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) Under the English common law system the main sources of law are:

(i) Legislation
This is law produced through the Parliamentary system. This is the most important source of law today for two reasons. First, in terms of quantity, Parliament produces far more legal rules than any other source. Second, and perhaps even more importantly, the doctrine of parliamentary sovereignty within the United Kingdom means that Parliament is the ultimate source of law and, at least in theory, it can make whatever laws it wishes. Much legislation now appears in the form of secondary legislation, which introduces concerns about its legitimacy and control, as it is not subject to the thorough scrutiny of Parliament as is the case with primary legislation.

(ii) Case Law
This is law created by judges in the course of deciding cases. The doctrine of *stare decisis* or binding precedent refers to the fact that courts are bound by previous decisions of courts equal or above them in the court hierarchy. It is the reason for a decision, the *ratio decidendi*, which binds. Everything else is *obiter dictum* and need not to be followed.

The Supreme Court can now overrule its own previous rules, but the Court of Appeal cannot. Judges, however, do have the ability to avoid precedents they do not wish to follow through the procedure of distinguishing the cases on their facts, and, of course, they have a very large number of cases and precedents to choose from.

(iii) Custom
Although there is always the possibility of a specific local custom, which has been in existence since 'time immemorial', acting as a source of law, in practice the limitations which operate in relation to custom render it an extremely unlikely source of contemporary law.

(iv) The European Union
Since joining the European Community, now the European Union, the United Kingdom and its citizens have become subject to European Union law. In areas where it is applicable, European law supersedes any existing United Kingdom law to the contrary (see *Factortame Ltd* v *Secretary of State for Transport* (1989)).

Tutorial note: *Full marks can be obtained without mention of custom and the European Union. These are not specifically examinable but are important sources of law and therefore have been added to the answer.*

(b) (i) A European civil law system
As regards civil law systems, the main source of law is the various codes which provide the law relating to particular areas of activity. Such codes differ from United Kingdom legislation in that they are written in broad terms in the pursuit of general principles and the implicit power of the courts to make, or change, the law is reduced.

Such systems also tend to operate with written constitutions, which provide a fundamental basis for legal activity and allows the courts to challenge any legislation that they decide is contrary to the constitution.

As with the United Kingdom, European civil law systems are also governed by European Union law.

Although, by definition, these are not common law systems and consequently the doctrine precedent does not apply in the same way as in English law, nonetheless, the courts have worked out a *de facto* system of following previous court decisions, although these are not strictly speaking a source of law as they are in the common law.

(ii) A Sharia law system
The major distinction in relation to Sharia law is that the general law has to be interpreted from essential religious sources. Thus the main source of Sharia law is the *Quran*, which is accepted as the revealed dictate of Allah as revealed to his prophet Muhammad. In addition the *Sunnah*, which is derived from the sayings of the prophet (the Ahadith), is also a primary source of law in Sharia systems.

As secondary sources of law, Sharia systems refer to the *Madhab*, which is the opinions of leading early jurists on the meaning and effect of Sharia law.

Such systems also have written constitutions and these specifically subordinate law to the religious rules.

2 Damages are the monetary compensation that a party in breach of contract has to pay to compensate the innocent party for any loss suffered by them, including loss of profit. The issue of damages is dealt with in section II of the UN Convention on Contracts for the International Sale of Goods (CISG). The general position is stated in Article 74, which provides that damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.

However, any such loss must have been reasonably foreseeable by the party in breach, or in the words of Article 74: 'Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the

breach of contract.'

In addition to this general provision, CISG also details two particular situations. Thus Article 75 applies where the innocent party has avoided the contract and, if they are the buyer, has bought goods in replacement or, if they are the seller, has resold the goods. In such circumstances, the innocent party may recover the difference between the contract price and the price in the substitute transaction. This award is in addition to any other damages recoverable under Article 74. It should be noted that the innocent party must act reasonably and if they re-sell at less than the market price, or buy at more than the market price, they will be required to demonstrate that such action was reasonable.

