Answers

1 **(a)** Criminal law relates to conduct which the State considers with disapproval and which it seeks to control. Criminal law involves the *enforcement* of particular forms of behaviour, and the State, as the representative of society, acts positively to ensure compliance. Thus, criminal cases are brought by the State in the name of the Crown and cases are reported in the form of *Regina* v … (*Regina* is simply Latin for 'queen' and case references are usually abbreviated to *R* v …). In criminal law the prosecutor prosecutes a defendant (or 'the accused') and is required to prove that the defendant is guilty *beyond reasonable doubt*.

(b) 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, whereas 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 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.

(c) Arbitration is the procedure whereby parties in dispute refer the issue to a third party for resolution, rather than take the case to the ordinary law courts. Studies have shown reluctance on the part of commercial undertakings to have recourse to the law to resolve their disputes and it is common for commercial contracts to have arbitration clauses included in them. As with contractual terms generally, such clauses are binding and the courts will not allow the parties to ignore them and pursue a court case rather than go through with the agreed arbitration procedure.

There are numerous advantages to be gained from using arbitration rather than the court system:

- *Privacy*. Arbitration tends to be a private procedure. This has the twofold advantage that outsiders do not get access to any potentially sensitive information and the parties to the arbitration do not run the risk of any damaging publicity arising out of reports of the proceedings.
- *Informality*. The proceedings are less formal than a court case and they can be scheduled more flexibly than court proceedings.
- *Speed*. Arbitration is generally much quicker than taking a case through the courts. Where, however, one of the parties makes use of the available grounds to challenge an arbitration award the prior costs of the arbiration will have been largely wasted.
- *Cost*. Arbitration is generally a much cheaper procedure than taking a case to normal courts. Nonetheless, the costs of arbitration and the use of specialist arbitrators should not be underestimated.
- *Expertise*. The use of a specialist arbitrator ensures that the person deciding the case has expert knowledge of the actual practice within the area under consideration and can form their conclusion in line with accepted practice.
- *Finality*. Appeals on arbitration decisions are limited and once the arbitrator has reached a decision the parties are bound by it and any award can be enforced through court action.

2 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 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).

3 Damages are the monetary compensation that a party in breach of contract has to pay to compensate the innocent party for any loss suffered by them, including loss of profit. The issue of damages is dealt with in section II of the UN Convention on Contracts for the International Sale of Goods (CISG). The general position is stated in Article 74, which provides that damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. However, any such loss must have been reasonably foreseeable by the party in breach, or in the words of Article 74 'Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.'

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

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

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

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

4 Before incorporation companies are required to submit a memorandum of association to the registrar of companies, which must be signed by at least two subscribers from amongst the company's first shareholders. The memorandum mainly governs the company's external affairs. Amongst the clauses required to be contained in a company's memorandum of association are the following:

(a) The registered office clause
This is the company's legal address. It is the place where legal documents such as writs or summonses can be served on the company. It is also the place where statutory documents and registers, such as the register of members, are required to be kept available for inspection. The memorandum does not state the actual address of the registered office, but only the country within which the company is registered, whether Scotland or England and Wales. The precise location of the registered office however, has to be stated on all business correspondence (s.351).

(b) The authorised share capital clause
This states the maximum amount of share capital that a company is authorised to issue. The authorised capital must be divided into shares of a fixed monetary value and it follows, therefore, that United Kingdom company law does not recognise no-fixed-value shares as do other jurisdictions. As companies do not have to issue shares to the full extent of their authorised capital, it is imperative to distinguish authorised capital from issued capital, which is the amount of shares actually issued. The current minimum value of issued capital in relation to a public limited company is $50,000.

(c) The name clause

Except in relation to specifcally exempted companies such as those involved in charitable work, companies are required to indicate that they are operating on the basis of limited liability. Thus private companies are required to end their names either with the word 'limited' or the abbreviation 'ltd'; and public companies must end their names with the words 'public limited company' or the abbreviation 'plc' (CA 1985 ss.25, 27 & 30).

