Answers

Fundamentals Level – Skills Module, Paper F4 (GLO)
Corporate and Business Law (Global) **December 2011 Answers**

1 This question requires candidates to assess the relative advantages and disadvantages of arbitration and court-based proceedings in relation to commercial disputes.

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration in 1985. The model law applies where the parties to an arbitration agreement have their place of business in different states, or if the parties in dispute are in the same state, where the arbitration agreement designates a different state as the place where the arbitration has to take place. In addition, of course, the dispute has to arise from a commercial relationship, that is one relating to trade, although this term is interpreted widely.

As the accompanying background explanation of the model law explains, it is 'designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmonisation is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.'

In England arbitration is conducted under the Arbitration Act (AA) 1996, which follows the UN model law. Section 1 AA 1996 states its founding principles as follows:

- the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without necessary delay or expense;
- the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- in matters governed by this part of the Act the court should not intervene except as provided by this part.

Arbitration is one example of what is more generally referred to as Alternative Dispute Resolution. That term refers to a number of processes, which provide an alternative to litigation through the courts, and can be used to resolve disputes where those involved would be unlikely to resort to the courts. Alternative Dispute Resolution techniques have evolved to meet perceived defects in more formal procedures. Being involved in a court case is a stressful experience. Research has found that parties involved find the formal court hearing intimidating, and that many of those who funded their own case suffered anxiety about their mounting legal bills and the possibility of having to pay the costs of the other party.

Characteristically, in litigation in the courts one side wins and one side loses. It is therefore a process focused on finding fault; not just adversarial, but antagonistic, with an inherent risk of entrenching positions, and encouraging the nursing of grievances. Such consequences cannot but have a damaging effect on the possibility of the parties in dispute continuing to have a friendly relationship.

It is strongly argued that some Alternative Dispute Resolution processes reduce or remove these problems. Arbitration is the oldest of these alternative dispute resolution procedures. It is the procedure whereby parties in dispute refer the issue to a third party for resolution, rather than take the case to the ordinary law courts. Studies have shown reluctance on the part of commercial undertakings to have recourse to the law to resolve their disputes and it is common for commercial contracts to have arbitration clauses included in them. As with contractual terms generally, such clauses are binding and the courts will not allow the parties to ignore them and pursue a court case rather than go through with the agreed arbitration procedure.

There are numerous advantages to be gained from using arbitration rather than the court system:

- **Privacy.** Arbitration tends to be a private procedure. This has the twofold advantage that outsiders do not get access to any potentially sensitive information and the parties to the arbitration do not run the risk of any damaging publicity arising out of reports of the proceedings.
- **Informality.** The proceedings are less formal than a court case and they can be scheduled more flexibly than court proceedings.
- **Speed.** Arbitration is generally much quicker than taking a case through the courts. Where, however, one of the parties makes use of the available grounds to challenge an arbitration award the prior costs of the arbitration will have been largely wasted.
- **Cost.** Arbitration is generally a much cheaper procedure than taking a case to the normal courts. Nonetheless, the costs of arbitration and the use of specialist arbitrators should not be underestimated.
- **Expertise.** The use of a specialist arbitrator ensures that the person deciding the case has expert knowledge of the actual practice within the area under consideration and can form their conclusion in line with accepted practice.
- **Finality.** Appeals on arbitration decisions are limited and once the arbitrator has reached a decision the parties are bound by it and any award can be enforced through court action.

The foregoing has emphasised the advantages of arbitration over court-based proceedings, but there are alternative grounds for the parties to prefer the latter procedure. For example, judges are experts in the law and have particular expertise in evaluating evidence and the statements of witnesses. Court decisions are also taken within the framework of the doctrine of precedent and therefore are not *ad hoc* decisions made on a case-by-case basis, as is the situation with arbitration. It might actually be to the advantage of one of the parties to have a particular issue determined by the courts in order to set a precedent for the future. Finally it should also be mentioned that the court-based procedure allows much more scope for appeal within its structure.

2 This question requires candidates to explain the three different ways in which an offer can be brought to an end under the United Nations Convention for the International Sale of Goods.

Under the provisions of the convention, a contract comes into existence when the offeree's acceptance of the offer becomes effective. In order to constitute an offer, any statement must be addressed to specific persons and be sufficiently definite. Prior to that effective acceptance however, it is open to the offeror to bring the offer to an end either through withdrawing it or revoking it. Whilst English law merely sees withdrawal as an aspect of revocation, the UN Convention distinguishes between the two in order to deal with some difficulties that arise under the common law. The need for this distinction becomes apparent when it is realised that the convention allows for the possibility of irrevocable offers, which are those which indicate, whether by stating a fixed time for acceptance or otherwise, that the offer is irrevocable. Alternatively the offer may be worded in such a way as to make it reasonable for the offeree to rely on the offer as being irrevocable. In this latter situation the offeree must have acted on the offer.

