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

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

Civil cases are referred to by the names of the parties involved in the dispute, for example, *Smith* v *Jones*. In civil law, a claimant sues (or 'brings a claim against') a defendant and the degree of proof is *on the balance of probabilities*. In relation to the CA 2006 the duties owed to companies by directors set out in ss.171–177 may be cited as examples of civil liability, and directors in breach being liable to recompense the company for the consequences of their failure to comply with those duties, as is set out in s.178.

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

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

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

Magistrates' courts have a significant civil jurisdiction, especially under the Children Act 1989, as 'family proceedings courts', but the main civil courts are the county court and the High Court.

There are about 220 county courts in England and Wales. They are presided over by District Judges and circuit judges. County courts hear small claims, that is, those whose value is £5,000 or under, and fast track cases.

The High Court is divided into three divisions. The Queen's Bench Division deals with contract and tort. Chancery deals with cases involving land, mortgages, bankruptcy and probate. The Family Division hears matrimonial and child related matters and its Divisional Court hears appeals from magistrates' courts and county courts on these issues. Appeal is to the Court of Appeal and then to the Supreme Court on a significant point of law.

2 **(a)** As regards the appointment of arbitrators, the parties to the arbitration are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of Article 11, which pass responsibility to the court where the parties fail to act to appoint arbitrators.

Article 10(1) gives the parties the power to determine the number of arbitrators. However, if they do not exercise this discretion then the default position, under Article 10(2), is that the number of arbitrators shall be three.

Article 11(1) makes it clear that no-one is to be precluded from acting as an arbitrator by reason of their nationality. However, even here the parties may provide otherwise.

Where the parties fail to agree otherwise the default position is that in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator.

If one of the parties fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the appropriate court or other specified authority (Article 11(3)(a)). In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the appropriate court or other authority (Article 11(3)(b)).

(b) The appointment of a person as an arbitrator may only be challenged on two grounds:

– where circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or
– where the person appointed does not possess qualifications agreed to by the parties.

In addition a party cannot challenge an arbitrator appointed by them, or in whose appointment they participated, for any reasons they were aware of before the arbitrator was appointed.

(c) The decision of the arbitration tribunal shall be made in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute, but in the absence of any such decision the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (Article 28). Article 29 of the Model Law goes on to provide that where there is more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members, unless, as usual, the parties have agreed otherwise.

Article 31 requires that the award be made in writing and has to be signed by the arbitrators. However, in arbitral proceedings with more than one arbitrator, the signatures of the majority of the panel is sufficient, as long as the reason for any omitted signature is stated. Also under Article 31(2) the award has to state the reasons upon which it is based, unless once again the parties have agreed that no reasons are to be given or the award is a settlement based on the agreement of the parties (Article 30). The award has to state its date and the place of arbitration and a copy signed by the arbitrators has to be delivered to each of the parties.

3 (a) Offer

Part Two of the United Nations Convention for the International Sale of Goods provides that the formation of the contract is concluded through the exchange of an offer, followed by due acceptance of that offer. Once an offer has been accepted, a contract comes into existence and the parties are bound by the terms of their agreement.

Article 14(1) of the 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 indicate that the offeror intends to be bound on those terms in the case of acceptance.

The offer becomes effective when it reaches the offeree (Article 15).

(b) Offers may be terminated before acceptance and the consequent formation of a binding agreement, in one of three distinct ways: withdrawal, rejection, or revocation.

Withdrawal
Withdrawal is provided for in Article 15(2), which simply states that an offeror may withdraw their offer as long as the withdrawal reaches the offeree before or at the same time as the offer. This should not be confused with the withdrawal of an acceptance *by* the offeree, which is covered by Article 22.

Rejection
Alternatively the offeree may reject the offer, in which case it comes to an end and cannot be subsequently reactivated and accepted by the offeree. This is equally true even where the offer was of an irrevocable nature. Such a rejection may be express, where the offeree actually informs the offeror that they are not accepting the offer or it may be implied from the conduct of the offeree, which makes it apparent that they have no intention of accepting the offer. Rejection takes place when it reaches the offeror (Article 17).

Revocation
The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. Offers may be revoked as long as any revocation reaches the offeree before he has dispatched an acceptance. However, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. An offer becomes effective when it reaches the offeree.

It is worth repeating that an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer (Article 15(2)). Thus the difference between withdrawal and revocation is a matter of time rather than intention.