The Registrar of Companies will not register any company with a name that is the same as one already on the index of business names index (CA 1985 s.26(c)). Certain categories of names are, subject to the decision of the Secretary of State, unacceptable *per se*, as follows:

(i) names which in the opinion of the Secretary of State constitute a criminal offence (s.26(1)(e)).
(ii) names which in the opinion of the Secretary of State are offensive (s.26(1)(e)).
(iii) names which are likely to give the impression that the company is connected with either government or local government authorities (s.26(2)(a)).
(iv) names which include a work or expression specified under the Company and Business Names Regulations 1981 (s.26(2)(b)).

The name of a company can always be changed by a special resolution of the company so long as it continues to comply with the above requirements (s.28(1)).

5 (a) Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the memorandum 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 longstanding 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 were introduced by the Companies Act 1980, now the Companies Act 1985. These rules represent a considerable strengthening of the previous situation, which was notoriously lax in the way in which dividend payments could be determined. The present Act governs, and imposes restrictions on distributions made by all companies, both public and private. Section 263 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 263 also 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 275 provides that all losses are to be treated as realised except where a general revaluation of all fixed (non-current) 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.264 requires that any distribution must not reduce the value of the company's net assets below the aggregate of its total called up share capital plus any undistributable reserves. The effect of this rule is that public companies have to account for changes in the value of their fixed (non-current) 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 277 of the Companies Act 1985 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 (a) The exact meaning of an international bill of exchange can be derived from the provisions of the United Nations Convention on International Bills of Exchange and International Promissory Notes. Thus Article 2 of the Convention provides that a bill of exchange is international if it specifies at least two of the following places and indicates that they are situated in different States:

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

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

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

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

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

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

Finally it should be noted that the Convention does not apply to international cheques (Article 1).

(b) (i) **The drawer** is the person who has actually instructed the payment to be made. Under Article 38 of the Convention the drawer engages that upon dishonour of the bill by non-acceptance or by non-paymment they will pay the bill to the holder, or to any endorser or any endorser's guarantor who takes up and pays the bill.

However the Article also permits the drawer to exclude or limit their liability for acceptance or for payment by an express stipulation in the bill. Such a stipulation is effective only with respect to the drawer and is effective only if another party is, or becomes, liable on the bill.

(ii) **The drawee** is the person on whom a bill is drawn, i.e. the person instructed to make the actual payment. In most cases the drawee will be a bank. However, the drawee is not liable on a bill until they accept it, but on acceptance engages that they will pay the bill in accordance with the terms of his acceptance to the holder, or to any party who takes up and pays the bill (Article 40).

Article 41 provides that an acceptance must be written on the front or on the back of the bill and requires the signature of the drawee accompanied by the word 'accepted' or by words of similar meaning. Alternatively the signature of the drawee is sufficient.

(iii) **The payee** means a person in whose favour the drawer directs payment to be made or to whom the maker promises to pay. If an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any other case the instrument is payable to all of them and the rights of a holder may be exercised only by all of them (Article 10).

7 This question requires candidates to consider the crucially important role of the auditor in relation to companies and the way in which the behaviour of such businesses function and are overseen. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. Auditors have an extremely important role to play in that regard: they are appointed to ensure that the interests of the shareholders in a company are being met. Their key function is to produce independent and authoriative reports confirming, or otherwise, that the accountancy information provided to shareholders is reliable. The law relating to company auditors is to be found in ss.384–394 Companies Act (CA) 1985 as altered by CA 1989. Even where a company has passed an elective resolution to dispense with laying accounts, the accounts are still required to be prepared, audited and circulated. Consequently every company, only excepting dormant private companies, is required to appoint an auditor, who must be appropriately qualified and in other respects eligible (s.384(1) CA 1985).