(a) withdrawal of an offer

Article 15 of the convention provides that an offer becomes effective when it reaches the offeree, and that any offer, even an irrevocable one, may be withdrawn as long as the withdrawal reaches the offeree before or at the same time as the offer. As a consequence this effectively allows the offeror to have second thoughts and to withdraw what would otherwise be an irrevocable offer, just as long as the offeree has not been in a position to think the offer was open to acceptance.

(b) revocation of an offer

Under Article 16 of the convention, an offer may be revoked if the revocation reaches the offeree before he has despatched an acceptance. An offer cannot be revoked, however, if it indicates that it is irrevocable, or it is reasonable for the offeree to rely on its being irrevocable. In effect this means that an offeror cannot 'revoke' an irrevocable offer after the offeree has received it. As demonstrated above, any such offer must be 'withdrawn' either prior to, or at the same time as, the offer is actually received.

From parts (a) and (b) it can be seen that the general rule is that an offer may be revoked as long the revocation reaches the offeree before he has sent an acceptance. An offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. However, even irrevocable offers may be withdrawn as long as the withdrawal arrives either before, or at the same time as, the offer.

(c) rejection of an offer

Rejection occurs when the offeree indicates that he does not wish to accept the offer. Once such an indication has been given, the original offer comes to an end and the offeree cannot subsequently go back on it and seek to accept the offer at a later time. Termination takes effect when the rejection reaches the offeror. Under Article 17 even an irrevocable offer is terminated by a rejection and cannot be subsequently accepted.

It should also be noted that Article 19 provides that any reply to an offer which 'purports to be an acceptance but contains additions, limitations or other modifications' constitutes a counter-offer and effectively operates as a rejection of the original offer. However, a reply to an offer which purports to be an acceptance but contains additional or different terms, which do not materially alter the terms of the offer, constitutes an acceptance. However, the offeror can object orally to the discrepancy or dispatch a notice to that effect. If he does not object without undue delay the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

3 The United Nations Convention on Contracts for the International Sale of Goods imposes a duty on both parties to any contract covered by its provisions to preserve any goods in their possession belonging to the other party. Such a duty is of particular importance in international sale of goods contracts where the other party is unlikely to have a physical presence, and may not even have agents to act for them, in the country where the goods are located.

Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. In such a situation the party selling the goods has the right to retain reasonable expenses for preserving and selling the goods out of the proceeds of the sale. They must of course account for any deduction to the other party for the balance.

The detailed provision of the Convention is as follows:

Article 85 provides that if the buyer does not take delivery of the goods at the agreed time and the seller has the goods in their possession or control, then the seller must take such steps as are reasonable in the circumstances to preserve them. As a result of the failure on the part of the buyer, the seller is entitled to any additional expense entered into to preserve the goods. The seller is entitled to keep the goods until they have received reasonable expenses from the buyer.

Equally, where the goods are supposed to be paid for on delivery, failure by the buyer to pay the price gives rise to similar provisions and procedures.

Article 86 applies to situations where goods are rejected by the buyer for some reason, either under the specific terms of the contract, or under the general provisions of the convention and the seller, or their agent, is not present at the place of delivery. In such circumstances, the buyer must take such steps to preserve the goods as are reasonable in the circumstances. If the goods have been placed at the buyers' disposal at the agreed destination and the buyers exercise the right to reject them, they must nonetheless take possession of the goods on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense.

Once again, as with Article 85, they are entitled to retain the goods until they have been compensated for any reasonable expenses incurred. In respect of this latter point, Article 87 expressly provides that any party, who is bound to take steps to preserve goods under the provisions of the convention, may deposit them in a warehouse of a third person at the expense of the other party to the contract, provided that the expense incurred is not unreasonable.

Article 88
If the goods are subject to rapid deterioration, or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with the convention must take reasonable measures to sell them.

Also, where there has been an unreasonable delay by the other party in taking possession of the goods, or in taking them back, or in paying the price or the cost of preservation, then the party who was bound by the convention to preserve the goods may sell them.

In the first situation, the party selling the goods must give notice to the other party of his intention to sell to the extent that such notice is reasonably possible. In the second situation, reasonable notice of the intention to sell must be given to the other party.

