Answers

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

1 This question requires candidates to explain the way in which the doctrine of precedent operates within two of three legal systems, although it is recognised that the doctrine is essentially an aspect of Common Law systems.

(a) Precedent in the English Common Law
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. 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 normally follow the rule of law established in the earlier case.

It is important to establish that it is not the actual decision in a case that sets the precedent; that is set by the rule of law on which the decision is founded. This rule, which is an abstraction from the facts of the case, is known as the *ratio decidendi* of the case.

Any statement of law that is not an essential part of the *ratio decidendi* is, strictly speaking, superfluous; and any such statement is referred to as *obiter dictum*, i.e. said by the way. Although *obiter dicta* statements do not form part of the binding precedent they are persuasive authority and can be taken into consideration in later cases.

There are numerous perceived advantages of the doctrine of *stare decisis*; amongst which are:

(i) *Time saving*. This refers to the fact that it saves the time of the judiciary, lawyers and their clients for the reason that cases do not have to be re-argued. In respect of potential litigants it saves them money in court expenses because they can apply to their solicitor/barrister for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points.

(ii) *Certainty*. Once the legal rule has been established in one case, individuals can act with regard to that rule relatively secure in the knowledge that it will not be changed by some later court.

(iii) *Flexibility*. This refers to the fact that the various mechanisms by means of which the judges can manipulate the common law provides them with an opportunity to develop law in particular areas without waiting for Parliament to enact legislation.

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

(i) *Overruling*, which is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case.

(ii) *Distinguishing*, on the other hand, occurs when a later court regards the facts of the case before it as significantly different from the facts of a cited precedent. Consequently it will not be bound to follow that precedent. Judges use the device of distinguishing where, for some reason, they are unwilling to follow a particular precedent.

Disadvantages of Case Law

(i) *Uncertainty*. This refers to the fact that the degree of certainty provided by the doctrine of *stare decisis* is undermined by the absolute number of cases that have been reported and can be cited as authorities. This uncertainty is increased by the ability of the judiciary to select which authority to follow through use of the mechanism of distinguishing cases on their facts.

(ii) *Fixity*. This refers to possibility that the law in relation to any particular area may become set on the basis of an unjust precedent with the consequence that previous injustices are perpetuated. An example of this is the long delay in the recognition of the possibility of rape within marriage, which has only been recognised relatively recently.

(iii) *Unconstitutionality*. This is a fundamental question that refers to the fact that the judiciary are in fact overstepping their theoretical constitutional role by actually making law rather than restricting themselves to the role of simply applying it.

(b) Precedent in Civil Law
If Common Law judges look to previous cases in order to find law, judges in Civil Law systems look to legislation or general codes for guidance as to what the law is.

Thus the usual distinction to be made between the two systems is that the former, common law system, tends to be case centred and hence judge centred, whilst the latter focuses on legislation rather than judges. As a consequence the Common Law system is seen as allowing scope for a discretionary, *ad hoc*, pragmatic approach to the particular problems that appear before the courts; whereas the latter, civil law system, tends to be a codified body of general abstract principles which control the exercise of judicial discretion. In reality, both of these views are extremes, with the former over-emphasising the extent to which the common law judge can impose their discretion and the latter under-estimating the extent to which continental judges have the power to exercise judicial discretion. Also within the Common Law the focus on case law tends to lead to an underestimation of the extent to which contemporary law is the product of legislation, whilst within the Civil Law system the focus on legislation and codes tends to underestimate the lack of completeness in such systems: a lack of completeness that has necessarily to be filled in by the judiciary.

The prime form of judicial reasoning within the Civil Law system is a deductive one within which the judge is required to apply the general principles stated in the legislation to the facts of the situation. Where the case involves a new problem that has never been the subject of a legal case, the judge is supposed merely to apply the principles of the ruling legislation to those facts in order to reach a decision. The source of the law is therefore the legislation not previous judgements; consequently precedent has no place in such a system. However, as a matter of practice, consistency does tend to develop and judges within Civil Law systems will follow previous decisions. The point is that they are now required to do so.

(c) Precedent in Islamic Law

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 Hadith, which are held to be the practices and teachings of the prophet, and consequently to be divinely sanctioned.

