that the company will have no money to remain in business if it is honest. However, creditors may be held so liable if they accept money knowing it has been procured by carrying on business with intent to defraud creditors and for the very purpose of paying their debts.

In relation to payments made to creditors, in *Re Sarflax Ltd* (1979), the UK courts concluded that although distributing the proceeds of the realisation of assets could constitute the carrying on of business, the mere preference of one creditor over another did not constitute intent to defraud for the purpose of fraudulent trading.

It is however clear from the facts given that the directors were fully aware of the precarious financial position of the company and notwithstanding this continued to trade and undertake negotiations relative to new contracts with suppliers with the intent of defrauding them. No action appears to have been taken to minimise the potential loss of the creditors.

Where a person is held liable for wrongful trading the court may sentence him to make a payment towards the company's assets in such amount as the court thinks fit. As to the actual amount of the liability order, a UK case gives clear guidance. As the purpose is primarily compensatory, it is *prima facie* the amount by which the company's assets can be discerned to have been depleted by the director's conduct which amounted to wrongful trading. Thus, in simple terms the directors may be made liable to contribute the amount of the loss caused to the company after the time they should have predicted its demise, yet continued to trade. A difficulty which arose in another UK case was that the company's accounting records were so inadequate that it was impossible to quantify that amount. The court therefore held that the director should instead be liable to contribute the amount of the unpaid debts of the company incurred after the critical date.

In quantifying the amount of the order the court would also look to the position of the director himself. In the former case, the court held that fraudulent intent, positive untruths stated to raise credit and ignoring warnings from auditors might all be factors influencing the amount of the order. Also as one director was older and more senior in every sense, his contribution was to be greater than others. Therefore, an element of moral judgement is likely to form part of the court's discretion in establishing the amount.

A point which should be made insofar as the success or otherwise of a claim for wrongful trading is that although a director may be held liable and ordered to contribute an amount to the assets of the company, such would be futile where the directors do not have the means to make such contribution. The existence of directors' guarantees of bank lending and collateral security on their assets may often mean that the directors fail financially with the collapse of the company. This is where the possibility that the company cover the liability of its officers through adequate insurance policies gains importance; a possibility which also exists under local law.

In finding a person responsible for fraudulent trading, the court may declare the individual concerned personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. Furthermore, where the business of the company was carried on with a fraudulent intent or for the purposes detailed in the relative provision, every person who was knowingly a party in the carrying on of the business as aforesaid, shall be guilty of an offence and liable on conviction to a fine (*multa*) of not more than €232,940 or imprisonment for a term of not more than five years, or to both such fine and imprisonment.

9 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 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 a nutshell it shall be the duty of the directors of a company to promote its well-being and therefore be responsible for its general governance and its proper administration and management as well as for the general supervision of its affairs.

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.

Furthermore, the Act provides that directors must not make secret or personal profits from their position without the consent of the company or make personal gain from confidential company information. Also, they must not use any property, information or opportunity, of the company for their own or anyone else's benefit, nor obtain benefit in any other way in connection with the exercise of their powers, except with the consent of the company in the general meeting or except as permitted by the company's memorandum or articles of association. It is clear from the given facts that Mike benefited from his position within ABC Ltd through the contract concluded with PM Ltd. Although the facts do not provide that he was instrumental in the contract being concluded, he did vote in favour of its conclusion and did not make any disclosure on his links and involvements.

The Companies Act, 1995 does not provide for a definition of 'breach of duty'. From a review of case-law, including foreign case-law, it is noted that such is related to various matters such as failure to act in good faith, negligence and breach of duty. Where specific duties are provided for in the law as in the case of administrative duties, failure to comply therewith shall result in the penalties also prescribed at law. More generally however, directors are held personally, jointly and severally liable for damages for any breaches of duty unless a particular duty is entrusted to one or more directors in which case, only such director or directors shall be held so liable. Furthermore, a director shall not be held liable for the acts of his co-director where he proves either (i) that he did not know of the breach of duty before or at the time of its occurrence and that on becoming aware of it after its occurrence, he immediately signified his dissent in writing to the other directors; or (ii) that, knowing that the co-directors intended to commit a breach of duty he undertook all reasonable steps to prevent it.

An important fiduciary duty which is statutorily imposed on directors is that they must not create conflict between the duties they owe to the company and their personal interests and those they owe to others. To avoid such situations arising the law provides for measures of disclosure. Thus, where a director is in any way interested, whether directly or indirectly, in a contract or proposed contract with the company he is to declare the nature of his interest to the other directors, either at the meeting at which the question of entering in the contract is first taken into consideration, or, if the director was not at that date so interested in the said contract or proposed contract, at the next meeting of the directors held after he became so interested. Any director who fails to declare such interest shall be liable to a penalty of €2,329·40 payable to the Registry of Companies. In the case under consideration Mike should have declared his interest at the board meeting.

In a UK case, *Guinness* v *Saunders* (1990), the UK court went a step further and held that if a director fails to declare his interest, the transaction is voidable at the instance of the company and any benefits received by the director are recoverable by the company if it acts while it is still possible to restore both parties to their former positions.

