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) The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations system in the field of international trade law. It was established by the General Assembly in 1966 (Resolution 2205(XXI)). In establishing the Commission, the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and UNCITRAL was given the task of furthering the progressive harmonisation and unification of the law of international trade. This was to be achieved by:

– Co-ordinating the work of organisations active in this field and encouraging co-operation among them;
– Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
– Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organisations operating in this field;
– Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;
– Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
– Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
– Maintaining liaison with other United Nations organs and specialised agencies concerned with international trade;
– Taking any other action it may deem useful to fulfil its functions.

The Commission is composed of 60 Member States elected by the General Assembly and is structured so as to be representative of the world's various geographic regions, economic and legal systems. The Commission carries out its work at annual sessions, which are held in alternate years at United Nations Headquarters in New York and in Vienna. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

The following are some of the most important outcomes of the work conducted by UNCITRAL:

– **United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).** This Convention establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.

– **United Nations Convention on the Carriage of Goods by Sea, 1978 (the 'Hamburg Rules').** This Convention establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea.

– **UNCITRAL Model Law on International Commercial Arbitration (1985).** These provisions are designed to assist States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.

– **United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).** This Convention provides a comprehensive code of legal rules governing new international instruments for optional use by parties to international commercial transactions.

– **UNCITRAL Model Law on Electronic Commerce.** This Model Law, adopted in 1996, is intended to facilitate the use of modern means of communications and storage of information.

– **UNCITRAL Model Law on Cross-Border Insolvency.** This Model Law seeks to promote fair legislation for cases where an insolvent receivable (debtor) has assets in more than one State.

(b) The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation established in 1926 with its seat in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and, in particular, commercial law as between States and groups of States.

Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. Its 63 Member States, alphabetically ranging from Argentina to Venezuela, are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.

UNIDROIT's basic statutory objective is to prepare modern, and where appropriate harmonised, uniform rules of private law understood in a broad sense. Uniform rules prepared by UNIDROIT are concerned with *substantive* law rules; they will only include rules relating to issues of a conflict of law nature when they arise out of the appellation of such rules.

The rules produced by UNIDROIT assume one of three types:

(i) **Conventions**
These documents are designed to apply automatically in preference to a State's municipal law upon the completion of all the formal requirements of that State's domestic law for their entry into force. However, as UNIDROIT itself recognises, the low priority, which tends to be accorded by governments to the implementation of such Conventions and

the time it therefore tends to take for them to enter into force, has led to the increasing popularity of alternative forms of unification in areas where a binding instrument is not felt to be essential.

(ii) **Model laws**
These documents are designed to allow states to adopt or adapt them, when drafting domestic legislation on the subject covered by the model law.

(iii) **General principles**
This form is addressed directly to judges, arbitrators and contracting parties who are, however, left free to decide whether to use them or not.

The following list sets out the most important Conventions and Model Laws, drawn up by UNIDROIT:

– 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague);
– 1964 Convention relating to a Uniform Law on the International Sale of Goods (The Hague);
– 1970 International Convention on the Travel Contract (Brussels);
– 1973 Convention providing a Uniform Law on the Form of an International Will (Washington);
– 1983 Convention on Agency in the International Sale of Goods (Geneva);
– 1988 UNIDROIT Convention on International Financial Leasing (Ottawa);
– 1988 UNIDROIT Convention on International Factoring (Ottawa);
– 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome);
– 2001 Convention on International Interests in Mobile Equipment (Cape Town);
– 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town).

UNIDROIT is a sponsor of two essential legal databases:

UNILAW is a database providing access to up-to-date information regarding uniform law conventions and other instruments. The database is in both English and French and covers a large number of uniform law instruments.

UNILEX is a database of international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the United Nations Convention on Contracts for the International Sale of Goods.

