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F4

**CORPORATE AND
BUSINESS LAW
(GLOBAL)**

JUNE 2012 EXAMINATIONS



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Paper F4 Global

1	Sharia law	1
2	Market, planned and mixed economies	5
3	International organisations	7
4	International Court of Arbitration	17
5	UNCISG	25
6	International Sale Of Goods Contracts – The Seller’s Obligations	33
7	Rights and obligations of the buyer and the seller	39
8	When does risk pass from the seller to the buyer?	47
9	Documents found in international trade	51
10	Agency Law	59
11	Partnership Law	65
12	Company Law	73
13	Company Law: Directors and Officers	93
14	Company Law: Meetings and Resolutions	107
15	Company Law: Loan Capital	115
16	Company Law: Liquidations	119
17	Company Law: Corporate Governance	125
18	Company Law: Illegalities	133
19	Capital Maintenance	141

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Chapter 1

SHARIA LAW

- Sharia - a way to a watering place
- Quran - primary source of Sharia law
- Sunnah - what has come to be accepted conduct
- Shia, Hanafi, Maliki, Hanbali, Shafi
 - the five schools of law
 - they provide further details / interpretation of acceptable conduct and application of the law
 - a Sharia judge may refer to these secondary schools to determine how to apply the law
- Ijithad - methods of interpreting the law
- taqlid - the belief that no further interpretation is required
 - ijma - one of two methods of interpretation open to a judge who is not a follower of the taqlid thinking
 - ijma is a consensus of opinion of legal scholars or judges
- qiyas - the Sharia equivalent of judicial precedent
 - involves the comparison of two similar situations and the application of accepted law in the first situation to the second

Judicial precedent

- in UK common law, judges are bound to follow decisions from earlier similar cases
- this concept does not have any true equivalent in Sharia law, the nearest equivalent is qiyas
- judges, in the UK, may avoid the earlier decision and therefore avoid having to follow the precedent decision:
 - if earlier decision was made per incuriam (without care)
 - if too obscure
 - if in conflict with basis principle of law
 - if too wide
 - (in Europe) if in conflict with European law
 - if facts are not materially similar
- rules for applying a precedent
 - must be based on a point of law, not a point of fact
 - must be part of the ratio decidendi in the previous case
 - material facts should be sufficiently similar
 - prior court must have superior status in the hierarchy of the courts

Separation of powers and the rule of law

- rule of law reflects the situation which exists when members of a society abide / obey a set of rules governing behaviour
- separation of powers
- the process of making laws is separated into three distinct areas:
 - the legislature – an elected body which decides which laws need to be passed to satisfy the nation's wishes (for example, health, defence)
 - the executive – an elected body which makes the decisions which put the law into action (for example in the UK, the elected government)
 - the judiciary – a non-elected body which rules on disputes about law
 - these disputes may be between government and individuals (criminal law)
 - or between individual and individual (civil law)



Chapter 2

MARKET, PLANNED AND MIXED ECONOMIES

Market

- allocation of resource is determined by the forces of supply and demand
- market forces dictate quantity of production and consumption
- price is dependent upon supply and demand
- wealth is held individually rather than collectively

Planned

- allocation of resource is determined centrally by government
- prices are fixed centrally for both resources and production
- prices are not therefore the result of the forces of supply and demand
- individuals own items of personal property but ...
- ... real wealth is held by government (central or regional)

Mixed

- as the name suggests, it incorporates elements of both market and planned economies
 - resource allocation and production are determined by a mixture of factors
 - government decisions (both direct and indirect)
 - private sector decisions
-
- prices are affected by supply and demand
 - but are also affected by government actions such as taxation and subsidies
 - wealth is split between the individuals in society and the government



Chapter 3

INTERNATIONAL ORGANISATIONS

• UN – United Nations

• general purposes:

- maintenance of peace and security
- development of friendly relations among nations
- promotion of cooperation in solving economic, social, cultural and humanitarian problems
- promotion of respect for human rights and international freedoms

UNCITRAL United Nations Commission on International Trade Law

- one of two bodies actively involved in drafting international law (the other is the International Law Commission)
- concentrates on the development and codification of international law
- tries to overcome the practical problems created by different nations having different laws relating to trade
- looks to standardise international law in areas such as:
 - sale of goods
 - e-commerce
 - dispute resolution
- also attempts to increase international trade by introducing the Hamburg rules covering
 - carriage of goods by sea
 - international bills of exchange
 - cross-border insolvency
- encourages countries to adopt UNCITRAL principles

INTERNATIONAL ORGANISATIONS

UNCITRAL United Nations Commission on International Trade Law

- UNCITRAL – specific ways in which UNCITRAL tries to harmonise and unify international trade
 - coordinating the work of the various interested organisations
 - encouraging inter-organisational cooperation
 - promoting wider acceptance and participation in existing international conventions
 - preparing new international conventions, model laws and uniform laws
 - promoting ways of ensuring consistency in the interpretation and application of conventions and laws
 - collecting and disseminating information on legal developments and national legislation
 - maintaining close liaison and collaboration with the UN Conference on Trade and Development
 - maintaining contact and liaising with other UN elements concerned with international trade

WTO World Trade Organisation

- formed in 1995
- based on the principles of the General Agreement on Tariffs and Trade (GATT)
- devoted to the promotion of international free trade in goods, services and intellectual property
- in order to achieve this, it works actively to remove obstacles to free trade
 - tariffs
 - import controls
 - customs
 - bureaucracy
- acts as a forum for the creation of trade agreements and then ...
- ... administers them when they are formed
- continuously reviews the trade policies of different nations
- assists developing nations to design their own national trade policies
- assists in international trade dispute resolution

INTERNATIONAL ORGANISATIONS

Chapter 3

ICC – International Chamber of Commerce

- purpose is to serve world business by promoting
 - trade
 - investment
 - open markets
- advocates free and fair competition among businesses
- encourages economic growth in both developed and developing countries
- active in its attempts to fight international commercial criminal activities
- concerned with the legal processes which underpin trading activity such as trade agreements and dispute resolution arrangements
- developed INCOTERMS

INCOTERMS

- produced and promoted by International Chamber of Commerce
- idea is to address the main issues involved in international trade
- in particular, the terms address
 - the extent to which the costs of carriage are included within the contract price
 - which party should bear the risk in the event of goods being damaged during the delivery of those goods
 - at what moment does ownership of the goods, and therefore also risk, pass
 - the extent to which customs duties are included within the contract price
 - the responsibility for customs clearance documentation
- these INCOTERMS incorporated into a contract establish the extent of the service and the risk accepted by each of the contracting parties, and will be reflected in the negotiated price of the contract

INTERNATIONAL ORGANISATIONS

INCOTERMS (these MUST be learned!)

- there used to be 4 categories
- now, with effect from 2010, there are just 2

- rules for use in relation to "any mode / modes of transport"

- rules for transport by sea or inland waterway

- "any mode of transport" rules

- may be used when either sea transport is not involved or...

- ... if it is, when sea transport is only for part of the journey

- 7 rules / abbreviations apply

- EXW "ex works"

- minimum obligations for the seller concerning delivery of the goods

- buyer is responsible for all costs incurred in delivery from seller's premises

- FCA "free carrier (named place)"

- seller completes obligations when the goods have been cleared for export and custody has been transferred to a named carrier at a specified place

- CIP "carriage and insurance paid to"

- the seller is responsible for carriage and insurance up to a specified location

- thereafter, the buyer is responsible

- CPT "carriage paid to"

- the seller pays the costs of delivery to a stated location

- once at that location, the buyer assumes responsibility

- DAT "delivered at terminal"
 - requires the seller to pay for carriage to the terminal and the costs associated up to the time the goods are unloaded at the terminal
 - does NOT include costs of import clearance – these costs are the responsibility of the buyer
 - effectively, therefore, the goods are "delivered" when they are unloaded at the terminal and placed at the buyer's disposal
 - the terminal is the "named terminal in the contract at the named port or place of destination"
- DAP "delivered at place"
 - the seller bears all costs (except import clearance costs) involved in delivering goods to the named destination – the "place"
 - this means all costs up to the point where the goods are ready to be unloaded by the buyer at the agreed destination
- DDP "delivered duty paid"
 - seller completes obligations when the goods have been delivered to the buyer at a specified location in the buyer's country
 - seller pays all costs of delivery to that location including all import taxes, customs duties and any other official charges in the importing country
- "sea or inland waterway transport" rules
 - these rules apply when goods are being transported from one port to another
- 4 rules / abbreviations apply
 - FAS "free alongside ship"
 - only applies where goods are transported by ship
 - seller's responsibilities / obligations cease when the goods are placed on the quay alongside the ship
 - buyer should have arranged for export formalities
 - FOB "free on board"
 - buyer arranges for shipment
 - seller completes obligations when goods are loaded onto the ship
 - seller provides export documentation, buyer provides import documentation

INTERNATIONAL ORGANISATIONS

- CFR "cost and freight"
 - only applicable to goods being delivered by ship
 - seller pays all costs until the goods have "passed the ship's rail" in the export country's port
 - after that point, the buyer assumes responsibility
 - thus the buyer arranges for marine insurance and for customs costs

- CIF "cost, insurance and freight"
 - all three costs shall be the responsibility of the seller
 - insurance is such that the buyer has the right to recover from the insurer
 - minimum insurance cover is contract price plus 10%

• terms apply to domestic carriage of goods as well as international (previously these rules only applied to international carriage)

• goods sold whilst in transit?