Article 76, on the other hand, deals with the situation where the innocent party has avoided the contract but has not made a purchase or resale under Article 75. In this situation they may recover the difference between the price fixed by the contract and the current price at the time of avoidance, as well as any further damages recoverable under Article 74. However, if the party claiming damages has taken over the goods before seeking to avoid the contract, then the current price is that operative at the time they took over the goods rather than at the time of avoidance. The reason for this provision is to prevent a buyer from holding onto defective goods until a fall in the market makes avoidance advantageous. Further, it should also be noted that in any case the buyer will lose their right to avoid if they do not do so within a reasonable time after they knew, or ought to have known, of the breach.

Article 76 also provides that the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute. In the latter situation allowance should be made for any difference in the cost of transporting the goods.

Finally, Article 77 sets out the need for the party claiming damages on a breach of contract to take reasonable measures to mitigate the loss, including loss of profit, resulting from the breach. If the claimant fails to mitigate the loss, then the party in breach may claim a reduction in the damages by the amount by which the loss should have been mitigated.

3 **(a)** Except in relation to specifically exempted companies, such as those involved in charitable work, companies are required to indicate that they are operating on the basis of limited liability. Thus private companies are required to end their names either with the word 'limited' or the abbreviation 'ltd', and public companies must end their names with the words 'public limited company' or the abbreviation 'plc'. Welsh companies may use the Welsh language equivalents (Companies Act (CA) 2006 ss.58, 59 and 60).

Companies Registry maintains a register of business names, and will refuse to register any company with a name that is the **same** as one already on that index (CA 2006 s.66).

Certain categories of names are, subject to the decision of the Secretary of State, unacceptable *per se*, as follows:

(i) names which in the opinion of the Secretary of State constitute a criminal offence or are offensive (CA 2006 s.53).
(ii) names which are likely to give the impression that the company is connected with either government or local government authorities (s.54).
(iii) names which include a word or expression specified under the Company and Business Names Regulations 1981 (s.26(2)(b)). This category requires the express approval of the Secretary of State for the use of any of the names or expressions contained on the list, and relates to areas which raise a matter of public concern in relation to their use.

Under s.67 CA 2006, the Secretary of State has power to require a company to alter its name under the following circumstances:

(i) where it is the same as a name already on the Registrar's index of company names.
(ii) where it is 'too like' a name that is on that index.

The name of a company can always be changed by a special resolution of the company, so long as it continues to comply with the above requirements (s.77).

(b) The action of 'passing off' was developed to prevent one person from using any name which is likely to divert business their way by suggesting that the business is actually that of some other person, or is connected in any way with that other business. It thus enables people to protect the goodwill they have built up in relation to their business activity. In *Ewing* v *Buttercup Margarine Co Ltd* (1917), the plaintiff successfully prevented the defendants from using a name that suggested a link with his existing dairy company. It cannot be used, however, if there is no likelihood of the public being confused, where, for example, the companies are conducting different businesses (*Dunlop Pneumatic Tyre Co Ltd* v *Dunlop Motor Co Ltd* (1907) and *Stringfellow* v *McCain Foods GB Ltd* (1984)). Nor can it be used where the name consists of a word in general use (*Aerators Ltd* v *Tollitt* (1902)).

Part 41 of the Companies Act (CA) 2006 does not prevent one business from using the same, or a very similar, name as another business, so the tort of passing off will still have an application in the wider business sector. However, with regard to registered companies, the CA 2006 introduced a new procedure to deal specifically with company names. A company cannot register with a name that is the same as any already registered (s.665 CA 2006) and under CA s.67 the Secretary of State may direct a company to change its name if it has been registered in a name that is the same as, or too like, a name appearing on the registrar's index of company names. In addition, however, a completely new system of complaint has been introduced.

(c) Under ss.69–74 of CA 2006 a new procedure has been introduced to cover situations where a company has been registered with a name

(i) that it is the same as a name associated with the applicant in which he has goodwill, or
(ii) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant (s.69).

Section 69 can be used not just by other companies, but by any person, to object to a company names adjudicator, if a company's name is similar to a name in which the applicant has goodwill. There is a list of circumstances raising a presumption that a name was adopted legitimately; however even then, if the objector can show that the name was registered either to obtain money from them, or to prevent them from using the name, then they will be entitled to an order to require the company to change its name.

Under s.70, the Secretary of State is given the power to appoint company names adjudicators and their staff and to finance their activities, with one person being appointed Chief Adjudicator.

