Answers

In relation to aspects of business law, the default law and cases relate to the United Kingdom; however, relevant law and cases from other jurisdictions will be credited where appropriate.

1 (a) Criminal law relates to conduct which the State considers with disapproval and which it seeks to control. Criminal law involves the enforcement of particular forms of behaviour, and the State, as the representative of society, acts positively to ensure compliance. Thus, criminal cases are brought by the State in the name of the Crown and cases are reported in the form of *Regina* v … (*Regina* is simply Latin for 'queen' and case references are usually abbreviated to *R* v …). In criminal law, the prosecutor prosecutes a defendant (or 'the accused') and is required to prove that the defendant is guilty beyond reasonable doubt. The Companies Act (CA) 2006 sets out many potential criminal offences, which may be committed by either the company itself, or its officers or other individuals. As an example of this may be cited s.993 CA, which relates to the criminal offence of fraudulent trading and applies to any person, not just directors or members, who is knowingly a party to the carrying on of a business with the intent to defraud creditors. The potential penalty on conviction is imprisonment for a maximum period of 10 years, or a fine or both.

Civil law, on the other hand, is a form of private law and involves the relationships between individual citizens. It is the legal mechanism through which individuals can assert claims against others and have those rights adjudicated and enforced. The purpose of civil law is to settle disputes between individuals and to provide remedies; it is not concerned with punishment as such. The role of the State in relation to civil law is to establish the general framework of legal rules and to provide the legal institutions to operate those rights, but the activation of the civil law is strictly a matter for the individuals concerned. Contract, tort and property law are generally aspects of civil law.

Civil cases are referred to by the names of the parties involved in the dispute, for example, *Smith* v *Jones*. In civil law, a claimant sues (or 'brings a claim against') a defendant and the degree of proof is on the balance of probabilities. In relation to the Companies Act, the duties owed to companies by directors set out in ss.171–177 may be cited as examples of civil liability, and directors in breach being liable to recompense the company for the consequences of their failure to comply with those duties, as is set out in s.178.

In distinguishing between criminal and civil actions, it has to be remembered that the same event may give rise to both. For example, where the driver of a car injures someone through their reckless driving, they will be liable to be prosecuted under the Road Traffic legislation, but at the same time, they will also be responsible to the injured party in the civil law relating to the tort of negligence. Similarly, a director may fall foul of both the criminal regulation of fraudulent trading (s.993 CA) as well as breaching their duty to the company under one of the provisions of ss.171–177 CA 2006.

(b) The essential criminal trial courts are the magistrates' courts and Crown Courts. In serious offences, known as indictable offences, the defendant is tried by a jury in a Crown Court. For less serious offences, known as summary offences, the defendant is tried by magistrates; and for 'either way' offences, the defendant can be tried by magistrates if they agree, but the defendant may elect for jury trial.

Criminal appeals from the magistrates go to the Crown Court or to the Queen's Bench Division (QBD) Divisional Court 'by way of case stated' on a point of law or that the magistrates went beyond their proper powers. Further appeal is to the Court of appeal and then to the Supreme Court on a significant point of law.

Some civil cases are heard in the magistrates court, but the main civil courts are the county court and the High Court, with appeals to the Court of Appeal and subsequently the Supreme Court.

2 (a) Article 7 of the UNCITRAL Model Law on International Commercial Arbitration provides that an arbitration agreement is 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Article 7(2) states that: 'the arbitration agreement shall be in writing'. Consequently if such an agreement is not in writing, the requirement to enter arbitration in relation to any dispute arising cannot be enforced under the model law.

The model law goes on to explain that an agreement is in writing if it is contained:

(i) in a document signed by the parties or
(ii) in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement,
(iii) in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.