4 The first part of this question requires candidates to discuss the role of the company promoter and the second part the concept of the pre-incorporation contract in company law.

(a) There is no general statutory definition of a promoter in company law. In *Whaley Bridge Calico Printing Co* v *Green* (1880) Bowen L described the term promoter as 'a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence'.

Whether a person is a promoter or not is a question of fact, and the determining factor is whether the individual in question will exercise control over the affairs of the company both before and after it is formed, up until the process of formation is completed. A person is not to be treated as a promoter of a company simply on the basis that they act in a professional capacity with respect to the establishment of a company. Thus solicitors and accountants employed purely in their professional capacity in order to establish a company will not be considered to be promoters.

As with directors, promoters are in a fiduciary relationship with the company they are establishing. This is a position akin to that of a trustee and the most important consequence that flows from it is that the promoter is not entitled to make a profit from establishing the company, without full disclosure of that profit to either an independent board of directors, or to the existing and prospective shareholders in the company. Such a situation usually arises in situations where the promoters sell assets to the company they are in the process of forming. Failure to make such a disclosure will enable the company to: rescind the contract; claim damages or hold the promoter liable to account for any profit made (*Erlanger* v *New Sombrero Phosphate Co* (1878), *Gluckstein* v *Barnes* (1900); *Re Leeds* & *Hanley Theatres of Varieties* (1902)).

(b) A pre-incorporation contract is a contract which promoters enter into, naming the company as a party, prior to the date of the certificate incorporation and hence prior to its existence as a separate legal person. However, in law, the company cannot enter into a binding contract until it has come into existence through incorporation. The legal consequences of this situation are that:

- the company, when formed, is not bound by the contract even if it has taken some benefit under the contract.
- the company cannot ratify or adopt the contract even if it wishes to after it has become incorporated.
- The person who purportedly contracted on behalf of a company in respect of pre-incorporation contract is treated as if he had contracted on his own behalf.

These consequences are a result of the ordinary rules of agency law as stated in *Kelner* v *Baxter* (1866) but the third one has been restated and confirmed in s.51 Companies Act (CA) 2006, which provides that:

'a contract that purports to be made by or on behalf of a company, at a time when the company has not been formed, has effect, *subject to any agreement to the contrary*, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly.'

It can be seen from the wording of s.51 that liability of the agent is contractual, but it should be noted that this liability arises whether the promoter contracts as agent or not. Thus in *Phonogram Ltd* v *Lane* (1982) it was proposed to form a company, FM Ltd, to run a pop group. L made a contract with Phonogram Ltd 'for and on behalf of FM Ltd'. However, FM Ltd was never actually incorporated. Consequently the court held that Lane was personally liable for the money advanced to FM Ltd by Phonogram Ltd. The Court of Appeal held that the fact that Lane had signed 'for and on behalf of FM' made no difference to his personal liability.

To give effect to the words '*subject to any agreement to the contrary*' in s.51, the words used would need to amount to an express exclusion of liability. However, promoters can avoid liability for pre-incorporation contracts in a number of ways. For example:

- it is possible to avoid entering the contract until the company has actually been incorporated.
- the promoter may enter into an agreement 'subject to contract' with the effect that there is no binding agreement until the company itself enters into one. As the promoters are usually the first directors of the company, they can ensure that the company does in fact enter into the pre-arranged contract.
- the promoters can expressly provide that they will bear no responsibility for any pre-incorporation contracts.

5 This question requires candidates to consider the procedures relating to the issuing of shares to the public and the rules relating to the payment for shares issued.

In order to register for incorporation, s.9 Companies Act (CA) 2006 requires companies with share capital to submit a statement of capital and initial shareholdings and s.10 requires the nominal value of those shares to be stated. This designated amount, set out at the initial registration of the company, establishes the nominal value of the shares in the company. Once issued the market value of the shares may diverge from that nominal value, but that nominal value remains fixed, unless altered through a strictly regulated procedure.

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

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

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

Applying the rules relating to capital maintenance, it follows that what the share premium account cannot be used for is to pay dividends to the shareholders.

The rules relating to share premiums apply whether the issue is for cash or otherwise and so a share premium account can arise where shares are issued in exchange for property which is worth more than the par value of the shares (*Shearer* v *Bercain Ltd* (1980)). In the light of that case, relief from the strict application of the rules relating to premium was introduced in the case of certain company group reconstructions (s.161 CA 2006) and company mergers (s.162 CA 2006).