2 **(a)** The UNCITRAL Model Law on International Commercial Arbitration does not lay down procedural details of recognition and enforcement, but merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement. Article 35 of the Model Law provides that any arbitration award made under its auspices, irrespective of the country in which it was made, shall be recognised as binding and is to be enforced in the competent court within the state in which it is sought to be implemented. The party seeking to enforce the award must provide the authenticated original award or a certified copy of it, plus either the original or a certified copy of the arbitration agreement.

(b) Article 36 sets out the grounds on which arbitration decisions and awards may be refused by the courts. The party against whom the award is being enforced must supply the court with proof of one of the following:

(i) a party to the arbitration agreement was under some incapacity; or the agreement was not valid under the law to which the parties subjected it or, failing any such indication in the agreement, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award, which contains decisions on matters submitted to arbitration, may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Alternatively, the award will not be enforced if the court finds that either:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of its state; or
(ii) the recognition or enforcement of the award would be contrary to the public policy of that state.

3 The UN Convention on Contracts for the International Sale of Goods provides a number of rules that implement the seller's obligations in respect of the quality of the goods. Article 35(1) states that, in general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. As regards quality specifically, Article 35(2) provides that, except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used. Goods are not fit under this case where they *lack specific ordinary* characteristics, or when they *have defects* which impede their material use. Goods are also unfit for ordinary use when the defects, though not affecting the material use of the goods, *considerably lessen their trade value*;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement. If the goods in question are to be used for other, non-ordinary purpose, the buyer has no rights if he has not indicated the specific use;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

Subparagraphs (a) to (d) apply whenever the parties have not agreed otherwise. If they are not to apply, they must be expressly disclaimed in the contractual agreement.

Article 35(3) goes on, however, to state that the seller is not liable under subparagraphs (a) to (d) above, if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

As regards liability, Article 36(1) provides that the seller remains liable for any lack of conformity which exists *at the time when the risk passes to the buyer*, even though the lack of conformity only comes to the attention of the purchaser after the risk has passed to them. Where the lack of conformity arises *after the risk has passed to the buyer*, the seller remains liable if the lack of conformity arises as a result of a breach of any of the seller's obligations, which include any guarantee that the goods will remain fit for their ordinary purpose, or for some particular purpose, or will retain specified qualities or characteristics for a period of time (Article 36(2)).

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages (Article 37).

4 **(a)** Bribery is defined as 'giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. So this could cover seeking to influence a decision-maker by giving some kind of extra benefit to that decision-maker rather than by what can legitimately be offered as part of a tender process.' (Ministry of Justice Guide to the Bribery Act 2010)

(b) There are four categories of offences of bribery under the Act:

(i) **Offences of bribing another person** (s.1 BA)
It is an offence to offer a financial or other advantage to another person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity.

(ii) **Offences relating to being bribed** (s.2 BA)
It is an offence where a person receives or accepts a financial or other advantage to perform a relevant function or activity improperly. 'Relevant function or activity' includes any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, and any activity performed by – or on behalf of – a body of persons. The activity may be performed in a country outside the UK.

(iii) **Bribery of foreign public officials** (s.6 BA)
It is an offence directly, or through a third party, to offer a financial or other advantage to a foreign public official (FPO) to influence them in their capacity as a FPO, and to obtain relevant business, or an advantage in the conduct of business.

'FPO' means an individual who holds a legislative, administrative or judicial position of any kind outside the UK, or who exercises a public function outside the UK, or is an official or agent of a public international organisation.

(iv) **Failure of commercial organisations to prevent bribery** (s.7 BA)
It is an offence for a commercial organisation (a UK company or partnership) if a person associated with it bribes another person intending to obtain or retain business, or to obtain or retain an advantage in the conduct of the business, for the organisation. This could take place outside the UK. Section 8 defines associated persons as someone who performs services for – or on behalf of – the commercial organisation, and, therefore, could be an employee, agent or subsidiary.

(c) While s.7 makes it an offence for a commercial organisation to fail to prevent bribery, it also provides a full defence against any such allegation. Thus, a commercial organisation will have a defence if it can show that adequate procedures have been put in place to prevent persons associated with it from engaging in bribery. This defence also serves the purpose of ensuring that commercial organisations have developed procedures to prevent bribery.