Qualifications

The essential requirement for any person to act as a company auditor is that they are, eligible under the rules, and a member of, a recognised supervisory body (s.25 CA 1989). This in turn requires them to hold a professional accountancy qualification. 'Supervisory bodies' are ones established in the UK to control the eligibility of potential company auditors and the quality of their operation (s.30 CA 1989). The recognised supervisory bodies are:

(a) the Institute of Chartered Accountants in England and Wales;
(b) the Institute of Chartered Accountants of Scotland;
(c) the Institute of Chartered Accountants in Ireland;
(d) the Association of Chartered Certified Accountants; and
(e) the Association of Authorised Public Accountants.

The first four bodies mentioned above are also recognised as 'qualifying bodies', meaning that accountancy qualifications awarded by them are recognised professional qualifications for auditing purposes. There still is the small possibility of unqualified but appropriately experienced individuals acting as auditors in relation to what used to be known as 'exempt private companies' (s.3 CA 1989).

A person is ineligible for appointment as auditor if they are either:

(a) an officer or employee of the company (the auditor being specifically declared not to be an officer or employee); and/or
(b) a partner or employee of a person in (i) above, or is a partnership of which such a person is a partner (CA 1989, s.27).

It is a criminal offence to act while ineligible.

Appointment and removal
Auditors are appointed annually (s.385 CA 1985), generally, at each annual general meeting. Where a company has passed an elective resolution to dispense with the annual reappointment of auditors, they are, nonetheless, deemed to be re-appointed automatically for each year. The first auditors are usually appointed by the directors or, in default, by the company in general meetings (s.385 CA 1985). The first auditors hold office until the conclusion of the first meeting at which accounts are laid, although they can, of course, be re-elected. If auditors are not appointed, or re-appointed, then the Secretary of State may appoint auditors to act (s.387(1) CA 1985).

Under the Combined Code on Corporate Governance, a company's audit committee must be involved in the appointment and dismissal of both the external and internal auditors. Audit committees must have annual procedures to ensure the independence and objectivity of the external auditor which should involve a consideration of all relationships between the company and the firm carrying out the external audit.

An auditor may be removed at any time by an ordinary resolution of the company (s.391(1)). This does, however, require special notice. Any auditor who is to be removed or not re-appointed is entitled to make written representations and require these to be circulated or have them read out at the meeting (s.391A CA 1985).

An auditor may resign at any time (s.392 CA 1985). Notice of resignation must be accompanied by a statement of any circumstances that the auditor believes ought to be brought to the attention of members and creditors (payables), or alternatively a statement that there are no such circumstances (s.394 CA 1985). The company is required to file a copy of the notice with the registrar of companies within 14 days (s.392 CA 1985). Where the auditor's resignation statement states that there are circumstances that should be brought to the attention of members, then he may require the company to call a meeting to allow an explanation of those circumstances to the members of the company (s.392A(1) CA 1985).

Rights and duties
The auditors have the right of access at all times to the company's books and accounts, and officers of the company are required to provide such information and explanations as the auditors consider necessary (s.389A CA 1985). It is a criminal offence to make false or reckless statements to auditors (s.389A CA 1985).

It should be noted that the *Companies (Audit, Investigations And Community Enterprise) Act* 2004 (C(AICE)A) significantly strengthened the power of auditors. Under s.389A of the Companies Act 1985 a company's auditors were entitled to require from the company's officers such information and explanations as they thought necessary for the performance of their duties as auditors. It always was a criminal offence for an officer of the company to provide misleading, false or deceptive information or explanations. However, it was not an offence for them to fail to provide any information or explanation that the auditors required of them. That anomaly has been remedied by the C(AICE)A as follows:

– s.8 of C(AICE)A makes it a criminal offence to fail to provide information or explanations required by the auditor;
– s. 8 also entitles the auditor to require information and explanations from a wider group of people than merely the officers of the company. Consequently employees may now be subject to the auditor's authority;
– subsection 8(4) makes it an offence for a parent company to fail to take all steps reasonably open to it to obtain the information or explanations which the auditor has required it to obtain from its non-UK subsidiary and those associated with it; and the offence applies also to any officer of the company who knowingly and wilfully authorises or permits the failure;
– s.9 requires that Directors' Reports must contain a statement that the directors are not aware of relevant information which has not been disclosed to the company's auditors. The directors are placed under the duty to ensure that they have taken all the steps they should have taken as a director to make themselves aware of such information and to establish that the auditors are aware of it. It will be a criminal offence to issue a false statement. The stated purpose of s.9 is to ensure that each director will have to think hard about whether there is any information that they know about or could ascertain which is needed by the auditors in connection with preparing their report.

