

**MARK SCHEME for the October/November 2009 question paper
for the guidance of teachers**

9084 LAW

9084/32

Paper 32 (Law of Contract), maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began, which would have considered the acceptability of alternative answers.

Mark schemes must be read in conjunction with the question papers and the report on the examination.

- CIE will not enter into discussions or correspondence in connection with these mark schemes.

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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

- recall, select, use and develop knowledge and understanding of legal principles and rules by means of example and citation

Analysis, Evaluation and Application

- analyse and evaluate legal materials, situations and issues and accurately apply appropriate principles and rules

Communication and Presentation

- use appropriate legal terminology to present logical and coherent argument and to communicate relevant material in a clear and concise manner.

Specification Grid

The relationship between the Assessment Objectives and this individual component is detailed below. The objectives are weighted to give an indication of their relative importance, rather than to provide a precise statement of the percentage mark allocation to particular assessment objectives.

Assessment Objective	Paper 1	Paper 2	Paper 3	Paper 4	Advanced Level
Knowledge/Understanding	50	50	50	50	50
Analysis/Evaluation/Application	40	40	40	40	40
Communication/Presentation	10	10	10	10	10

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Mark Bands

The mark bands and descriptors applicable to all questions on the paper are as follows. Maximum mark allocations are indicated in the table at the foot of the page.

Indicative content for each of the questions follows overleaf.

Band 1

The answer contains no relevant material.

Band 2

The candidate introduces fragments of information or unexplained examples from which no coherent explanation or analysis can emerge

OR

The candidate attempts to introduce an explanation and/or analysis but it is so fundamentally undermined by error and confusion that it remains substantially incoherent.

Band 3

The candidate begins to indicate some capacity for explanation and analysis by introducing some of the issues, but explanations are limited and superficial

OR

The candidate adopts an approach in which there is concentration on explanation in terms of facts presented rather than through the development and explanation of legal principles and rules

OR

The candidate attempts to introduce material across the range of potential content, but it is weak or confused so that no real explanation or conclusion emerges.

Band 4

Where there is more than one issue, the candidate demonstrates a clear understanding of one of the main issues of the question, giving explanations and using illustrations so that a full and detailed picture is presented of this issue

OR

The candidate presents a more limited explanation of all parts of the answer, but there is some lack of detail or superficiality in respect of either or both so that the answer is not fully rounded.

Band 5

The candidate presents a detailed explanation and discussion of all areas of relevant law and, while there may be some minor inaccuracies and/or imbalance, a coherent explanation emerges.

Maximum Mark Allocations:

Question	1	2	3	4	5	6
Band 1	0	0	0	0	0	0
Band 2	6	6	6	6	6	6
Band 3	12	12	12	12	12	12
Band 4	19	19	19	19	19	19
Band 5	25	25	25	25	25	25

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Section A

1 Critically examine the circumstances under which statements made by one party during oral contractual negotiations will become a term of the contract.

Candidates should introduce their response to this question by stating that in all but the simplest transactions, negotiations will preface the formation of a contract. These commonly take place orally and problems arise when although agreement is reached, parties disagree as to whether or not oral statements made beforehand were intended to be binding.

Traditionally, pre-contractual statements are classified by the courts as either representations or terms. Representations and terms must be defined and the respective effects of statements being untrue must be explained (i.e. action for misrepresentation or for breach of contract). There should be a clear indication made that whether statements are declared to have been mere representations or terms is a matter of the parties intentions, but candidates might question this approach.

Candidates should carry on to examine guidelines for the courts to use when parties' intentions are not evident – importance of the statement (*Bannerman v White*), special knowledge and skill (*Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd*, *Oscar Chess v Williams*) and timing of the statement (*Routledge v McKay*, *Schawel v Reade*).

Candidates are expected to critically examination of the way in which the law deals with these situations to reach band 4.

2 Consideration must be sufficient but need not be adequate. Analyse the meaning of this statement and evaluate the extent to which it is true with regard to the formation of valid contracts.

Candidates must introduce their response by explaining the doctrine of consideration and the enforcement of bargains. Consideration should be defined (*Currie v Misa*) and its general scope outlined. The rules of consideration might be listed, but detailed examination thereof should not be credited with the exception of rules pertinent to the question set.

Consideration must provide something beneficial to the promisee or detriment to the promisor and as long as it has some value in money terms or money's worth (*White v Bluett*), its actual value is unimportant. Candidates might cite a simple example: such as where a company may dispose of comparatively high value assets to its employees and ask for a nominal sum in return (such as £1) so as to enable title to be transferred legally by simple contract of 'sale' (consideration is the sign and seal of a bargain). Candidates might relate the rule back to the old idea of freedom of contract which allowed parties to make bargains that suit them without interference from the courts (*Thomas v Thomas*, *Chappell v Nestle*).

The issue of sufficiency of consideration might be further explored through the examination of cases involving the performance of an existing duty (*Collins v Godefroy*, *Glasbrook Bros v Glamorgan County Council*, *Stilk v Myrick*, *Hartley v Ponsonby*, *Williams v Roffey*). Does the mere performance of a duty owed either morally, legally or by existing contract ever amount to anything of real economic value?

Candidates must adopt an evaluative approach and make suitable comment on how true they feel the statement to be in order to reach band 4.