Although no definition of 'adequate procedures' is provided, Ministry of Justice guidance indicates six principles which underpin the defence of adequate procedures. These principles are:

(i) **Proportionate procedures**
The procedures taken by an organisation should be proportionate to the risks it faces and the nature, scale and complexity of its activities. A small organisation would require different procedures to a large multinational organisation.

(ii) **Top-level commitment**
The top-level management should be committed to prevent bribery and foster a culture within the organisation in which bribery is unacceptable.

(iii) **Risk assessment**
Organisations should assess the nature and extent of their exposure to risks of bribery, including potential external and internal risks of bribery. For example, some industries are considered higher risk than others, such as the extractive industries; some overseas markets may be higher risk where there is an absence of anti-bribery legislation.

(iv) **Due diligence**
The organisation should apply due diligence procedures in respect of persons who perform services for – or on behalf of – the organisation in order to mitigate bribery risks.

(v) **Communication**
The organisation should ensure its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, proportionate to the risks it faces. Communication and training enhances awareness and helps to deter bribery.

(vi) **Monitoring and review**
The organisation should monitor and review procedures designed to prevent bribery and make improvements where necessary. The risks an organisation faces may change and, therefore, an organisation should evaluate the effectiveness of its anti-bribery procedures and adapt where necessary. The question of whether an organisation had adequate procedures in place to prevent bribery is a matter that will be determined by the courts by taking into account the circumstances of the case. The onus will, however, be on the organisation to prove it had adequate procedures in place.

5 (a) Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the articles of association, every company has the implied power to apply its profits in the distribution of dividend payments to its shareholders. Although the directors recommend the level of dividend payment, it is for the company in a general meeting to declare the dividend. This is one of the items conducted at the annual general meeting. If the directors decline to recommend a dividend, then it is not open to the general meeting to overrule that decision and declare a dividend.

The long-standing common law rule is that dividends must not be paid out of capital (*Flitcroft's case* (1882)). The current rules relating to the payment of dividends are to be found in part 23 Companies Act (CA) 2006. The Act governs and imposes restrictions on distributions made by all companies, both public and private. Section 829 defines distribution as any payment, cash or otherwise, of a company's assets to its members, except for the categories stated in the section, which include the issue of bonus shares, the redemption of shares, authorised reductions of share capital and the distribution of assets on winding up.

Section 830 provides the basic condition for distribution, applying to all companies, which, in essence, is that they must have profits available for that purpose. This term is defined as accumulated realised profits less accumulated realised losses, with profit or loss being either revenue or capital in origin.

It is important to note that the use of the term accumulated means that any previous years' losses must be included in determining the distributable surplus, and that the requirement that profits be realised prevents payment from purely paper profit resulting from the mere revaluation of assets. Section 841 provides that all losses are to be treated as realised except where a general revaluation of all fixed assets has taken place.

(b) As has been stated, the foregoing realised profits test applies to both private and public companies, but public companies face an additional test in relation to distributions, in that s.831 requires that any distribution must not reduce the value of a public company's net assets below the aggregate of its total called-up share capital plus any undistributable reserves. In this regard, undistributable reserves include the share premium account, capital redemption reserve fund and the excess of accumulated unrealised profits.

The effect of this rule is that public companies have to account for changes in the value of their fixed assets and are required to apply an essentially balance-sheet approach to the determination of profits.

(c) Under the rule in *Flitcroft's case*, any directors of a company who breached the distribution rules, and knowingly paid dividends out of capital, were held jointly and severally liable to the company to replace any such payments made. The fact that the shareholders might have approved the distribution did not validate the illegal payment (*Aveling Barford Ltd* v *Perion Ltd* (1989)). Also at common law, shareholders who knowingly received, or ought to have known that they had received, an unlawful dividend payment were required to repay the money received, or to indemnify the directors for payments they might have already been required to have made (*Moxham* v *Grant* (1900)). Section 847 CA 2006 restates the common law rule, providing that shareholders, who either know or have reasonable grounds for knowing that any dividend was paid from capital, shall be liable to repay any such money received to the company.