Section 71 provides the Secretary of State with power to make rules for the proceedings before a company names adjudicator. Section 72 provides that the decision of an adjudicator and the reasons for it are to be published within 90 days of the decision.

Section 73 provides that if an objection is upheld, then the adjudicator is to direct the company with the offending name to change its name to one that does not similarly offend. A deadline must be set for the change. If the offending name is not changed, then *the adjudicator will decide* a new name for the company.

Under s.74, either party may appeal to a court against the decision of the company names adjudicator. The court can either uphold or reverse the adjudicator's decision, and may make any order that the adjudicator might have made.

4 Section 7 Companies Act (CA) 2006 sets out the method for forming a company, which is that one or more persons must subscribe their name to a memorandum of association and comply with the requirements of the provisions of the Act as to registration. Under s.9, two documents must be delivered to the registrar: the memorandum of association and the application for registration.

(a) Memorandum of Association

Although the CA 2006 retains the previous requirement for individuals wishing to form a company to subscribe their names to a memorandum of association, it nonetheless significantly reduces the importance of the memorandum and as a consequence, it will not be possible to amend or update the memorandum of a company formed under the CA 2006. Nonetheless the memorandum of association, which must be in the prescribed form, remains an important document to the extent that, as required by s.8, it evidences the intention of the subscribers to the memorandum to form a company and become members of that company on formation. In relation to a company limited by shares, the memorandum also provides evidence of the members' agreement to take at least one share each in the company. Under s.28, provisions in the memorandums of existing companies will be treated as provisions in the articles if they are of a type that will not be in the memorandums of companies formed under the CA 2006.

(b) Application for Registration

Under CA s.9, the application for registration must contain:

– the company's proposed name;
– whether the company's registered office is to be situated in England and Wales (or Wales), in Scotland or in Northern Ireland;
– a statement of the intended address of the company's registered office;
– whether the liability of the company's members is to be limited and if so, whether it is to be limited by shares or by guarantee;
– whether the company is to be a private or a public company;
– a copy of any proposed articles to the extent that the company does not intend to use the model articles (this issue will be dealt with in more detail below);
– memorandum of association.

The application must also contain the following additional documents:

– a statement of capital and initial shareholdings or a statement of guarantee under ss.10 and 11;
– a statement of the company's proposed officers under s.12;
– a statement of compliance under s.13;
– registration fee.

Section 13 requires a statement of compliance. Such a statement does not need to be witnessed and may be made in either paper or electronic form. Under s.1068, the registrar is authorised to specify the rules relating to, and who may make, such a statement. Section 1112 makes it a criminal offence to make a false statement of compliance, as is the case in relation to all documents delivered to, or statements made to, the registrar.

(c) Articles of Association

The articles of association are the main element of a company's constitution and in effect they are the rules which govern a company's internal affairs. All the company's key internal rules on matters such as the appointment and dismissal of directors,

the allocation of powers between the members of a company and its directors will be set out in the articles. Companies are free to make such rules about their internal affairs as they think appropriate, subject to the proviso than any such rules must not contain anything that is either contrary to:

– the general law, or
– the specific provisions of the Companies Act.

As previously, the articles of association form a statutory contract between the company and its members and between each of the members in their capacity as members (s.33 CA 2006), and the previous common law will continue to be applied as appropriate.

Section 18 requires all registered companies to have articles of association, and they have to be contained in a single document and must be divided into consecutively numbered paragraphs (s.18(3)).

Section 19 gives the Secretary of State the power to prescribe 'default' model articles for the different types of company. Such model articles apply to companies where they have not registered any articles of their own, or have not specifically excluded the operation of the model article in question. Model articles were provided for in the Companies (Model Articles) Regulations 2008 (SI No 3229).

5 **(a)** As shareholders in limited companies, by definition, have the significant protection of limited liability, the courts have always seen it as the duty of the law to ensure that this privilege is not abused at the expense of the company's creditors. To that end, they developed the doctrine of capital maintenance, the specific rules of which are now given expression in the Companies Act (CA) 2006. The rules, such as that stated in CA 2006 s.580 against shares being issued at a discount, ensure that companies receive at least the full nominal value of their share capital. The rules relating to the doctrine of capital maintenance operate in conjunction to those rules to ensure that the capital can only be used in limited ways. Whilst this may be seen essentially as a means of protecting the company's creditors, it also protects the shareholders themselves from the depredation of the company's capital.