The Quran, being the fundamental source of law upon which even the *hadith* is based, is primary precedent: its rulings are binding and not subject to any dispute or further interpretation. The *hadith* is secondary to the Quran, for it was collected and written down by humans. In spite of the care taken to authenticate the many thousands of examples remembered by the companions of the Prophet, it is recognised that due to human frailty the sources were prone to error, and this gave rise to the different categories of *hadith* depending on their authority.

After the Prophet's death there was a need, to develop a system of jurisprudence that would serve the dual purpose of safeguarding the central belief system of Islam, whilst simultaneously allowing the generation of legal rulings to deal with previously unprecedented matters, not dealt with directly in the Quran or the Hadith texts. This necessary process gave rise to the development of the science of understanding and interpreting legal rulings known as *fiqh*.

Fiqh in Arabic means 'knowledge', 'understanding', or 'comprehension'. Besides direct rulings from the Quran and *hadith*, the scholars of *fiqh* generated a body of additional rulings, using tools of jurisprudence, that serve as a third source of law.

The tools involved in giving life to this third body of rules were *ijma* (consensus), *istihsan* (legal extrapolation), *ijtihad* (interpretation), and *qiyas* (analogy).

Some would argue that the body of Islamic jurisprudence has 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 Quran and *Hadith* texts on one hand and the second element, developed through *itjihad*, which is still capable of development in line with social changes.

In conclusion it can be said that the Quran, and *hadith*, together with the legal rulings of scholars from the accepted schools of thought make up the body of Islamic law, the *Shari'ah*. However within Islamic jurisprudence, only the authority of the rulings of the Quran, and at least the *sahih* (strong) *hadith*, cannot be challenged and constitute binding authorities. The rulings from scholars are, ultimately open to reinterpretation, nevertheless, if scholars unanimously agree on a certain point of law, the ruling is binding and has the force of law.

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

(i) *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.

(ii) *Informality*. The proceedings are less formal than a court case and they can be scheduled more flexibly than court proceedings.

(iii) *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 arbitration will have been largely wasted.

(iv) *Cost*. Arbitration is generally a much cheaper procedure than taking a case to the normal courts. Nonetheless, the costs of arbitration and the use of specialist arbitrators should not be underestimated.

(v) *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.

(vi) *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.

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration in 1985. The model law applies where the parties to an arbitration agreement have their place of business in different states, or if the parties in dispute are in the same state, where the arbitration agreement designates a different state as the place where the arbitration has to take place. In addition, of course, the dispute has to arise from a commercial relationship, that is one relating to trade, although this term is interpreted widely.

The foregoing has emphasised the advantages of arbitration over court-based proceedings, but there are alternative grounds for the parties to prefer the latter procedure. For example, judges are experts in the law and have particular expertise in evaluating evidence and the statements of witnesses. Court decisions are also taken within the framework of the doctrine of precedent and therefore are not *ad hoc* decisions made on a case-by-case basis, as is the situation with arbitration. It might actually be to the advantage of one of the parties to have a particular issue determined by the courts in order to set a precedent for the future. Finally it should also be mentioned that the court-based procedure allows much more scope for appeal within its structure.

(b) Article 23 of the Model Law in International Commercial Arbitration specifically refers to statements of claim and defence. As regards the statement of claim the Article provides that, within the period of time agreed by the parties or decided on by the arbitral tribunal, the claimant has to state the facts supporting their claim, the points at issue and the relief or remedy sought. In response the respondent should state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. In addition the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

However, unless otherwise agreed by the parties, either party may amend or supplement their claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24 makes it clear that all statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision also has to be communicated to the parties.

Article 25 makes clear the different consequences for the parties if they fail to submit their statements of claim or defence. Thus unless otherwise agreed by the parties, if, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with article 23(1), then not surprisingly as there will be no claim to determine, the arbitral tribunal shall terminate the proceedings. However, where the respondent fails to communicate their statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings, but it will not treat such failure in itself as an admission of the claimant's allegations.

Article 25 provides further that where either party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. These provisions, which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since they allow the tribunal to perform its function even where one of the parties has little interest in co-operating or expediting its operation.