6 The Companies Act (CA) 2006 sets out a new statutory statement of seven general duties owed by directors to their companies. The three duties raised in this question are the most important of those duties.

(a) Duty to promote the success of the company for the benefit of members as a whole

Section 172 CA 2006 replaces the previous common law duty on directors to act in good faith in the best interests of the company. In the course of making their decisions under s.172(1), directors are now required to have regard to each of the following list of matters:

– the likely consequences of any decision in the long term;
– the interests of the company's employees;
– the need to foster the company's business relationships with suppliers, customers and others;
– the impact of the company's operations on the community and the environment;
– the desirability of the company maintaining a reputation for high standards of business conduct; and
– the need to act fairly as between members of the company.

The list above is non-exhaustive and directors must also have regard to other non-specific matters. Additionally, s.172(3) makes specific reference to the need to consider the interests of the company's creditors where the company is operating under straightened circumstances.

Section 172 is based on the concept of 'enlightened shareholder value' but, nonetheless, it clearly privileges the rights of the shareholders over the other interests mentioned. This is especially apparent when it is remembered that, as emphasised in s.172(2), all duties are owed, not to the various interested stakeholders mentioned, but to the company itself.

(b) Duty to exercise reasonable skill, care and diligence

Section 174 CA 2006 codifies and replaces the previous common law duty but in a way that reflects the recent tightening of control over directors in line with the standard set out in relation to wrongful trading in the Insolvency Act 1986, s.214.

Section 174 requires that a director must exercise 'reasonable' care, skill and diligence and adds that the requirement means the care, skill and diligence that would be exercised by a reasonably diligent person with:

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
(b) the general knowledge, skill and experience that the director has.

It is expected that all directors who are performing either specific or general functions perform to a standard appropriate to those functions. Directors who actually lack the knowledge or skills to fulfil particular roles, or perform particular functions, will not be allowed to rely on their lack of competency as an excuse for not showing a required measure of skill or diligence. Thus, for example, it would be expected that a finance director would be able to understand accounts, otherwise they should not be in that position; the function sets the standard expected, not the actual ability of the director, as historically was the case.

Under the second, subjective, element of the test, a director's particular professional or business skills will have a bearing on whether they have met the standard of skill and diligence expected of them. However, this element can only increase that basic standard. For example, a qualified lawyer or accountant would be expected to know more about certain issues than a non-specialist director and would be expected to bring their particular skill to bear on company issues in the area of their particular expertise.

(c) Duty to avoid conflicts of interest

Section 175 CA 2006 reflects the long-standing common law rule that directors, as fiduciaries, must respect the trust and confidence placed in them and should do nothing to undermine or abuse their position as fiduciaries. The practical effect of the rule is that any conflict of interest must be authorised by the members of the company, unless some alternative procedure is properly provided. In the case of a private company, a conflict can be authorised by the other directors of the board unless the company's constitution provides to the contrary. The position is the same for public companies, except that the constitution must expressly permit authorisation by the board.

The duty not to accept benefits from third parties, specifically covered in s.176, is an aspect of the previous general duty to avoid conflicts of interest.

7 (a) Bill of lading

A bill of lading is a document which is issued by a carrier to the shipper acknowledging that they have received the shipment of goods and that they have been placed on board a particular vessel which is bound for a particular destination. The document states the terms on which the goods are to be carried. Separate bills of lading are issued for domestic transportation and ocean or air transportation, although a through bill of lading can be issued covering all modes of transport to the destination.

There are four types of bills of lading:

– Inland Bill of Lading – this refers to a contract for transporting goods overland to an exporter's international carrier.
– Ocean Bill of Lading – this refers to a contract for transporting goods from an exporter to a specified foreign market overseas.

