Answers

In relation to aspects of business law the default law and cases relate to the United Kingdom, however relevant law and cases from other jurisdictions will be credited where appropriate.

1 (a) The English Common Law System

The use of the term common law refers to all those legal systems which have adopted the historic English legal system. Foremost amongst these is, of course, the US but many other Commonwealth, and former Commonwealth, countries retain a common law system.

Common law systems tend to be case-centred and hence judge-centred, allowing scope for a discretionary, *ad hoc*, pragmatic approach to the particular problems that appear before the courts. In reality this approach tends to over-emphasise the extent to which the common law judge can impose his discretion, but it certainly reflects the power that English judges have to form the law in certain circumstances.

The doctrine of binding precedent, or *stare decisis*, lies at the heart of the English legal system. The doctrine refers to the fact that, within the hierarchical structure of the English courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In general terms, this means that when judges try cases they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. In practice, flexibility is achieved through the possibility of previous decisions being either overruled, or distinguished, or the possibility of a later court extending or modifying the effective ambit of a precedent.

The main mechanisms through which judges alter or avoid precedents are:

(i) *Overruling*

This is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case.

It is somewhat anomalous that, within the system of *stare decisis*, precedents gain increased authority with the passage of time. As a consequence, courts tend to be reluctant to overrule long-standing authorities even though they may no longer accurately reflect contemporary practices or morals. In addition to the wish to maintain a high degree of certainty in the law, the main reason for judicial reluctance to overrule old decisions would appear to be the fact that overruling operates retrospectively with the effect that the principle of law being overruled is held never to have been law. Overruling a precedent might, therefore, have the consequence of disturbing important financial arrangements made in line with what were thought to be settled rules of law. It might even, in certain circumstances, lead to the imposition of criminal liability on previously lawful behaviour. It has to be emphasised, however, that the courts will not shrink from overruling authorities where they see them as no longer representing an appropriate statement of law.

(ii) *Distinguishing*

In comparison to the mechanism of overruling which is rarely used, the main device for avoiding binding precedents is that of distinguishing. This opens up the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent and thus consequentially it will not find itself bound to follow that precedent. Judges use the device of distinguishing where, for some reason, they are unwilling to follow a particular precedent and the law reports provide many examples of strained distinctions where a court has quite evidently not wanted to follow an authority that it would otherwise have been bound by.

(b) (i) Civil Law System

The term civil law refers to those other jurisdictions which have adopted the European continental system of law derived essentially from ancient Roman law, but owing much to the Germanic tradition.

The role of the judge in civil law systems is significantly different from that of the common law judge. Or at least that is the theory; in practice the differences are not as wide as they might appear at first.

Civil law systems tend to be stated in a codified body of general abstract principles, which control the exercise of judicial discretion in a way that is not evident in the common law system. This assumption, however, underestimates the extent to which continental judges have the power to exercise judicial discretion through their implementation of those general principles in particular cases.

It is perhaps worth mentioning at this point that both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), established, in theory, on civil law principles, do in practice, and increasingly recognise the practical benefits of establishing a body of case law. It has to be recognised, and indeed the English courts do so, that, although the ECJ is not bound by the operation of the doctrine of *stare decisis*, it still does not decide individual cases on an *ad hoc* basis and, therefore, in the light of a perfectly clear decision of the European Court, national courts will be reluctant to refer similar cases to its jurisdiction. Thus, after the ECJ decided, in *Grant* v *South West Trains Ltd* (1998), that Community law did not cover discrimination on grounds of sexual orientation, the High Court withdrew a similar reference in *R* v *Secretary of State for Defence ex p Perkins* (No 2) (1998).

However, even here it has to be recognised that in the final analysis the ECJ will not allow mere precedent to prevent the development of the law.

(ii) Sharia Law System

The major difference between *Sharia* law and the previously considered systems is that the former is explicitly based on the religion of Islam. As a consequence of this, *Sharia* sets out a complete pattern for living encompassing all aspects of being, thought and conduct. *Sharia* governs all aspects of the believer's existence and provides a coextensive moral and legal map for the individual, in contradistinction to alternative positivist systems which display a tendency to distinguish the moral from the legal.