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 on to detail 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. If the seller changes his place of business after the contract has been entered into, he will be liable for any additional expenses that arise as a consequence of that change (*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 he has 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 him to enable the seller to make delivery.

4 **(a)** Except in relation to specifically 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'. Welsh companies may use the Welsh language equivalents (Companies Act (CA)2006 ss.58, 59 & 60).

Companies Registry maintains a register of business names, and will refuse to register any company with a name that is the **same** as one already on that index (CA 2006 s.66).

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 or are offensive (CA 2006 s.53)

(ii) names which are likely to give the impression that the company is connected with either government or local government authorities (s.54).

(iii) names which include a word or expression specified under the Company and Business Names Regulations 1981 (s.26(2)(b)). This category requires the express approval of the Secretary of State for the use of any of the names or expressions contained on the list, and relates to areas which raise a matter of public concern in relation to their use.

Under s.67 of the Companies Act 2006 the Secretary of State has power to require a company to alter its name under the following circumstances:

(i) where it is the same as a name already on the Registrar's index of company names.

(ii) where it is 'too like' a name that is on that index.

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.77).

(b) The action of passing off was developed to prevent one person from using any name which is likely to divert business their way by suggesting that the business is actually that of some other person or is connected in any way with that other business. It thus enables people to protect the goodwill they have built up in relation to their business activity. In *Ewing* v *Buttercup Margarine Co Ltd* (1917) the plaintiff successfully prevented the defendants from using a name that suggested a link with his existing dairy company. It cannot be used, however, if there is no likelihood of the public being confused, where for example the companies are conducting different businesses (*Dunlop Pneumatic Tyre Co Ltd* v *Dunlop Motor Co Ltd* (1907)) and *Stringfellow* v *McCain Foods GB Ltd* (1984). Nor can it be used where the name consists of a word in general use (*Aerators Ltd* v *Tollitt* (1902)).

Part 41 of the Companies Act (CA) 2006, which repeals and replaces the Business Names Act 1985, still does not prevent one business from using the same, or a very similar, name as another business so the tort of passing off will still have an application in the wider business sector. However, the Act introduced a new procedure to deal specifically with company names. As previously under the CA 1985, a company cannot register with a name that was the same as any already registered (s.665 Companies Act (CA) 2006) and under CA s.67 the Secretary of State may direct a company to change its name if it has been registered in a name that is the same as, or too like a name appearing on the registrar's index of company names. In addition, however, a completely new system of complaint has been introduced.

(c) Under ss.69–74 of CA 2006 a new procedure has been introduced to cover situations where a company has been registered with a name

(i) that it is the same as a name associated with the applicant in which he has goodwill, or

(ii) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant (s.69).

Section 69 can be used not just by other companies but by any person to object to a company names adjudicator if a company's name is similar to a name in which the applicant has goodwill. There is a list of circumstances raising a presumption that a name was adopted legitimately; however even then, if the objector can show that the name was registered either, to obtain money from them, or to prevent them from using the name, then they will be entitled to an order to require the company to change its name.

Under s.70 the Secretary of State is given the power to appoint company names adjudicators and their staff and to finance their activities, with one person being appointed Chief Adjudicator.

Section 71 provides the Secretary of State with power to make rules for the proceedings before a company names adjudicator. Section 72 provides that the decision of an adjudicator and the reasons for it, are to be published within 90 days of the decision.

Section 73 provides that if an objection is upheld, then the adjudicator is to direct the company with the offending name to change its name to one that does not similarly offend. A deadline must be set for the change. If the offending name is not changed, then *the adjudicator will decide* a new name for the company.

Under s.74 either party may appeal to a court against the decision of the company names adjudicator. The court can either uphold or reverse the adjudicator's decision, and may make any order that the adjudicator might have made.

5 **(a)** As shareholders in limited companies, by definition, have the significant protection of limited liability, the courts have always seen it as the duty of the law to ensure that this privilege is not abused at the expense of the company's creditors. To that end they developed the doctrine of capital maintenance, the specific rules of which are now given expression in the Companies Act (CA) 2006. The rules, such as that stated in CA 2006 s.580 against shares being issued at a discount, ensure that companies receive at least the full nominal value of their share capital. The rules relating to the doctrine of capital maintenance operate in conjunction to those rules to ensure that the capital can only be used in limited ways. Whilst this may be seen essentially as a means of protecting the company's creditors, it also protects the shareholders themselves from the depredation of the company's capital.