As the explanatory notes to the Model Law, provided by the UNCITRAL Secretariat, explain, Article 7(1) recognises the validity and effect of a commitment by the parties to submit to arbitration an existing dispute or a future dispute. This provision is significant, as the latter type of agreement is not given full effect under certain national laws. While oral arbitration agreements are found in practice and are recognised by some national laws, such as the English law, Article 7(2) follows the 1958 New York Convention in requiring written form before arbitration is enforced. It also widens and clarifies the definition of written form of Article 11(2) of the New York Convention by adding 'telex or other means of telecommunication which provide a record of the agreement', and by including the submission-type situation of 'an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another', and by providing that 'the reference in a contract to a document' (e.g. general conditions) 'containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract'.

(b) Article 23 of the Model Law in International Commercial Arbitration specifically refers to statements of claim and defence. As regards the statement of claim, the Article provides that, within the period of time agreed by the parties or decided on by the arbitral tribunal, the claimant has to state the facts supporting their claim, the points at issue and the relief or remedy sought. In response, the respondent should state their defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. In addition, the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

However, unless otherwise agreed by the parties, either party may amend or supplement their claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24 makes it clear that all statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision also has to be communicated to the parties.

Article 25 makes clear the different consequences for the parties if they fail to submit their statements of claim or defence. Thus unless otherwise agreed by the parties, if, without showing sufficient cause, the claimant fails to communicate their statement of claim in accordance with Article 23(1), then not surprisingly as there will be no claim to determine, the arbitral tribunal shall terminate the proceedings. However, where the respondent fails to communicate their statement of defence in accordance with Article 23(1), the arbitral tribunal shall continue the proceedings, but it will not treat such failure in itself as an admission of the claimant's allegations.

Article 25 provides further that where either party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. These provisions, which empower the arbitral tribunal to carry out its task even if one of the parties does not participate, are of considerable practical importance since they allow the tribunal to perform its function even where one of the parties has little interest in co-operating or expediting its operation.

3 (a) The manner of accepting offers is provided for in Articles 18 and 19 of the UN Convention on Contracts for the International Sale of Goods. First, acceptance is deemed to have taken place where the person receiving the offer has indicated their agreement to the offer. Thus if the offeree writes or speaks to the offeror, telling them that they accept the terms of the offer, they will be bound by the terms of the contract. However, a reply to an offer, which, although it claims to be an acceptance, contains additions or changes to the terms of the original offer, does not amount to an acceptance. Any such alteration will be considered as a rejection of the original offer and will be treated as a counter-offer, which may or may not be accepted by the original offeror. However, if the changes in the terms do not materially alter the terms of the offer, then the reply will count as an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or despatches a notice to that effect.

Second, Article 18 states that the offeree may be also seen as accepting the offer as a result of their conduct, such as acting on it by despatching goods or paying the price. However, the article is quite clear that silence or inactivity does not in itself amount to acceptance.

(b) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. Where a time period has been fixed for acceptance, any acceptance is not effective if the indication of assent does not reach the offeror within that period of time. If no time period is fixed, then the acceptance must reach the offeror within a reasonable time, taking into account the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

However, if the offeree can indicate their assent by performing an act, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided it is done within any period of time laid down by the offeror. Article 20 states that where the offeror has fixed a period of time for acceptance in either a telegram or a letter, that period begins to run from the moment the telegram is handed in for despatch or from the date shown on the letter. If no date is shown on the letter, the time runs from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

4 (a) Shareholders in limited liability companies enjoy the benefit of limited liability and usually cannot be required to pay more than the value of the shares they take in their company. However, that privilege is only extended to them on the basis that they fully subscribe to the company's capital. In turn, that capital is seen as a fund against which creditors can claim in the event of a dispute. Capital maintenance refers to the way in which the capital fund of limited liability companies can be used and, most essentially, reduced. The fundamental rule is that payments may not be improperly made out of capital to the detriment of the company's creditors. To that end, company law lays out rules as to what may be considered proper payment from capital and, in particular, establishes clear rules relating to the payment of dividends and the ways in which capital can be reduced.