- Through Bill of Lading – refers to a contract for transporting goods covering both the domestic and international transport of export goods between specified points.
- Air Waybill – refers to a contract for transporting goods by way of domestic and international flights to a specified destination. The air waybill is a non-negotiable document and only serves as a receipt for the shipper.

A bill of lading has a threefold purpose:

- formal receipt by the ship-owner for goods;
- evidence of the contract of carriage; and
- document of title to goods.

Bills of lading can be either negotiable or non-negotiable. In relation to negotiable bills of lading, ownership to the goods and the right to re-route the shipment are with the person who has legal ownership of the bill of lading properly issued or negotiated to it. Negotiable bills of lading are issued to shipper's order, rather than to a specific, named consignee. If the bill of lading is in negotiable form, the carrier will hold the goods until it receives an original bill of lading that has been endorsed by the shipper (seller). The exporter must endorse the bill of lading and deliver it to the bank in order to receive payment.

As regards non-negotiable bills of lading, the carrier is required to deliver the goods only to the consignee named in the bill of lading. The person to whom the goods are being sent normally needs to show the bill of lading in order to obtain the release of the goods.

(b) Bill of exchange

A bill of exchange is an order in writing by one person to another to pay a specified sum to a specified person or bearer on a particular date. A bill of exchange is a substitute for money. Consequently, a bill of exchange can be understood as a form of commercial credit instrument, or IOU, used in international trade. A bill of exchange may be stated to be payable on demand or at a given time on presentation. A cheque is a bill of exchange drawn on a banker, payable on demand.

In England, a bill of exchange is defined in the Bills of Exchange Act 1882, which provides that a bill of exchange is:

'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.'

The following terms apply:

- The person making the order or drawing the bill is known as the drawer.
- The person to whom the bill is addressed is the drawee (for example a bank).
- The person to whom the bill is payable is the payee.
- The person to whom a bill is transferred by indorsement is called the indorsee.
- The generic term 'holder' includes any person in possession of a bill who holds it either as payee, indorsee or bearer.
- A bill which in its origin is payable to order becomes payable to bearer if it is indorsed in blank.

If the drawee assents to the order, he is then called the acceptor. An acceptance must be in writing and must be signed by the drawee. The mere signature of the drawee is sufficient. By the acceptance of a bill, the drawee becomes the principal debtor on the instrument and the party primarily liable to pay it. Acceptance may be either general or qualified. As a qualified acceptance is so far a disregard of the drawer's order, the holder is not obliged to take it; and if he chooses to take it, he must give notice to antecedent parties, acting at his own risk if they dissent.

8 (a) 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* his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

Thus as regards the first possibility, Article 71 provides that a party may *suspend* performance of his 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 his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or
(b) his 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.

In the first element of the problem scenario, Bon has failed to make full payment under the first contract in spite of Anton's informing him that the second delivery would not take place unless it was paid in full. Were Bon to instigate any action for breach of contract for failure to deliver the summer clothes, Anton would be able to cite Article 71 as justification for his suspension of the delivery on the basis that there was clearly a doubt about his creditworthiness, as evidenced in his failure to fully pay for the first delivery of goods. Further failure on Bon's part to pay for the first contract would lead to Anton avoiding both contracts and suing for damages.

(b) Under the facts of the problem scenario, it is apparent that Con has performed an anticipatory breach of his contract with Anton. Anton can suspend performance of the contract and see if Con changes his mind. However, as a result of Con's express repudiation of the contract, and consequently a fundamental breach, Anton would be well advised to avoid the contract immediately under Article 72 and sue Con for damages.

9 This question requires candidates to consider several related points concerning the removal of directors and the nature of the articles of association and how they can be altered.