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

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

The reason for such rigour in relation to preventing the issue of shares at a discount is the protection of the company's creditors. Shareholders were seen to enjoy the benefit of limited liability but that privilege was only extended to them on the basis that they fully subscribed to the company's capital. That capital being seen as a creditor fund against which they could claim in the event of a dispute.

In private companies it is possible to avoid the strict effect of this rule by exchanging shares for property that is overvalued (*re Wragg* (1897)). In public companies all such non-cash consideration has to be valued (s.593 CA 2006). Equally the effect of issuing shares at a discount may arise where the company pays underwriting commission under s.553 CA 2006 which permits a company, subject to authorisation in its articles and to disclosure, to issue shares at up to a 10% commission.

It should also be noted that the above only applies to shares. Debentures may be issued at a discount. This is the case even where they are convertible into shares, as long as they do not carry an immediate right to conversion (*Mosely* v *Koffyfontein Mines* (1904)).

6 **(a)** Corporate governance refers to the way in which companies are run and operated with the stated aim that they are run effectively and properly and are not subject to mismanagement, as has unfortunately been the case in regard to some notorious cases in the fairly recent past. Corporate governance has been defined as the system through which business corporations are directed and controlled. The corporate governance structure relates to the distribution of rights and responsibilities among different participants in the organisation, such as the board, managers, shareholders and other stakeholders, and lays down the procedures for decision-making in relation to corporate affairs. Corporate governance also provides, not only the structure through which the company objectives are set, but also the means through which those objectives are achieved and the process of monitoring the company's performance in the pursuit of those objectives.

According to the UK Corporate Governance Code, 'the purpose of corporate governance is to facilitate effective, entrepreneurial and prudent management that can deliver the long-term success of the company', and the classic definition of corporate governance is:

'…[T]he system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to apppoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting.'

'Corporate governance is therefore about what the board of a company does and how it sets the values of the company, and is to be distinguished from the day to day operational management of the company by full-time executives.'

(b) In order to ensure the effective corporate governance framework necessary to promote confidence in corporate reporting and governance, it has been deemed necessary to set out defined rules and regulations, including voluntary codes.

(i) The OECD principles on corporate governance are as follows:

- The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.
- The corporate governance framework should protect and facilitate the exercise of shareholders' rights.
- The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.
- The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.
- The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.
- The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

The principles are non-binding and do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest various means for achieving them.

(ii) In the United Kingdom the corresponding code is the UK Corporate Governance Code which was issued in May 2010 and replaced the previous Combined Code On Corporate Governance. The code is produced and overseen by the Financial Reporting Council (FRC), an independent regulator charged with that duty.

All companies incorporated in the United Kingdom that are listed on the main market of the London Stock Exchange must comply with its Listing Rules, which require them to account for the application of the code.

The code adopts a principles approach in that it sets out what are considered best practices for running companies rather than imposing strict rules which must be adhered to. As a consequence, it establishes what is known as the 'comply or explain' approach and companies that are subject to its operation must comply with its rules and general principles, or explain why they have not complied with them. Whilst listed companies are expected to comply with the Code's provisions most of the time, it is recognised that departure from its provisions may be justified in particular circumstances. Every company must review each provision carefully and give a considered explanation if it departs from the code provisions.

The Code establishes principles of corporate governance under five broad areas:

- leadership;
- effectiveness;
- accountability;
- remuneration;
- relations with shareholders.

It also focuses attention on the role of institutional investors, whose passivity has been much criticised in the past. This aspect of corporate governance will be dealt with in a separate code relating to corporate stewardship and will cease to apply in this Code when this comes into effect.

(c) As regards the structure of the board of directors, the OECD principles state generally that:

'Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key executives, and board remuneration. While the responsibility for financial reporting, remuneration and nomination are frequently those of the board as a whole, independent non-executive board members can provide additional assurance to market participants that their interests are defended. The board may also consider establishing specific committees to consider questions where there is a potential for conflict of interest. These committees may require a minimum number or be composed entirely of non-executive members.'

More specifically, the UK Corporate Governance Code requires that the board should include an appropriate combination of executive and non-executive directors (and in particular independent non-executive directors), such that no individual or small group of individuals can dominate the board's decision-taking. The requirement of independence if emphasised in the code and factors that might suggest a lack of genuine independence could include facts such as whether the director in question:

- has been an employee of the company or group within the last five years;
- has, or has had within the last three years, a material business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship with the company;
- has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme;
- has close family ties with any of the company's advisers, directors or senior employees;

– holds cross-directorships or has significant links with other directors through involvement in other companies or bodies;
– represents a significant shareholder; or has served on the board for more than nine years from the date of their first election.