- only the original seller "ships" the goods
- so subsequent purchasers now have an obligation to "procure goods shipped"
- buyers and sellers must cooperate in providing sufficient information to each other to make easier the import / export of the goods

• handling costs

- the 2010 terms try to remove an awkward situation which used to exist under the 2000 terms
- 2010 terms clearly allocate responsibility for the handling costs at the destination terminal



Chapter 4

INTERNATIONAL COURT OF ARBITRATION

ICA International Court of Arbitration

- set up by the International Chamber of Commerce nearly 100 years ago
- promotes the use of arbitration procedures in commercial disputes
- oversees all elements of arbitration process:
 - maintains lists of prospective arbitrators
 - confirms appointment of arbitrators
 - makes decisions about challenges to arbitrators
 - approves arbitrators' awards
 - fixes arbitrators' fees

UNCITRAL Arbitration

- involves the settlement of a disputed contract by an independent third party, the arbitrator, or arbiter
- often involves compromise
- the two disputing parties may or may not be legally represented
- the decision of the arbitrator is binding
- ... although there is normally a right of appeal to the courts
- advantages
 - cost
 - no court costs
 - no costs of legal representatives
 - speed
 - generally much quicker decision than taking the dispute to court
 - flexibility of the process generally leads to quicker decisions
 - privacy
 - court proceedings are a matter of public record
 - arbitration is a private, unpublicised matter
 - informality
 - court proceedings can be extremely stressful
 - the informality of the arbitration process is much less stressful
 - expertise
 - the arbitrator should be an acknowledged expert in contract law area under dispute
 - a judge is an expert in law with possibly no experience in the disputed matter
 - decisions
 - because arbitration is not bound by precedent, decisions of an arbitrator are likely to be more innovative

UNCITRAL – arbitration

- the requirement of qualifications for an arbitrator should be established within the arbitration agreement
- if no qualification requirement has been agreed, then anyone may be selected
- no one should be prevented from serving as an arbitrator on the grounds of their nationality alone
- an arbitrator should be independent and unbiased
- any nominated arbitrator should disclose any relevant facts which may be seen to impair their independence
- similarly, if it becomes the case that independence is threatened, an arbitrator should disclose the circumstances
- if it becomes impossible for an appointed arbitrator to continue to act, they should withdraw from the position, or
 - both parties may agree that the appointment should be terminated, or
 - either party may challenge the arbitrator concerning independence

UNCITRAL – arbitration

- for a dispute to be submitted to arbitration, under the UN's Model Law on International Commercial Arbitration the agreement to turn to arbitration must be in writing
- there should therefore be an "arbitration clause" agreement
- to qualify as "being in writing" one of the following requirements should be appropriate
- it should be contained in:
 - a document, signed by both parties
 - an exchange of documents clearly referring to such an agreement / clause
 - an exchange of documents of a legal nature clearly referring to such an agreement / clause
 - another written contract between the parties referring to the arbitration agreement / clause
- the arbitration tribunal
 - if the parties have agreed to have a sole arbitrator, the two parties should agree on that person's identity
 - if the parties cannot agree, they will need to refer the matter to a nominated court or tribunal for them to decide the identity of the arbitrator
 - if the parties have not agreed on a sole arbitrator, the Model Law states that there should be three arbitrators
 - one chosen by each of the two disputing parties, and
 - one chosen by the two arbitrators

UNCITRAL – arbitration

- disadvantages
 - privacy!
 - one party in the dispute may actually want the publicity
 - application of the law
 - independent arbitrators do not necessarily have expertise in the interpretation and application of the law, whereas
 - judges in courts are experts in this field
 - predictability
 - arbitrators are not bound by precedent so may be inconsistent when compared with decisions in similar disputes, whereas
 - judges are bound to follow the principles of precedent so dispute resolution may be seen as predictable
 - precedent
 - resolution under arbitration creates no precedent so future similar dispute resolution could differ from the earlier arbitration decision, whereas
 - where a dispute lies beyond the scope of established precedent, a court decision could be seen to create a new precedent upon which later similar dispute resolution will be based

UNCITRAL – arbitration – application to have an arbitration award set aside / cancelled

- incapacity
 - occurs when one party in the dispute is suffering under an incapacity when the tribunal hearing took place
- notice
 - occurs when insufficient notice has been given of either
 - the appointment of an arbitrator, or
 - the date of the proceedings
- invalidity of the agreement
 - if the tribunal decision is invalid under the law governing the dispute contract
- public policy
 - where a decision from a tribunal is claimed to be against the public policy of the claimant's state
- subject matter
 - tribunals are restricted to making awards only on matters included within the agreement to seek arbitration
- composition of the panel of arbitrators
 - if the proper requirements of panel selection have not been followed (normally three arbitrators)

INTERNATIONAL COURT OF ARBITRATION

UNIDROIT – International Institute for the Unification of Private Law

- independent inter-governmental organisation

- studies the need for and how to modernise, harmonise, standardise and co-ordinate private law in an international context

- of particular concern is international trade law

- three tier structure
 - secretariat
 - responsible for day-to-day running
 - governing council
 - supervises policy
 - draws up a work programme
 - supervises how the secretariat carry out the program
 - general assembly
 - the ultimate decision making body
 - approves the budget
 - approves the work programme
 - elects the governing council



Chapter 5

UNCISG

UNCISG – United Nations Convention on Contracts for the International Sale of Goods

- applies to contracts where buyer and seller are in different states
- two possibilities
 - where both states have accepted the convention (contracting states)
 - where only one of the states has accepted the convention
- in this latter situation, both parties have agreed that the contract should be subject to the law of the accepting state
- nationality of the parties is not relevant
- location of parties' business is important

Contracts not covered by UNCISG

- a contract for the sale of goods is one in which
 - the seller agrees to transfer title (ownership) of the goods
 - to the buyer
 - in exchange for a money consideration (the price)
- so Uncisg does not apply to contracts:
 - for the supply of services
 - for the exchange of goods
 - where one of the parties has the main obligation to supply labour
 - for manufacture, where the buyer provides all the material (or most)
 - where goods are purchased for personal, family or household use ...
 - unless the seller knew or ought to have known about the proposed use
 - where goods are bought at auction
 - where goods are bought by legal authority
 - for purchase of stocks and shares
 - for purchase of ships or aircraft
 - for purchase of electricity

UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

- contracts are agreements
- an agreement consists of an offer and an acceptance
- the agreement should be supported by consideration and
- made with intention to create legal relations
- an offer is a sufficiently definite proposal for concluding a contract which
 - is addressed to one or more persons
 - indicates the intention and willingness of the offeror to be bound upon acceptance of the offer
 - indicates the goods involved, the quantity and the price and therefore qualifies for the description "sufficiently definite"
- offers must be distinguished from invitations
- an invitation is not capable of acceptance
- an invitation is inviting another person to make an offer

UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

- for example:
 - goods in a supermarket are invitations
 - goods in a shop window are invitations
 - adverts are normally invitations
- but, very occasionally, adverts may be taken to be offers
- mail catalogues are invitations
- the process of an auction sale constitutes the auctioneers inviting a series of offers

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Offers

- half of the agreement

- an expression of willingness to be bound on specific terms

- must be certain

- must still exist when "accepted"

- must be distinguished from invitations

- must be distinguished from statements of intent

- a response to a request for information is not an offer

- a request for information is not a counter offer

- revocation of an offer must be communicated to the offeree

- an offer is effective from the moment it is received by the offeree whether
 - orally
 - by mail
 - by personal delivery

- an offer will cease to be capable of acceptance if
 - withdrawn
 - revoked
 - rejected

- withdrawal
 - is where the offeror communicates to the offeree the intention to withdraw the offer **before** the offeree has received it
- revocation
 - (effectively, withdrawal after the offeree has received it) may be effected at any time before the offeree has accepted it
 - if an offer is stated as being “irrevocable” then the offeror cannot rely upon revocation
- rejection
 - occurs when the offeree says “no”
 - but may also occur when the offeree’s “acceptance” is not complete and unconditional
- any material alteration to the terms stated in the offer or, indeed, any additional terms introduced within the “acceptance” will have the effect of rejecting the offer and replacing it with a counter offer
- an immaterial alteration is not rejection and counter offer
- the contract is valid incorporating the immaterial alterations

Acceptance

- the other half of the agreement
- must be complete and unconditional ...
- ... subject to allowing immaterial alterations to the offer
- the offer must still be "open" at the time of acceptance
- acceptance must be communicated to the offeror, but the offeror may waive this right of communication
- communication may be by a reliable third party
- silence cannot be acceptance
- acceptance may be by conduct
- once the acts of acceptance have started, the offeror cannot revoke the offer
- if acceptance is by letter, it is effective from the date shown in the letter
- acceptance should be within a reasonable time of the offer
 - oral offer? immediate acceptance
 - emailed offer? two or three days
 - surface mail offer? a "few" days
 - telegraphed offer? reasonable time commences from the date the telegraphed offer was handed in for delivery



Chapter 6

INTERNATIONAL SALE OF GOODS CONTRACTS – THE SELLER’S OBLIGATIONS

- contracts involving carriage

- if the goods are not specific i.e. they are unidentified goods from inventory, the seller must notify the buyer about the details of the consignment giving clear indication about the particular goods allocated to the buyer's contract
- in addition, the choice of transport should be appropriate to the particular goods
 - inanimate or non-perishable goods, no problem
 - but perishable goods should be placed in the hands of an appropriate carrier

- timing of the delivery

- delivery should be effected on the date specified in the contract (or within a specified period)
- if no date or period is specified, the seller should deliver within a reasonable time of the formation of the contract

- specific goods – those particular units / items which are to be sold i.e. “this particular pair of trousers”

- unidentified goods drawn from inventory – not individually identifiable, rather they are part of general inventory i.e. “a packet of biscuits” rather than “that packet of biscuits”

Contracts involving carriage

- two main areas
 - delivery
 - quality
- delivery
 - the seller is obliged to deliver the goods, hand over any documents relating to the goods and transfer title to the goods as required by the contract
 - if a place for delivery is specified within the contract, then the goods must be delivered to that specified place
- if no place is specified, implied terms apply
 - if carriage of the goods is involved in the contract, the seller's obligation ceases when the goods are delivered to the carrier (or first carrier if more than one is involved)
 - if unidentified goods are in the seller's inventory, the seller's obligations are complete upon placing the goods at the buyer's disposal
 - if specific goods are involved, again, the seller's obligations are complete upon placing the goods at the buyer's disposal.
- if none of the above three "place" situations is apparent, the seller's obligations cease when the goods are placed at the disposal of the buyer at the seller's place of business