In any case the party selling the goods has the right to retain reasonable expenses for preserving and selling the goods out of the proceeds of the sale. They must, of course, account to the other party for any balance due on the sale.

4 An agent is a person who is empowered to represent another legal party, called the principal, and to bring the principal into a legal relationship with a third party. Any contract entered into is between the principal and the third party each of whom may enforce it. In the normal course of events the agent has no personal rights or liabilities in relation to the contract. The principal/agent relationship can be created in a number of ways. It may arise as the outcome of a distinct contract, which may be made either orally or in writing, or it may be established purely gratuitously where some person simply agrees to act for another.

In establishing a relationship of principal/agent, however, the principal does not give the agent unlimited power to enter into any contract whatsoever but is likely to place strict limits on the nature of the contracts that the agent can enter into on his behalf. In other words, the authority of the agent is limited and in order to bind a principal, any contract entered into must be within the limits of the authority extended to the agent. The authority of an agent can take a number of distinct forms.

(a) Express authority
In this instance, when the principal/agency relationship is established, the agent is instructed as to what particular tasks are required to be performed and is informed of the precise powers given in order to fulfil those tasks. If the agent subsequently contracts outside of the ambit of their express authority then they will be liable to the principal and to the third party for breach of warrant of authority (see below). The consequences for the relationship between the principal and third party depends on whether the third party knew that the agent was acting outside the scope of their authority.

For example, an individual director of a company may be given the express power by the board of directors to enter into a specific contract on behalf of the company. In such circumstances the company would be bound by the subsequent contract but the director would have no power to bind the company in other contracts.

(b) Implied authority
This refers to the way in which the scope of express authority may be increased. Third parties are entitled to assume that agents holding a particular position have all the powers that are usually provided to such an agent. Without actual knowledge to the contrary they may safely assume that the agent has the usual authority that goes with their position.

In *Watteau* v *Fenwick* (1893) the new owners of a hotel continued to employ the previous owner as its manager. They expressly forbade him to buy certain articles including cigars. The manager, however, bought cigars from a third party who later sued the owners for payment as the manager's principal. It was held that the purchase of cigars was within the usual authority of a manager of such an establishment and that for a limitation on such usual authority to be effective it must be communicated to any third party.

Directors of companies can also bind their companies on the basis of implied authority. In *Hely-Hutchinson* v *Brayhead Ltd* (1968), although the chairman and chief-executive of a company acted as its *de facto* managing director, he had never been formally appointed to that position. Nevertheless, he purported to bind the company to a particular transaction. When the other party to the agreement sought to enforce it, the company claimed that the chairman had no authority to bind it. It was held that, although the director derived no authority from his position as chairman of the board, he did acquire such authority from his position as chief executive and thus the company was bound by the contract he had entered into on its behalf as it was within the implied authority of a person holding such a position.

(c) Ostensible/apparent authority
This type of authority, which is an aspect of agency by *estoppel*, can arise in two distinct ways:

(i) Where a person makes a representation to third parties that a particular person has the authority to act as their agent without actually appointing them as their agent. In such a case the person making the representation is bound by the actions of the ostensible/apparent agent. The principal is also liable for the actions of the agent where they are aware that the agent claims to be their agent and yet does nothing to correct that impression.

(ii) Where a principal has previously represented to a third party that an agent has the authority to act on their behalf.

Even if the principal has subsequently revoked the agent's authority they may still be liable for the actions of the former agent unless they have informed third parties who had previously dealt with the agent about the new situation (*Willis Faber & Co Ltd* v *Joyce* (1911)).

In *Freeman & Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* (1964), although a particular director had never been appointed as managing director, he acted as such with the clear knowledge of the other directors and entered into a contract with the plaintiffs on behalf of the company. When the plaintiffs sought to recover fees due to them under that contract it was held that the company was liable: a properly appointed managing director would have been able to enter into such a contract and the third party was entitled to rely on the representation of the other directors that the person in question had been properly appointed to that position.

5 (a) (i) Under the provisions of the Companies Act (CA) 1985, the memorandum of a limited company with a share capital was required to state the amount of the share capital with which the company proposed to be registered and the nominal amount of each of its shares. This was known as the 'authorised share capital' and set a limit on the amount of capital which the company could issue, subject to increase by ordinary resolution. Section 9 CA 2006 removes the concept of 'authorised capital' and replaces it with the requirement to submit a 'statement of capital and initial shareholdings' to the registrar in the application to register the company.

The statement of capital and initial shareholdings is essentially a 'snapshot' of a company's share capital at the point of registration.