There are two key aspects of the doctrine of capital maintenance: firstly, that creditors have a right to see that the capital is not dissipated unlawfully; and secondly that the members must not have the capital returned to them surreptitiously. There are a number of specific controls over how companies can use their capital, but perhaps the two most important are the rules relating to capital reduction and company distributions.

(b) The procedure through which a company can reduce its capital is laid down by ss.641–653 Companies Act 2006.

Section 641 states that a company may reduce its capital in any way by passing a special resolution to that effect. In the case of a public company any such resolution must be confirmed by the court. In the case of a private company, however, court approval is not required as long as the directors issue a statement as to the company's present and continued solvency for the following 12 months (ss.642 & 643). The special resolution, a copy of the solvency statement, a statement of compliance by the directors confirming that the solvency statement was made not more than 15 days before the date on which the resolution was passed, and a statement of capital must be delivered to the registrar within 15 days of the date of passing the special resolution.

Section 641 sets out three particular ways in which the capital can be reduced by:

(a) removing or reducing liability for any capital remaining as yet unpaid. In effect the company is deciding that it will not need to call on that unpaid capital in the future.

(b) cancelling any paid-up capital which has been lost through trading or is unrepresented by the current assets. This effectively brings the statement of financial position into balance at a lower level by reducing the capital liabilities in recognition of a loss of assets.

(c) repayment to members of some part of the paid up value of their shares in excess of the company's requirements. This means that the company actually returns some of its capital to its members on the basis that it does not actually need that level of capitalisation to carry on its business.

It can be seen that procedure (a) reduces the potential creditor fund, for the company gives up the right to make future calls against its shares and procedure (c) reduces the actual creditor fund by returning some of its capital to the members. In recognition of this fact, creditors are given the right to object to any such reduction. However, procedure (b) does not actually reduce the creditor fund, it merely recognises the fact that capital has been lost. Consequently creditors are not given the right to object to this type of alteration (ss.645 & 646).

Under s.648 the court may make an order confirming the reduction of capital on such terms as it as it thinks fit. In reaching its decision the court is required to consider the position of creditors of the company in cases (a) and (c) above and may do so in any other case. The court also takes into account the interests of the general public. In any case the court has a general discretion as to what should be done. If the company has more than one class of shares, the court will also consider whether the reduction is fair between classes. In this it will have regard to the rights of the different classes in a liquidation of the company since a reduction of capital is by its nature similar to a partial liquidation.

When a copy of the court order together with a statement of capital is delivered to the registrar of companies a certificate of registration is issued (s.649).

6 The Company Directors Disqualification Act (CDDA) 1986 was introduced to control individuals who persistently abused the various privileges that accompany incorporation, most particularly the privilege of limited liability. The Act applies to more than just directors and the court may make an order preventing any person (without leave of the court) from being:

(i) a director of a company;

(ii) a liquidator or administrator of a company;

(iii) a receiver or manager of a company's property; or

(iv) in any way, whether directly or indirectly, concerned with or taking part in the promotion, formation or management of a company.

The CDDA 1986 identifies three distinct categories of conduct, which may, and in some circumstances must, lead the court to disqualify certain persons from being involved in the management of companies.

(a) *General misconduct in connection with companies*

This first category involves the following:

(i) A conviction for an indictable offence in connection with the promotion, formation, management or liquidation of a company or with the receivership or management of a company's property (s.2 of the CDDA 1986). The maximum period for disqualification under s.2 is five years where the order is made by a court of summary jurisdiction, and 15 years in any other case.

(ii) Persistent breaches of companies legislation in relation to provisions which require any return, account or other document to be filed with, or notice of any matter to be given to, the registrar (s.3 of the CDDA 1986). Section 3 provides that a person is conclusively proved to be persistently in default where it is shown that, in the five years ending with the date of the application, he has been adjudged guilty of three or more defaults (s.3(2) of the CDDA 1986). This is without prejudice to proof of persistent default in any other manner. The maximum period of disqualification under this section is five years.