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- 3 With reference to decided case law and relevant rules for the formation of contracts, discuss the exact moment in proceedings when acceptance occurs and a binding contract results.**

Candidates must explain that contracts come into existence when a firm offer has been unconditionally accepted. Unconditional assent to the terms of the offer must be *defined* (*Tinn v Hoffman*) and its potential to be in oral or written form or implied by conduct should be explored and explained. Candidates should be credited for a brief examination of whether silence can also amount to an acceptance in law (*Felthouse v Bindley; re Selectmove*).

Candidates should explore the battle of the forms in some detail and examine whether it really is the 'last shot' that succeeds in such cases (*Butler Machine Tool Ltd v Ex-Cell-O Corp; British Road Services v Crutchley (Arthur V) Ltd*).

Candidates should also consider communication of acceptance (*Entores v Miles Far East Corporation*) and exceptions thereto, such as conduct and the posting rule (*Adams v Lindsell; Henthorn v Fraser; Byrne v Van Tienhoven; Holwell Securities v Hughes; Brinkibon v Stahag Stahl GmbH*)

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Section B

4 Using case law to support your views, consider Anthony's legal position when he decides to sell his computer to Carol rather than to David nor Lenka.

Candidates will have no trouble identifying offer and acceptance (formation of contract) as the crux of the issue here. Responses should be contextualised by stating the general rule regarding formation of contract: a contract cannot come into existence unless and until a firm offer has been made on certain terms which has been unconditionally accepted.

Anthony has sent emails to David and Lenka asking whether either is interested in buying his laptop. Is this a firm offer on certain terms or a mere invitation to treat? (*Gibson v Manchester City Council*) On the basis that he does not appear to be offering to sell at a set price, it would appear to be the latter, but candidates who interpret this as an offer to sell for £300 can also receive credit for later argument.

If an invitation to treat, then David's email amounts to an offer to buy for £300 by instalments. Lenka's letter would amount to an offer (once received by Anthony) to buy for £400). When she then telephones, she revokes the offer by letter (revocation any time prior to acceptance - *Dickinson v Dodds*) and replaces it with an offer to buy for £300.

With two offers on the table, Anthony decides to decline them both and sell to Carol – perfectly legitimate.

If initial email taken to be an offer to sell for £300, does David's immediate response amount to an unconditional acceptance or a counter offer (*Harvey v Facey*), or a mere request for further information?

What about Lenka's letter – would that create a binding contract on the basis of the posting rule? What about her subsequent phone-call?

Issues must be fully discussed and clear, compelling conclusions drawn. General, all-embracing and ill-focused responses or ones limited to factual recall are to be awarded a maximum mark within mark band 3.

5 Using case law to support your views, consider the effect of the circumstances set out above on the validity of the contract made for the vinyl records and of the contract made for the car. Advise Stan of the potential remedies available to him.

The scenario invites candidates to consider the effects of common and mutual mistake on the validity of contracts. Candidates should introduce responses by highlighting the general rule of law which states that mistakes do not invalidate contracts, thus encouraging parties to take care not to make mistakes when entering contracts. Candidates should then add that if considered sufficiently fundamental that it undermined the consent given to the agreement, the contract will be declared void.

In the case of the Elvis Presley records is this a case of common mistake as to the existence of the subject matter of the contract (*Couturier v Hastie*, *Associated Japanese Bank v Credit du Nord*)?

Did Stan know that Ollie owned an Elvis collection already? Did both parties have reason to believe that Ollie still owned and possessed the Elvis collection when the sale was agreed? Did Ollie by implication warrant the existence of the records (*McRae v Commonwealth Disposals Commission*)? If fundamental mistake is established, then the contract would be void, leaving

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Stan with no remedy unless a discretionary, equitable one were granted, which is unlikely (*The Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*).

In the case of the Cadillac, the issue would appear to be whether there was a mutual mistake as to the identity of the contract's subject matter; it does see that Ollie and Stan were talking at cross purposes and that the contract should be rendered void (*Raffles v Wichelhaus*). However, Stan might argue that it was only Ollie who was mistaken (a unilateral mistake) and that he had made a qualitative mistake about the subject matter insufficient to render the contract void.

Whatever way candidates interpret the facts presented, legal principles must be applied to those facts and clear, compelling conclusions must be drawn to reach band 4.

6 Using case law to support your views, discuss the contractual liability of Out East Builders Ltd for lost business profits and for the pain and suffering caused to Dilip.

The focus of responses to this question is expected to be remedies for breach of contract in general and the principle of remoteness of damage in particular.

Candidates should recognise that the award of compensation in the form of damages is a common law remedy and is thus a remedy which should be awarded as of right to those able to establish that a breach of contract has occurred. Types of damages do not need to be considered. Candidates should then highlight that, once actionable breach has been established, the role of the judge is to establish the measure of damages to be awarded.

The remoteness of damage principle must be identified, explained and illustrated by reference to case law (*Hadley v Baxendale*, *Heron II (Koufos v Czarnikow)*, *Victoria Laundry v Newman Industries*). Candidates are expected to recognise that actionable losses are those arising naturally from a breach or those that the party in breach might have anticipated given the knowledge that he possessed at the time. These principles must be applied to the loss of profits and clear, compelling conclusions drawn.

The issue of mental distress should be addressed. What about Dilip's frustration/distress? The decision in *Jackson v Horizon Holidays* suggests that damages for mental distress are confined to contracts whose object is peace of mind or enjoyment and that in *Addis v Gramophone* suggests that such damages are not available in commercial contracts. A clear, compelling conclusion is required.

General, all-embracing and ill-focused responses or ones limited to factual recall are to be awarded a maximum mark within mark band 3.