Quality

- the seller must deliver goods which are of the quantity, quality and description required by the contract, and...
- ... which are contained or packaged in the manner required by the contract
- however, if the contract fails to specify quantity and quality and there is no description within the contract, the seller must nevertheless meet “conformity requirements”
 - goods delivered should be fit for any purpose which has been specified
 - if no purpose has been specified, the goods delivered should be fit for the purpose for which goods of that description would normally be used
 - if a sample is offered by the seller for inspection by the buyer, the goods delivered must be exactly the same quality as the sample offered. It is irrelevant whether the buyer does in fact inspect the sample
 - if no sample is offered, the goods delivered must be exactly in accordance with any description given
 - the goods should be packaged in the manner which is normal for goods of that description

- there is no obligation on the seller to ensure that the goods comply with legislation in the buyer's state unless
 - that same legislation applies in the seller's state, or
 - the buyer made the seller aware of the legislation, or
 - the seller knew the requirements imposed by the legislation
- the seller will not be liable for breach of the conformity requirements in the situation where the buyer knew that the goods would not conform
- the seller will be liable if the non-conformity existed at the date the title / risk to the goods passed to the buyer
- this is so even if the failure to conform became apparent only after the date the title / risk passed
- in addition, the seller is liable even after title / risk has passed where the seller is in breach of obligations
 - for example, where there is a guarantee that the goods will remain fit for the purpose for a period of time after delivery
- finally, if the quantity delivered is less than the quantity ordered but delivery is before the contract date for delivery, the seller is able to make good the short-fall at any time up to the contract date of delivery with no penalty
- the only exception is where, as a result of the reduced quantity, the buyer incurs unreasonable expense or inconvenience. In that situation, the buyer may seek compensation in the form of damages

The buyer's duty to examine the goods

- as soon as possible after delivery, the buyer should examine the goods
- when the buyer is going to despatch the goods immediately on receipt, and the seller is aware of that fact, the buyer may inspect the goods upon receipt at that next destination
- notice of non-conformity should be given to the seller within a reasonable time after the non-conformity was discovered
- failure to give notice within that reasonable time will lose the buyer the right to sue for breach
- if non-conformity notice is not given within two years of delivery, the buyer will lose the right of compensation
- however, if the seller knew of the non-conformity, and failed to disclose this to the buyer, the seller will remain responsible

Third party rights

- the seller must deliver goods which are free from any third party right or claim ...
- ... unless the buyer agrees to accept those goods subject to the right or claim of the third party
- special provisions relate to the situation where the right or claim is based on intellectual property or industrial property
- in these situations the seller must deliver goods which are free from these property rights provided the rights exist in the law of
 - the state where the goods will be resold or used, or
 - the state where the buyer has a place of business
- intellectual property includes
 - trade marks
 - patents
 - copyrights
- such a contract where these third party property rights are affected must involve the buyer's awareness and acceptance that the rights exist and will be respected

Chapter 7

RIGHTS AND OBLIGATIONS OF THE BUYER AND THE SELLER

- The buyer's remedies arising from the seller's breach of contract
 - require proper performance
 - avoid the contract
 - proportionally reduce the contract price
 - seek damages
- damages may be claimed by the buyer even when any of the first three remedies is also claimed
- proper performance
 - the buyer may require the seller to honour the contract
 - this right is lost if the buyer has already taken action which is inconsistent with the requirement of performance, for example, the buyer has treated the contract as avoided
 - the buyer may extend the time period for performance
 - an order by the court of specific performance will only be awarded if that is consistent with the existing local law
 - if a breach by the seller is with reference to non-conformance of the delivered goods the buyer may require the seller to
 - repair the goods where non-conformance is minor, or
 - replace the goods where non-conformance is fundamental
 - the seller may seek to remedy the failure to perform if
 - there is no unreasonable delay, and
 - the buyer is not unreasonably inconvenienced
 - for this to apply, the seller must give notice to the buyer of the intention to remedy, and
 - the buyer should contact the seller showing acceptance of late performance

RIGHTS AND OBLIGATIONS OF THE BUYER AND THE SELLER

- note, the buyer must actually receive the notification from the seller
- where the buyer fails to reply to the seller's notice, the seller is entitled to assume that the buyer has accepted late performance
- where goods are delivered before the due date, the buyer
 - may accept delivery, or
 - refuse delivery until the contracted date
- where excess goods are delivered, the buyer
 - may accept all the goods, or
 - some of the excess, or
 - just those goods as per the contract
- if the buyer accepts some or all of the excess, the buyer must pay for that excess
- avoid the contract
 - the buyer may avoid the contract where the seller is in fundamental breach
 - may also avoid in the situation where the seller
 - fails to deliver, or
 - gives notice that delivery will not be possible on the contract date (or any extension to that date)
 - such a declaration of avoidance is effective only if it is made by notice from the buyer to the seller
- proportionally reduce the contract price
 - for non-conformity breach the buyer may reduce the contract price in proportion to the degree of non-conformity
 - if the seller corrects the non-conformity, the buyer cannot reduce the price
 - if third party rights are involved and the buyer could not reasonably have known then, on subsequent discovery, the buyer may reduce the contract price

Obligations of the buyer

- the buyer must take delivery of the goods as specified within the contract and must pay the agreed price for those goods
- if a price is not specified within the contract it is assumed that the buyer and seller have an agreement to set the price which prevailed at the date of the contract
- if the price is determined by the weight of goods delivered, the value is calculated based on the net weight
- place of payment, if not specified within the contract, shall be
 - at the seller's place of business, or
 - if payable when goods / documents are delivered to the buyer, at the place where that delivery takes place
- timing of payment, if not specified within the contract, shall be
 - on delivery of the goods / documents ...
 - ... but only after the buyer has examined the goods
- the seller may include a contract term which states that title to the goods shall not pass until payment has been made. This is called a "Romalpa Clause"
- in addition, where carriage is involved, the seller may state that the goods shall not be released to the buyer until payment is made
- where there is an agreed date of payment, the buyer should pay on that date without the seller having to request payment
- the buyer is obliged to take delivery of the goods, and
- take all such reasonable steps to enable the seller to effect delivery

RIGHTS AND OBLIGATIONS OF THE BUYER AND THE SELLER

- The seller's remedies arising from the buyer's breach of contract
 - require acceptance of the goods
 - require payment for the goods
 - avoid the contract
 - seek damages
- acceptance and payment
 - the seller may enforce the contractual terms with reference to acceptance and payment unless...
 - ... the seller has taken steps incompatible with that right, for example, the seller has notified the buyer that the contract is being treated as avoided
 - it is possible for the seller to extend the time period for the buyer to meet obligations ...
 - ... but such extension should be of reasonable length
- avoid the contract
 - if the buyer's breach is fundamental, or
 - the buyer refuses to accept the goods, or
 - the buyer fails to pay according to the contract
 - if the buyer has paid, the seller loses the right to avoid unless...
 - ... it is in respect of late performance by the buyer, or
 - it is in respect of any other breach by the buyer

Damages

- may be claimed by either party in addition to any other remedy claimed e.g. avoidance
- is a monetary amount claimed in compensation for the loss suffered by the injured party
- the amount of damages awarded is limited to that amount which could have been reasonably foreseeable by the breaching party
- the injured party should seek to mitigate the loss suffered as a result of the breach, for example:
 - by selling goods which have been rejected by the buyer and claiming only the difference between contract price and sale proceeds
 - by buying replacement goods and claiming only the amount paid in excess of the contract price

Breach of contract

- defined as “the failure of one party to perform their obligations under the contract”
- two types
 - anticipatory breach, and
 - breach during performance
- anticipatory breach is a breach in advance of the due date for commencement of performance
 - if it becomes apparent that the other party will not perform a material part of their obligations because
 - there is a serious indication of their inability to perform
 - creditworthiness is in doubt
 - indications arising from the other party’s preparation to perform
 - in these situations, one party may suspend their own performance, even if the due date for commencement has not yet been reached
 - but must give notice of the intention to suspend
 - when such notice is received, if the other party gives assurance that everything is fine, the notifier cannot suspend performance
 - when goods have already been despatched before the potential breach becomes known, the seller can prevent delivery of those goods, even though the buyer may already hold the title documents

RIGHTS AND OBLIGATIONS OF THE BUYER AND THE SELLER

Breach during performance

- remedies available to the injured party have already been covered in these notes
- possible that the breach may be classed as “fundamental”
 - this is a major breach, for example, one party giving notice that they will not continue with the contract
 - in this situation, the injured party may declare that the contract is avoided and ...
 - ... claim damages
- instalment contracts
 - where delivery of the goods is by instalments the rights of the injured party depend on the timing of the breach
 - in (say) a ten instalment contract, the first instalment is in breach (e.g. poor quality) the buyer may treat the whole contract as avoided
 - but if the first seven instalments are accepted and the eighth is in breach, the buyer will likely only be able to reject the eighth instalment and claim damages or require replacement

Effects of avoidance

- where a contract is avoided, both parties are released from their obligations
- but, of course, remedies must then be available to the injured party
 - claim damages
 - resort to a tribunal
 - exercise any rights specified in the contract in anticipation of avoidance
 - claim recovery of any goods delivered (restitution)
- but note, restitution is only available if no third party rights will be adversely affected and full restitution is possible (restitutio in integrum)

Chapter 8

WHEN DOES RISK PASS FROM THE SELLER TO THE BUYER?

- when does risk pass from the seller to the buyer?
 - three possible situations
 - contracts involving carriage
 - contracts for goods sold whilst in transit
 - contracts not involving carriage
 - contracts involving carriage, specific goods
 - if the contract specifies the event, time or place when risk is to pass, then risk passes according to the contract term
 - if no such term is within the contract, risk passes when the goods are put into the hands of the carrier, or first carrier if more than one is involved
 - contracts for goods sold whilst in transit
 - when goods have been put in the hands of a carrier, for example, to deliver to a distribution centre, and those goods are sold whilst in transit, risk passes to the buyer at the time the contract is entered into
 - the effect of this is that the buyer assumes responsibility and, therefore, risk as at the date the goods are put into the hands of the carrier
 - exceptionally, if the seller knew at the time of the contract that the goods were damaged or had been lost, the seller remains liable
 - contracts not involving carriage
 - risk passes from the time the goods are put at the disposal of the buyer and the buyer is aware of that fact
 - finally, when goods do not conform to required standards, and this is not discovered until after risk has passed, the seller is liable for breach of obligations concerning non-conformity

WHEN DOES RISK PASS FROM THE SELLER TO THE BUYER?