(iii) Fraud in connection with winding up (s.4 of the CDDA 1986). A court may make a disqualification order if, in the course of the winding up of a company, it appears that a person:

(1) has been guilty of an offence for which he is liable under s.993 of the CA 2006, that is, that he has knowingly been a party to the carrying on of the business of the company either with the intention of defrauding the company's creditors or any other person or for any other fraudulent purpose; or

(2) has otherwise been guilty, while an officer or liquidator of the company or receiver or manager of the property of the company, of any fraud in relation to the company or of any breach of his duty as such officer, liquidator, receiver or manager (s.4(1)(b) of the CDDA 1986).

The maximum period of disqualification under this category is 15 years.

(b) *Disqualification for unfitness*

The second category covers:

(i) disqualification of directors of companies which have become insolvent, who are found by the court to be unfit to be directors (s.6 of the CDDA 1986). Under s.6, the minimum period of disqualification is two years, up to a maximum of 15 years;

(ii) disqualification after investigation of a company under Pt XIV of the CA 1985 (*it should be noted that this part of the previous Act still sets out the procedures for company investigations*) (s.8 of the CDDA 1986). Once again, the maximum period of disqualification is 15 years.

Schedule 1 to the CDDA 1986 sets out certain particulars to which the court is to have regard in deciding whether a person's conduct as a director makes them unfit to be concerned in the management of a company. In addition, the courts have given indications as to what sort of behaviour will render a person liable to be considered unfit to act as a company director. Thus, in *Re Lo-Line Electric Motors Ltd* (1988), it was stated that:

'Ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although . . . in an extreme case of gross negligence or total incompetence, disqualification could be appropriate.'

(c) *Other cases for disqualification*

This third category relates to:

(i) participation in fraudulent or wrongful trading under s.213 of the Insolvency Act (IA)1986 (s.10 of the CDDA 1986);

(ii) undischarged bankrupts acting as directors (s.11 of the CDDA 1986); and

(iii) failure to pay under a county court administration order (s.12 of the CDDA 1986).

For the purposes of most of the CDDA 1986, the court has discretion to make a disqualification order. Where, however, a person has been found to be an unfit director of an insolvent company, the court has a duty to make a disqualification order (s.6 of the CDDA 1986). Anyone who acts in contravention of a disqualification order is liable:

(i) to imprisonment for up to two years and/or a fine, on conviction on indictment; or

(ii) to imprisonment for up to six months and/or a fine not exceeding the statutory maximum, on conviction summarily (s.13 of the CDDA 1986).

7 **(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.

(b) Endorsement relates to the way in which international bills of exchange are transferred and in effect it allows the original payee of the instrument to transfer the benefit of it to some other party by signing it.

Article 13 of the UN Convention on International Bills of Exchange and International Promissory notes provides, a bill of exchange is transferred either by:

(a) endorsement and delivery of the instrument by the endorser to the endorsee; or

(b) mere delivery of the instrument if the last endorsement is in blank.

By virtue of Article 14 an endorsement must be written on the instrument attached to it. Any such endorsement may be:

(a) *in blank*, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to a person in possession of it;

(b) *special*, that is, by a signature accompanied by an indication of the person to whom the instrument is payable.

A signature alone, other than that of the drawee, is an endorsement only if placed on the back of the instrument. An endorsement must be unconditional and in the light of any conditional endorsement the bill of exchange will still be transferred whether or not the condition is fulfilled (Article 18).

An endorsement must relate to the entire sum of the bills or it is ineffective (Article 19).

If there are two or more endorsements, it is presumed, unless the contrary is proved, that each endorsement was made in the order in which it appears on the instrument (Article 20).

An instrument may be transferred in accordance with Article 13 after maturity, except by the drawee, the acceptor or the maker (Article 23).

Under Article 17(1) a bill cannot be transferred if the bill or an endorsement on the bill contains words such as not negotiable/not transferable/not to order/pay x only.

Under Article 25, if an endorsement is forged, the person whose endorsement is forged, or a party who signed the instrument before the forgery, has the right to recover compensation for any damage that he may have suffered because of the forgery. This right may be exercised against:

(a) the person who forged the endorsement;

(b) the person to whom the instrument was directly transferred by the forger;

(c) a party or the *drawee* who paid the instrument to the forger directly or through one or more endorsees for collection.