(b) It is possible, and not at all uncommon, for a company to require prospective subscribers to pay more than the nominal value of the shares they subscribe for. This is especially the case when the market value of the existing shares are trading at above the nominal value. In such circumstances the shares are said to be issued at a premium, the premium being the value received over and above the nominal value of the shares. Section 610 CA 2006 provides that any such premium received must be placed in a share premium account. The premium obtained is regarded as equivalent to capital and, as such, there are limitations on how the fund can be used. Section 610 provides that the share premium account can be used for the following limited purposes:

(i) to write off the expenses, commission or discount incurred in any issue of the shares in question;
(ii) to pay up bonus shares to be allotted as fully paid to members.

Section 687 also allows for the share premium account to be used to finance the payment due for any premium due on the redemption of redeemable shares.

Applying the rules relating to capital maintenance, it follows that what the share premium account cannot be used for is to pay dividends to the shareholders. The rules relating to share premiums apply whether the issue is for cash or otherwise and so a share premium account can arise where shares are issued in exchange for property which is worth more than the par value of the shares (*Shearer* v *Bercain Ltd* (1980)). In the light of that case, relief from the strict application of the rules relating to premium was introduced in the case of certain company group reconstructions (s.611 CA 2006) and company mergers (s.612 CA 2006).

(c) It is a long-established rule that companies are not permitted to issue shares for a consideration which is less than the nominal value of the shares together with any premium due. The strictness of this rule may be seen in *Ooregum Gold Mining Co of India* v *Roper* (1892). In that case the shares in the company, although nominally £1, were trading at 12·5p. In an honest attempt to refinance the company, new £1 preference shares were issued and credited with 75p already paid (note the purchasers of the shares were actually paying twice the market value of the ordinary shares). When, however, the company subsequently went into insolvent liquidation, the holders of the new shares were required to pay a further 75p.

This common law rule is now given statutory effect in s.580 CA 2006. If a company does enter into a contract to issue shares at a discount, it will not be able to enforce this against the proposed allottee. However, anyone who takes shares without paying the full value, plus any premium due, is liable to pay the amount of the discount as unpaid share capital, together with interest at 5% (s.580(2) CA 2006). Also any subsequent holder of such a share who was aware of the original underpayment will be liable to make good the shortfall (s.588 CA 2006).

5 This question requires candidates to explain the operation and potential liability of members of three distinct types of partnerships.

(a) The ordinary partnership
This is the most common form of partnership. Ordinary partnerships involve potential unlimited liability for their members, should the business run into financial difficulties. It is possible to attempt to limit individual liability within the partnership by setting specific limits on the liability of the individual partners. This, however, has no effect on the external liability of the various members of the partnership who will remain liable for the full extent of the partnership debts. As a result, any partner who has to pay more than the amount agreed internally will be in the position to raise an action to recover any amount paid out in addition to their agreed limit from the other members of the partnership.

(b) The limited partnership
The Limited Partnerships Act (LPA) 1907 allows for the formation of limited partnerships. For members of a partnership to gain the benefit of limited liability under this legislation, the following rules apply:

– limited partners are not liable for partnership debts beyond the extent of their capital contribution, but in the ordinary course of events they are not permitted to remove their capital;
– at least one of the partners must retain full, that is unlimited, liability for the debts of the partnership;
– a partner with limited liability is not permitted to take part in the management of the business enterprise and cannot usually bind the partnership in any transaction. If a partner acts in contravention of this rule, they will lose the right to limited liability;
– the partnership must be registered with the Companies Registry.

Very few limited partnerships were ever registered as partnerships could access the advantages available under the LPA 1907, and more, by simply registering their business as a private limited company.

(c) The limited liability partnership
As has already been seen, the main shortcoming with regard to the standard partnership is the lack of limited liability for its members. The Limited Liability Partnerships Act 2000 provided for a new form of business entity, the limited liability partnership (LLP). Although stated to be a partnership, the new form is a corporation, with a distinct legal existence apart from its members. As such it has the ability:

– to hold property in its own right;
– to sue and be sued in its own name.

It has perpetual succession and consequently an alteration in its membership does not have any effect on its existence. Most importantly, however, the new legal entity allows its members to benefit from limited liability as they will not be liable for more than the amount they have agreed to contribute to its capital.