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

As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy. Non-executive directors should scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance. They should satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible. They are responsible for determining appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary removing, executive directors, and in succession planning.

The Code requires that non-executive directors should:

– appoint one of the independent non-executive directors to be the senior independent director to provide a sounding board to the chairman and to serve as an intermediary for the other directors when necessary. The senior independent director should be available to shareholders if they have concerns.
– have meetings with the chairman without the executive directors present. They should also meet without the chairman present at least annually to appraise the chairman's performance, and on other such occasions as are deemed appropriate.
– where they have concerns which cannot be resolved about the running of the company or a proposed action, ensure that they are recorded in the board minutes.
– give a statement to the chairman for circulation to the board, if they have such unresolved concerns on resignation.

It is important to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former (*Dorchester Finance Co* v *Stebbing* (1989)) and consequently the code stresses that it is up to each non-executive director to reach a view as to what is necessary in particular circumstances to comply with the duty of care, skill and diligence they owe as a director to the company.

7 (a) A bill of lading is a document that 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 that 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.

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 in negotiable or non-negotiable form. 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) The bill of lading has an important part to play in the passage of risk and consequently the liability for any loss or damage sustained by goods in transit, or alternatively the responsibility for insuring the goods in question. Article 67(1) of the UN Convention for the International Sale of Goods (CISG) provides that if a contract of sale involves carriage of goods and the seller is not bound to hand them over at a particular place, then the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. Further, if the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

However, the risk does not pass to the buyer until the goods are clearly identified to the contract, and Article 67(2) states that such identification may be done by:

– markings on the goods,
– notice given to the buyer, or
– shipping documents, or otherwise.

By shipping documents is meant 'bill of lading', hence the importance of such documents in relation to the passage of risk. It has to be emphasised, however, that the bill of lading must sufficiently identify the goods in question, thus a bill of lading referring to an undifferentiated amount of goods would not be sufficiently certain to pass on liability for risk.

The fact that the seller is authorised to keep the bill of lading does not affect the passage of the risk.

8 As a leading academic has pointed out, 'delivering too early and too much is no less a breach of contract than delivering too late and too little'.

Early delivery

Article 33 expressly provides that if a date is fixed by or determinable from the contract, the seller must deliver the goods on that date, and Article 52(1) provides that if the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

Consequently whether to accept early delivery or not is clearly in the hands of the recipient/buyer, but the accepted view is that such early delivery does not give rise to a right to repudiate the contract and the seller would be entitled to arrange for the subsequent redelivery on the correct date as per the contract. The reason for this is apparent from the question scenario in that Az is deliberately trying to pass on his liability for keeping the metals to the other parties. Consequently, if the recipients of the early delivery do not want to assume the expense of storing the goods they are entitled to decline acceptance of the delivery. However, following this line of reasoning it is also apparent that the recipient is entitled to refuse early tender of the goods, they should not be able to repudiate the contract completely and would have to accept the goods when they were re-delivered on the correct date as stated in the contract. Articles 34 and 37 would also appear to support this approach.

However, it should be remembered that under Article 86(2), the buyer is obliged to take possession of the goods on behalf of the seller, but that is distinct from taking delivery, i.e. accepting the goods. Taking possession without taking delivery requires immediate notification to the seller, according to Article 27, so as to avoid an erroneous conclusion of tacit acceptance of delivery.

Delivery of additional amounts

Under CISG Article 52(2), if the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery *of the excess quantity*. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate. A buyer who retains the goods without objection is deemed to have accepted the whole (Article 39) and must pay at the contract rate. However, where it is not feasible for the buyer only to reject the excess quantity, for example it is legally impossible to take delivery of only the contract amount, where for instance the whole shipment travels under one single bill of lading they may be entitled to reject the whole shipment if the delivery of the excess quantity constitutes a fundamental breach.

It is important to emphasise that if the buyer accepts the whole or part of the excess amount or simply fails to give notice according to Article 39, then the price they have to pay for the excess is the contract price not the market rate. Consequently, where market prices are rising the buyer would be well advised to accept the whole amount delivered. Alternatively, in the case of falling market prices they would be well advised to reject the additional amount or at least to negotiate a lower price for the excess. If the buyer refuses to accept the excess amount, as with early delivery above, they can claim for costs of storing the excess or indeed the costs of separating that excess from the amount actually contracted for.