Sharia, or Islamic law, in its pure form derives its authority from two sources: the Quran, which is held to express the commandments and instructions of Allah as revealed to the prophet Muhammad, and the Sunnah, which are held to be the practices and teachings of the prophet, and consequently to be divinely sanctioned. In addition to these two primary sources (the *Hadith* texts) are the secondary sources of *ijma* (consensus) and *qiyas* (analogical reasoning), both of which derive their authority from the primary sources the Quran and the Sunnah and together are known as *ijtihad*. *Fiqh*, the science of Islamic law, thus exists in the knowledge of one's obligations and rights derived from the Quran and the Sunnah, but informed by the consensus of opinion amongst the learned (*ijma*) and analogical deduction from them (*qiyas*).

Some, however, would argue that the body of Islamic jurisprudence had been completed by the jurists of the earlier centuries. Such views gave rise to the doctrine of *Taqlid*, which requires the adherence to, and the refusal to further develop through the use of *itjihad*, the legal principles established by the legal scholars of the second and third centuries of Islam. The more general opinion, however, would appear to be that Islamic law may be seen as consisting of two elements, the unambiguous and unchanging rules contained in the *Hadith* texts on one hand and the second element, developed through *itjihad*, which is capable of development in line with social changes.

The religious nature of *Sharia* means that strictly speaking judges should be clerics, *Imam*, as they are in Iran for example. However, in other Muslim states there is a mixture of clerical and secular judges.

2 (a) In any case of arbitration it is essential that the parties involved can place utmost reliance on the person chosen to be the arbitrator. They must be able to rely on the fact that the arbitrator has the requisite skills to act in his arbitral capacity, but equally they must be able to trust that the person appointed is, and will remain, neutral and will deliver a fair and impartial decision. Impartiality and independence are therefore of crucial importance in the operation of international arbitration. Consequently, under Article 12 of the UNCITRAL Model Law of Commercial Arbitration, when a person is approached in connection with the possibility of their being appointed as an arbitrator, they are required to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. They are also required to notify the parties of any circumstances that subsequently raise such doubts as to their impartiality.

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 can not challenge an arbitrator appointed by them, or in whose appointment they participated, for any reasons they were aware of before the arbitrator was appointed.

(b) Under Article 13 the parties are free to agree on a procedure for challenging an arbitrator. Where no such agreement has been established, then any party who intends to challenge an arbitrator has 15 days, after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any grounds for challenge, to send a written statement of the reasons for the challenge to the arbitral tribunal.

Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge is not successful, the party issuing the challenge has a further 30 days to request the court or other specified authority to decide on the challenge. This level of decision is final, and cannot be further appealed against. Whilst any appeal is under way, the original arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

3 Compared to the obligations of the seller, the general obligations of the buyer under the UN Convention on the International Sale of Goods are less extensive and relatively simple; they are to pay the price for the goods and take delivery of them as required by the contract (*Article 53*). However, the Convention does go into detail as to how such action is to be conducted.

As regards payment the following provisions apply.

Firstly, the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made (*Article 54*).

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned (*Article 55*). If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight (*Article 56*).

If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller at the seller's place of business. However, if the payment is to be made when the goods or documents are handed over, payment should be made at the place where the handing over takes place. The seller must bear any increase in the expenses incidental to payment which is caused if the seller changes his place of business after the contract has been entered into (Article 57).

If the contract does not require the buyer to pay the price at any other specific time, he must pay it when the seller places either the goods, or documents controlling their disposition, at the buyer's disposal as agreed in the contract. The seller may make payment a condition for handing over the goods or documents. The buyer, however, is not bound to pay the price until they have had an opportunity to examine the goods, except where the terms of the contract are inconsistent with the buyer being afforded such an opportunity (Article 58).

Payment should be on the date fixed by the contract without the seller being required to request payment (Article 59).

As regards taking delivery Article 60 requires the buyer not only to do so, but to do everything which could reasonably be expected of them to enable the seller to make delivery.

4 **(a)** 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 s.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.

(b) The duty to mitigate losses

Article 77 provides that a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Articles 75 and *76* provide the operation of this rule. Thus *Article 75* states that if a contract is avoided and if the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under *Article 74*. *Article 76* further provides that if the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under *Article 75*, 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*.

The operation of the rules means that the buyer of goods that are not delivered, as required under the terms of a contract, has to buy the replacements as cheaply as possible. Correspondingly, the seller of goods that are not accepted in line with a contractual agreement has to try to get as good a price as they can when they sell them.