(a) Directors can be removed at any time by a simple majority vote of the members under s.168 Companies Act (CA) 2006. This right cannot be removed, although it can be restricted where the company has introduced weighted voting rights on such votes (*Bushell* v *Faith* (1969)). 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 on the resolution at the meeting at which it is considered (s.169). Fi, Gee and Ki can, therefore, use their majority voting power to remove Dee from her role as company director. Even if the removal of the person from the board of directors leads to a breach of their contract of service, the company cannot be prevented from doing so (*Southern Foundries Ltd* v *Shirlaw* (1940)). Directors in quasi-partnership private companies may have a legitimate expectation to act as a director and could seek to take action under s.994 (*Re Bird Precision Bellows Ltd* (1984)) but as the usual remedy offered would be a sale of shares at fair value, this would not further Dee's cause.

(b) Under s.33 CA 2006, articles of association constitute a contract between the members and the company, and *vice versa*, as well as a contract between the members. An essential point to bear in mind, however, is that the contract between members and the company only applies to membership rights and the articles cannot form a contract between the company and either a non-member, or a member acting in some other capacity than that of a member (*Eley* v *Positive Government Security Life Assurance Co* (1876)).

In this situation, Dee is claiming that the articles create a contract between her and the company for her to act as the company secretary. However, as acting as a secretary is clearly not a membership right, she would not normally be able to rely on the articles as the basis of the contract. It is possible for the courts to imply a contract of service from the behaviour of the parties and rely on the articles to provide the actual terms of the contract (*Re New British Iron Co ex parte Beckwith* (1898)), in which case Dee would be able to claim recompense on a *quantum meruit* basis.

(c) Section 21 CA 2006 provides for the alteration of articles of association on the passing of a special resolution, requiring a 75% vote in favour of the proposition. Any such alteration has to be made '*bona fide* in the interest of the company as a whole'. This test involves a subjective element in that those deciding the alteration must actually believe they are acting in the interest of the company. There is additionally, however, an objective element requiring that any alteration has to be in the interest of the 'individual hypothetical member' (*Greenhalgh* v *Arderne Cinemas Ltd* (1951)). Whether any alteration meets this requirement depends on the facts of the particular case. In *Brown* v *British Abrasive Wheel Co Ltd* (1919), an alteration to a company's articles to allow the 98% majority to buy out the 2% minority shareholders was held to be invalid as not being in the interest of the company as a whole. However, in *Sidebottom* v *Kershaw Leese & Co* (1920), an alteration to the articles to give the directors the power to require any shareholder, who entered into competition with the company, to sell their shares to nominees of the directors at a fair price was held to be valid.

It is extremely likely, therefore, that the alteration will be permitted. Fi, Gee and Ki control 75% of the voting power in the company and so are in a position to pass the necessary special resolution. Additionally, it would clearly benefit the company as a whole and the hypothetical individual shareholder to prevent Dee from passing on its secrets to a rival organisation, so Dee would lose any challenge raised in court.

10 As with registered companies, business assets must be used to pay the debts of a partnership. However, unlike most registered limited companies, members of ordinary partnerships, formed under the Partnership Act (PA) 1890, do not benefit from the advantage of limited liability and consequently their personal wealth may be called upon to pay off business debts. In order to gain the benefit of limited liability for all its members, partnerships may register as limited liability partnerships under the Limited Liability Partnerships Act 2000. However, in such circumstances, the name of the business must end with the words 'limited liability partnership' or the abbreviation LLP. The fact that the business name of the partnership in the scenario is HIJ Potteries indicates that it is not a limited liability partnership, but is to be treated as an ordinary partnership, and the ordinary rules of liability will apply. It remains to consider the fact that the partnership agreement provides that Jo's liability for any business debts has to be fixed at the level of her initial capital contribution of $1,000. In law, the partnership agreement is an internal document and its terms cannot bind outsiders without their express agreement. In effect, this has the result that outsiders can hold Jo liable for debts amounting to more than her agreed limit of $1,000. She would, however, be entitled to claim any additional sum paid over that amount from the other two partners.

Upon dissolution, the value of the partnership property is realised and the proceeds are applied in the following order:

(i) in paying debts to outsiders;
(ii) in paying to the partners any advance made to the firm beyond their capital contribution;
(iii) in paying the capital contribution of the individual partners.