Preservation of goods

- both parties have a duty to preserve the goods (ptg)
- so, whoever has possession must ptg even though ownership has passed to the other
- if a buyer refuses to accept delivery, the seller still has an obligation to ptg
- when a buyer is obliged to pay for goods on delivery, but then fails to do so, the seller must then ptg, but need not deliver
- when a buyer intends to reject the goods, but neither the seller nor agent is available to accept this rejection, the buyer is obliged to ptg
- this latter point applies unless it would be unreasonably expensive or inconvenient
- the party who is preserving the goods can recover reasonable expenses from the other party ...
- ... and may even store them in the premises of a third party (at reasonable expense)
- if the goods are perishable, it is available for the one in possession to sell them at the best available price before they become worthless

WHEN DOES RISK PASS FROM THE SELLER TO THE BUYER?

Impediment

- if a party fails to perform their obligations under a contract, the normal position is that the other party may avoid the contract and claim damages
- however, if the breaching party can prove that their failure to perform was due to an impediment beyond their control, they will not be liable to pay damages
- the impediment should be such that it was not reasonably foreseeable at the time the contract was entered into
- once the impeding event ceases to prevent performance, the contract should go ahead as planned
- if a third party's failure to perform is the cause of contract failure, the breaching party is exempt from liability only if they can prove that both themselves and the third party would be exempt because of circumstances beyond their control
- if failure to perform is because of an impediment, the impeded party must give notice to the other party within a reasonable time after first knowing of the impediment



Chapter 9

DOCUMENTS FOUND IN INTERNATIONAL TRADE

International Bills of exchange

- a bill of exchange is
 - an unconditional order
 - in writing
 - addressed by one person (drawer) to another (drawee)
 - signed by the person giving it
 - requiring the person to whom it is addressed
 - to pay
 - on demand, or of a fixed or determinable future time
 - a sum certain in money
 - to, or to the order of
 - a specified person (payee)
 - or to bearer

DOCUMENTS FOUND IN INTERNATIONAL TRADE

Chapter 9

- for a bill of exchange to be classed as “an international bill of exchange”, it must identify at least two of the following five places of which at least two are in different states
 - the place where the bill is drawn
 - the place where the drawer signed
 - the place next to the drawee’s name
 - the place next to the payee’s name
 - the place where it is to be paid
- in addition, the words “International Bill of Exchange” must be shown (Uncitral Convention)
- the bill will be sent by the drawer to the drawee (typically the drawee’s bank)
- the drawee will sign it and thus accept liability
- by that signature, the drawee becomes the acceptor
- the accepted bill will then be delivered to the payee (the drawer’s creditor)
- in turn the payee, if they want the money now instead of at “some fixed or determinable future time”, can sign the bill and thus becomes the indorser
 - the indorsement may be in favour of a specified person (the indorsee) or may be signed in blank
 - an indorsee of an indorsed bill can themselves indorse it in favour of another
 - and that “other” can indorse it in favour of another who can, in turn, indorse it in favour of
- if signed in blank, the bill becomes a bearer bill and the person who has possession of that bearer bill is the person entitled to claim the money represented by the bill

DOCUMENTS FOUND IN INTERNATIONAL TRADE

- the bearer of a bearer bill can settle a debt merely by passing the bill to their creditor who, in turn, becomes the bearer
- liability? If, on final presentation to the acceptor (originally called the drawee) the acceptor refuses to pay, the bill is classed as dishonoured

• in this situation, all prior parties who have signed the bill before it came into the hands of the holder (as well as the person who passed a bearer bill to the holder) will be liable

• it is possible to have yet another party to a bill – a guarantor in case of need

• such a person who guarantees a bill is presumed to be guaranteeing that the drawee will pay the bill on final presentation.



Parties

- drawer owes money to the payee
- drawee typically, the drawer's bank
- payee the creditor of the drawer
- acceptor the drawee who signs as "accepted"
- indorser the payee who signs the bill on to the payee's own creditor
- indorsee the creditor of the indorser
- guarantor a person who guarantees that the bill will be honoured
- holder a person who has taken the bill through the process of negotiation / indorsement, or the bearer of a bearer bill

DOCUMENTS FOUND IN INTERNATIONAL TRADE

Bills of lading

- documents which are issued by a carrier to a seller (or agent) acknowledging that the carrier has received the goods and that they have been placed on board a particular vessel bound for a particular location
- evidences the timing of the passing of goods to the carrier

- normally, therefore, also the passing of risk to the buyer...

- ... unless the parties have separately agreed the timing of the passing of risk

- bill of lading may be:

- negotiable or non-negotiable
- inland, ocean or through
- airway

- negotiable

- the person who owns the bill of lading also, therefore, owns the goods
- the bill is made out in favour of the seller
- the carrier therefore holds the goods on behalf of the seller
- the seller will present the bill to a bank to obtain payment ...
- ... and then indorse the bill by signing it (negotiate it), thereby transferring title to the goods

- non-negotiable

- the bill is made out in favour of the buyer to whom the carrier must deliver the goods
- all airway bills are non-negotiable

DOCUMENTS FOUND IN INTERNATIONAL TRADE

- inland bill
 - relates to a contract for carriage overland to the international departure point
 - for example, from point of manufacture to the shipping port

- ocean bill
 - relates to a contract for carriage from a port in the seller's state to a specified port in another state

- through bill
 - relates to a contract for carriage which effectively combines "inland" with "ocean"
 - so a contract to transport goods from point of manufacture to specified port in buyer's state

- airway bill
 - relates to a contract for carriage of goods by air
 - applies both to domestic flights as well as international flights

DOCUMENTS FOUND IN INTERNATIONAL TRADE

Letters of credit

- are a means whereby a seller can get immediate payment for goods sold ...
- ... but the buyer still enjoys a period of credit before payment is made

- letters of credit should be arranged before the contract is entered into

- mechanism (B is buyer, BB is buyer's bank or the issuing bank, S is seller, SB is seller's bank or the advising bank)

- 1 B asks BB to issue a letter of credit in favour of S
- 2 by the issue, BB is guaranteeing that S will be paid
- 3 BB asks SB to advise S that a letter of credit has been issued
- 4 SB agrees to handle their end of the process
- 5 S produces to SB proof of delivery / transfer of the goods
- 6 SB pays S, and forwards the documents to BB
- 7 BB checks the documents, and pays SB
- 8 BB debits B's account, and hands the documents over to B

- a letter of credit may be confirmed or unconfirmed

- confirmed is where, at step 4 above, SB adds its own guarantee
- unconfirmed – SB does not add its own confirmation / guarantee that S will be paid

- letters of credit may be revocable or irrevocable

- revocable – a buyer may change the details without notifying the seller
- irrevocable – much preferable from a seller's point of view – the buyer cannot amend the details without notifying the seller

Letters of comfort

- apply to situations involving a group of companies
- typically, a letter of comfort will be written by a parent / holding company indicating its intention to continue to support its subsidiary
- most commonly applicable where the subsidiary is insolvent or is trying to raise finance
- but (normally) it is just a comfort
- rarely does such a letter bind the parent so, if the subsidiary in fact does become insolvent, there is no liability for the parent to settle the subsidiary's obligations



Chapter 10

AGENCY LAW

Agency – creation

- an agency relationship exists between a principal and an agent in which the role of the agent is to bring the principal into contractual positions with third parties
- this relationship may be established in a number of ways
 - by agreement, express
 - usually in writing, the principal will appoint the agent, typically with specific authority
 - if the agent has unrestricted power to act on behalf of the principal, this is a power of attorney and must be in writing
 - by agreement, implied
 - as a result of the conduct of the two parties, the courts may imply an agency relationship
 - by ratification
 - an agency relationship may be created retrospectively!
 - where an unauthorised person acts in a way which suggests they are an agent, the person on whose behalf they claimed to be acting may adopt / ratify the contract
 - ratification is not possible if, at the time the “agent” entered into the agreement, the “principal” did not exist
 - ratification must apply to the entire “contract” and must be notified to the third party who must have known that the agent was not acting on their own behalf

- by estoppel
 - agency relationship created, possibly without either express or implied agreement of the principal
 - where the principal holds out to third parties that somebody is their agent then...
 - ... they cannot deny (they are estopped from denying) that the "somebody" is their agent
- by necessity
 - where there is an emergency situation and the goods' owner cannot be contacted, a third person acting in good faith may take action concerning the owner's goods
 - that action-taking third party becomes an agent by necessity

Authority of the agent

- authority of an agent may be express, implied or apparent
- express authority is where the principal expressly authorises the agent in relation to a specific contract
 - this authority may be written or
 - may be oral
- where an agent acts beyond the limits of the express authority the agent will be liable for breach of warranty to
 - the principal and
 - the third party
- implied authority arises where the agent acts in accordance with what is "normal" in the circumstance
 - for example, an agent acting as the purchasing officer of an entity may be seen to have the implied authority to enter into purchasing / procurement contracts on the entity's behalf
 - the entity will therefore be liable to the third party, but ...
 - ... the entity will have a claim against the agent
- apparent authority, sometimes called "ostensible" authority may be greater than actual authority
 - this situation arises for example when an entity allows the agent to act as though they have authority even though such authority does not in fact exist
- where a third party contracts with this agent, and is not aware of any restriction on the agent's power, the entity will be liable to the innocent third party
- this apparent or ostensible authority is not limited to what is normal for an agent

- it could be much wider, and will be so if:
 - the entity itself (and not just the director) represents the agent as having wider authority
 - such representation should be one of fact, not one of law
 - the representation must be made direct to the third party and not, therefore, to someone else
 - the third party must show that they relied upon this representation and ...
 - ... must have acted upon that representation

Termination of agency relationship

- an agency agreement may be terminated by
 - agreement or
 - operation of law
- it is automatically terminated by
 - death of the agent or the principal
 - insanity of the agent or the principal
 - bankruptcy of the principal

Liability of the agent

- so long as an agent acts within the limits of their authority, the agent
 - incurs no liability under the contract
 - cannot enforce the contract
- but an agent may be held personally liable where
 - the agent enters into a contract without disclosing the existence of a principal
 - the agent acts on own behalf even though claiming to act on behalf of a principal
 - normal trade custom has established liability on the agent