Section 10 CA 2006 requires the statement of capital and initial shareholdings to contain the following information:

- the total number of shares of the company to be taken on formation by the subscribers to the memorandum;
- the aggregate nominal value of those shares;
- for each class of shares: prescribed particulars of the rights attached to those shares, the total number of shares of that class and the aggregate nominal value of shares of that class; and
- the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of premium).

The statement must contain such information as may be required to identify the subscribers to the memorandum of association. With regard to such subscribers it must state:

- the number, nominal value (of each share) and class of shares to be taken by them on formation, and
- the amount to be paid up and the amount (if any) to be unpaid on each share.

Where a subscriber takes shares of more than one class of share, the above information is required for each class.

(ii) Issued capital represents the nominal value of the shares actually issued by the company and public companies must have a minimum issued capital of £50,000 or the prescribed euro equivalent (s.763 CA 2006).

(b) Companies can issue shares of different value, and with different rights attached to them.

- Ordinary shares
  These shares are sometimes referred to as 'equity in the company'. Of all the various types of shares, they carry the greatest risk, but in recompense receive the greatest return. The nominal value of shares is fixed and determines the shareholder's level of potential liability to the extent that they are not paid up. However, the exchange value of the shares in the stock market fluctuates in relation to the performance of the company. Ownership of ordinary shares entitles the holder to attend and vote at general meetings.

- Preference shares
  These involve less of a risk than ordinary shares. They may have priority over ordinary shares in two respects: dividends and repayment. They carry a fixed rate of dividend, which has to be paid before any payment can be made to ordinary shareholders. Such rights are cumulative unless otherwise provided. This means that a failure to pay a dividend in any one year has to be made good in subsequent years.

  As regards repayment of capital, preference shares do not have priority unless, as is usually the case, this is specifically provided for. Also, without specific provision, preference shares have the same rights as ordinary shares, but it is usual for their voting rights to be restricted. Preference shareholders are entitled to vote at class meetings convened to consider any alteration to their particular rights but, apart from that, they are usually restricted to voting in general meetings when their dividends are in arrears.

6 (a) The Organisation for Economic Co-operation and Development (OECD) principles on corporate governance suggest that the corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders. As regards the actual structure of the board of directors the OECD principles state generally that:

'Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest.'

As regards the relationship between the chairman of the board of directors and the chief executive the principles state that 'In a number of countries with single tier board systems, the objectivity of the board and its independence from management may be strengthened by the separation of the role of chief executive and chairman, or, if these roles are combined, by designating a lead non-executive director to convene or chair sessions of the outside directors. Separation of the two posts may be regarded as good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board's capacity for decision-making independent of management. In the case of two-tier board systems, consideration should be given to whether corporate governance concerns might arise if there is a tradition for the head of the lower board becoming the Chairman of the Supervisory Board on retirement.'

The UK Corporate Governance Code requires that there should be a clear division of responsibilities at the head of a company between the running of the board of directors and the executive responsibility for the running of the company's business. It also requires that the roles of chairman and chief executive should not be exercised by the same individual.

(i) Under UK company law, Article 12 of the model articles of association for public limited companies provides for the board of directors to appoint one of their members to chair their meetings. The UK Corporate Governance Code explains that the chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role. The chairman is responsible for setting the board's agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues. The chairman should also promote a culture of openness and debate by facilitating the effective contribution of non-executive directors in particular and ensuring constructive relations between executive and non-executive directors.

The chairman is responsible for ensuring that the directors receive accurate, timely and clear information.

The chairman should ensure effective communication with shareholders. In relation to general meetings, although s.319 provides that any member may act as chair, this is subject to the provision of the articles and Model Article 31 states that if the directors have appointed a chairman, the chairman shall chair general meetings. The chairman conducts the meeting and must preserve order and ensure that it complies with the provisions of the companies legislation and the company's articles. He or she is under a general duty at all times to act *bona fide* in the interests of the company as a whole, and thus must use his or her vote appropriately.

(ii) The terms managing director and chief executive are now used interchangeably. The new model articles of association makes no reference to either title, but the UK Corporate Governance Code only refers to the title chief executive, so that appears to be the current preferred term for the person who oversees the day-to-day operation of the company (c.f. *Hely-Hutchinson* v *Brayhead Ltd* (1968)).

Under Article 5 of the model articles, the board of directors may delegate any of the powers, which are conferred on them under the articles, to such person or committee as they think fit and any such act of delegation may authorise further delegation of the directors' powers by any person to whom they are delegated. In this way, the board may appoint one or more managing directors or chief executives who have the authority to exercise all the powers of the company and to further delegate those powers as they see fit. Article 5 also makes provision for the board of directors to revoke any delegation in whole or part, or alter the terms and conditions under which it may be operated.