Auditors are entitled to receive notices and other documents in connection with all general meetings, to attend such meetings and to speak when the business affects their role as auditors (s.390 CA 1985). Where a company operates on the basis of written resolutions rather than meetings, then the auditor is entitled to receive copies of all such proposed resolutions as are to be sent to members (s.381B CA 1985).

Auditors are required to make a report on all annual accounts laid before the company in a general meeting during their tenure of office (s.235 CA 1985). They are specifically required to report on certain issues:

(a) whether the accounts have been properly prepared in accordance with the Act; and
(b) whether the individual and group accounts show a true and fair view of the profit or loss and state of affairs of the company and of the group, so far as concerns the members of the company;
(c) whether the information in the Directors' Report is consistent with the accounts presented.

Under s.237 CA 1985 auditors are required to investigate:

(a) whether the company has kept proper accounting records and obtained proper accounting returns from branches.
(b) whether the accounts are in agreement with the records; and state:

(i) whether they have obtained all the information and explanations that they considered necessary;
(ii) whether the requirements concerning disclosure of information about directors and officers' remuneration, loans and other transactions have been met; and rectify any such omissions.

The Companies Act places further duties on auditors relating to such issues as:

(a) the valuation of non-cash consideration for share allotment by a public company or a company converting to a public company (ss.44 & 108 CA 1985);
(b) purchase or redemption of own shares by payment out of capital (s.173 CA 1985);
(c) financial assistance for purchase of own shares (s.156 CA 1985).

Potential liabilities

In *Caparo Industries plc* v *Dickman* (1990) company accounts were audited in accordance with the Companies Act 1985. The respondents, who already owned shares in the company, decided to purchase more shares and take over the company after seeing the accounts. The accounts were inaccurate. The respondents then incurred a loss, which they blamed on the negligently audited accounts. It was held that, when the accounts were prepared, a duty of care was owed to members of the company (that is, the shareholders), but only so far as to allow them to exercise proper control over the company. This duty did not extend to members as individuals and potential purchasers of shares. The onus was clearly on the appellants in these circumstances to make their own indepedent inquiries, as it was unreasonable to rely on the auditors.

8 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.'

However, for a proposal for concluding a contract to constitute an offer 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.

Any communication that does not comply with the stated requirements for an offer is consequently to be treated as merely an invitation to make offers. As a consequence, it is for the recipient of the invitation to make the acutal offer to the first party who then is in the position to either accept or reject the proposal from them.

Particular problems arise where a purported acceptance of an offer contains additional or different terms than those proposed in the original offer. Article 19 provides that:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or despatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Consequently under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply will constitute an acceptance. However, even in relation to such non-material alterations, the offeror can object to the new terms as long as they respond without undue delay. If they do not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the additional or different terms **do** materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted by the original offeror for a contract to come into effect.

Applying the convention rules to the facts of the scenario it can be seen that at no time did a contract come into being. Ax's first contact with Bo merely solicited information about the possibility of their providing the screws and Bo's response supplied that information, but did not amount to an offer to supply the screws.

Ax's next communication did amount to an offer to purchase both the screws and the nuts and bolts, but it was not accepted by Bo, rather he introduced a new term into the agreement, the need for prepayment, or payment through a letter of credit. The subsequent invoice also introduced a new term into the negotiations relating to the lower quality of the screws to be supplied. This document constituted a new offer from Bo, which Ax could either accept or reject. When Ax objected to the new terms he was effectively making a new offer, which it was then up to Bo to accept or reject. By insisting on the higher price for the higher quality he effectively rejected Ax's offer and has restated his own offer.