Chapter 11

PARTNERSHIP LAW

- a partnership is defined in UK law as “the relationship which subsists between two or more people carrying on business in common with a view to profit”
- much of present-day partnership law is contained in the Partnership Act 1890
- partners may agree amongst themselves how their firm is to operate, so long as their arrangement is legal
- the business must be being “carried on”. It should be more than a one-off transaction, and must be continuing
- it must be “with a view to profit” and is more than the simple sharing of gross revenues
- if a business relationship satisfies the definition, the courts may well determine that a partnership exists, regardless of any written documentation (or intention of the parties) to the contrary
- as a general rule, partners in a firm are jointly and severally liable for partnership debts
- every partner is an agent of the firm and the other partners for the purpose of the business of the firm
- the acts of every partner done in the course of the firm’s business bind the firm and the partners unless the partner was exceeding his authority and
 - ... the other party knew that fact, or was not aware that the person was a partner

The Agreement

- partnerships are formed by agreement, and the internal arrangements are a matter for agreement amongst the partners
- partners can agree to do anything - so long as it's legal
- because a partnership is formed by agreement, it is also capable of being amended by agreement
- and terminated by agreement
- typical matters to be agreed upon include:-
 - -accounts and audit
 - -division of profits and, therefore, also sharing of losses
 - -drawings allowed to be taken in advance of being credited with a share of profits
 - -capital of the firm and respective contributions of each partner
 - -interest payable on capital contributions or chargeable on overdrawn current accounts
 - -salaries of partners before profits are shared
 - -current accounts as well as fixed capital accounts, or just one combined account for each partner
 - -goodwill computation basis
 - -time period for which the partnership is to last. If no time period is specified, this is a "partnership at will"

1890 Act

in the event that partners fail to make an arrangement about some matter which is later disputed, then the Partnership Act 1890 establishes what should happen. The main provisions are :- (medics in bed)

- management entitlement for all partners
- equality of profit share
- derived benefit, without consent of the other partners, should be paid back into the firm
- indemnity by other partners where one partner incurs a personal liability when doing anything necessary to protect the firm or its property
- competing business profits, gained without consent, should be paid back into the firm
- salaries - no automatic entitlement
- interest on capital not payable, but interest at the rate of 5% per annum is payable on loans and advances
- made to the firm over and above agreed fixed capital
- no new person may be introduced into the firm as a partner
- books of account shall be available for inspection by any partner at any time
- expulsion of a partner requires unanimous consent
- disputes concerning the business of the firm are settled by majority vote but no change in the nature of the firm's business may be made without unanimous consent

Dissolution Grounds – Automatic and by Court Order (dissolutions)

- death of a partner
- insolvency of a partner
- sending notice in a partnership at will
- share pledged by partner to settle private debts
- object of a joint venture is complete
- lapse of time where partnership formed for a specific period
- unable to carry out one's obligations created by the partnership agreement
- termination by the Court under the principles of "just and equitable"
- insanity of a partner
- only able to carry on the business at a loss
- naughty conduct calculated to affect the carrying on of the firm prejudicially
- shirty conduct - persistent breaches of the partnership agreement
- the first six are all objective matters of fact, whereas
- the last six have to be proved in a Court and the dissolution is as a result of the Court's subjective decision

LPA 1907 and LLPA 2000

- Limited Partnerships Act 1907 main features are :-
 - at least one general partner (with unlimited liability) and one limited partner (with limited liability)
 - must be registered with the registrar of companies
 - limited partner should take no part in the management of the firm
 - if the firm becomes bankrupt, only the general partners are liable for the firm's debts
- Limited Liability Partnerships Act 2000 main features are :-
 - combination of the advantages of a partnership with those of a limited company
 - must be registered with the registrar of companies
 - must file financial statements and be audited
 - as a separate legal entity, the partners are not liable for the firm's debts, thereby protecting themselves from personal disasters. However, the provisions relating to wrongful and fraudulent trading apply.

International partnerships

- French law does not recognise partnerships
- instead, French law looks to determine whether a person or group of people are acting for commerce
- if this “acting for commerce” is established as a fact, the affected person or people are required to
 - maintain proper accounting records
 - record particulars in the “commercial register”
- where two or more people are involved in acting for commerce they are known as a “Société”
 - a Société is therefore the French equivalent of a UK partnership
 - a Société may be
 - société en nom collectif, or
 - société en commandite simple
- en nom collectif is similar to a traditional UK partnership
- en commandite simple is similar to a limited partnership in that one or more of the participants has limited liability

International partnerships

- Muslim law recognises three types of profit-sharing operations
 - Musharakah
 - Mudaraba
 - Shirkah al-Inan

• Musharakah is very similar to a traditional UK partnership

- participants pool resources to invest in a commercial venture
- decision taking is shared
- profits and losses are shared

• Mudaraba is similar to a UK partnership where one (or more) of the partners takes no active part

- this dormant or sleeping partner invests in the firm and shares in the firm's profits
- the investment has the appearance of a loan but under Muslim law the payment of interest is forbidden
- ... but a return by way of profit-sharing is not forbidden

• Shirkah al-Inan has the appearance of a traditional UK partnership

- participants invest money or other value and
- share profits
- but partners are not liable for the debts of the other partners and
- can only sue on contracts which they themselves entered into.

Partnership compared with company (learn fast rats)

	Partnership	Company
liability	usually unlimited for partners	usually limited for member
existence	no separate legal existence so no perpetual existence	separate legal entity so enjoy perpetual existence
accounts	no requirement to file with government	required to file annual accounts
raising capital	cannot secure debts by way of floating charge	can secure debt by way of floating charge
number	normally a limit of 20 partners	no limit on the number of members
formality	firm may be created by informal oral agreement	company must have a formal constitution
assets	partners own assets jointly	company owns assets – members own company
separate entity	firm does not exist as a separate entity	company does have separate personality
transfer of interest	partners cannot without unanimous consent	members can
reduction of capital	easy for partners to withdraw their capital	very difficult for companies to reduce capital
active participation	partners are entitled to take an active part in management	members appoint directors as agents to manage the company
taxation	partners taxed on profit share	company pays tax on profits members pay tax on their dividend income
secretary	no requirement for partnership firm to have a secretary	public companies must have appropriately qualified secretary

Chapter 12

COMPANY LAW

Types of Corporation and Ways of Formation

- corporation sole – a public office occupied by a natural person. Death of the person does not affect the continuing survival of the corporation. The Mayor of London is a corporation sole.
- corporation aggregate – a collection of like-minded people who combine to form an artificial person – the corporation aggregate. Death of individual members has no effect on the existence of the corporation.
- formation may be by any of 3 ways
 - Royal Charter – eg East India Tea Company, many UK universities
 - very rare in modern times
 - Statute – equally (if not more) rare
 - Eg British Waterways
 - Registration – by far the most common method
 - Eg Tesco plc, Small & Co Ltd.
- since 2004 a new form of company, the Community Interest Company (CIC) is available in UK for organisations created for the benefit of the community / society rather than for the pursuit of profit

Types of Company

- public quoted
 - share price quoted on a recognised stock exchange
 - must be limited by shares
- public unquoted
 - again limited by shares, but not quoted
- private – unlimited
- private – limited by shares
- private – limited by guarantee, and having a share capital
- private – limited by guarantee but with no share capital
- community interest companies

Public Companies

- a company is a public company if it satisfies the definition
- it is a company which is limited by shares
- has at least 2 members
- the constitution states that it is public
- the name ends with the words "public limited company" or "plc"
- it has an allotted share capital not less than £50,000...
- ...of which not less than 25% is credited as paid up.....
- ...together with the whole of the share premium
- any company which does not satisfy the definition is a private company
- although a public company exists from the date on its certificate of incorporation, it cannot commence to trade until it acquires a trading certificate

Trading Certificates

- public companies cannot commence to trade until after they have received a trading certificate
- this is issued by the registrar following an application made by the company
- the application states
 - that the nominal value of allotted shares is not less than £50,000
 - the preliminary / formation expenses
 - and to whom these have been paid (or are still payable)
- the application must be accompanied by a statement of compliance
- if a public company does in fact commence trading before the receipt of the trading certificate, an innocent third party is protected
- but the company, and any officer in default, is liable to a fine
- if a public company fails to obtain a trading certificate within 12 months of incorporation, the court on application may grant a liquidation order against the company

Advantages of Being a Company as Distinct From a Partnership

- separate legal personality (Salomon v Salomon)(Adams v Cape Industries)
- limited liability
- perpetual existence
- raising finance
 - offer shares to the public
 - secure borrowing by way of floating charge
- ownership of property
- number of members
- transfer of interest

BUT there are disadvantages

- legal implications
- expense
- publicity and disclosure

Disadvantages (Expanded)

- legal implications
 - formation
 - audit
 - share issues
 - meetings and resolutions
 - liquidation
 - "proper accounting records"
- expense
- publicity
 - details of directors and their remuneration
 - business details

Lifting the Veil

- the court will look behind the veil of incorporation where justice requires it to prevent fraud, illegality or oppression:-
 - Gilford Motor Co v Horne
 - Daimler v Continental Tyre and Rubber
 - Ebrahimi v Westbourne Galleries
 - R v Oll
 - Re F G Films
- the veil will also be lifted under the provisions of statute:-
 - fraudulent trading
 - wrongful trading
 - commencing to trade without a trading certificate
 - abuse of company name
- other situations:-
 - preparation of group accounts
 - tax law
 - personal guarantees

International companies similar to UK companies

- France
 - Société anonyme (SA)
 - Société à responsabilité limitée (SaRL)
 - SA is similar to a UK public company
 - must have not less than 6 members
 - must have not less than 3 directors ...
 - ... not more than 12 directors
 - must have an auditor
 - SaRL comparable with UK private company
 - however, SaRL does not have a share capital
 - financing is divided into parts which the holders cannot sell to the general public
 - commonly used for family companies
- Germany
 - Aktiengesellschaft (AG) - similar to a UK public company
 - Gesellschaft mit beschränkter Haftung (GmbH) - similar to a UK private company
- Muslim societies
 - no separate corporate form is recognised by Muslim law, unlike partnerships which are recognised
- European companies
 - an organisation with operations in more than one EU member state can incorporate a new type of company – the European company
 - a European company or Societas Europaea (SE)
 - is a public company with
 - limited liability for the members and
 - a minimum capital of € 120,000 and
 - must be registered in the member state where the company has its administrative headquarters
- four ways of establishing a European company by companies from at least two EU member states
 - by merger
 - by formation of a new holding company