In the case of a chief executive/managing director the mere fact of appointment, however, will mean that the person so appointed will have the implied authority to bind the company in the same way as the board, whose delegate they are. Outsiders, therefore, can safely assume that a person appointed as managing director has all the powers usually exercised by a person acting as a managing director.

(b) (i) Non-executive directors do not usually have a full-time relationship with the company; they are not employees and only receive directors' fees. The role of the non-executive directors, at least in theory, is to bring outside experience and expertise to the board of directors. They are also expected to exert a measure of control over the executive directors to ensure that the latter do not run the company in their, rather than the company's, best interests.

It is important to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former.

(ii) Section 250 Companies Act (CA) 2006 defines a director as including any person occupying the position of director. The concept of a shadow director is introduced in s.251 CA 2006. A shadow director is a person who, although not actually appointed to the board, instructs the directors of a company as to how to act. It is a person's function rather than their title that defines them as a director. Such individuals are subject to all the rules applicable to ordinary directors. A person is not to be treated as a shadow director if the advice is given in a purely professional capacity. Thus, a business consultant or a company doctor (another title given to someone called in to give advice on companies in trouble) would not be liable as a shadow director for the advice they might give to their client company.

7 Endorsement relates to the way in which international bills of exchange are transferred and in effect it allows the original payee of the instrument to transfer the benefit of it to some other party by signing it.

Article 13 of the UN Convention on International Bills of Exchange and International Promissory notes provides, a bill of exchange is transferred either by:

(a) endorsement and delivery of the instrument by the endorser to the endorsee; or
(b) mere delivery of the instrument if the last endorsement is in blank.

By virtue of Article 14 an endorsement must be written on the instrument attached to it. Any such endorsement may be:

(a) in blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to a person in possession of it;
(b) special, that is, by a signature accompanied by an indication of the person to whom the instrument is payable.

Under Article 17(1) a bill cannot be transferred if the bill or an endorsement on the bill contains words such as not negotiable/not transferable/not to order/pay x only.

A signature alone, other than that of the drawee, is an endorsement only if placed on the back of the instrument.

An endorsement must be unconditional and in the light of any conditional endorsement the bill of exchange will still be transferred whether or not the condition is fulfilled (Article 18).

An endorsement must relate to the entire sum of the bills or it is ineffective (Article 19).

If there are two or more endorsements, it is presumed, unless the contrary is proved, that each endorsement was made in the order in which it appears on the instrument (Article 20).

An instrument may be transferred in accordance with Article 13 after maturity, except by the drawee, the acceptor or the maker (Article 24).

Under Article 25, if an endorsement is forged, the person whose endorsement is forged, or a party who signed the instrument before the forgery, has the right to recover compensation for any damage that he may have suffered because of the forgery. This right may be exercised against:

(a) the person who forged the endorsement;
(b) the person to whom the instrument was directly transferred by the forger;
(c) a party or the drawee who paid the instrument to the forger directly or through one or more endorsees for collection.

However, an endorsee for collection is not liable if they have no knowledge of the forgery:

– at the time he pays the principal or advises him of the receipt of payment; or
– at the time he receives payment, if this is later, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

Alternatively, the drawee who pays an instrument is not liable if they are unaware of the forgery, again just as long as their lack of knowledge is not due to their failure to act in good faith or to exercise reasonable care.

If an endorsement is made by an agent without authority or power to bind his principal in the matter, the principal, or a party who signed the instrument before such endorsement, usually has the right to recover compensation for any damage that he may have suffered because of such endorsement against:

(a) The agent;
(b) The person to whom the instrument was directly transferred by the agent;
(c) A party or the drawee who paid the instrument to the agent directly or through one or more endorsees for collection (Article 26).

If the instrument is subsequently dishonoured, i.e. it is either not accepted or not paid, the endorser is liable to pay the instrument to the holder, or to indeed any subsequent endorser or any endorser's guarantor who takes up and pays the instrument (Article 44). However, the endorser can avoid subsequent liability by an express stipulation in the instrument.

Unless otherwise agreed, a person who transfers an instrument, represents to the transferee, and consequently the holder of the instrument that:

(a) The instrument does not bear any forged or unauthorised signature;
(b) The instrument has not been materially altered;
(c) At the time of transfer, they have no knowledge of any fact which would impair the right of the transferee to payment of the instrument against the acceptor of a bill or, in the case of an unaccepted bill, the drawer, or against the maker of a note (Article 46(1)).