However, an *endorsee* for collection is not liable if they have no knowledge of the forgery: at the time he pays the principal or advises him of the receipt of payment; or at the time he receives payment, if this is later, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

Alternatively, the *drawee* who pays an instrument is not liable if they are unaware of the forgery again just as long as their lack of knowledge is not due to their failure to act in good faith or to exercise reasonable care.

If an endorsement is made by an agent without authority or power to bind his principal in the matter, the principal, or a party who signed the instrument before such endorsement, usually has the right to recover compensation for any damage that he may have suffered because of such endorsement against:

(a) The agent;

(b) The person to whom the instrument was directly transferred by the agent;

(c) A party or the *drawee* who paid the instrument to the agent directly or through one or more endorsees for collection (Article 26).

8 Anticipatory breach occurs where, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of their obligations under the contract or will commit a fundamental breach of contract. The Convention distinguishes between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

Thus as regards the first situation Article 71 provides that a party may *suspend* performance of his obligations if, after the conclusion of the contract but before it is due to be performed, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

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

(b) his conduct in preparing to perform or in performing the contract.

If the circumstances only become apparent after the seller has despatched the goods they may prevent them from being handed over to the buyer, even if the buyer holds a document, such as a Bill of Lading, which entitles the buyer to collect the goods. The party suspending the performance of the contract must immediately give notice of the suspension to the other party and must if that part gives adequate assurance of their future performance then the contract must continue. (Article 71)

Alternatively, under Article 72, if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract *avoided*. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what they were entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances.

If time allows, the party intending to avoid the contract must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. However, that requirement does not apply where the other party has expressly stated that that they will not perform their obligations under the contract.

Under the facts of the problem scenario it is apparent that Bo has performed an anticipatory breach of his contract with Arti. Arti can suspend performance of the contract and see if Bo changes his mind. Even if he does change his mind, Bo will not be able to claim the acid in spite of holding the Bill of Lading. However, as a result of Bo's express repudiation of the contract Arti is entitled to avoid the contract immediately if he chooses and sue Bo for damages.

9 This question requires an analysis of the doctrine of corporate opportunity and the rules relating to directors' duties. Section 178 of the Companies Act (CA) 2006 places directors' duties on a statutory basis, and although s.170 provides that the new statement of duties replaces the old common law rules and equitable principles, it nonetheless expressly provides that the duties now stated in the Act are to be interpreted and applied in the same way as those rules and principles were. Section 178 specifically preserves the existing civil consequences of breach of any of the general duties, so the remedies for breach of the newly stated general duties will be exactly the same as those that were available following a breach of the equitable principles and common law rules that the general duties replace. Section 178(2) specifically provides that the directors' duties are enforceable in the same way as any other fiduciary duty owed to a company by its directors and remedies available may include:

(i) damages or compensation where the company has suffered loss;

(ii) restoration of the company's property;

(iii) an account of profits made by the director; and

(iv) rescission of a contract where the director failed to disclose an interest.

It should be noted that the foregoing does not apply to the duty to exercise reasonable care, skill and diligence under s.174, which is not considered to be a fiduciary duty. Section 175 of the Act specifically deals with the duty to avoid conflicts of interest and replaces the previous no-conflict rule. Under the previous rule, certain consequences followed if directors placed themselves in a position where their personal interests came into conflict with their duties to the company, unless the company knew about the conflict and specifically consented to it. Section 175 continues that procedure in an amended form, which allows the other directors to authorise the conflict. The section makes clear that a conflict of interest may, in particular, arise when a director makes personal use of information, property or opportunities belonging to the company or specifically under ss.177 and 182 where the duties to declare interests in transactions are set out, when a director enters into a contract with his company. This is the case whether or not the company itself could have taken advantage of the property, information or opportunity, so once again the previous common law and equitable rules are maintained. As well as allowing the directors to approve a conflict under s.175, s.180 preserves the ability of the members of a company to authorise conflicts that would otherwise be a breach of this duty.