There are two key aspects of the doctrine of capital maintenance: first that creditors have a right to see that the capital is not dissipated unlawfully; and second that the members must not have the capital returned to them surreptitiously. There are a number of specific controls over how companies can use their capital, but perhaps the two most important are the rules relating to capital reduction and company distributions.

(b) The procedures through which a company can reduce its capital are laid down by ss.641–653 Companies Act 2006.

Section 641 states that, subject to any provision in the articles to the contrary, a company may reduce its capital in any way by passing a special resolution to that effect. In the case of a public company, any such resolution must be confirmed by the court. In the case of a private company, however, it is possible to reduce capital without court approval, as long as the directors issue a statement as to the company's present and continued solvency for the following 12 months (ss.642 and 643). The special resolution, a copy of the solvency statement, a statement of compliance by the directors confirming that the solvency statement was made not more than 15 days before the date on which the resolution was passed, and a statement of capital must be delivered to the registrar within 15 days of the date of passing the special resolution.

Section 641 sets out three particular ways in which the capital can be reduced by:

(i) removing or reducing liability for any capital remaining as yet unpaid. In effect, the company is deciding that it will not need to call on that unpaid capital in the future.
(ii) cancelling any paid-up capital which has been lost through trading or is unrepresented in the current assets. This effectively brings the statement of financial position into balance at a lower level by reducing the capital liabilities in recognition of a loss of assets.
(iii) repayment to members of some part of the paid value of their shares in excess of the company's requirements. This means that the company actually returns some of its capital to its members on the basis that it does not actually need that level of capitalisation to carry on its business.

It can be seen that procedure (i) reduces the potential creditor fund since the company gives up the right to make future calls against its shares and procedure (iii) reduces the actual creditor fund by returning some of its capital to the members. In recognition of this fact, creditors are given the right to object to any such reduction. However, procedure (ii) does not actually reduce the creditor fund, it merely recognises the fact that capital has been lost. Consequently, creditors are not given the right to object to this type of alteration (ss.645 and 646).

Under s.648, the court may make an order confirming the reduction of capital on such terms as it thinks fit. In reaching its decision, the court is required to consider the position of creditors of the company in cases (i) and (iii) above and may do so in any other case. The court also takes into account the interests of the general public. In any case the court has a general discretion as to what should be done. If the company has more than one class of shares, the court will also consider whether the reduction is fair between classes. In this it will have regard to the rights of the different classes in a liquidation of the company since a reduction of capital is, by its nature, similar to a partial liquidation.

When a copy of the court order together with a statement of capital is delivered to the Registrar of Companies, a certificate of registration is issued (s.649).

6 Winding up, or liquidation, is the process whereby the life of the company is terminated. It is the formal and strictly regulated procedure whereby the business is brought to an end and the company's assets are realised and distributed to its creditors and members. The procedure is governed by the Insolvency Act (IA) 1986 and may be divided into three distinct categories:

– members' voluntary winding up,
– creditors' voluntary winding up,
– compulsory winding up.

Administration, on the other hand, is a means of safeguarding the continued existence of business enterprises in financial difficulties, rather than merely ensuring the payment of creditors. Administration was first introduced in the IA 1986. The aim of the administration order is to save the company, or at least the business, as a going concern by taking control of the company out of the hands of its directors and placing it in the hands of an administrator. Alternatively, the procedure is aimed at maximising the realised value of the business assets.

Once an administration order has been issued, it is no longer possible to commence winding up proceedings against the company or enforce charges, retention of title clauses, or even hire-purchase agreements against the company. This major advantage was in no small way undermined by the fact that, under previous provisions, an administration order could not be made after a company had begun the liquidation process. Since companies are required to inform any person who is entitled to appoint a receiver of the fact that the company is applying for an administration order, it was open to any secured creditor to enforce their rights and to forestall the administration procedure. This would cause the secured creditor no harm, since their debt would more than likely be covered by the security, but it could well lead to the end of the company as a going concern.