Liability under Article 46 does not arise where the transferee took the instrument with knowledge of the matter otherwise giving rise to such liability (Article 46(2)).

However, if the transferor is liable, the transferee may recover, even before maturity, the amount paid by him to the transferor, with interest.

8 From Aldo's perspective the bottles were fit for their purpose when they left his factory and were damaged on the journey. As the parties to the contract had used the Incoterm 'ex works', it was Bod's duty to collect the bottles from Aldo's factory and transport them to Greece, which he did. Ex works means that the seller had the minimum obligations with regard to delivery and only had to make the goods available to the buyer at his place of business. In relation to such a term, risk passes to the purchaser when the goods are handed over to the purchaser's carrier/agent.

Article 66 UN Convention on Contracts for the International Sale of Goods (CISG) specifically provides that 'loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller'.

As the damage was sustained on the journey, subsequent to the passing of risk, Aldo will maintain that as risk had passed, he was no longer responsible and as result Bod will have to bear the risk and pay the full contract price as stated in Article 66.

However, Bod can rely on the final proviso in Article 66 and cite Article 35 (CISG), paragraph one of which requires that the seller must not only deliver goods which are of the quantity, quality and description required by the contract but that 'they must also be contained or packaged in the manner required by the contract'. Paragraph 2(d) of Article 35 goes on to provide that, except where the parties have agreed otherwise, the goods do not conform with the contract unless they 'are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods'.

Consequently, although the risk of loss or damage passed to the buyer, when the bottles were taken over by Bod's carrier, nevertheless Articles 36(2) and 66 CISG, have the effect that Aldo will remain liable for the damage to the contract as he clearly did not package them in a sufficiently robust way to protect them on their journey. Aldo's failure to provide adequate packaging for the bottles to preserve them and to ensure their arriving in a marketable condition would, therefore, lead to a fundamental breach of contract under Article 25 CISG. Bod would therefore be able not only to avoid the contract under Article 49 CISG and thus not be required to pay Aldo. He would moreover be able to claim damages against Aldo, which would cover his expenses in transporting the inadequate bottles and also the additional cost of buying the new bottles (Articles 74–77 CISG).

9 Doc faces a number of difficulties, which result from the operation of the doctrine of separate personality. When a company registers under the Companies Act 2006 it becomes a corporation, with the effect that, from then on it is treated as having its own distinct legal personality, completely separate from its members. This doctrine of separate personality applies equally to single person enterprises as it does to the largest of transnational enterprises. The doctrine of separate personality is an ancient one, although the clearest expression of it can be found in the famous case of *Salomon* v *Salomon* (1897). A number of important consequences flow from the fact companies are treated as having legal personality in their own right, but there are also a number of situations when the courts will ignore the separate legal personality of the company. In such situations the courts will treat the shareholders as being, or being responsible for the actions of, the company.

(a) One consequence of the doctrine of separate personality is that companies have full contractual capacity in their own right. Equally, companies can sue and be sued in their own right, so once a company enters into a contract, it is the company, rather than its individual members, which is liable for any default. In the first situation, it is clear from the contract document that Doc has entered into an agreement, not with Ed as he thought, but with the company, Ed Ltd. He cannot, therefore, take action against Ed personally. As a member of a limited company, Ed's only liability will be to pay any amount remaining unpaid on the shares he holds in Ed Ltd. Doc will have to claim as an ordinary unsecured trade creditor of the company, and the fact that it has gone into insolvent liquidation makes it unlikely that he will recover much, if anything, from the company.

(b) Where, however, an individual looks to misuse the doctrine of separate personality, the courts will ignore the separate personality of the company and will enforce corporate liability against the members. Thus in *Jones* v *Lipman* (1962), Lipman had entered into a contract to sell a house to Jones, but before completion of the contract, and in order to avoid it, he sold the house to a company that he had set up for that purpose. Thus Lipman was attempting to hide behind a company to avoid his personal contractual obligation. In that instance the court held that the company was 'the creature of the defendant' and no more than a sham and required Lipman to complete his contractual obligations.

A further example of the misuse of the corporate form in an attempt to avoid a legal obligation may be seen in *Gilford Motor Co Ltd* v *Horne* (1933), a case similar to the facts in the problem scenario, where a former employee tried to avoid the consequences of a restraint of trade clause by working for a newly established company. In that case the Court of Appeal held that the company was a mere sham used to conceal the defendant's breach of a contractual agreement and the individual concerned was required to abide by the agreement he had entered into.