Applying the preceding rules to the facts of the problem scenario it can be seen that Des has breached his statutory duty under CA 2006 s.175 by allowing a conflict of interest to arise with declaring it to the board and getting the approval of the other directors or indeed the members.

The operation of the previous fiduciary duty not to make an undisclosed benefit from the position as directors and not to profit personally from what is a corporate opportunity even survived after the director in question has left the company (*IDC* v *Cooley* (1972)). As the CA 2006 continues the previous equitable principles and specifically states that the duty to avoid conflicts of interest applies to former directors, Des will still be liable for his action.

It is also now clear that the rules against allowing a conflict of interest to arise apply even if the company cannot itself take advantage of the opportunity wrongly misappropriated, which continues the previous very strict application of principle (*Regal (Hastings)* v *Gulliver* (1942)). However the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest: s.175(4)(a).

Applying this to the facts of the problem it would appear that Des has acted in breach of his statutory duty and will be held liable to account to the company for any profits he made on the transaction.

He will not be allowed to hide his personal profit behind the separate personality of Flush Ltd as the courts will simply lift the veil of incorporation as in *Gilford Motor Co*. v *Horne* (1933).

10 This question requires candidates to recognise and explain the law relating to two criminal offences: insider dealing and money laundering.

(a) Insider dealing is dealing in shares, on the basis of access to unpublished price sensitive information. Such activity is unlawful and is governed by part V of the Criminal Justice Act 1993 (CJA). Money laundering refers to the attempt to disguise the origin of money acquired through criminal activity in order to make it appear legitimate. The aim of the process is to disguise the source of the property, in order to allow the holder to enjoy it free from suspicion as to its source.

Such activity is regulated by the Proceeds of Crime Act 2002 (PCA) together with the specifically anti-terrorist legislation, the Terrorism Act 2000 and the Anti-terrorism Crime and Security Act 2001 and the Prevention of Terrorism Act 2005.

Under s.52 of the Criminal Justice Act (CJA) 1993 an individual is guilty of insider dealing if they have information as an insider and deal in price-affected securities on the basis of that information.

Section 54 specifically includes shares amongst those securities and dealing is defined in s.55, amongst other things, as acquiring or disposing of securities, whether as a principal or agent, or agreeing to acquire securities.

Section 56 defines 'inside information' as:

(i) relating to particular securities,

(ii) being specific or precise,

(iii) not having been made public and

(iv) being likely to have a significant effect on the price of the securities.

Section 57 states that a person has information as an insider only if they know it is inside information and they have it from an inside source and covers those who get the inside information directly through either:

(i) being a director, employee or shareholder of an issuer of securities; or

(ii) having access to the information by virtue of their employment, office or profession.

On summary conviction, an individual found guilty of insider dealing is liable to a fine not exceeding the statutory maximum and/or maximum of six months imprisonment. On indictment the penalty is an unlimited fine and/or a maximum of seven years imprisonment. It is quite clear from the facts of the problem scenario that Greg has engaged in insider dealing under the CJA 1993.

(b) Although he has tried to disguise his criminal activity, that has merely involved him in further criminal activity; money laundering.

Under s.327 of the Proceeds of Crime Act 2002 it is an offence to conceal, disguise, convert, transfer or remove criminal property from England and Wales, Scotland or Northern Ireland. Concealing or disguising criminal property is widely defined to include concealing or disguising its nature, source, location, disposition, movement or ownership or any rights connected with it. These offences are punishable on conviction by a maximum of 14 years imprisonment and/or a fine.

Applying the general law to the problem scenario, one can conclude that Greg is an 'insider' as he receives inside information as a result of his position as a director of Huge plc. The information fulfils the requirements for 'inside information' as it: relates to particular securities, the shares in Kop plc; is specific, in that it relates to the company's take-over plans; has not been made public; and is likely to have a significant effect on the price of the securities. On that basis Greg is clearly guilty of an offence under s.52 of the CJA when he arranges for Jet Ltd to buy the shares in Kop plc.

It is equally apparent that Greg has attempted to disguise the source of his profit from the illegal activity of insider dealing by pretending that it is the result of legitimate work that he has carried out for his company Imp Ltd. As a consequence he would also be liable for prosecution under s.327 of the Proceeds of Crime Act 2002.