The Enterprise Act 2002 introduced a new scheme, which limited the powers of floating charge holders to appoint administrative receivers, whose function had been essentially to secure the interest of the floating charge holder who had appointed them, rather than the interests of the general creditors. By virtue of the Enterprise Act 2002, which amends the previous provisions of the IA 1986, floating charge holders no longer have the right to appoint administrative receivers, but must now make use of the administration procedure as provided in that Act. As compensation for this loss of power, the holders of floating charges are given the right to appoint the administrator of their choice.

The function of the administrator is to:

– rescue the company as a going concern, or
– achieve a better result for the company's creditors as a *whole* than would be likely if the company were to be wound up, or
– realise the value of the property in order to make a distribution to the secured or preferential creditors.

The administrator is only permitted to pursue the third option where:

– he thinks it is not reasonably practicable to rescue the company as a going concern, and
– he thinks that he cannot achieve a better result for the creditors as a whole than would be likely if the company were to be wound up, and
– if he does not unnecessarily harm the interests of the creditors of the company as a whole.

An application to the court for an administration order may be made by a company, the directors of a company, or any of its creditors, but in addition the Enterprise Act allows the appointment of an administrator without the need to apply to the court for approval. Such 'out of court' applications can be made by the company or its directors, but may also be made by any floating charge holder.

During the administration process the administrator has the powers to:

– do anything necessary for the management of the company
– remove or appoint directors
– pay out monies to secured or preferential creditors *without the need to seek the approval of the court*
– pay out monies to unsecured creditors *with the approval of the court*
– take custody of all property belonging to the company
– dispose of company property. This power includes property which is subject to both fixed and floating charges, which may be disposed of without the consent of the charge holder, although they retain first call against any money realised by such a sale.

The administration period is usually 12 months, although this may be extended by six months with the approval of the creditors, or longer with the approval of the court. When the administrator concludes that the purpose of their appointment has been achieved, a notice to this effect is sent to the creditors, the court and the companies registry. Such a notice terminates the administrator's appointment. If the administrator forms the opinion that none of the purposes of the administration can be achieved, the court should be informed and it will consider ending the appointment. Creditors can always challenge the actions of the administrator through the courts.

7 Incoterms are frequently to be found in international contracts, and they seek to provide a common set of rules for the most often used international terms of trade with the aim of removing confusion over their interpretation. 'Incoterms' is an abbreviation of International Commercial Terms.

These terms have been published by the International Chamber of Commerce (ICC) since 1936. Since that time, there have been seven different revisions and updates to the Incoterms, with the most recent coming into effect in January 2011.

Most contracts made after 1 January 2011 will refer to this latest edition of Incoterms. However, earlier versions of Incoterms may still be incorporated into future contracts if the parties so agree. In order to avoid the possibility of confusion, contracts should refer specifically to the 'Incoterms 2010' rather than just Incoterms, if the parties wish the new terms to apply.

(a) EXW

EXW – EX WORKS (... named place)
'Ex works' means that the seller fulfils his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc) to the buyer. This means that the seller is **not** responsible for loading the goods on to the buyer's vehicle or for clearing the goods for export, unless otherwise agreed. As a consequence of this term, the buyer bears all the costs and risks involved in taking the goods from the seller's premises to their final destination. The ex works term thus represents the minimum obligation for the seller. However, if the parties wish the seller to assume responsibility for the loading of the goods on departure, such a term should be expressly stated in the contract of sale. It follows that this term should not be used where the buyer themselves cannot carry out the necessary export formalities, either directly or indirectly.

(b) FOB

Free On Board (named port of shipment)
Some Incoterms are specific to particular modes of transport, such as shipping, and the FOB term is one of those. The initials stand for 'Free on board' and mean that the seller is considered to have delivered the goods when they pass the ship's rail at the named port of shipment. This means that the seller has to clear the goods for export, but the buyer has to bear all costs and risks of loss or damage to the goods from the point that the goods are on the ship. However, as a result of the specific mention of the ship's rails, it follows that this term can only be used for sea or inland waterway transport. It would be obviously inappropriate to use this term where the goods are to be transported by motor transport, train or aeroplane. In the latter situation the alternative FCA (Free Carrier) should be used.

(c) CIF

Cost, Insurance and Freight (named port of destination)
'Cost, insurance and freight' means that the seller delivers the goods when they pass the ship's rail in the port of shipment.

The seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. The CIF term requires the seller to clear the goods for export.