- by formation of a new subsidiary

- by transforming a company (in one EU member state) which has owned a subsidiary for at least two years in another EU member state



Formation

- formed by promoters (see next)
- pre incorporation contracts (Kelner v Baxter)
- documents to be filed :-
 - application for registration
 - memorandum
 - articles
 - statement of compliance
 - statement of capital and initial shareholders
 - registration fee
 - certified translation

Formation - role and duties of promoters

- roles
 - act, under instruction, to form a company
 - this involves:
 - finding people who will sign the memorandum and articles of association, and act as the company's first directors
 - select a suitable name for the company
 - determine the form and amount of the company's share capital
 - determine the rights to be attached to the different classes of share capital
 - prepare the constitution of the company
 - submit all the necessary forms to the registrar of companies
 - pay all the preliminary and formation expenses of the company
- duties
 - act with reasonable skill and care
 - disclose any profit or potential conflict of interest
 - either to the first independent board of directors, or
 - to the company's existing or intended shareholders
 - breach of duty - ie non-disclosure - allows the company to rescind the contract and recover the purchase price (Erlanger v New Sombrero Phosphate Mining Co)
 - the company may require the promoter to pay over to the company any undisclosed profits (Gluckstein v Barnes) (Whaley Bridge v Green)
 - the company may sue the promoter and claim damages for breach of fiduciary duty (Leeds v Hanley)

Formation (continued)

- the application for registration details:-
 - proposed name
 - registered office (England and Wales)
 - proposed postal address of registered office
 - limitation of members liability (shares or guarantee)
 - public or private
- certificate of incorporation
 - if everything is in order, registrar will issue a certificate of incorporation
 - the date on the certificate is conclusive proof
 - Jubilee Cotton Mills v Lewes

Memorandum and the Constitution

- historically the memorandum of association was a major document

- since 2006, now just a matter of record

- states that the subscribers

- wish to form a company
- agree to become members
- agree to take at least one share each

- company's constitution comprises

- articles
- resolutions (affecting the articles)
- agreements (affecting the articles)

Articles – Contractual Force

- when a person becomes a member of a company, it is as though they have separately entered a contract with the company and with all the other members individually
- the terms of that contract are contained within the articles
- the effect is to bind the members to the company
- Hickman v Kent or Romney Marsh Sheepbreeders Association
-and the company to the members
- Pender v Lushington
-and the members to the members
- Clarke v Dunraven
- but the articles do not create a contract between the company and third parties
- Eley v Positive Government Life Assurance Co.

Articles – Alterability

- basic rule – can only alter if for the benefit of the company as a whole
- individual hypothetical member of the future
- Greenhalgh v Arderne Cinemas
- no outside contract shall prevent a change, but company may become liable for breach of that contract (Southern Foundries v Shirlaw)
- even if proposed alteration adversely affects only one member, it may still be valid (Allen v Gold Reefs of West Africa)
- alterations allowing compulsory purchase of minority's shares will be (normally) disallowed (Dafen Tinplate v Llanelli Steel)
- allowing expulsion of defrauding director – OK (Shuttleworth v Cox Brothers)
- allowing expulsion of competing members – OK (Sidebottom v Kershaw Leese)
- possible to prevent alteration by weighted voting rights
- Bushell v Faith

Articles – Procedure for Alteration

- special resolution
- 75% majority
- 14 days notice
- copy of resolution to registrar within 15 days
- copy of amended articles to registrar
- alteration is binding on all members
- articles may say that, for a meeting proposing an alteration, the affected member must be present
- so affected member can prevent alteration by not attending
- articles may require a greater majority than 75%
- ...but can never be drafted to prevent amendment

Company Names

- basic rule – company can have any name selected by promoters
- but there are restrictions
- registrar may refuse to register a company with a name which is misleading or offensive
- connection with royalty, banks....
- name may be restricted by statute
- ANZAC
- name will not be allowed if the same as an existing company
- name may be disallowed as a tort (passing-off)
- Ewing v Buttercup Margarine
- the word 'limited' (or plc) shall not appear anywhere except at the end of the name

Name Change

- compulsory or voluntary
- may be required to change by order from the registrar
- ...within 12 months if the company has been, by mistake, registered with a name too similar to an existing company
- ...within 5 years if misleading information was supplied
- at any time if the use of the name is likely to cause harm to the public
- special resolution
- 75% majority
- 14 days notice
- copy of resolution and amended constitution to registrar within 15 days
- registrar issues new certificate of incorporation

Objects

- company can do anything so long as it is legal
- so since 2006, only reason to mention objects in the articles is restrictively
- if company tries to ignore the restriction, ultra vires
- member can object (Ashbury Railway v Riche)
- “the validity of a transaction shall not be called into question on the grounds of lack of capacity”
- “in favour of a third party acting in good faith, the power of the directors to bind the company shall be deemed to be free of any limitation under the company’s constitution”
- these apply only to third parties, not to members
- good faith – but this is presumed unless shown otherwise
- no requirement for third party to make enquiries
- so third parties are protected, but company cannot sue to enforce an ultra vires transaction



Chapter 13

COMPANY LAW: DIRECTORS AND OFFICERS

General Points

- a director is anyone who occupies the position of ...
- a shadow director is a person in accordance with whose instructions the directors are accustomed to act
- de facto director – a person who purports to act as though they were a director
- alternate director – a person appointed by a director who is unable to attend a board meeting
- executive directors – more on these next
- non – executive directors
 - integral element of corporate governance
 - bring an independent view
 - help in providing effective leadership
 - help to establish and maintain financial probity
 - keep a watchful eye on the effectiveness of the executive directors

Number and Eligibility

- private company – at least one
- public company – at least two
- anyone may be a director (but some restrictions)
- must be over 16
- may be a non-natural person
- must not be disqualified under CDDA (see later)
- must not be bankrupt
- must not be of unsound mind
- should not be absent, without permission, from board meetings for a period in excess of 6 months

Company Directors Disqualification Act

- on application to the Court, a director may be disqualified by court order on a number of grounds:
 - for an offence committed in the promotion, formation, management, liquidation or striking off a company
 - where persistently in default (3 offences in 5 years) of filing returns
 - when found guilty of fraudulent or wrongful trading
 - when involved in a company insolvent liquidation
 - following a Department of Trade investigation
 - in general, the disqualification period is "up to 15 years"
 - breaking the disqualification order → up to 2 years in prison

Directors Appointment

- first directors – named in documents sent to registrar before incorporation
- subsequent directors may be appointed by :-
 - members in general meeting
 - other directors – to fill a casual vacancy
 - the court (rare)
 - a lender (if part of the loan agreement)
 - administrator – under an administration order
- 1/3 rotation procedure
- FTSE top 350 company? All directors retire every year
- appointed by ordinary resolution
- registrar notified

Directors Removal

- ordinary resolution
- special notice
 - 28 days notice to company
 - 21 days notice to members
 - opportunity to make written representations of reasonable length and not defamatory in nature
 - reasonable length
 - must also satisfy legal restrictions – 100 members holding \geq £100 share capital on average
 - notice to registrar
 - weighted voting rights can make removal impossible
 - Bushell v Faith
 - company may have to pay substantial compensation to a removed director (Southern Foundries v Shirlaw)

Directors - Statutory Duties

- 2006 Act put into statute many of the established common law principles
- 7 duties
 - act within their powers
 - perform their duties with reasonable skill, care and diligence
 - promote success of company (see next)
 - independent judgement
 - avoid conflicts of interest
 - no benefits from third parties
 - declare interest in transactions/contracts
- common law cases which the courts will follow in interpreting these statutory duties follow

Directors' Duties – Common Law Cases

- Re City Equitable Fire Insurance
- Dorchester Finance Co v Stebbing

• Cook v Deeks

• IDC v Cooley

• Regal (Hastings) v Gulliver

• Howard Smith v Ampol Petroleum

• Bamford v Bamford

• Hogg v Cramphorn

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Directors – Promoting Success

- statute trying to encourage long-term approach by directors
- directors to have regard for all stake-holders
- non-exhaustive list of matters for directors to consider:
 - long-term consequences of their decisions
 - employees' interests
 - good relationships with customers and suppliers
 - local community and environmental impact
 - high standards of business conduct
 - good reputation
 - fair treatment for all members

Directors – Remedies

- make them account for personal gain (Regal (Hastings) v Gulliver)
- make them indemnify the company against loss caused by their negligence (see below)
- rescind the contract where director has a conflict of interest
- ask the court to declare a transaction is ultra vires
- directors are not liable for the acts of other directors
- may be held liable by the court looking behind the veil of incorporation
- may be held liable by the court for fraudulent or wrongful trading
- liable for negligence?
- not if honest (Pavlides v Jensen)
- but if negligence results in personal benefit? (Daniels v Daniels)

Company Secretary

- every public company must have one
- should be appropriately qualified
- duties, determined by the directors, are administrative in nature (Panorama Developments v Fidelis Furnishing Fabrics)
 - maintaining company's statutory records (see later)
 - filing returns with the registrar
 - taking minutes of meetings
 - ensuring the company complies with statutory requirements
 - signing documents as required by law
- under principles of corporate governance should also:-
 - advise the board on governance matters
 - arrange the induction process for new needs
 - enable effective communication between board and its various sub-committees

Company Secretary: Statutory books

- every company must maintain certain records required by statute – “the statutory books”
- these records must be kept at the company’s registered office, unless ...