To form a limited liability partnership:

– two or more persons must subscribe to an incorporation document;
– the incorporation document must be delivered to the Companies Registry;
– a statement of compliance must be completed by a solicitor or subscriber to the incorporation document.

The incorporation document must include:

– the name of the LLP (subject to restrictions);
– the address of the registered office;
– the names and addresses of those who will be members on incorporation of the LLP;
– the names of at least two designated members, whose duty it is to ensure that the administrative and filing duties of the LLP are complied with. If no such members are designated, then all members will be assumed to be designated members.

6 **(a)** This question requires candidates to explain the meaning and procedures involved in the course of a voluntary liquidation in company law. One of the many consequences of incorporation is that a registered company becomes a legal entity in its own right having existence apart from its member shareholders. One of the attributes of this legal personality is that the company has not only separate, but also perpetual, existence, in that it continues irrespective of changes in its membership. Indeed, the company can continue to exist where it has no members at all. Winding up, or liquidation, is the process whereby the life of the company is brought to an end and its assets realised and distributed to its members and/or creditors. The rules governing winding up are detailed in the provisions of the UK Insolvency Act (IA) 1986 and the exact nature of the procedure depends on the type of winding up involved and depends upon the solvency of the company at the time when liquidation commences. Winding up can be conducted on a voluntary basis, in which case the members of the company themselves determine that the time has come for it to come to an end, or, alternatively, the court may make an order that the company's life should come to an end. This question refers to the first of these alternatives, voluntary winding up.

Section 84 IA states that a company may be wound up voluntarily:

(i) when any period fixed for the duration of the company by the articles expires, or any event occurs, which shall, according to the articles, lead to its dissolution. Under such circumstances the winding up has to be approved by an ordinary resolution.

(ii) for any other reason whatsoever. Under these circumstances a special resolution is required to approve the winding up.

This is the procedure the members would follow if the company is insolvent.

In any case the winding up is deemed to have started on the date that the appropriate resolution was passed.

(b) **(i)** A members' voluntary liquidation takes place when the directors of the company are of the opinion that the company is solvent and is capable of paying off its creditors. The directors are required to make a formal declaration to the effect that they have investigated the affairs of the company and that in their opinion it will be able to pay its debts within 12 months of the start of liquidation. It is a criminal offence for directors to make a false declaration without reasonable grounds. On appointment, by an ordinary resolution of the company, the job of the liquidator is to wind up the affairs of the company, to realise the assets and distribute the proceeds to its creditors. On completion of this task, the liquidator must present a report of the process to a final meeting of the shareholders. The liquidator then informs the Registrar of the holding of the final meeting and submits a copy of their report to them. The Registrar formally registers these reports and the company is deemed to be dissolved three months after that registration.

(ii) A creditors' voluntary liquidation takes place when the company is insolvent when it is decided to wind it up. The essential difference between this and the former type of liquidation is that, as the name implies, the creditors have an active role to play in overseeing the liquidation of the company and there is no declaration of solvency. First, a meeting of the creditors must be called within 14 days of the resolution to liquidate the company at which the directors must submit a statement of the company's affairs. The creditors have the final say in who should be appointed as liquidator and may, if they elect, appoint a liquidation committee to work with the liquidator. On completion of the winding up, the liquidator calls and submits their report to meetings of the members and creditors. The liquidator then informs the Registrar of the holding of these final meetings and submits a copy of their report to them. The Registrar formally registers these reports and the company is deemed to be dissolved three months after that registration.

7 **(a)** The exact meaning of an international bill of exchange can be derived from the provisions of the United Nations Convention on International Bills Of Exchange and International Promissory Notes. Thus Article 2 of the Convention provides that a bill of exchange is international if it specifies at least two of the following places and indicates that they are situated in different States:

(a) the place where the bill is drawn;
(b) the place indicated next to the signature of the drawer;
(c) the place indicated next to the name of the drawee;
(d) the place indicated next to the name of the payee;
(e) the place of payment.

However, to comply, the place where the bill is drawn or the place of payment must be situated in a contracting State.