But more importantly, the seller also has to arrange marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller, therefore, contracts for insurance and pays the insurance premium. The seller, however, is only required to obtain minimum insurance cover for the goods. If the buyer wishes to have greater protection, then either they must agree that expressly with the seller, as a term of the contract, or they must arrange any extra insurance on their own behalf.

As with FOB above, the CIF term can only be used for sea and inland waterway transport. If the goods are to be delivered some other way, then the CIP term should be used.

8 (a) This question asks candidates to analyse the scenario provided in the light of the rules relating to the formation of a contract. In particular, it requires an examination of the distinction between offer and invitation to treat, and the various ways in which an offer can be accepted.

Article 14(1) of the UN Convention provides that:

'A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.'

Thus in order for a proposal for concluding a contract to constitute an offer,

(i) it must be addressed to one or more specific persons. Consequently, the offer cannot be made to 'the world at large' as it can in common law jurisdictions.
(ii) it must be sufficiently definite. This requires that the offer must indicate the goods to be transferred and either expressly or implicitly fix or make provision for determining the quantity of the goods to be transferred and the price to be paid.
(iii) it must indicates that the offeror intends to be bound on those terms in case of acceptance.

Acceptance and Counter-offer
A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the Convention (Article 23). Such a pronouncement, however, requires an explanation of what is to be taken as amounting to acceptance under the provisions of the Convention.

By virtue of Article 18, an acceptance of an offer may be made by means of a *statement* or other *conduct* of the offeree. The essential feature is that the action indicates agreement to the offer *originally made by the offeror*.

Under Article 19 an acceptance which contains additions, limitations or other modifications constitutes a counter-offer and acts as a rejection of the original offer.

However, if the additional terms do not 'materially alter the terms of the offer', then the acceptance is valid unless the offeror, without undue delay, objects to the alterations to the original offer.

What will be considered as material alterations are such additional or different terms as relate to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes.

Applying the above law to the problem scenario leads to the following conclusions:

(b) Art and Bon
Art certainly made an offer to Bon on specific terms, but Bon did not accept those terms. Instead, he altered one of the fundamental terms of the offer by reducing the acceptance price or $750,000. That was sufficient to invalidate the original offer. Therefore there is no contract and Bon has no right of action against Ali.

(c) Art and Con
Once again Art can be seen to have made an offer to Con, but once again, by altering one of the fundamental terms of the offer, this time by stating that he will not able to pay the full amount before September, Con, the recipient of the offer, has actually made a counter-offer rather than an acceptance. Therefore there is no contract and Con has no right of action against Ali.

(d) Art and Dan
This instance is similar to the other two examples in that Dan changes a fundamental term of Art's offer by stating that he would only accept the original offer if Art provided an additional four rugs. Consequently, there is no contract and no liability owed by Art to Dan.

9 This question requires candidates to consider the breach of directors' duties and the consequences of such breach.

The Companies Act (CA) 2006 places directors' duties on a statutory basis. However, 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 172 establishes a general duty on directors to promote the success of their company, however, more specific duties are provided for in subsequent sections.

Under s.175, a director of a company must avoid a situation in which they have, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. Section 175(2) specifically provides that it 'applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).'

The duty, however, does not apply to a conflict of interest arising in relation to a transaction or arrangement between the director and the company. Nor does it apply where the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or where it has been authorised by the directors.

Further, s.176 places directors under a duty not to accept benefits from third parties. Specifically a director must not accept a benefit from a third party, which is conferred by reason of

(a) his being a director, or
(b) his doing (or not doing) anything as director.

This duty is an aspect of the general duty to avoid conflicts of interest, but it has been stated separately in order to ensure that the obtaining of a benefit from a third party by a director can only be authorised by members of the company rather than by the board. However, s.176(4) provides that no breach of duty takes place if the acceptance of the benefit by the director 'cannot reasonably be regarded as likely to give rise to a conflict of interest'. As a result, it is likely that 'inconsequential' benefits or those 'totally unrelated' to the affairs of the company will be permissible.

Section 178 specifically preserves the previous common law civil consequences of breach of any of the general duties and consequently 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.