In the English case *Payzu* v *Saunders* (1919), the parties entered into a contract for the sale of fabric, which was to be delivered and paid for in instalments. When the purchaser, Payzu, failed to pay for the first instalment on time, Saunders refused to make any further deliveries unless Payzu agreed to pay cash on delivery. The plaintiff refused to accept this and sued for breach of contract. The court decided that the delay in payment had not given the defendant the right to repudiate the contract. As a consequence, he had breached the contract by refusing further delivery. The buyer, however, should have mitigated his loss by accepting the offer of cash on delivery terms. His damages were restricted, therefore, to what he would have lost under those terms, namely, interest over the repayment period.

In *Western Web Offset Printers Ltd* v *Independent Media Ltd* (1995), the parties had entered into a contract under which the plaintiff was to publish 48 issues of a weekly newspaper for the defendant. In the action which followed the defendant's repudiation of the contract, the only issue in question, was the extent of damages to be awarded. The Court of Appeal decided that the plaintiff had been unable to replace the work due to the recession in the economy and, therefore, had not been able to mitigate the loss, and in the circumstances was entitled to receive the full amount that would have been due in order to allow it to defray the expenses it would have had to pay during the period the contract should have lasted.

5 This question requires candidates to explain the concept of limited liability and to consider three alternative categories of companies; the first unlimited in nature, whilst the second and third are limited in different ways.

(a) In this context, liability refers to the extent to which shareholders in companies are responsible for the debts of their companies and limited liability indicates that a limit has been placed on such liability. The point is that the limitation on liability is enjoyed by the member shareholders rather than the company. One of the major advantages of forming a company is that the members of the company may achieve limited liability. The great majority of registered companies are limited liability companies. This means that the maximum liability of shareholders is fixed and cannot be increased without their agreement. As will be seen below there are two ways of establishing limited liability.

(b) Section 3 of the Companies Act (CA)2006 sets out the various types of companies that can be registered in terms of different liabilities.

(i) Companies can be formed without limited liability. These by virtue of s.3(4) CA 2006 are referred to as unlimited companies. Such companies are incorporated under the Companies Acts and receive all the benefits that flow from incorporation except limited liability. Consequently the shareholders in such unlimited companies remain liable to the full extent of their personal wealth for any unpaid debt of the company. It should be noted that, in line with the doctrine of separate personality, even in the case of unlimited companies any subsequent debt is owed to the company and not directly to the creditors of the company. The compensating benefit enjoyed by such companies is that they do not have to submit their accounts and make them available for public inspection.

(ii) The company limited by guarantee (s.3(3) CA 2006) is usually restricted to non-trading enterprises such as charities and professional and educational bodies. It limits the shareholders liability to an agreed amount which is only called on if the company cannot pay its debts on being wound up. In reality, the sum guaranteed is usually a nominal sum, so no real risk is involved on the part of the guarantor.

(iii) The more common procedure is to limit liability by reference to shares (s.3(2) CA 2006). The effect of this is to limit liability to the amount remaining unpaid on shares held (Insolvency Act 1986 s.74(2)(d)). If the shareholder has paid the full nominal value of the shares to the company, then that is the end of responsibility with regard to company debts. Consequently, if the company should subsequently go into insolvent liquidation the shareholders cannot be required to contribute to its assets in order to pay off its outstanding debts.

6 This question requires candidates to explain the meaning of the terms 'compulsory winding up' and 'administration'.

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

Members' voluntary winding up,
Creditors' voluntary winding up,
Compulsory winding up.

This question requires attention to be focused on the last of these three. A compulsory winding up is a winding up ordered by the court under s.122 of the IA 1986. Although there are seven distinct grounds for such a winding up, the most common reason for the winding up of a company is its inability to pay its debts. Section 123 provides that, if a company with a debt exceeding £750 fails to pay it within three weeks of receiving a written demand, then it is deemed unable to pay its debts.

On the presentation of a petition to wind a company up compulsorily, the court will normally appoint the Official Receiver to be the company's provisional liquidator. The Official Receiver will require the present or past officers, or indeed employees of the company to prepare a statement of the company's affairs. This statement must reveal:

– particulars of the company's assets and liabilities;
– names and addresses of its creditors;
– any securities held by the creditors (fixed or floating charges) and the dates on which they were granted;
– any other information which the Official Receiver may require.