Article 3 goes on to define a bill of exchange as a written instrument which:

(a) contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to their order;
(b) is payable on demand or at a definite time;
(c) is dated;
(d) is signed by the drawer.

It is important to note that Article 7 of the Convention provides that the sum payable is deemed to be a definite sum, although the instrument states that it is to be paid:

(a) with interest, which may be paid at a fixed or variable rate (Article 8);
(b) by instalments at successive dates;
(c) by instalments at successive dates with a stipulation in the instrument that upon default in payment of any instalment the unpaid balance becomes due;
(d) according to a rate of exchange indicated in the instrument or to be determined as directed by the instrument; or
(e) in a currency other than the currency in which the sum is expressed in the instrument.

Finally it should be noted that the Convention does not apply to international cheques.

(b) 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.

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 23).

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.

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 which they 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 they pay the principal or advises them of the receipt of payment; or
– at the time they receive payment, if this is later, unless their lack of knowledge is due to their 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 their 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 they 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).

8 Anticipatory breach occurs where, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of their obligations under the contract or will commit a fundamental breach of contract. The Convention distinguishes between those cases in which the other party may suspend their own performance of the contract but the contract remains in existence awaiting future events and those cases in which they may declare the contract avoided.

Thus as regards the first situation, Article 71 provides that a party may suspend performance of their obligations if, after the conclusion of the contract but before it is due to be performed, it becomes apparent that the other party will not perform a substantial part of their obligations as a result of:

(a) a serious deficiency in their ability to perform or in their creditworthiness; or
(b) their conduct in preparing to perform or in performing the contract.

If the circumstances only become apparent after the seller has despatched the goods, they may prevent them from being handed over to the buyer, even if the buyer holds a document, such as a bill of lading, which entitles the buyer to collect the goods. The party suspending the performance of the contract must immediately give notice of the suspension to the other party and if that party gives adequate assurance of their future performance, then the contract must continue (Article 71).

Alternatively, under Article 72, if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive them of what they were entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances.

If time allows, the party intending to avoid the contract must give reasonable notice to the other party in order to permit them to provide adequate assurance of their performance. However, that requirement does not apply where the other party has expressly stated that they will not perform their obligations under the contract.

Under the facts of the problem scenario, it is apparent that Ang has performed an anticipatory breach of his contract with Ben. Consequently Ben can suspend performance of the contract and see if Ang changes his mind. However, as a result of Ang's express repudiation of the contract, Ben is entitled to avoid the contract immediately if he chooses and sue Ang for damages arising from the breach of contract. In particular, Ben would be entitled to purchase replacement steel from another supplier and claim any difference in price as damages. Ben would also be entitled to claim any consequential damages arising from Ang's failure to supply the steel.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' duties generally and specifically the rules applying when a director has a personal interest in a contract entered into by their company.

Section 178 Companies Act (CA) 2006 places directors' duties on a statutory basis, and although s.170 provides that the new statement of duties replaces the old common law rules and equitable principles, it nonetheless expressly provides that the duties now stated in the Act are to be interpreted and applied in the same way as those rules and principles were. Section 178 specifically preserves the existing civil consequences of breach of any of the general duties, so the remedies for breach of the newly stated general duties will be exactly the same as those which were available following a breach of the equitable principles and common law rules which the general duties replace. Section 178(2) specifically provides that the directors' duties are enforceable in the same way as any other fiduciary duty owed to a company by its directors and remedies available may include:

(i) damages or compensation where the company has suffered loss;
(ii) restoration of the company's property;
(iii) an account of profits made by the director; and
(iv) rescission of a contract where the director failed to disclose an interest.

Section 175 CA 2006 deals with the general duty to avoid conflicts of interest and replaces the previous common law no-conflict rule. Under the previous rule, certain consequences followed if directors placed themselves in a position where their personal interests came into conflict with their duties to the company, unless the company knew about the conflict and specifically consented to it. Section 175 continues that procedure in an amended form, which allows the other independent directors to authorise the conflict. However. any conflicted directors must not be counted in the quorum for the meeting or vote. Section 180 also preserves the ability of the members of a company to authorise conflicts which would otherwise be a breach of this duty.