Applying the preceding rules to the facts of the problem scenario, it can be seen that Fay has breached her statutory duties under CA 2006 ss.175 and 176 by passing on the research results to Ix plc in return for the substantial payment. It is also clear that the rules against allowing a conflict of interest to arise apply, even if the company cannot itself take advantage of the opportunity wrongly misappropriated. This continues the previous very strict application of principle (*Regal (Hastings)* v *Gulliver* (1942)). Applying this to the facts of the problem, it would appear that Fay will be held liable to account to FGH Ltd for any profits she made on the transaction.

In addition, as directors can be removed at any time by a simple majority vote of the members under s.168 CA, Gus and Het can use their majority voting power to remove Fay from her role as company director. This is the case, even if the removal leads to a breach of their contract of service (*Southern Foundries Ltd* v *Shirlaw* (1940)). Those proposing to remove the director must give the company 28 days notice of the resolution and the director in question must receive a copy of the resolution and is entitled to speak to the resolution at the meeting at which it is considered (CA s.169).

10 This question invites candidates to consider the criminal offence of insider dealing and requires a detailed account of the law relating to that area.

The value of shares in a company on the stock market fluctuates in relation to the underlying performance of the company. Amongst other things, good company results will lead to an increase in the value of the shares. It is, of course, the fact that share prices fluctuate in this way that provides the possibility of individuals making large profits, or losses, in speculating in shares. It also, however, provides other people with the opportunity to take advantage of their close relationship with particular companies in order to make profits from illegal share dealing. Such illegal trading in shares, known as insider dealing, occurs when someone trades on the basis of price sensitive information before the general public has access to that information. Insider dealing is governed by the Criminal Justice Act (CJA) 1993.

Section 52 CJA 1993 states that an individual who has information as an insider is guilty of insider dealing if they deal in securities that are price-affected securities in relation to the information. They are also guilty of an offence if they encourage others to deal in securities that are linked with this information, or if they disclose the information other than in the proper performance of their employment, office or profession.

Section 56 makes it clear that securities are price affected in relation to inside information if the information, made public, would be likely to have a significant effect on the price of those securities.

Section 57 defines an insider as a person who knows that they have inside information and knows that they have the information from an inside source. This section also states that inside source refers to information acquired through being a director, employee or shareholder of an issuer of securities, or having access to information by virtue of their employment, office or profession. Additionally, and importantly, it also treats as insiders those who acquire their information from those primary insiders previously mentioned.

There are a number of defences to a charge of insider dealing. For example, s.53 makes it clear that no person can be so charged if they did not expect the dealing to result in any profit or the avoidance of any loss.

On summary conviction, an individual found guilty of insider dealing is liable to a fine not exceeding the statutory maximum and/or a maximum of six months imprisonment. On indictment, the penalty is an unlimited fine and/or a maximum of seven years imprisonment. There is also the possibility that the person who benefits from the information, which belongs to the company, will be required to account to it for any profit made. This would certainly be the case with regard to directors who engaged in insider dealing, as they would have breached their fiduciary duties.

Applying the law to the situation in the problem, it can be seen that, as an employee of Jaz plc, Kip is an insider under s.57, and the information he has is certain to affect the price of the company's shares. It follows, therefore, that when he buys the shares in Jaz plc, Kip is liable to a charge of insider dealing under s.52 CJA 1993. Kip is also liable for the separate offence, under s.57, of disclosing the information to Lu other than in the proper performance of their employment.

As he received the information from an insider, Lu is treated as an insider under s.57 and is liable for trading on the basis of the information under s.52.

1 This question requires candidates to explain the main sources of law in the English common law and either a civil law system or a Sharia law system.

8–10 marks Thorough treatment of the major sources of law in the two systems selected.

5–7 marks Thorough treatment of the sources in the selected systems but perhaps lacking overall detail or focusing mainly on one system to the marginalisation of the other.

2–4 marks Some understanding, but lacking in detail. Perhaps unbalanced answer, focusing on only one aspect of the question and ignoring the others.

0–1 mark Shows little understanding of the subject matter of the question.

2 This question requires candidates to explain the rules relating to the award of damages in the UN Convention on Contracts for the International Sale of Goods.

8–10 marks A good explanation of the meaning and effect of damages, with reference to the Articles or appropriate examples.

5–7 marks Fair explanation of damages for breach of contract but perhaps lacking in detail or reference to the convention.

2–4 marks Some, if little, explanation of damages but perhaps too general or lacking in any detail, or alternatively very unbalanced.

