Examiners' report

F4 Corporate and Business Law (MLA)
December 2008

General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. This is the third session with the new paper format and candidates appear to have adapted to the new format and in fact most candidates attempted all questions, There still remain those candidates which treat the three problem/application questions at the end of the paper in the same way as they dealt with the last three questions which existed in the old paper format (where 20 marks were awarded to these questions), with the effect that the candidates are spending too much time dealing with these questions to the detriment of their general performance. Candidates should recall that these questions are worth no more than the other questions and they should be encouraged to manage their time better in making sure they have sufficient time to deal with all the questions equally well.

As is most often stated in these reports, length is of no fundamental importance and that marks are not awarded on the basis of the length of answers given but on the level of content of the same, one cannot but remark that higher marks could be awarded if candidates provide some more detail in answering questions. Similarly, where questions are divided into more than one part, candidates are expected to attempt each part giving due consideration to the mark allocation to each part. On the other hand, there are still those candidates who fail to insist on regurgitating all they know about a subject and do not concentrate on that part of the subject which has been included in the question. In application based questions, candidates are expected to apply their knowledge to the given facts and not state all they know about the subject- matter covered by the given facts. Not applying this method of answering questions affects overall performance as precious time is lost in answering the other questions in the paper.

The report will begin with some general brief comments on the overall performance of candidates in this session before going on to look at the questions in the paper in detail. One notes that both positive and negative aspects of performance are given so as to enable candidates to learn from past performers and performance.

At the outset one can state that there were some sound performances. However, there were also many average performances. The latter were due to candidates being fully prepared for the examination. The inadequate performance of many candidates was once again evidenced by a clear failure to carefully read the content and requirements of questions, which impacted particularly on the performance in the narrative questions.

Some general indications of good practice follow:

- candidates must be well prepared for the exam - on all topics and not on what they consider the 'most important';
- candidates need to manage their time effectively;
- candidates must read carefully and understand the requirements of each question;
- keep in mind that the marks that the examiner allocates to each part of the question is indicative of the detail which candidates are required to go into;
- provide concise and complete answers;
- candidates should indicate the question number in the paper on each page of the respective reply;
- candidates should indicate the questions done in the box on the front of the paper;
- start each question on a new page;
- use both sides of the booklet;
- general essay answer format should not be used for problem questions as these will contain little information relating to the specific issues raised in the problem question.

Specific Comments

Question 1

This question was divided into two parts with the first part having 3 marks and the second part 7 marks. Both

parts of the question focused on the fundamental human rights and freedoms afforded protection under Maltese law.

The first part of the question required candidates to list three fundamental human rights afforded protection under the Constitution of Malta. Most candidates answered this question adequately and listed three human rights afforded protection.

The second part of the question required candidates to discuss the effect which the adoption of the European Convention Act had on Maltese law. A good percentage of candidates were able to trace the history of the enactment of this law back to 1987 and to also mention how this has been amended since then. There were however those candidates who clearly showed that they were not aware of this background and merely presumed that Malta adhered to this legislation when it became a member of the European Union.

Question 2
This question was a one part question which specifically dealt with one aspect of contract law and namely the internal requisite of capacity. Many answers given to this question were more than satisfactory with candidates dealing with all aspects of capacity namely age and mental capacity. However, this was one question where some candidates chose to dwell on all aspects of contract law and mention the eternal requisites for a valid contract and all internal requisites of all contract law. The question was clearly worded and made reference to one internal requisite of contract law. Marks cannot be awarded to candidates who dwell on areas which are not covered by the specific question; hence the importance of carefully reading the question and answering 'to the point'.

Question 3
This question was also worded in a straightforward manner and required candidates to analyse the effects of a breach of contract. This appears to be an area of contract law in respect of which candidates do not appear to be sufficiently and adequately prepared. This was also noted in reports of previous sessions when a question on this subject matter was presented. Undoubtedly there were candidates who gave satisfactory answers and discussed breach of contract and the resultant effects. The latter discussed mora non-performance in relation to time) and culpa (the omission of due diligence on the part of the debtor) and the type of damages which may be awarded by the local courts when a breach of contract is found to have occurred. On the other hand, there were those candidates who struggled and gave brief and incomplete answers.