After his appointment, the Official Receiver calls meetings of the company's members and creditors in order to select a liquidator to replace him and to select a liquidation committee if required. Once again, in the event of disagreement, the choice of the creditors prevails.

Section 142 of the IA 1986 states that the functions of the liquidator are 'to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it'. Once the liquidator has performed these functions, he must call a final meeting of the creditors, at which he gives an account of the liquidation and secures his release from the creditors. Notice of the final meeting has to be submitted to the registrar of companies and, three months after that date, the company is deemed to be dissolved.

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

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

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

The function of the administrator is to:

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

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

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

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

During the administration process the administrator has the powers to:

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

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

7 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 discussion of the term bill of exchange.

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

There are four types of bills of lading:

– Inland Bill of Lading – this refers to a contract for transporting goods overland to an exporter's international carrier.
– Ocean Bill of Lading – this refers to a contract for transporting goods from an exporter to a specified foreign market overseas.
– Through Bill of Lading – refers to a contract for transporting covering both the domestic and international transport of export goods between specified points.
– Air Waybill – refers to a contract for transporting goods by way of domestic and international flights to a specified destination. The air waybill is a non-negotiable document and only serves as a receipt for the shipper.

A bill of lading has a threefold purpose:

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

Bills of lading can be either negotiable or non-negotiable in form. In relation to negotiable bills of lading, ownership of 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) Bills of exchange

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

In England, a bill of exchange is defined in the Bills of Exchange Act 1882, s.3 of which provides that a bill of exchange is:

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

The following terms apply:

– The person making the order or drawing the bill is known as the drawer
– The person to whom the bill is addressed is the drawee (for example a bank)
– The person to whom the bill is payable is the payee.

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

– The person to whom a bill is transferred by indorsement is called the indorsee.
– The generic term 'holder' includes any person in possession of a bill who holds it either as payee, indorsee or bearer.
– A bill which in its origin is payable to order becomes payable to bearer if it is endorsed in blank.

8 Under the UN Convention on Contracts for the International Sale of Goods (the CISG) convention risk generally passes to the buyer when he takes over the goods, or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery. There are, however, two special situations covered by the convention. These arise when the contract of sale involves carriage of the goods or where the goods are sold while in transit. This question involves both of these two special circumstances which are governed by *Article 67* of the convention.

Article 67 relates to contracts of sale involving carriage of goods. It provides that in the situation where the seller is not bound to hand the goods over at a particular place,

– 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.

However, 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. The mere fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.

Article 67(2) goes on to state, however, that risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Applying the foregoing to the situations in the problem scenario leads to the following conclusions:

(i) In relation to Ben's contract, as the cloth was made from a special limited manufacturing run, the goods were ascertained and certain, even though the cloth was included with other cloth in the container. Consequently the risk had passed to Ben when the goods were handed over to the carrier for delivery to him and he would have to suffer the loss of the goods.

(ii) However, in the second contract it is apparent that Con's cloth was not specifically allocated to him, as the agent was to make the allocation when the bulk of the cloth arrived in Beloria. Consequently under *Article 67(2)*, the risk had not passed to Con and Ali retained liability for the loss.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with their companies.

As a consequence of the position they hold, company directors owe fiduciary duties to their companies. One such duty is *the duty not to permit a conflict of interest and duty to arise*. This equitable rule is strictly applied by the courts and the effect of its operations may be seen in *Regal (Hastings)* v *Gulliver* (1942). In that case, the directors of a company owning one cinema provided money for the creation of a subsidiary company to purchase two other cinemas. After the parent and subsidiary companies had been sold at a later date, the directors were required to repay the profit they had made on the sale of their shares in the subsidiary company on the grounds that they had only been in the situation to make that profit because of their positions as directors of the parent company. It is not necessary to prove an actual conflict of interest, merely the possibility of such a conflict, and the rigorous nature of this principle may be seen in *Boardman* v *Phipps* (1967).