9 Earl clearly finds himself in an awkward situation in that he holds a number of concurrent relationships with Flash Co; for he is at one and the same time, a member of the company through his shareholding, a creditor (payable) of the company through his debentures and its employee. All of these relationships involve different legal rules and result in different consequences: as an employee he has not been paid the wages due to him and consequently is looking for payment, as a creditor (payable) he is also owed money, which he will look to be repaid. However as a member of the company, holding partly paid up shares he may be liable to contribute to the company's debts. Each of these relationships will be considered in turn.

(a) Earl's unpaid wages

As an employee Earl's situation is governed by s.175 and Schedule 6 of the Insolvency Act 1986, which sets out what are to be treated as preferred payments and specifically relates to the wages of employees together with all accrued holiday pay ($800 maximum). It should be noted that the Enterprise Act 2002 removed the Crown from those who can claim preference. Consequently, the state can no longer take any priority over non-secured creditors (payables) in relation to monies due to such as unpaid value added tax, national insurance or income tax. However, it should also be noted that Earl's rights are limited to a maximum payment of $800 as an employee and he would then have to claim against the company as an ordinary unsecured creditor (payable) for the remainder of the money owed to him.

(b) Earl's partly paid up shareholding

The nominal value of a share normally fixes the amount which the shareholder is required to contribute to the assets of the company. Section 1(2) of the Companies Act 1985 provides that members' liability is limited to the amount (if any) remaining unpaid on their shares.

Shareholders must pay at least the full nominal value of any shares issued to them (i.e. shares must not be issued at a discount s.100). Where, however, the company issues shares at a premium, i.e. at more than the nominal value of the shares, as is quite common, then the holders of those shares will be liable to pay the amount owed, over and above the nominal value. The excess will still form part of the company's capital but will be included in a distinct share premium account (s.130) and may only be used for limited purposes.

Applying these rules, it can be seen that Earl has only paid 75 cents per $1 nominal share. Consequently he is liable to contribute the amount remaining unpaid per share, i.e. a maximum of 25 cents per share ($1,250 in total), to the assets of the company if such payment is necessary to satisfy the outstanding debts of Flash Co upon its winding up.

(c) Earl's debentures

In relation to a fixed charge, a specific asset of the company, in this instance the land on which the business stands, is made subject to a charge in order to secure a debt. If the company fails to honour the commitments to the secured debenture holders, they can appoint a receiver who will if necessary sell the asset charged to recover the money owed. In the case of a company liquidation the asset charged is realised and the sum of money raised goes to pay off the outstanding debts owed to the debenture holders. If the value of the asset that is subject to the charge is greater than the debt against which it is charged then the excess goes to pay off the rest of the company's debts. If it is less than the value of the debt secured then the debenture holders will become unsecured creditors (payables) for the amount remaining outstanding. It should be emphasised that fixed charge holders take priority over any other creditors (payables) in the event of company liquidation.

Thus in this instance, Earl is secure in the knowledge that his loans to Flash Co will be paid before any other debts and as the security is against Flash's most valuable asset, its land, it is likely that he will receive the full amount of the loan of $5,000.

10 This question requires candidates to consider the authority of company directors and other company officers to enter into binding contracts on behalf of their companies. Article 70 of Table A model articles of association 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.

(a) The individual director may be given *express authority* to enter into a particular transaction on the company's behalf. To this end, Article 72 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 Len has been expressly given the power to enter into the contract with Mo, and so the company cannot be made liable on this basis.

(b) 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. Article 84 provides for the board of directors to appoint a managing director and Article 72 also allows the board of directors to delegate to any managing director such powers as they consider desirable to be exercised by that person. Thus the board of directors may expressly confer any of their powers on the managing director as they see fit. The mere fact of appointment, however, will mean that the person so appointed will have the implied authority to bind the company in the same way as the board, whose delegate he or she is. Outsiders, therefore, can safely assume that a person appointed as managing director has all the powers usually exercised by a person acting as a managing director.