Fundamentals Level – Skills Module, Paper F4 (GLO)
Corporate and Business Law (Global) **June 2009 Marking Scheme**

1 This question requires candidates to examine the doctrine of precedent and how it operates within three different legal systems one of which is the English legal system.

8–10 marks	Good explanation of the way that precedent operates in two systems. It is necessary that candidates will refer to the Common Law system.
5–7 marks	Sound explanation but lacking in detail or perhaps slightly unbalanced. A maximum of 6 marks only is possible if the candidate only deals with the English legal system.
3–4 marks	Weak explanation or very unbalanced answer.
0–2 marks	Little or no understanding.

2 **(a)** This part of the question requires candidates to assess the relative advantages and disadvantages of court proceedings and arbitration. The main focus may be placed on arbitration, but the court system must also be considered.

4–5 marks	Good explanation of the meaning of arbitration as opposed to the court system, together with a sound assessment of the relative advantages and disadvantages of both.
2–3 marks	Fair explanation of both systems but perhaps lacking in detail or examples. Perhaps only dealing with arbitration without the required evaluation.
0–1 mark	Very unbalanced answer or lacking any detail and evaluation.

(b) This part of the question requires candidates to explain certain key terms in relation to the UNCITRAL Model Law on International Commercial Arbitration; i.e. statements of claim and statements of defence.

4–5 marks	Good explanation of the meaning and effect of both terms.
2–3 marks	Sound explanation but lacking in detail or perhaps slightly unbalanced.
0–1 mark	Weak explanation or very unbalanced answer.

3 This question requires candidates to explain the obligations relating to price placed on the purchaser 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 **(a)**

3–4 marks	Good explanation of the rules relating to company names.
0–2 marks	Some but limited knowledge of the control over company names.

(b)

3–4 marks	Good explanation of the action of 'passing off' with case authority to support the explanation.
0–2 marks	Some but limited knowledge of 'passing off' or control over company names.

(c)

2 marks	Good explanation of the role of the company names adjudicators and why they are necessary.
0–1 mark	Little if any knowledge of the concept.

5 **(a)**

3–4 marks	Thorough explanation of the doctrine of capital maintenance perhaps with some examples of its application.
0–2 marks	Some knowledge but lacking in detail.

(b)

4–6 marks	Good to full consideration of the procedure for reducing capital. Reference must be made to the 2006 Act procedure and the difference between public and private companies should be mentioned specifically.
2–3 marks	Some general knowledge but lacking in detail as regards to the process or not mentioning the difference between the two company forms.
0–1 mark	Little or no understanding of the process.

6 This question requires candidates to explain the operation of the Company Directors Disqualification Act 1986.

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

7 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 marks A thorough explanation of the topic with references to the Convention provisions.
0–2 marks Some but little or no understanding of the topic.

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

5–6 marks A thorough explanation of the meaning and operation of endorsement
2–4 marks Some general understanding, but perhaps lacking in specific information.
0–1 mark Little if any understanding.

8 This question requires candidates to explain the circumstances under which a party can avoid a contract under the UN Convention on the International Sale of Goods on the grounds of anticipatory breach of contract. It requires candidates to analyse a problem scenario and explain and apply the law appropriately.

8–10 marks Good to complete answer which shows thorough knowledge of the appropriate provisions of the convention and applies them accurately.
5–7 marks Fair explanation of the convention as it applies to anticipatory breach of contract, but perhaps lacking in detail, or only dealing well with one aspect.
0–4 marks Some basic knowledge of what is involved in anticipatory breach under the Convention, but no real depth of understanding. Perhaps an unbalanced answer that only deals with one part of the question.

9 This question requires a consideration of the statutory duties placed on company directors under the Companies Act 2006.

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

10 This question requires candidates to explain the meaning and regulation of the two criminal offences of insider dealing and money laundering and apply that law to a problem scenario.

8–10 marks Clear analysis of the problem scenario – recognition of both the criminal law issues raised and a convincing application of the legal principles to the facts.
6–7 marks Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.
3–5 marks Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.
0–2 marks Very weak answer showing little analysis, appropriate knowledge or application.