One obvious area where directors place themselves in a position involving a conflict of interest is where they have an interest in a contract with the company. The common law position was that in the event of any such situation arising, any contract involved was voidable at the instance of the company (*Aberdeen Rly Co* v *Blaikie* (1854)). However, s.182 of the Companies Act 2006 places a duty on directors to declare any interest, direct or indirect, in any contracts with their companies, and provides for a fine if they fail in this regard.A director's disclosure can take the form of a general declaration of interest in a particular company, which is considered sufficient to put the other directors on notice for the future. Any declaration of interest must be made at the board meeting that first considers the contract, or if the director becomes interested in the contract after that, at the first meeting thereafter. Failure to disclose any interest renders the contract voidable at the instance of the company and the director may be liable to account to the company for any profit made in relation to it.

Applying the above to the problem scenario, it appears that Caz did not declare her interest in either Era Ltd generally, or the particular contract in question. Dull plc could have avoided the contract had they found our earlier and acted sooner, but in any case Caz can be held liable to account to Dull plc for any profit she made on the deal. Caz will also be liable to prosecution and a fine under s.183 of the Companies Act 2006, which criminalises any failure to comply with the requirements of s.182.

10 This question requires candidates to consider fraudulent trading both under s.993 of the Companies Act 2006 and s.213 of the Insolvency Act 1986, and wrongful trading under s.214 of the Insolvency Act 1986.

(a) There has long been civil liability for any activity amounting to fraudulent trading. Thus, s.213 of the Insolvency Act (IA) 1986 governs situations where, in the course of a winding up, it appears that the business of a company has been carried on with intent to defraud creditors, or for any fraudulent purpose. In such cases, the court, on the application of the liquidator, may declare that any persons who were knowingly parties to such carrying on of the business are liable to make such contributions (if any) to the company's assets as the court thinks proper. There is a major problem in making use of s.213, however, and that lies in meeting the very high burden of proof involved in proving dishonesty on the part of the person against whom it is alleged. It should be noted that there is also a criminal offence of fraudulent trading under s.993 of the Companies Act 2006, which applies to anyone who has been party to the carrying on of the business of a company with intent to defraud creditors or any other person, or for any other fraudulent purpose.

Given that it is stated that Gram and Hen hid the fact that Ire Ltd was insolvent it is possible that they might be liable under the fraudulent trading provisions both civil and criminal. As a consequence they may well be liable for a maximum prison sentence of ten years and may have to contribute to the assets of the company to cover any loss sustained by creditors as the a result of their actions. There is no evidence to support either action against Fran.

(b) Wrongful trading does not involve dishonesty but, nonetheless, it still makes particular individuals potentially liable for the debts of their companies. Section 214 applies where a company is being wound up and it appears that, at some time before the start of the winding up, a director knew, or ought to have known, that there was no reasonable chance of the company avoiding insolvent liquidation. In such circumstances, then, unless the directors took every reasonable step to minimise the potential loss to the company's creditors, they may be liable to contribute such money to the assets of the company as the court thinks proper. In deciding what directors ought to have known, the court will apply an objective test, as well as a subjective one. As in common law, if the director is particularly well qualified, they will be expected to perform in line with those standards. Additionally, however, s.214 of the IA 1986 establishes a minimum standard by applying an objective test which requires directors to have the general knowledge, skill and experience, which may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company.

The manner in which incompetent directors will become liable to contribute to the assets of their companies was shown in *Re Produce Marketing Consortium Ltd* (1989), in which two directors were held liable to pay compensation from the time that they ought to have known that their company could not avoid insolvent liquidation, rather than the later time when they actually realised that fact. Interestingly, the common law approach to directors' duty of care has been extended to accommodate the requirements of s.214 (*Re D'Jan of London Ltd* (1993)).

It is clearly apparent that both Gram and Hen will be personally liable under s.214 for the increase in Ire Ltd's debts from \$10,000 to \$100,000. However, as a director of the company Fran will also be liable to contribute to the assets of the company under s.214.

1 This question requires candidates to consider the role of judges in two of three distinct legal systems.

8–10 marks	Clear explanation of role of the judges in two of the legal systems.
5–7 marks	Fair knowledge of, but perhaps lacking in detail.
2–4 marks	Unbalanced answer, merely dealing with one element of the question, or demonstrating no real understanding of the nature of the question.
0–1 mark	Little or no understanding of any of the systems.

2 This question requires candidates to explain the grounds and procedures for challenging the appointment of arbitrators under the UNCITRAL Model Law on International Commercial Arbitration.