Any residue is divided between the partners in the same proportion as they shared in profits (s.44 PA 1890)).

If the assets are insufficient to meet debts, partners' advances and capital repayments, then the deficiency has to be made good out of any profits held back from previous years, or out of partners' capital or by the partners individually in the proportion to which they were entitled to share in profits.

Applying these rules to the partnership in question, the first step is for the value of the partnership assets to be realised in order to pay off the debts owed to the various outside creditors. As stated, the partnership assets are worth $5,000 and it has debts to outside creditors of $9,000. As a result, the partnership has external debts of $4,000. If the partnership cannot pay the outstanding debts, then the individual partners will become personally liable for any outstanding debt. Although, under s.9 PA 1890, partnership debts are said to be joint, the Civil Liability Act 1978 provides that a judgement against one partner does not bar a subsequent action against the other partners.

As the value of the assets is insufficient to cover all of these debts, the partners will be required to contribute additional funds to make good the shortfall. The losses will be met according to the partnership agreement, which stated that all profits and losses were to be divided in proportion to the capital contribution. Consequently, the partners will be required to contribute as follows:

Han: $2,400
Ita: $1,200
Jo: $400

Jo, of course, has the right to recover any payment she makes beyond her original contribution of $1,000 from the other two partners.

The final stage in the problem is to consider Han's advance of $1,000 to the partnership. In this case, the losses will be divided between the parties in the ratio of 6:3:1, as with the other losses; so Han will lose another $600, and Ita a further $300. Jo's loss of $100 will be split between Han and Ita, so, in effect, only Ita will be required to pay an additional $50.

1 This question requires candidates to explain the meaning of the two acronyms UNCITRAL and UNIDROIT and the scope of operation of the two organisations those acronyms represent.

(a) 4–6 marks A thorough to complete description of the structure and functions of UNCITRAL, together with examples of its output.

2–3 marks A less detailed treatment of UNCITRAL but still covering its main purpose.

1 mark Weak answer, perhaps just providing some examples with no explanation of model laws.

0 marks No appropriate knowledge whatsoever.

(b) 3–4 marks A good knowledge of the operation of UNIDROIT.

1–2 marks Little detailed knowledge of the work of UNIDROIT, but some awareness of its role.

0 marks No knowledge of the topic.

2 This question requires candidates to explain the circumstances under which arbitration awards made under the UNCITRAL Model Law on International Commercial Arbitration may be enforced, but, more importantly, it also requires an explanation of the grounds on which such decisions and awards may be refused by the courts.

(a) 2–3 marks A good to full explanation of the way in which arbitration awards may be enforced. It is very likely that detailed reference will be made to Articles 35 of the Model Law.

1 mark Unbalanced answer, perhaps lacking in detail in relation to the provisions of the Model Law.

0 marks No knowledge of the topic.

(b) 5–7 marks A good to full explanation of the circumstances under which arbitration awards may be refused. It is likely that reference will be made to Article 36 of the Model Law.

3–4 marks Sound understanding, but perhaps no reference to the provisions of the Model Law.

1–2 marks Some, but limited, knowledge only about the topic.

0 marks No knowledge of the topic.

3 This question requires candidates to explain the rules governing the seller's obligations in respect of the quality of the goods under the UN Convention.

8–10 marks Thorough to complete answers, showing a detailed understanding of the Convention rules.

5–7 marks A clear understanding of the topic, perhaps lacking in detail.

2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.

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

4 This question requires candidates to consider the relatively recent legislation that seeks to control bribery.

(a) Requires a general definition/consideration of bribery.

1–2 marks	Fair to full answer.
0 marks	No knowledge of the topic.

(b) Requires a consideration of the offences.

5–6 marks	Full to complete examination of the four offences with some explanation.
3–4 marks	Some, but not detailed, awareness of the offences.
1–2 marks	Some, but little, awareness of the offences.
0 marks	No knowledge whatsoever of the topic.

(c) Requires a consideration of the defence of adequate procedures.