One obvious area where directors place themselves in a position involving a conflict of interest is where they have an interest in a contract with the company. Sections 177 and 182 CA 2006 place a specific duty on directors to declare any interest, direct or indirect, in any contracts, either proposed or already existing, with their companies. Any declaration of interest must be made at the board meeting which first considers the contract, or if the director becomes interested in the contract after that, at the first meeting thereafter. Failure to disclose any interest renders the contract voidable at the instance of the company and the director may be liable to account to the company for any profit made in relation to it. Section 183 makes it a criminal offence punishable by a fine if a director fails to make the required declaration in relation to an existing contract.

Section 185 CA 2006 states that a director's disclosure can take the form of a general declaration of interest in a particular company, which is considered sufficient to put the other directors on notice for the future.

Applying the above to the problem scenario, it appears that Cy did not declare his interest in either Fox Ltd generally, or the particular contract in question. Dix Co could have avoided the contract had they found our earlier and acted sooner, but in any case Cy can be held liable to account to Dix Co for any profit he made on the deal, or, more significantly, he will be liable to account to Dix Co for its significant loss on the contract. Cy will also be liable to prosecution and a fine under s.183 CA 2006.

10 This question requires candidates to consider and explain a problem scenario which raises issues relating to directors' statutory duties under ss.213 and 214 UK Insolvency Act (IA) 1986 as they apply to fraudulent and wrongful trading.

At common law, the duties owed by directors to their company and the shareholders, employees and creditors of that company were notoriously lax. Statute has, by necessity, been forced to intervene to increase such duties in order to provide a measure of protection for those concerned.

Common law did not place any great burden on directors in regard to liability for company losses. Damages could be recovered against directors for losses caused by their negligence but the level of such negligence was high. As was stated in *Lagunas Nitrate Co* v *Lagunas Syndicate* (1899), it must, in a business sense, be culpable or gross. The laxity of the situation at common law has been much tightened by statute, particularly by the development of civil liability for wrongful trading, which was introduced by s.214 IA 1986.

Fraudulent trading
There has long been civil liability for any activity amounting to fraudulent trading. Thus, s.213 IA 1986 governs situations where, in the course of a winding up, it appears that the business of a company has been carried on with intent to defraud creditors, or for any fraudulent purpose. In such cases, the court, on the application of the liquidator, may declare that any persons who were knowingly parties to such carrying on of the business are liable to make such contributions (if any) to the company's assets as the court thinks proper. The major problem in making use of s.213, however, lies in meeting the very high burden of proof involved in proving dishonesty on the part of the person against whom it is alleged.

Wrongful trading
Wrongful trading does not involve dishonesty but, nonetheless, it still makes particular individuals potentially liable for the debts of their companies. Section 214 IA 1986 applies where a company is being wound up and it appears that, at some time before the start of the winding up, a director knew, or ought to have known, that there was no reasonable chance of the company avoiding insolvent liquidation. In such circumstances, then, unless the directors took every reasonable step to minimise the potential loss to the company's creditors, they may be liable to contribute such money to the assets of the company as the court thinks proper. In deciding what directors ought to have known, the court will apply an objective test, as well as a subjective one and s.214 IA establishes a minimum standard of what may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company.

The manner in which incompetent directors will become liable to contribute to the assets of their companies was shown in *Re Produce Marketing Consortium Ltd* (1989), in which two directors were held liable to pay compensation from the time that they ought to have known that their company could not avoid insolvent liquidation, rather than the later time when they actually realised that fact.

In addition, directors may be disqualified from holding office for a period of up to 15 years under the provisions of the Company Directors Disqualification Act (CDDA)1986 if they are found liable for either fraudulent or wrongful trading.

Applying the foregoing law to the problem scenario, it is unlikely that there is sufficient evidence to substantiate a claim against Gim or Hom for fraudulent trading, as apparently they genuinely thought they could trade their way out of difficulty. Although it has to be recognised that Gim and Hom did actually disguise the debts of the company, they did not do so in order to benefit themselves.