8–10 marks	Good explanation of the grounds and procedure for challenging an arbitrator's appointment. Reference to the provisions of the Model Law will be expected.
5–7 marks	Fair understanding perhaps lacking in detail or reference to the Model Law
0–4 marks	Very unbalanced answer or lacking any detailed explanation.

3 This question requires candidates to explain the obligations placed on the buyer under the UN Convention on Contracts for the International Sale of Goods.

8–10 marks	Thorough answers which show a detailed knowledge of the operation of the convention.
5–7 marks	Fair explanation of the operation of the convention, but perhaps unbalanced and lacking in detail.
0–4 marks	Some basic knowledge of the provisions of the convention, but no real depth of understanding. Perhaps a very unbalanced answer that only deals with one part of the question.

4 This question requires an explanation of two aspects of the law relating to damages for breach of contract. It is split into two parts and the marks will be awarded equally.

(a)	4–6 marks	A good explanation of the meaning of damages generally and the way in which they are treated under the United Nations Convention on Contracts for the International Sale of Goods (CISG).
	2–3 marks	Some, if little, knowledge of the question or unbalanced in only dealing with one aspect of the question.
	0–1 mark	Little, if any knowledge of the question.
(b)	3–4 marks	A thorough explanation of the duty to mitigate losses with reference to the provisions of the CISG.
	0–2 marks	Some, if little, knowledge of the duty but not clear or lacking in detail.

5 This question is likely to be answered in a global way and marks will be awarded inline with points made.

(a) Up to 3 marks for a general explanation of limited liability.

(b) **(i)** Up to 2 marks for an explanation of unlimited liability and why it might be used.

(ii) Up to 2 marks for knowledge of companies limited by guarantee. What they are, where they are used and the nature of liability.

(iii) Up to 3 marks for a thorough explanation of liability limited by reference to the amount unpaid on shares and how it operates.

6 This question in two parts, carrying 4 marks for part (a) and 6 marks for part (b) requires candidates to explain the meaning of the terms 'compulsory winding up' and 'administration'.

(a) 3–4 marks A good explanation of the meaning and effect of winding up generally and compulsory winding up in particular.

0–2 marks Some, if little, winding up, or perhaps too general or unbalanced in not dealing specifically with compulsory winding up.

(b) 4–6 marks A good explanation of the meaning and effect of administration generally and contrasting its purpose with that of compulsory winding up.

2–3 marks Some explanation of administration, but perhaps too general or lacking in detail.

0–1 mark Little if any explanation of administration.

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 discussion of the term bill of exchange.

(a) 3–5 marks Good to thorough explanation of the nature and function of a bill of lading

0–2 marks Some but not very clear understanding of the term or perhaps lacking in detail

(b) 3–5 marks Thorough explanation of bills of exchange.

0–2 marks Some but limited explanation.

8 This part requires candidates to analyse a problem scenario and explain and apply the law relating to the passing of risk under the UN Convention for the International Sale of Goods.

8–10 marks A good analysis of the scenario with a clear explanation of the law, with detailed application of *Articles 67* & *68*.

5–7 marks Some understanding of the situation but perhaps lacking in detail or reference to the convention.

3–4 marks Weak answer lacking in knowledge or application, with little or no reference to the convention.

0–2 marks Little or no knowledge of the topic.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with their companies.

8–10 marks A good analysis of the scenario with a clear explanation of the law relating to contracts between directors and their companies under the Companies Act 2006.

5–7 marks Some understanding of the situation but perhaps lacking in detail or reference to the statute.

3–4 marks Weak answer lacking in knowledge or application, with little or no reference to the Companies Act 2006.

0–2 marks Little if any knowledge of the appropriate legal principles.

10 This question requires candidates to consider fraudulent trading both under s.993 of the Companies Act 2006 and s.213 of the Insolvency Act 1986, and wrongful trading under s.214 of the Insolvency Act 1986.

(a) 4–5 marks Clear explanation of operation of the law relating to fraudulent trading, under both criminal and civil law, but with the emphasis on the Insolvency Act provisions.

2–3 marks Some to good understanding but lacking detail.

0–1 mark Little or no knowledge.

(b) 4–5 marks Clear explanation of the law relating to wrongful trading, probably, but not necessarily referring to case law.

2–3 marks Some to fair understanding but lacking detail.

0–1 mark Little if any knowledge.