Following the above cases, and in particular *Gilford Motor Co Ltd* v *Horne*, it is extremely likely that the court will ignore the separate personality of Gen Ltd and allow Doc to enforce the restraint of trade clause against Fitt.

10 Money laundering is the process by which the proceeds of crime, either money or other property, are converted into assets, which appear to have a legitimate rather than an illegal origin. The aim of the process is to disguise the source of the property, in order to allow the holder to enjoy it free from suspicion as to its source.

The process usually involves three distinct phases:

- placement is the initial disposal of the proceeds of criminal activity into apparently legitimate business activity or property.
- layering involves the transfer of money from business to business, or place to place in order to conceal its initial source.
- integration is the culmination of the previous procedures through which the money takes on the appearance of coming from a legitimate source.

Money laundering was first made a criminal offence in the United Kingdom under the Drug Trafficking Offences Act 1986 and is now regulated by the Proceeds of Crime Act 2002, and the Money Laundering Regulations 2007, together with the specifically anti-terrorist legislation, such as the Prevention of Terrorism Act 2005.

The Proceeds of Crime Act 2002 seeks to control money laundering by creating three categories of criminal offences in relation to the activity.

– laundering
  The first category of principal money laundering offences relates to laundering the proceeds of crime or assisting in that process and is contained in ss.327–329.

  Under s.327, it is an offence to conceal, disguise, convert, transfer or remove criminal property from England and Wales, Scotland or Northern Ireland. Concealing or disguising criminal property is widely defined to include concealing or disguising its nature, source, location, disposition, movement or ownership or any rights connected with it.

  These offences are punishable on conviction by a maximum of 14 years imprisonment and/or a fine.

– failure to report
  The second category of offence relates to failing to report a knowledge or suspicion of money laundering and is contained in ss.330–332.

  Under s.330 it is an offence for a person who knows or suspects that another person is engaged in money laundering not to report the fact to the appropriate authority. However, the offence only relates to individuals, such as accountants who are acting in the course of business in the regulated sector. The offences set out in these sections are punishable, on conviction, by a maximum of five years imprisonment and/or a fine.

– tipping off
  The third category of offence relates to tipping off and is contained in s.333, which makes it an offence to make a disclosure, which is likely to prejudice any investigation under the Act. The offences set out in these sections are punishable, on conviction, by a maximum of five years imprisonment and/or a fine.

The Money Laundering Regulations 2007 implement the European Union third money laundering directive. They set out administrative requirements for the anti-money laundering regime within what is referred to as 'the regulated sector', which specifically includes auditors, insolvency practitioners, external accountants and tax advisers.

The regulations set out the requirement relating to the manner in which members of the regulated sector should approach their clients and outline the scope of this action on the basis of what is known as 'customer due diligence'. The regulations create specific offences for those in the regulated sector who fail to comply with its requirements.

It is apparent from the scenario that Ian and Jet are liable to control and prosecution under the Proceeds of Crime Act 2002 as they are involved in money laundering. It is clear that the original money to purchase the football club was not the product of crime, so that transaction itself is not covered by the money laundering legislation. However, even if the club was bought with legitimate money, it is nonetheless the case that it is being used to conceal the fact that the source of much of Jet's money is criminal activity. Jet would therefore be guilty on the primary offence of money laundering under s.327 Proceeds of Crime Act.

Ian is also guilty of an offence in relation to the Proceeds of Crime Act as he is clearly assisting Jet in his money laundering procedure. His activity is covered both by s.327, as he is actively concealing and disguising criminal property, and s.328 as his arrangement with Jet 'facilitates the retention of criminal property'.

Ian is also liable under s.330, for failing to disclose any suspiciously high profits from the football club and is clearly in breach of the regulatory regime set out in the Money Laundering Regulations 2007.

Fundamentals Level – Skills Module, Paper F4 (GLO)
Corporate and Business Law (Global) **December 2011 Marking Scheme**

1 This question requires candidates to assess the relative advantages and disadvantages of court proceedings and arbitration. The main focus may be placed on arbitration, but the court system must also be considered.

8–10 marks	Good explanation of all the meaning of arbitration as opposed to the court system, together with a sound assessment of the relative advantages and disadvantages of both. Reference should be made to the model law.
5–7 marks	Fair explanation of both systems but perhaps lacking in detail or examples. Perhaps only dealing with arbitration without the required evaluation.
2–4 marks	Very unbalanced answer or lacking any detail and evaluation.
0–1 mark	Very little knowledge of the topic.

2 This question requires candidates to explain the three different ways in which an offer can be brought to an end under the United Nations Convention for the International Sale of Goods.