Implied actual authority to bind a company may also arise as a consequence of the appointment of an individual to a position other than that of managing director. 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 Mo cannot make use of this method of fixing Katch Co with liability for his contract as Len has not been appointed to any executive office in the company.

(c) 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 Katch Co has permitted Len to act as its managing director, and he has even used that title. The board has therefore acquiesced in his representation of himself as their managing director and consequently they and Katch Co are bound by any contracts he might make within the scope of a managing director's implied authority. As entering into a contract to draw up plans would clearly come within that authority, Katch Co will be liable to pay Mo or face an action for breach of contract.

1 This question is divided into three parts, the first of which requires an explanation of the differences between criminal law, civil law and arbitration.

(a) 2–3 A good explanation of what is meant by criminal law.
0–1 Little knowledge down to no understanding at all of the topic.

(b) 2–3 A good explanation of what is meant by civil law.
0–1 Little knowledge down to no understanding at all of the topic.

(c) 3–4 Good explanation of the meaning of arbitration as opposed to the court system, together with a sound assessment of its relative advantages.
0–2 Unbalanced answer or lacking any detail and evaluation.

2 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 Thorough to complete answers, showing a detailed understanding of the Convention rules.
5–7 A clear understanding of the topic, perhaps lacking in detail.
2–4 Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.
0–1 Little or no knowledge of the topic.

3 This question requires candidates to explain the rules relating to the award of damages under the UN Convention.

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

4 This question requires candidates to explain three of the clauses in a company's memorandum of association.

8–10 A thorough understanding of all three clauses. It is likely that the best answers will provide examples or cite appropriate cases, although this is not necessary to acquire full marks.
5–7 A clear understanding of the clauses but perhaps lacking in detail or unbalanced in only dealing with two of them.
2–4 Some, but limited, understanding of the clauses.
0–1 Little or no knowledge of the clauses.

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 A thorough understanding of law relating to dividends as it applies to both public and private companies. Cases may well be cited and will be credited.
5–7 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 Some, but limited, understanding of the law.
0–1 Little or no knowledge of the appropriate law.

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

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

3–4 A thorough explanation of the topic with references to the Convention provisions.
1–2 Some understanding, but perhaps lacking in specific information.
0 No understanding.

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

5–6 A thorough explanation of the various roles, with references to the Convention provisions.
2–4 Some general understanding, but perhaps lacking in specific information.
0–1 Little if any understanding.

7 This question requires candidates to consider the role of the auditor in relation to companies and the precise way in which this relationship is regulated by company law.

8–10 A thorough understanding of the role of the auditor explaining their rights and duties. Mention will also be made of their qualifications for office and the manner in which they are appointed and may be removed.
5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 Some knowledge of the role of auditors but lacking in detail or unbalanced in the detail provided.
0–1 Little or no knowledge of the topic.

8 This question requires candidates to analyse a problem scenario from the perspective of the UN Convention of the International Sale of Goods (CISG) and to apply that law appropriately. Given the fact that there are only 10 marks available candidates will gain no marks for irrelevant material.

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

9 This question is divided into three parts and essentially requires candidates to consider the difference between various company creditors (payables) on the winding up of a company.

(a) 2–3 A good to thorough explanation of the different situation of employees as preferred creditors (payables).
0–1 Little or no knowledge of the relevant law.

(b) 2–3 A good general explanation of the liability of holders of unpaid shares.
0–1 Little or no knowledge of the relevant law.

(c) 2–4 A good explanation of fixed charges together with accurate application of the law.
0–1 Some knowledge, but lacking in detail or application.

10 This question focuses on the authority of individual directors and how companies may be fixed with liability for contracts entered into by them. as with the other questions in this section it requires candidates to analyse the problem scenario and to apply that law appropriately.

8–10 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.
5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 Some, but limited, understanding of the law or completely lacking in application.
0–1 Little or no knowledge of the relevant law.