Besides disclosure of interest, the articles of association of the company may also provide that a director shall not vote at a meeting of the directors in respect of any contract or arrangement in which he is interested, and if he shall do so his vote shall not be counted. This would also be relevant to the facts of the case if the articles of ABC Limited do so provide.

A UK text-writer suggests that a fiduciary duty owed by directors should be the disclosure of their own misconduct where this is relevant to any proposed transaction between the company and the directors. An important consequence of the principle that directors cannot place themselves in a position where their fiduciary duties conflict with their personal interests. Some have stated that directors must not, without the informed consent of the company, use for their own profit the company's assets, opportunities or information. While it is contended that misuse of corporate assets usually presents no problems as every director knows that he must not use the company's property as his own, misuse of corporate information and opportunities may create problems. In *Regal (Hastings)* v *Gulliver* (1942), a much debated UK judgement which concerned both such aspects, the court concluded that the acts of the directors were so related to the affairs of the company that they can properly be said to have been done in the course of their management and in the utilisation of their opportunities and information and moreso because they resulted in profits for the said directors.

One of the most obvious examples of a situation which might be expected to give rise to a conflict between a director's interests and his duties is where he carries on or is associated with a business competing with that of the company as in the given facts. Article 143 of the Companies Act is precisely geared towards such an undesirable situation. Thus, a director may not, in competition with the company and without the approval of the same company given in a general meeting, carry on business for his own account or on account of others, nor may he be a partner with unlimited liability in another partnership or a director of a company which is in competition with that company. Failure to comply with this provision, other than any remedy which the company may have against the director for breach of duty, vests the company with the right either to take action for damages and interest against the director or to demand payment of any profits made by him from such failure. This provision does not totally prohibit directors from holding other directorships or from carrying on other business, but that when such shall be deemed to be in competition with his post of directorship, before so proceeding he is to acquire the approval of the company in the general meeting.

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 promulgated on 31 July 2008 (LN 180 of 2008) and 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.

This legal framework is further complemented by the provisions of other unrelated legal instruments, such as the provisions of the Dangerous Drugs Ordinance 1939 (as amended in 1994), which criminalises the handling of money in drug-related offences, and the Cash Control Regulations (LN 149 and 411 of 2007) promulgated on 15 June 2007 in virtue of powers conferred by the External Transactions Act, which requires any person entering or leaving Malta, or transiting through Malta with an amount of cash (including monetary instruments) amounting to €10,000 to report such cash to the Customs Department on a prescribed form.

The Prevention of Money Laundering Act 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 Mark 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. Mark, as a bank manager falls under the definition of a Subject Person in terms of the Prevention of Money Laundering and Funding of Terrorism 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.

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 asks candidates to demonstrate their knowledge on primary and secondary/delegated legislation.

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

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 subject matter as an essential requisite of a valid contract and breach of contract.

8–10 Full detail given on both parts of the question.

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

0–4 Unbalanced answer merely dealing scarcely with both parts of the question.

3 The purpose of this question is to test the candidates' knowledge of the legal requirements of what information must be provided to an employee by an employer in the absence of a contract of employment.

7–10 Candidates earning these marks will indicate and detail all the information which must be provided in the absence of a contract of employment as provided for in the relative regulations.

4–6 Good treatment of the information required with candidates showing a sound knowledge of the subject-area but at the same time not providing adequate detail.

0–3 Showing very poor knowledge of the subject-matter of the question.

4 The purpose of this question is to test the candidates' knowledge on a basic concept of company law namely the separate legal personality of a company. The question requires candidates to explain the instances where disclosure is required and the corporate veil of a company is lifted. Marks will be awarded depending on the level of detail given.

6–10 Answers will provide a detailed explanation of separate legal personality.

3–5 Answers in this band will provide less detail than 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.

5 This question asks candidates to explain the features of a partnership deed and how changes are to be made to it.

5–10 Thorough explanation of all the required contents of a partnership deed. Higher marks will be awarded to those candidates who do not only provide a list of such contents but at least give a very brief description of the requisites.

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

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 non-cash consideration.

6–10 Answers will provide a detailed explanation of the procedure to be followed.

3–5 Answers in this band will provide less detail than 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.

7 This question seeks to test the candidates' knowledge on the types of decisions which may be taken by the shareholders of a limited liability company and makes particular reference to the types of resolutions which are the ordinary and extra-ordinary resolutions.

7–10 Answers must make specific reference to the relative provisions of law with regards to these resolutions.

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

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

8 This question tests the candidates' knowledge on fraudulent and wrongful trading, namely offences committed by the directors and the implications ensuing from such action.

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

4–6 Candidates show that they are aware of the legal implications of the actions of directors where the financial situation of a company is not progressing well.

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

9 The question deals with the fiduciary duties of directors. Marks will vary depending on the level of detail given and the ability of candidates to apply their knowledge of the law to the facts of the case.

7–10 Candidates earning these marks will clearly explain the fiduciary duties of directors.

4–6 Good treatment of the information required.

0–3 Poor answers 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.

6–10 Detailed explanation of the question of liability or otherwise of persons and of the obligations of Subject Persons.

0–5 Weaker answers showing little or a brief explanation of the subject matter of the two questions.