Applying the foregoing to the situation of Brad, Chad and Dan. As regards the early delivery in the question scenario, it is apparent that all three of the recipients can refuse to accept the metals when they arrive before the contractual date of delivery. Whether or not they choose to exercise that right is for them to decide.

As for the delivery of additional metal to Chad and Dan, it is extremely likely that the former will not accept the additional amount of copper and require Az to pay any costs involved in returning it to him. On the other hand Dan is extremely likely to want to keep the additional amount of tin and pay the contract price, rather than the new market price.

9 This question requires candidates to consider the authority of company directors to enter into binding contracts on behalf of their companies.

Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.

Article 3 of the model articles of association for private companies provides that the directors of a company may exercise all the powers of the company. It is important to note that this power is given to the board as a whole and not to individual directors and consequently individual directors cannot bind the company without their being authorised, in some way, so to do. There are three ways in which the power of the board of directors may be extended to individual directors.

(i) The individual director may be given *express authority* to enter into a particular transaction on the company's behalf. To this end, Article 5 allows for the delegation of the board's powers to one or more directors. Where such express delegation has been made then the company is bound by any contract entered into by the person to whom the power was delegated. However, in the present situation it does not appear that Hope has been expressly given the power to enter into the contract with Ima, and so the company cannot be made liable on this basis.

(ii) A second type of authority that may empower an individual director to bind his company is *implied authority*. In this situation, the person's authority flows from their position. Thus, although the board of directors may expressly confer any of their powers on a director as they see fit under Article 5, the mere fact of appointment to a particular position will mean that the person so appointed will have the implied authority to bind the company to the same extent as people in that position usually do. Whereas the previous model articles of association specifically provided for the delegation of the board's general authority to one or more managing directors, the new model articles make no such reference, other than the general power under Article 5. However, as implied actual authority to bind a company could always arise as a consequence of the appointment of an individual to a position other than that of managing director that previously specific rule now becomes the general rule in relation to implied authority. For example in *Hely-Hutchinson* v *Brayhead Ltd* (1968), although the chairman and chief executive of a company acted as its *de facto* managing director, he had never been formally appointed to that position. Nevertheless, he purported to bind the company to a particular transaction. When the other party to the agreement sought to enforce it, the company claimed that the chairman had no authority to bind it. It was held that, although the director derived no authority from his position as chairman of the board, he did acquire such authority from his position as chief executive and thus the company was bound by the contract he had entered into on its behalf.

Once again, however, it would appear that Ima cannot make use of this method of fixing Goal Ltd with liability for her contract, as Hope has not been appointed to any executive office in the company.

(iii) The third way in which an individual director may possess the power to bind his company is through the operation of ostensible authority, which is alternatively described as apparent authority, or agency by *estoppel*.

This arises where an individual director has neither express nor implied authority. Nonetheless, the director is held out by the other members of the board of directors as having the authority to bind the company. If a third party acts on such a representation, then the company will be *estopped* from denying its truth.

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

The situation in the problem is very similar to that in *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd*. The board of Goal Ltd has permitted Hope to act as its chief executive, and he has even used that title. The board has therefore acquiesced in his representation of himself as Goal Ltd's chief executive and consequently they and Goal Ltd are bound by any contracts he might make within the scope of a chief executive's implied authority. As entering into a contract to draw up plans would clearly come within that authority, Goal Ltd will be liable to pay Ima or face an action for breach of contract.

10 One of the most significant advantages of the limited liability company is that once members have paid the full nominal value of their shares, they no longer face the prospect of any further liability. Even where the shares are not fully paid, the shareholders at least are clearly aware of the maximum potential payments that they stand to make, i.e. the amount remaining unpaid on their shares. This is precisely the meaning of limited liability – shareholders know exactly, and can control, the amount that they stand to lose if their company goes into insolvent liquidation. This situation can be contrasted with the situation of the ordinary partnership where the liability of the partners is not only uncertain, but also unlimited.

Personal guarantees are the means by which powerful lenders avoid the limited liability of the members of the company to which they lend money. Rather than merely relying on the capital of the company, the lenders require the members to enter into a contractual agreement that they will back the debts of the company with their own personal wealth. Effectively this device removes limited liability with respect to those lenders who are in a position to demand personal guarantees, although not ordinary trade creditors. In that way it undermines the theoretical effectiveness of limited liability by refusing to recognise it in practice.