It would appear, however, that the two of them are certainly liable for an action for wrongful trading, as they carried on trading after it was clear that they ought to have known that there was no reasonable chance of the company avoiding insolvent liquidation. Nor can it be claimed that they took every reasonable step to minimise the potential loss to the company's creditors. Indeed, it was their continued trading which caused the creditors to suffer an additional loss beyond what they would have suffered had IMP Co been wound up at an earlier date.

It remains to determine from which date Gim and Hom should be held responsible for the debts of the company and it is immediately apparent that there was no real prospect of the company avoiding insolvent liquidation as early as October 2012. Consequently, they will be personally liable for any debts accrued by the company after that date.

They will also be liable to be disqualified from acting as company directors under the CDDA.

1 The first part of this question requires candidates to explain the differences between criminal and civil law.

(a) 4–6 marks A detailed answer explaining the types of law and perhaps citing appropriate examples.

2–3 marks A less detailed answer; perhaps too general and lacking clear examples to support the understanding.

0–1 mark Little if any understanding of the concepts.

(b) 4 marks Full explanation of the criminal and civil courts.

2–3 marks Good explanation, but perhaps lacking in some detail or missing out some important court.

0–1 mark Very weak understanding of the courts concerned.

2 **(a)** This question requires candidates to consider the requirement of the UNCITRAL Model Law on International Commercial Arbitration that arbitration agreements should be in writing.

4– 5 marks Good explanation of the provisions of the model law and their effect.

2–3 marks Fair explanation but perhaps lacking in detail or examples. Perhaps only dealing with the requirement without any evaluation.

0–1 mark Very unbalanced answer or lacking any detail and evaluation.

(b) This part of the question requires candidates to explain certain key terms in relation to the UNCITRAL Model Law on International Commercial Arbitration; i.e. statements of claim and statements of defence.

4–5 marks Good explanation of the meaning and effect of both terms.

2–3 marks Sound explanation but lacking in detail or perhaps slightly unbalanced.

0–1 mark Weak explanation or very unbalanced answer.

3 This question requires candidates to refer to the rules relating to acceptance under the United Nations Convention for the International Sale of Goods.

(a) 4–6 marks Good to complete answer which shows knowledge of the rules relating to acceptance.

2–3 marks Some basic knowledge of the rule relating to acceptance, but no real depth of understanding.

0–1 mark Very weak answer with no real knowledge of the topic.

(b) 3–4 marks Good to complete answer which shows knowledge of the rules relating to when acceptance becomes effective.

1–2 marks Some basic knowledge of the rule relating to acceptance, but no real depth of understanding.

0 marks No knowledge of the topic.

4 This question requires candidates to consider the linked concepts of capital maintenance and the payment for shares.

(a) Requires an explanation of the overall concept of capital maintenance.

2 marks	Clear answer providing explanation of the creditor fund and the way in which a company's capital may be used and may not be used. Reference may be made to limited liability and examples of the operation of the doctrine may be provided.
1 mark	Some knowledge of the concept but lacking any depth or explanation. Perhaps merely a reference to the idea of the creditor fund.
0 marks	No knowledge of the topic.

Part (b) relating to payment at a premium carries 4 marks, as does part (c) which relates to payments at a discount.

(b)	3–4 marks	A good to complete explanation of what is meant by share premiums and how they are to be treated in law. Reference must be made to the provisions of the Companies Act 2006.
	1–2 marks	Some idea about the issues but lacking in detail.
	0 marks	No understanding of the issues.
(c)	3–4 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority, although examples will be acceptable as an alternative.
	1–2 marks	Some knowledge of the topic but lacking in detail.
	0 marks	No knowledge of the topic.

5 This question requires candidates to explain the operation of three types of partnerships, one unlimited and the others benefitting from limited liability.