• ... the register of members is maintained by an independent organisation – the company’s registrars

• in this situation, certain other books may be kept also at the offices of the company’s registrars

• registers include:

- members
- directors
- secretary
- mortgages and charges
- debenture holders
- directors’ interests
- substantial shareholders

Auditors

- required (unless 'small')
- appointed by:-
 - directors (first and casual vacancies)
 - members (subsequent and casual vacancies)
 - secretary of state (if no-one else does)
- must be appropriately qualified
- cannot be :-
 - director or employee of the company
 - partner or employee of the above
 - undischarged bankrupt
- professionally prevented from
 - owning beneficial interest
 - being close relative of company officers or employees

Auditors – Rights and Duties

- rights
 - access to company records
 - information and explanations
 - notice of and attendance at company general meetings
 - written representations (when proposed for removal)
 - receive copies of proposed written resolutions
- duties
 - express an opinion on truth and fairness (and proper preparation)
 - report if directors' report is inconsistent or misleading
 - (for quoted companies) report on certain elements of the directors' remuneration report
- auditors should sign and date the audit report
- report, by exception, if proper accounting records not kept



Chapter 14

COMPANY LAW: MEETINGS AND RESOLUTIONS

Annual General Meeting

- public companies must hold an AGM
 - ...every calendar year (Gibson v Barton)
- first no more than 18 months after incorporation
- subsequent, no more than 15 months after previous
- private company members can request an AGM
 - 21 days notice
- ordinary business:-
 - formal presentation of the financial statements
 - reappointment of directors
 - reappointment of auditors
 - approval of dividend proposed by directors

Resolutions

- ordinary
 - simple majority
 - ordinary business and (some) special business
 - 14 days notice
- special
 - 75%
 - 14 days notice
- written
 - private companies only
 - any resolution (ordinary or special)
 - ...except for removal of auditor or director
 - auditor needs to approve the wording
 - resolution passed on the date required majority is reached

Resolutions – Special Notice

- special notice applies only to some ordinary resolutions
- 28 days notice is given to the company
- the company gives 21 days notice to the members
- resolutions requiring special notice :-
 - to remove a director
 - to remove an auditor
 - to appoint a new auditor other than the retiring auditor
 - to fill a casual vacancy in the office of auditor
 - to confirm in appointment an auditor appointed by the directors in the mid-term to fill a casual vacancy
- director / auditor may write written representations of reasonable length and not defamatory in nature

Resolutions

- normally the directors will determine the agenda for a meeting
- but sometimes members may require a resolution
- members must hold at least 5% of the total voting rights, or ...
- ... not less than 5% in number of the members, or ...
- ... be not less than 100 members holding on average not less than £100 each in paid up share capital
- the request should be in hard copy form, or electronic form
- the request must be delivered not less than 6 weeks before the general meeting
- the requisitionists may request that a statement of reasonable length be circulated together with the notice of the meeting
- reasonable length is, as usual, not more than 1,000 words
- the requisitionists will bear the incidental costs unless...
- ...the company resolves otherwise

COMPANY LAW: MEETINGS AND RESOLUTIONS

Proxies

- a proxy is 'a written statement authorising another person to vote on behalf of an absent shareholder'
- the person appointed need not be a member of the company – it can be anyone
- the word 'proxy' is used to describe both the form and the person appointed by the form
- proxies may speak at the meeting
- they may vote on a poll and on a show of hands
- they may demand a poll
- companies will provide 'two-way' proxy forms so that the absent member can indicate which way the proxy should vote – 'for' or 'against' each resolution
- proxy forms should be delivered to the company not less than 48 hours before the meeting
- a proxy appointed by a member which is a company is called a 'representative'
- a person may be appointed by more than one member as their proxy

Quorum

- a quorum is the minimum number of members who shall be present at a meeting before the meeting may validly pass resolutions
- the minimum number is normally contained within the constitution
- typically, the minimum number is 2 members present, in person or by proxy
- but the word 'meeting' implies that there should be at least 2 persons
- so one member in person who also holds a proxy for another member cannot, normally, be a quorum
- it is, however, possible!
 - in the situation of a class meeting, where all the shares of that class are owned by a single person
 - if the company is a private company with only one member
 - if the court directs that a quorum shall be a single person
- if a meeting is inquorate at the scheduled start time it will normally be adjourned to 'same time, same place, next week'

COMPANY LAW: MEETINGS AND RESOLUTIONS

Voting

- following discussion about a resolution, the chair will call for a vote
- initially, this will be by 'show of hands'
- each member, no matter how many shares they hold, therefore has only one vote
- but members holding many shares may ask, following a show of hands, for a vote count – a poll
- polls may be demanded by
 - not less than 5 members
 - members holding not less than 10% of the total voting rights
 - members holding not less than 10% of paid-up capital
 - the chair
- votes are counted, whether by show of hands or by poll
- abstentions are not counted, neither 'for' nor 'against'
- the chair's decision about the result of the vote is final



Chapter 15

COMPANY LAW: LOAN CAPITAL

Loan Capital

- a debenture is 'the written acknowledgement of a debt by a company'
- may be secured or unsecured
- may be a single debenture or a series of debentures
- if issued as a series, debenture holders rank 'pari passu inter se'
- security / the charge may be fixed or floating
- to be valid, the charge must be registered within 21 days of its creation
- if there are 2 charges over the same property, a fixed charge will take precedence over a floating charge
- if there are 2 fixed charges (or 2 floating charges) over the same property, the earlier one will take precedence
- the earlier one is the one which is registered first!
- debenture holders are creditors of the company, not members

Fixed Charges

- attaches to specific assets
- company is not free to deal / dispose of those charged assets
- fixed charge created within the 6 months immediately prior to a company commencing liquidation may be invalid
- a liquidator will try to prove invalidity
- a receiver may prove validity if
 - the charge was granted in exchange for new 'money' or
 - the company was solvent at the date of creation of the charge
- in the event of a liquidation, the fixed charge debenture holder ranks number one in the sequence of asset distribution
- where a floating charge exists over an asset, there may be a negative pledge clause
- the effect is to ensure that a floating charge debenture holder has to be notified of any proposed fixed charge over the same asset

Floating Charges

- unlike fixed charges, floating charges do not attach to specific assets
- defined in the case re Yorkshire Woolcombers as:-
 - a charge on a class of assets of a company, present and future
 - where the class changes from time to time in the ordinary course of business
 - and the company may deal with these assets until the charge crystallises
- typically applies to the current assets of inventory and accounts receivable
- whether a charge is fixed or floating is a matter of commercial reality rather than how it has been named
- in re Tunbridge a 'fixed' charge was held by the court to be floating because all three Yorkshire criteria were met
- in re Cimex a 'floating' charge was held to be fixed because the assets did not change from time to time in the ordinary course of business
- a floating charge will be invalid if created within the 12 months immediately prior to the commencement of a liquidation

Debentures Compared with Shares

- fixed rate of interest
- payable even though no profits
- no votes
- security (not always)
- preferential entitlement to return of money
- possession of the charged asset
- rights when company defaults
 - apply to court for liquidation order
 - apply to court for administration order
 - appoint a receiver (provided no administration order is in effect)

Chapter 16

COMPANY LAW: LIQUIDATIONS

Liquidation

- compulsory or voluntary
- voluntary may be members' or creditors'
- essential difference is solvency
- court may order liquidation if:-
 - special resolution
 - number of members falls below 2 (plcs only)
 - failure to obtain a trading certificate within 12 months of incorporation (plcs only)
 - suspension of business for 12 months (or failure to commence business within 12 months)
 - unable to pay its debts as they fall due
 - just and equitable

Compulsory Liquidation

- unable to pay its debts as they fall due
 - need to show the court that the company has owed the petitioning creditor more than £750 for more than 21 days
 - the debt should not be in dispute
- just and equitable
 - failure of substratum
 - Re German Date Coffee Co.
 - deadlock on the board
 - Re Yenidji Tobacco
 - quasi-partnership situation
 - Ebrahimi v Westbourne Galleries
- but just and equitable only given in the absence of alternative remedy (re A Company)

Administrator Appointed by the Court

- application to the court by :-
 - members ordinary resolution, directors or by creditors
- court may grant if:-
 - company is unable to pay its debts
 - the order, if granted, is likely to achieve the desired result
- effect of an order
 - moratorium on company's debts
 - powers of management passed to administrator
 - petitions for winding-up are dismissed
 - any administrative receiver already in office must step aside



Duties of an Administrator

- agent of the company and the creditors
- so has fiduciary duties as well as legal
- must send notice of appointment to creditors
- must obtain a list of creditors
- must send notice of appointment to registrar within 7 days
- must require a statement of affairs
- must identify appointment on all company business letters / correspondence
- must prepare proposals for achievement of administration objectives
- must manage the affairs of the company

Advantages of Administration Compared with Liquidation

- company may continue after the process is completed
- company is sheltered from creditors allowing time to design acceptable proposals
- creditors are therefore prevented from applying for a liquidation
- administrator can challenge previous transactions
- creditors more likely to get some money back
- members will hold shares in a viable company (possibly)
- any creditor can apply to the court
- floating charge debenture holders can appoint without reference to the court
- creditors (potentially) will have a continuing customer
- directors could avoid acquiring the reputation of having been involved in an insolvent company

End of Administration Period

- automatically ends:-
 - when successfully completed
 - 12 months after appointment
 - application to court by administrator
 - application to court by a creditor
 - when original applicant is discovered to have had an inappropriate motive
- administrator can apply to court
 - on determining that administration cannot be effective
 - the company should never have been in administration
 - (if appointed by the court) the administration has been successful

Chapter 17

COMPANY LAW: CORPORATE GOVERNANCE

Corporate Governance

- corporate governance is the system by which companies are directed and controlled
- important because (often) companies are controlled by people (directors) who are not the owners (shareholders)
- but there are other people also interested in the continuing health of a company – the stakeholders
- for example:
 - employees – wish to continue to have the opportunity of earning a salary
 - taxman – wishes to continue to receive share of profits
 - customers – wish for continuity of supply of goods
 - suppliers – wish for the opportunity to continue to supply
 - society – the ultimate consumers, but also affected by company's environmental footprint
 - planet earth – we are all affected, directly or indirectly, by the activities of everyone else!