2 marks	Good explanation of the defence.
1 mark	Some, but not detailed, awareness of the defence.
0 marks	No understanding at all.

5 This question requires candidates to explain the rules relating to the lawful distribution of company dividends and further requires the candidates to focus on the different rules that apply to public and private companies. Although divided into three parts, candidates may provide a global answer.

8–10 marks	A thorough understanding of the law relating to dividends as it applies to both public and private companies. Cases may well be cited and will be credited.
5–7 marks	A clear understanding of the general law, but perhaps lacking in detail or unbalanced in only dealing with one of the types of company.
2–4 marks	Some, but limited, understanding of the law.
0–1 mark	Little or no knowledge of the law.

6 This question requires candidates to consider three of the duties owed by directors to their companies. Although divided into three parts, candidates may provide a global answer.

8–10 marks	Clear explanation of the three duties.
5–7 marks	Fair knowledge of the duties, but perhaps lacking in detailed explanation.
2–4 marks	Some knowledge of the duties, perhaps merely dealing with one or two elements of the answer.
0–1 mark	Very little, if any, knowledge of the topic.

7 The first part of this question requires candidates to discuss the meaning of the term bill of lading. The second part involves a discussion of the term bill of exchange.

(a)	4–5 marks	Thorough to complete explanation of a bill of lading.
	2–3 marks	Fair to good treatment, but perhaps lacking in some detail.
	0–1 mark	Little, if any, understanding of the term.
(b)	4–5 marks	Thorough to complete explanation of a bill of exchange.
	2–3 marks	Fair to good treatment, but perhaps lacking in some detail.
	0–1 mark	Little, if any, understanding of the term.

8 This question requires candidates to explain the circumstances under which a party can suspend or avoid a contract under the UN Convention on the International Sale of Goods on the grounds of anticipatory breach of contract. It requires candidates to analyse a problem scenario and explain and apply the law appropriately. It is assumed that candidates will consider the meaning and consequences of anticipatory breach in relation to part (a), hence the fact that it carries additional marks. However, such marks may be gained in relation to part (b) where they are considered in that part.

(a) 6–7 marks Good to complete answer which shows thorough knowledge of anticipatory breach and the appropriate provisions of the convention, together with accurate application of the law to the facts of the scenario.

3–5 marks Fair explanation of anticipatory breach and the provisions of the convention as it applies to anticipatory breach of contract, but perhaps lacking in detail, and application.

1–2 marks Some basic knowledge of what is involved in anticipatory breach under the convention, but no real depth of understanding, or lacking in application.

0 marks No knowledge of the topic whatsoever.

(b) 2–3 marks Accurate application of the law to the facts of the scenario.

1 mark Some, if limited, application.

0 marks No, or totally wrong, application.

9 This question requires candidates to consider several related points concerning the removal of directors and the nature of the articles of association and how they can be altered.

(a) 2 marks Complete explanation of the procedure for removing a company director.

1 mark Some knowledge, but lacking detail.

0 marks No knowledge whatsoever.

(b) 3–4 marks Identification of some of the central issues together with an accurate application of the appropriate law. Case authorities may well be cited.

1–2 marks Weak answers which might recognise what the question is about, but show little ability to analyse or answer the problem as set out. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of law.

0 marks No knowledge of the topic shown.

(c) 3–4 marks Identification of some of the central issues together with an accurate application of the appropriate law. Case authorities may well be cited.

1–2 marks Weak answers which might recognise what the question is about, but show little ability to analyse or answer the problem as set out. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of law.

0 marks No knowledge of the topic shown.

10 This question requires candidates to explain and apply the rules governing liability for debts on the dissolution of a partnership.

8–10 marks This should provide a clear understanding of the legal rules and apply them accurately to the facts of the situation.

5–7 marks This may show some detailed knowledge of the legislation but inability to apply it accurately.

2–4 marks Some, but limited, understanding of the law and poor application.

0–1 mark Nothing but the briefest reference to the legislation and failure to apply it to the problem scenario.