8–10 marks	Good to complete answer which shows knowledge of the meaning and effect of the three procedures.
5–7 marks	Fair explanation of the three types of procedures, but perhaps lacking in detail, or only dealing with two types.
2–4 marks	Some basic knowledge of what is meant by the terms, but no real depth of understanding. Perhaps an unbalanced answer that only deals with one part of the question.
0–1 mark	Little, if any, knowledge of the topic.

3 This question requires candidates to explain the rules relating to the preservation of goods under the UN Convention on Contracts for the International Sale of Goods.

8–10 marks	Good explanation of rules with reference to the appropriate Articles.
5–7 marks	Fair explanation of the obligations but perhaps lacking in detail or examples.
2–4 marks	Very unbalanced answer or lacking any detailed explanation.
0–1 mark	Little, if any, understanding of the topic.

4 This question asks candidates to explain the various types of authority that agents can possess.

8–10 marks	Good to complete answer which shows a knowledge of the meaning and effect of the three terms. It is likely that case authority will be provided, and they will be rewarded accordingly.
5–7 marks	A clear understanding of the topic, perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the others.
2–4 marks	Some, but limited, understanding of the topic, or clear understanding of only one aspect.
0–1 mark	Little or no knowledge of the topic.

5 This question requires candidates to explain two related but distinct aspects of share capital. Part (a) relates to the concepts of share capital while part (b) focuses on the distinct types of shares.

8–10 marks	Thorough explanation of the meaning and effect of both elements of the question.
5–7 marks	Reasonable explanation of both aspects but perhaps lacking in detail in relation to some of the individual parts.
2–4 marks	Some, but limited, knowledge of both elements or only dealing with one of them.
0–1 mark	Little, if any, understanding of any of the concepts.

6 This question requires candidates to explain two related but distinct aspects of the nature and function of company directors, specifically within the context of corporate governance. Part (a) requires an explanation of the different roles of chairmen and chief executives and part (b) requires an explanation of the two distinct but related types of directors.

8–10 marks	Thorough explanation of the meaning and effect of both elements of the question with appropriate reference to corporate governance.
5–7 marks	Reasonable explanation of both aspects but perhaps lacking in detail in relation to some of the individual parts.
2–4 marks	Some, but limited, knowledge of both elements or only dealing with one of them.
0–1 mark	Little, if any, understanding of any of the terms.

7 This question requires candidates to explain the meaning of the term endorsement in the context of the UN Convention on International Bills of Exchange and International Promissory Notes.

8–10 marks	A thorough explanation of the meaning and operation of endorsement.
5–7 marks	Good general understanding, but perhaps lacking in specific information.
2–4 marks	Some understanding of the topic but lacking in specifics and detail.
0–1 mark	Little, if any, understanding of the topic.

8 This question requires candidates to demonstrate their understanding of the various provisions of the UN Convention on Contracts for the International Sale of Goods together with an awareness of the meaning of ICC Incoterms.

8–10 marks	Answers will demonstrate a thorough knowledge of the law generally together with a clear analysis of the problem situations and a deployment of the appropriate legal principles.
5–7 marks	Answers will be generally sound in relation to the law but may be lacking in analysis or application.
2–4 marks	Answers will demonstrate some knowledge of the law relating to the question but not to the degree expected of the very best answers. They may be weak in analysis and/or application.
0–1 mark	Little or no understanding of the law relating to the question. Extremely weak in terms of analysis and application.

9 This question requires an understanding of the way in which the doctrine of separate personality operates with respect to registered companies. There are two parts to the question, although marks are not allocated to individual elements in order to permit markers to reward particularly good, but partial, answers.

8–10 marks	Thorough understanding of the rules relating to separate personality and the exceptions thereto.
5–7 marks	Good but limited analysis, perhaps lacking in some or recognition of an element of the question.
2–4 marks	Some, but limited, knowledge of what the question is about, or recognition of what it is about but lacking in any analysis.
0–1 mark	Little, if any, understanding of what the question is about.

10 This question requires a general explanation of the meaning of money laundering together a consideration of the way in which the legislation seeks to control it.

8–10 marks	Good explanation of both the meaning of the concept and offences under the legislation together with a good analysis of the scenario with a clear explanation of the law relating to the parties.
5–7 marks	Fair explanation of the general concept but lacking in detail in relation to the legislation. Some understanding of the situation but perhaps lacking in detailed reference to the statute.
2–4 marks	Unbalanced answer, perhaps lacking detail, or application.
0–1 mark	Weak answer lacking in knowledge, with little or no reference to the legal regime.