Question 4
Question 4 was also a one part question and dealt with employment law. The question dealt with the termination of a contract of employment on grounds of redundancy. 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.

In replying to this question candidates were expected to deal with the general aspect of redundancy, namely that this is not defined in our law; the 'last in first out rule' and the procedure to be applied when an employer wishes to terminate employment of employees on this ground. Candidates were also expected to discuss the aspect of collective redundancies and how these are regulated under the Collective Redundancies (Protection of Employment) Regulations, 2002. Many candidates gave complete answers and dwelt on the general principles and on the collective redundancies, while there were some candidates who only chose to deal with collective redundancies despite the question being of a general nature. This may be again the result of candidates not reading the question carefully.

Question 5
This question was based on partnerships *en nom collectif* and partnerships *en commandite.* The purpose of this question was for the candidates to state what must be included in a deed of partnership of both types of

partnerships. Candidates were also required to explain the procedures stipulated at law to effect changes to the deeds of partnership.

This question was well answered by most candidates. The only comments being that some candidates omitted to answer to the second part of the question, namely that which dealt with effecting changes to the deeds and that a very brief explanation of each of the requirements to be included in the deeds would have better demonstrated to the examiner that the candidate actually understood the requisite and its importance in partnership deed drafting.

Question 6
This question dealt with a fundamental area of company law, namely the importance of the limited liability of the shareholders of a limited liability company. This question was worded in a wide manner allowing candidates to dwell on the subject area.

Very satisfactory answers were provided by those candidates who traced the historical development of this principle of corporate law and mentioned the infamous Salamon and Macaura cases, which cannot be left out when answering to a question on limited liability. In tracing this historical development, candidates explained the meaning and importance of limited liability and how this has been the main reason why limited liability companies have proved to be more popular than other forms of partnership. Finally, candidates dwelt on situations where the corporate veil may be lifted. In view of the satisfactory answers given, marks only varied depending on the level of detail given in the answers.

Question 7
This question dealt with a feature of company law which is not specifically provided for under our law. The question required candidates to explain the role of the promoter of a limited liability company. The term 'promoter' can be widely interpreted to include several persons and since this is not legislatively defined recourse has to be had to case-law. In one UK case, the judge defined it to include 'one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish the purpose.' Since before its incorporation a company cannot be said to exist, there must be somebody to act on its behalf. This is the general explanation which should have been given by candidates and in so doing explaining briefly the procedure to register a company.

There were those candidates who achieved satisfactory marks in this question as they clearly demonstrated that they were aware of the role of the promoter and dwelt on the duties and obligations of the same. While others outlined the role of the promoter they were uncertain of the role of the promoter once a company is registered and allocated rights and duties to the promoter which are normally exercised by the director of a company. Other candidates clearly showed that they were unprepared for this question and dwelt on the role and duties of company officers.

Question 8
This question is divided into two parts, with the first part having 4 marks allocated to it and the remaining 6 marks allocated to the second part of the question. The facts given are about a company by the name of ABC Limited and the questions relate to the share capital of a company.

The first part of the question required candidates to discuss and distinguish between the authorised and issued share capital of a company and to indicate the minimum required in respect of each type of capital as stipulated at law. The authorised share capital is the total amount of capital which the company is authorised to issue by its memorandum. Since the purpose of the authorised capital is to set a limit of issued capital, the authorised share capital is, in the strict juridical sense, not capital in that it merely represents an authority to create new capital up to its limit by the issue of shares. On the other hand, the issued capital is that which is actually paid up by the shareholders. Most candidates were able to bring out this distinction while some stopped short of explaining

what the authorised share capital is. The latter could be interpreted to mean that the candidates could not explain this distinction.