(a)	2 marks	Full understanding of unlimited liability of ordinary partners.
	1 mark	Some understanding of the liability of such partners.
	0 marks	No knowledge whatsoever.
(b)	2–3 marks	A thorough answer explaining fully the rules relating to the limited partnership.
	1 mark	Little if any explanation. Perhaps lacking reference to the rules relating to this form.
	0 marks	No knowledge of the topic whatsoever.
(c)	4–5 marks	A thorough answer explaining fully the rules relating to the limited liability partnership.
	2–3 marks	Some knowledge of the operation of limited liability partnerships but lacking in detail. Perhaps lacking in any reference to the rules relating to this form.
	1 mark	Little knowledge or understanding.
	0 marks	No knowledge of the topic whatsoever.

6 **(a)** Requires a general explanation of the concept of voluntary liquidation and carries 6 marks.

4–6 marks	Thorough to full answer explaining the meaning and effect of voluntary liquidation.
1–3 marks	Some knowledge but perhaps lacking in detail or structure.
0 marks	No knowledge of the topic.

(b) Requires candidates to explain what is meant by the two specific forms of voluntary liquidation.

(i)	2 marks	Available for explaining what is meant by a members' voluntary liquidation. To gain full marks, a clear explanation of the meaning and procedures relating to a members' voluntary liquidation must be provided. Both aspects must be considered to get all 2 marks.
	1 mark	Fair knowledge of the topic, but perhaps lacking in detail or not dealing with both aspects of the question.
	0 marks	No knowledge of the topic.
(ii)	2 marks	Good knowledge clearly explained with reference to the companies legislation. To gain full marks, a clear explanation of the meaning and procedures relating to a creditors' voluntary liquidation must be provided.
	1 mark	Clear understanding, but perhaps lacking in detail or not dealing with both aspects of the question.
	0 marks	No knowledge of the topic.

7 This question is divided into two parts and requires candidates to explain some essential terms in relation to the United Nations Convention on International Bills Of Exchange and International Promissory Notes:

(a) Requires a definition of what is actually meant by an international bill of exchange.

2–4 marks	A thorough explanation of the topic with references to the Convention provisions.
0–1 mark	Little or no understanding of the topic.

(b) Requires an explanation of the roles of some specific parties.

5–6 marks	A thorough explanation of the meaning and operation of endorsement
2–4 marks	Some general understanding, but perhaps lacking in specific information.
0–1 mark	Little, if any, understanding.

8 This question requires candidates to explain the consequences which flow from an anticipatory breach of contract under the UN Convention on the International Sale of Goods. It requires candidates to analyse a problem scenario and explain and apply the law appropriately.

8–10 marks	Good to complete answer which shows thorough knowledge of the appropriate provisions of the convention and applies them accurately.
5–7 marks	Fair explanation of the convention as it applies to anticipatory breach of contract, but perhaps lacking in detail, or only dealing well with one aspect.
2–4 marks	Some basic knowledge of what is involved in anticipatory breach under the Convention, but no real depth of understanding. Perhaps an unbalanced answer which only deals with one part of the question.
0–1 mark	Little or no understanding of the topic.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with their companies.

8–10 marks	A good analysis of the scenario with a clear explanation of the law relating to contracts between directors and their companies, both at common law and under statute. References to the Companies Act 2006 will be provided.
5–7 marks	Some understanding of the situation but perhaps lacking in detail or reference to the statute.
3–4 marks	Weak answer lacking in knowledge or application, with little or no reference to the Companies Act.
1–2 marks	Little, if any, knowledge of the appropriate legal principles.
0 marks	No knowledge whatsoever of the substance of the question.

10 This question requires candidates to consider fraudulent trading under s.213 Insolvency Act 1986, and wrongful trading under s.214 Insolvency Act 1986.

8–10 marks	A good analysis of the scenario with a clear explanation of the law relating to fraudulent and wrongful trading, together with an accurate application of that law.
5–7 marks	Fair to good understanding of the situation but perhaps lacking in detail or reference to the statute.
3–4 marks	Weak answer lacking in knowledge or application, with little or no reference to the provisions of the Insolvency Act 1986.
1–2 marks	Little knowledge of the appropriate legal principles.
0 marks	No knowledge whatsoever of the substance of the question.