When companies borrow money from a bank it is usual for them to provide security for any loans, known as debentures, given to them. 'Security' means that, in the event of the company being wound up, the creditor (payable) with a secured debt will have priority as regards repayment over any unsecured creditor (payable). A fixed charge represents a legal claim against a particular item of property owned by the company issuing the debenture. The company cannot dispose of the property charged without the consent of the charge holder and in the event of the company failing its duties, the creditor (payable) can have the property sold to realise the amount of their claim. A floating charge, on the other hand, is most commonly made in relation to the 'undertaking and assets' of a company and does not attach to any specific property whilst the company is meeting its requirements as stated in the debenture document.

Applying the foregoing to facts in the problem scenario it can be seen that the company has debts totalling \$40,000; \$30,000 owed to Oop bank plc, of which \$20,000 is secured by a fixed charge over the company's land and \$10,000 to ordinary trade creditors, with assets of \$27,750.

Oop bank plc will be able to assert its priority over the creditors (payables) to the extent of its fixed charge and thus it will recover its original loan for \$20,000 from the sale of the company's land. That will leave the company with unsecured debts of \$10,000 to the trade creditors and \$10,000 to Oop bank plc. However, as the shareholders have only partly paid for their shares, they will be required to make good the difference, up to the nominal value of their shares, to pay off the debts. In effect this means that Mat, Mary and Norm will each have to provide a further \$750, making a total of \$2,250. As a result the company will have a total of \$10,000 to pay unsecured debts of \$20,000. Consequently all the unsecured debts will be paid off from the company's remaining assets at the rate of 50 cents per \$1 owed.

It remains, however, to consider Mat's personal guarantee to Oop bank plc for the company's debts. As the company has outstanding unpaid debts of $5,000 owed to the bank, Mat will have to make good that amount from his personal assets.

In conclusion it can be seen that:

- the bank will receive all of its debts, either from the company or from Mat personally;
- the unsecured creditors (payables) will receive 50% of their debts from the company;
- both Mary and Norm will have to pay $750 towards the company's debts;
- Mat will have to pay both $750 on his unpaid shares and a further $5,000 on the basis of his personal guarantee.

Tutorial note

In the problem scenario Oop bank plc held a fixed charge over the land owned by the company. The situation would have been different in English law had its debt been secured by a floating charge. In order to improve the position of unsecured creditors, the Enterprise Act 2002 introduced the concept of ring-fencing some of a company's assets for the exclusive use of unsecured creditors. Under the new regime, s.176A of the Insolvency Act 1986, which applies to floating charges created after 15 September 2003, a liquidator, administrator or receiver is required to make a prescribed part of the company's net assets available for the satisfaction of unsecured debts before any money can be paid in satisfaction of a floating charge. Currently, the procedure does not apply if the company's assets are less than £10,000; thereafter, the prescribed amount is set at 50% of the first £10,000 and 20% of any assets above that value up to a maximum of £600,000.

1 This question requires candidates to explain the difference between criminal and civil law and to demonstrate their understanding by providing examples of each category. As there are so many potential examples the model answer has only focused on one aspect, but any suitable alternative example will be credited.

8–10 marks	A detailed answer explaining the types of law and citing appropriate examples, together with an indication of the civil and criminal courts.
5–7 marks	A less detailed answer; perhaps too general and lacking clear examples to support the understanding or perhaps missing out some important court.
2–4 marks	Some understanding of the area, but lacking in required detail.
0–1 mark	Little or no knowledge of the area.

2 This question requires candidates to consider aspects of the UNCITRAL Model Law on International Commercial Arbitration relating to the way in which members of an arbitration panel are appointed and the way in which they reach their decisions.

(a)	4 marks	Thorough to complete explanation of the appointment procedure.
	2–3 marks	Some, but limited, knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.
	0–1 mark	Very little or no understanding whatsoever.
(b)	2 marks	Full explanation of the topic.
	0–1 mark	Very little or no understanding whatsoever.
(c)	4 marks	A good to complete explanation of how arbitration tribunals are required to reach their decisions.
	2–3 marks	Some idea about the issues but lacking in detail.
	0–1 mark	Very little, if any, understanding of the issues.