The Companies Act lays down the minimum authorised share capital requirements for both private and public companies. Article 72 provides that in the case of public companies, this must be at least Euro 46,587.47 whereas in the case of private companies it must be at least Euro 1,164.67. As is the case with the authorised share capital the law lays down the minimum amount of share capital which is to be issued and paid up. Thus, where the authorised share capital of the company is equal to the minimum amount stipulated, it shall be fully subscribed to (issued) and in cases where it exceeds such minimum, at least that minimum must be subscribed to. Furthermore, in the case of a public company at least 25% of the issued share capital must be paid up on the signing of the memorandum and in the case of a private company this must be at least 20% paid up on the signing of the memorandum. The comment that can be made here are that aside from the fact that some candidates did not indicate the correct minimum requirements, others chose to indicate the minimum amounts in Maltese Liri despite the fact that Malta adopted the Euro in January 2008 and few brought out the afore-mentioned distinction between the minimum authorised share capital requirements and the minimum issued share capital requirements.

Other points which could have been mentioned in the case of the share capital is that the issued share capital must be subscribed to by at least two persons; except in the case of a private exempt company having a single member in which case the share capital shall be fully subscribed to by such single member. Furthermore, the issued share capital may be partly paid up and partly unpaid. Some candidates also mentioned these points.

The second part of the question dealt with an increase in the issued share capital of a company where the consideration is in kind and not in cash. 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. Many candidates who attempted this question failed to mention all of these conditions.

Candidates were also expected to explain the nature of an experts' report which must also be prepared in the event where the consideration is in kind. 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. Most candidates made reference to the report but several did not go into the requirements of it.

Question 9

This question was about GAM Statistics Limited and the proposal which has been put to the director of this company to leave GAM Statistics and move to another company which is engaged type of business as the said GAM Statistics Limited. The questions posed relate the duties of directors with the first part of the question giving candidates the possibility to discuss and analyse the general duties of directors which arise out of the law.

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

its affairs. Accordingly, candidates were expected to detail all the various powers of the directors. Many candidates however focused only on the fiduciary duties of directors without dealing with the other duties.

The second part of the question, on the other hand, was a specific question which relates to the duty of a director to disclose any interests he may have in a company in which he holds the post of officer or in a transaction which the said company may be entering into. 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 fine of Euro 2,329.37.

Similarly, Article 143 of the Companies Act is geared towards undesirable situations involving conflicts of interest. 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.

Candidates were therefore expected to make reference to these provisions and in general to the fiduciary duties of directors. In terms of such Matthew must comply and disclose his intentions to establish the new company which shall be engaged in the same activities as GAM Statistics Limited. Candidates' answers to this part of the question were fair, in that, while not many made specific reference to the relative provisions were able to dwell on the requirement of disclosure in situations of conflicts of interest.

Question 10

This question dealt with the appointment of a liquidator and the powers a liquidator can exercise. Mastermind Limited is a limited liability company with two shareholders. No mention is made as to who holds the post/s of company officers. The question requires candidates to analyse the provisions at law on the appointment of a liquidator and who may hold such a post.

In terms of law, a company, by extraordinary resolution, appoints a liquidator for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him. Except where a company has appointed a liquidator at the meeting at which the extraordinary resolution to liquidate the company has been passed, the directors have to call a general meeting of the company, to be held within 30 days after the date of the dissolution, to appoint a liquidator. If for any cause whatsoever, a liquidator is not appointed by the general meeting, any director shall apply to the court for the appointment of a liquidator and the appointment shall be made by the court. As to who may be appointed liquidator the law provides for certain exclusions and it is with these exclusions in mind that candidates had to answer to the first part of the question.

A person shall not be qualified to act as liquidator unless he is an advocate or is an individual who is a certified public accountant or certified public accountant and auditor, or is registered with the Registrar as fit and proper to exercise the function of liquidator. A person who is qualified to act as liquidator, may not act as liquidator if he has held the office of director or company secretary or has held any other appointment with or in connection with

that company, at any time during the four years prior to the date of dissolution of the company as determined in accordance with the provisions of the Act. The term 'director' includes a person in accordance with whose directions or instructions the directors of the company are or have been accustomed to act. Most answers to this part of the question failed to refer to these exclusions.

The second part of the question required candidates to dwell into the powers of a liquidator and since advice is being given to an individual as to whether to take on such role or otherwise, reference must also be made to both the rights and obligations of a liquidator.

As opposed to the first part of the question, candidates gave satisfactory answers to the second part of the question giving a lengthy description of the role of the liquidator and the powers which such a person may exercise in winding up the affairs of a company.