0–1 mark Little or no knowledge of the topic.

3 This question, divided into three parts, requires candidates to explain aspects of the law relating to the control of company names.

(a) 3–4 marks Good explanation of what the rules relating to company names.

1–2 marks Some, but limited, knowledge of the control over company names.

0 marks No knowledge.

(b) 3–4 marks Good explanation of the action of 'passing off' with case authority to support the explanation.

1–2 marks Some, but limited, knowledge of 'passing off' or control over company names.

0 marks No knowledge.

(c) 2 marks Good explanation of the role of the company names adjudicators and why they are necessary.

1 mark Some, but limited, knowledge.

0 marks No knowledge.

4 This question requires candidates to explain three constitutional documents relating to registered companies.

(a) This part relating to the memorandum of association only carries two marks.

2 marks A good general understanding of the topic.

1 mark Some knowledge.

0 marks No knowledge whatsoever of the topic.

(b) This part relates to the application for registration.

3–4 marks Good explanation of the contents of the application required by statute. Reference to sections need not be made.

1–2 marks Some, but limited, knowledge of the contents of the application.

0 marks No knowledge of the topic whatsoever.

(c) This part relates to a company's articles of association.

3–4 marks Good explanation of the contents of the articles of association.

1–2 marks Some, but limited, knowledge of the contents of the articles of association.

0 marks No knowledge of the topic whatsoever.

5 This question requires candidates to explain the doctrine of capital maintenance in company law and the way in which companies can legally reduce their capital.

(a) 3–4 marks Thorough explanation of the doctrine of capital maintenance, perhaps with some examples of its application.

1–2 marks Little knowledge of the topic.

0 marks No knowledge of the topic whatsoever.

(b) 5–6 marks Good to full consideration of the procedure for reducing capital. Reference must be made to the Companies Act 2006 procedure and the difference between public and private companies should be mentioned specifically.

2–4 marks Some general knowledge but lacking in detail as regards to the process or not mentioning the difference between the two company forms.

0–1 mark Little or no understanding of the process.

6 This question requires candidates to explain the meaning of administration.

8–10 marks A good explanation of the meaning and effect of administration generally and contrasting its purpose with that of compulsory winding up and explaining its rules.

5–7 marks Fair explanation of the process of administration, perhaps lacking in detail or focusing on only certain aspects of the procedure.

2–4 marks Some, if little, explanation of administration, but perhaps too general or lacking in any detail, or alternatively very unbalanced.

0–1 mark Little or no knowledge of the topic.

7 This question requires candidates to explain the meaning of three specific ICC Incoterms.

8–10 marks Good to complete answer which shows knowledge of the meaning and effect of the three terms.

5–7 marks Fair explanation of the three terms, but perhaps lacking in detail, or only dealing with two types.

0–4 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.

8 This question requires candidates to analyse and apply the appropriate law to a scenario involving issues relating to the formation of contracts under the UN Convention on Contracts for the International Sale of Goods.

(a) 3–4 marks Full analysis and explanation of the nature of Art’s letter.

1–2 marks Some analysis and explanation, but lacking in detail.

0 mark No knowledge whatsoever of the topic.

(b) 2 marks A full explanation of Bon’s situation in law.

1 mark Some, but limited, explanation.

0 marks No knowledge or explanation.

(c) 2 marks A full explanation of Con’s situation in law.

1 mark Some, but limited, explanation.

0 marks No knowledge or explanation.

(d) 2 marks A full explanation of Dan’s situation in law.

1 mark Some, but limited, explanation.

0 marks No knowledge or explanation.

9 This question requires a consideration of the statutory duties placed on company directors under the Companies Act 2006.

8–10 marks	Thorough to complete answers, showing a detailed understanding of the rules relating to conflict of interest.
5–7 marks	A clear understanding of the topic but perhaps lacking in detail or application.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its application.
0–1 mark	Little or no knowledge of the topic.

10 This question requires candidates to analyse a problem scenario and apply the law specifically relating to insider dealing.

8–10 marks	Thorough to complete answers, showing a detailed understanding of the rules relating to insider dealing.
5–7 marks	A clear understanding of the topic but perhaps lacking in detail or application.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its application.
0–1 mark	Little or no knowledge of the topic.