3 This question requires candidates to explain the law relating to contractual offers and the circumstances under which they can be terminated.

(a)	4–5 marks	Thorough to complete explanation of the meaning of offer.
	2–3 marks	Some, but limited, knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.
	0–1 mark	Very little or no understanding whatsoever.
(b)	4–5 marks	A good to complete explanation of how offers may be terminated.
	2–3 marks	Some idea about the issues but lacking in detail.
	0–1 mark	Very little, if any, understanding of the issues.

4 The first part of this question requires candidates to discuss the role and legal duties of promoters in company law. The second part of the question requires an explanation of the meaning of the term ‘pre-incorporation contract’ and the potential consequences of such a contract.

(a)	4–5 marks	Good to thorough explanation of the nature and function of a company promoter. The very best answers should have some reference to the fiduciary nature of the promoter’s position with respect to the company with perhaps reference to cases.
	2–3 marks	Some, but not very clear, understanding of the role of the promoter, perhaps lacking in detailed legal knowledge of the subject.
	0–1 mark	Little, if any, knowledge of the topic.
(b)	4–5 marks	Thorough explanation of the common law and statutory provisions, perhaps with cases and some suggestion as to how to avoid the problems inherent in pre-incorporation contracts.
	2–3 marks	Some, but limted, understanding.
	0–1 mark	Little, if any, knowledge of the topic.

5 This question invites candidates to explain the meaning of the two rules relating to the payment for shares. Part (a) relating to payment at a premium carries 5 marks and part (b), which relates to payments at a discount, carries 5 marks.

(a) 4–5 marks A good to complete explanation of what is meant by share premiums and how they are to be treated in law. Reference must be made to the changed provisions of the Companies Act 2006.
2–3 marks Some idea about the issues but lacking in detail.
0–1 mark Very little, if any, understanding of the issues.

(b) 4–5 marks Full understanding and explanation of the topic. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.
2–3 marks Some knowledge of the topic but lacking in detail.
0–1 mark Little, if any, knowledge of the topic.

6 It is likely that this question will be answered globally and will be marked as such.

8–10 marks A good explanation of the meaning of corporate governance generally, the OECD principles or the UK Corporate Governance Code in particular, and the role of non-executive directors.
5–7 marks A sound understanding of the area, although perhaps lacking in detail or balance.
2–4 marks Some understanding of the area, but lacking in detail, perhaps failing to deal with the code.
0–1 mark Little or no knowledge of the area.

7 The first part of this question requires candidates to discuss the meaning of the term bill of lading. The second part the question involves a consideration of the function of bills of lading in the passage of risk for goods.

(a) 4–5 marks Good to thorough explanation of the nature of a bill of lading.
2–3 marks Some, but not very clear, understanding of the term or perhaps lacking in detail.
0–1 mark Little, if any, understanding of the topic.

(b) 4–5 marks Good to thorough explanation of the function of a bill of lading in the passing of risk.
2–3 marks Some, but not very clear, understanding of the topic or perhaps lacking in detail.
0–1 mark Little, if any, understanding of the topic.

8 This question asks candidates to analyse the problem scenario in terms of the rules relating to early delivery and delivery of excess goods under Article 52 of the UN Convention for the International Sale of Goods.

8–10 marks A thorough to complete understanding of the legal issues in the question, citing Article 52, together with a clear analysis of the problem scenario and a correct application of the law to it.
5–7 marks Good understanding of the law and supporting analysis and application.
3–4 marks Some, if limited, knowledge of the law. Perhaps lacking in analysis and application.
0–2 marks Little understanding of the legal issues arising from the question.

9 This question focuses on the authority of individual directors and how companies may be fixed with liability for contracts entered into by them.

8–10 marks A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately. It is extremely likely that cases will be cited in support of the analysis and/or application and any reference to articles of association must refer to the provisions of the current model articles.
5–7 marks A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 marks Some, but limited, understanding of the law or completely lacking in application.
0–1 mark Little or no knowledge the relevant law.

10 This question requires candidates to consider a number of issues relating to companies' and shareholders' liability for debts.

8–10 marks A thorough to complete understanding of the legal issues in the question together with a clear analysis of the problem scenario and a correct application of the law to it.
5–7 marks Good understanding of the law and supporting analysis and application.
2–4 marks Some, if limited, knowledge of the law. Perhaps lacking in analysis and application.
0–1 mark Little understanding of the legal issues arising from the question.