Corporate Governance – Auditors

- the shareholders of a company need reassurance
- this may be reassurance concerning the reliability of financial information or
- ...concerning the legality of a company's activities or.....
- ...the appropriateness of the internal control systems being followed within the company
- auditors have a statutory duty to report on the truth and fairness of the view shown by the financial statements
- this is primarily for the benefit of the shareholders
- but other stakeholders also gain reassurance
- therefore important that auditors take active steps to ensure their continuing independence
- protect themselves against any matter which could threaten that independence or...
- ...be perceived by others to threaten it

Corporate Governance – Directors

- the owners of a company will typically not also be in control
- directors are appointed as agents of the company to run the entity in an orderly and efficient manner

- may be executive directors

- involved in the day-to-day running activities

- or non-executive

- their role is more supervisory in nature

- they bring an independent view to the board meetings

- they help the board to provide effective leadership

- they assist in the development of the good reputation of the company

- they comprise the majority or all of the governance sub-committees of the board



Corporate Governance – Stakeholders

- obvious stakeholders are directors, employees, customers etc
- but academic research has identified a number of different ways of categorising stakeholders:-
 - primary or secondary
 - internal or external
 - narrow or wide
 - known or unknown
 - legitimate or illegitimate
 - active or passive
 - voluntary or involuntary
 - recognised or unrecognised

Corporate governance – concepts

- **honesty / probity** – not simply telling the truth but also not being guilty of issuing misleading statements or presenting information in a confusing or distorted way
- **accountability** – emphasis of the directors' accountability to shareholders, but opens the door for discussion about the extent of their accountability to other stakeholders
- **independence** – strong emphasis on the appointment of independent non-executive directors who are free from conflicts of interest and are thus able to monitor effectively the entity's and executive directors' activities, ideally working closely with the external auditors
- **responsibility** – a system of responsibility should exist whereby entity directors acknowledge their responsibilities to the stakeholders, and will take whatever corrective action is necessary in order to keep the entity focussed
- **decision taking / judgement** – the skill with which management make decisions which will improve the wealth / prosperity of the organisation
- **reputation** – built by directors, often as a result of their ability to comply with other cg concepts
- **integrity** – straightforward dealing, honesty, and balance For financial statements to have the characteristic of integrity, this depends upon the integrity of those people who prepare them Integrity involves a person who demonstrates high moral character, is principled, professional, honest and trustworthy
- **fairness** – taking into account the interests, rights and views of everyone who has a legitimate interest in the entity
- **transparency / openness** – involves full disclosure of material matters which could influence the decisions of stakeholders This means not simply openness in the reporting of information required by IFRS in the financial statements It also involves other information such as cash and management forecasts, environmental reports and sustainability reports

Corporate governance and agency theory

- directors act as agents of the shareholders
- cg tries to ensure that agency responsibilities are fulfilled by requiring disclosure and by suggesting performance-related rewards
- definition: an agency relationship is a contract under which one or more persons (the principals) engage another person (the agent) to perform some service on their behalf that involves delegating some decision-making authority to the agent
- fiduciary duties definition: a duty imposed upon certain persons because of the position of trust and confidence in which they stand in relation to another
- The duty is more onerous than generally arises under a contractual or tort relationship
- It requires
 - full disclosure of information held by the fiduciary,
 - a strict duty to account for any profits received as a result of the relationship, and
 - a duty to avoid conflicts of interest
- fiduciary duties are owed to the entity, not to individual shareholders
- directors must exercise their powers for the proper purpose

Duties of directors as agents

- performance – if paid, directors have a contractual obligation to perform as agreed (if unpaid, no such obligation)
- obedience – directors should act strictly in accordance with the principal's instructions
- skill and care – directors should act with such a degree of skill and care as may reasonably be expected from a person with such experience and qualifications
- personal performance – directors should only delegate their assignments where they have no reason to believe that the person to whom the work is delegated is not capable of proper performance
- avoid conflicts of interest – eg should not sell his own property to the entity, even though it may be at an independent, arm's length valuation
- confidence – agents should not disclose confidential matters about the principal, even after the agency agreement has ended
- accounting for benefits – agents must account to the principal for any undisclosed benefit which they receive as a result of their office as agent
- because ownership of an entity is necessarily separated from the management, problems may result

Corporate governance – potential problems

- directors may choose to pursue strategies more beneficial for their own interest rather than the entity's
- directors will almost certainly have a different attitude to risk, and risk management, since it is not their own investment which they are risking
- if management have only a small beneficial interest in the entity (or even none at all) then they may well pursue activities which improve short term results (therefore improving their current bonuses) to the exclusion of more far-sighted strategies which would be of greater benefit to the entity in the longer term
- ultimately, shareholders have the right to decide who shall (and who shall not) be directors of their entity But this is, in practical terms, very much a theoretical power Generally shareholders neither have the dynamism nor organisation to effect such a change in the composition of the board

Overcoming the problem – alignment of interests (goal congruence)

- incentives designed to align interests include:
 - profit related pay
 - share issue schemes, for instance on the occasion of a management buy-out
 - share option schemes
- but for all of these there is a natural tendency for management to adopt creative accounting to manipulate the profit figure upon which these incentives are based

Chapter 18

COMPANY LAW: ILLEGALITIES

Wrongful Trading

- previous law extended by Insolvency Act 1986
- previously, directors could only be liable for company's debts where they were guilty of fraudulent trading
 - difficult to prove
- I.A. 1986 designed to give creditors increased protection
- an example of lifting the veil
- directors (and sometimes others too) may be held liable when:-
 - company has commenced insolvent liquidation
 - they knew, or should have known, that this was probable
 - they held a position of power (director)
- court may allocate financial penalty on the liquidator's application
- directors may escape liability if they can show the court that they took every step necessary to mitigate / minimise the creditors' potential loss

Money Laundering

- a process whereby the proceeds of criminal activity are converted into assets appearing to have a legitimate origin
- usually involves 3 distinct phases
 - placement of the funds into legitimate business activity
 - transfer of money from business to business (or place to place) to conceal its original source
 - integration – the money takes on the appearance of having come from a legitimate source
- proceeds of Crime Act 2002 seeks to control money laundering by the creation of 3 categories of criminal activity
 - laundering (maximum 14 years prison and / or fine)
 - failure to report (maximum 5 years prison and / or fine)
 - tipping-off (maximum 5 years prison and / or fine)
- the offence of failure to report relates only to individuals acting in the course of business – for example, accountants

Insider Dealing

- insider – a person who has a business connection with a company as a result of which they may acquire relevant information
- dealing – buying or selling shares or securities in a company
- unpublished price – sensitive information is information about the company which is not in the public domain.....
- ...is less than 6 months old, and.....
- ...is, on publication, likely to have a material impact on the market price of the company's shares
- an insider in possession of unpublished price – sensitive information should not deal
- an offence is also committed if the insider encourages another person to deal
- a person dealing as a result of that encouragement, and believing the source to be an insider, is also committing an offence
- disclosure of inside information, other than in the proper course of employment to an authorised person, is also an offence
- some defences are available to be claimed

Bribery

- Bribery Act 2010 targets both bribery and corruption
- 4 offences
 - bribing another person
 - receiving a bribe
 - bribing a foreign public official (FPO) (see next page)
 - commercial organisation failing to prevent bribery (see next)
- bribing = offering financial or other advantage to perform a relevant function or activity improperly
- relevant function or activity:
 - any function of a public nature
 - any activity connected with a business
 - any activity performed in the course of a person's employment
 - any activity performed by, or on behalf of, a group of persons
- these "relevant functions or activities" may be anywhere in the world

Bribing an FPO

- offence to offer, directly or indirectly, a financial or other advantage to an FPO intending to influence them in gaining business or an advantage in connection with business
- an FPO holds an administrative, legislative or judicial position outside the UK

- commercial organisation failing...

- a company or partnership is liable if an agent, employee or subsidiary bribes another person intending to gain a business advantage

- Defence - if a company can show that it had adequate procedures in place, appropriate to the level of risk

- "adequate procedures" based on six guidance principles

The Six principles

- proportionate procedures
 - proportionate to risks faced and size of company
- commitment by management
 - management should assess the nature and extent of risks faced and develop appropriate procedures to manage that risk
- due diligence
 - the company should apply due diligence procedures in respect of company personnel who are at greater risk of offering bribes
- communication
 - to ensure all employees / connected persons are aware of the company's culture and attitude
 - includes training and education procedures
- monitoring and review
 - procedures should be regularly reviewed and improved as necessary
- "adequacy of procedures" is a matter for a court to decide
- NB "hospitality" that is reasonable and proportionate is acceptable, ie is it not prohibited by the Act.

Penalties

- an individual who is found guilty faces imprisonment up to 10 years
- a guilty company is liable to an unlimited fine

• but, in addition, there is reputation loss...

• ... and potentially, civil claims against the directors for failing to implement adequate procedures

First conviction

- Munir Patel found guilty of accepting £500 to suppress a driving conviction from court records. Serving a 3 year prison sentence



Chapter 19

CAPITAL MAINTENANCE

Capital Maintenance

- the members contribute capital to the company
- this should be maintained within the company by way of net assets
- known as the buffer fund
- called "shareholders' equity" and comprises share capital plus undistributable reserves
- undistributable reserves are :-
 - share premium account
 - capital redemption reserve
 - accumulated unrealised profits less accumulated unrealised losses
 - any other reserve identified by the company's constitution as undistributable
- development of the principle of capital maintenance addresses three areas:-
 - restrictions on the payment of dividends
 - restrictions on the reduction of capital
 - assistance given to outsiders to acquire the company's shares

Capital Maintenance – Payment of Dividends

- power to declare dividends is given to the directors by the company's constitution
- members do not have an automatic right to receive a dividend (they approve one at the company's general meeting but cannot vote to increase the dividend proposed by the directors)
- dividends are normally paid based on the paid-up capital of the company
- dividends may be in the form of a cash payment (normal) or in another form (for example, a scrip dividend)
- a dividend is a company debt only from the date it is declared and due for payment
- if it is declared and unpaid, it is a deferred debt
- unclaimed dividends become statute barred after 6 years
- dividends may only be declared out of profits available for the purpose
- this is defined as 'accumulated realised profits less accumulated realised profits'
- there is no distinction drawn between capital profits and revenue profits

CAPITAL MAINTENANCE

Capital Maintenance – Reduction of Capital

- a company may reduce its capital, but only under the strictest control
- 3 authorities are required
 - special resolution
 - power in the constitution
 - consent of the court
- and for only 3 reasons/situations
 - the company's capital is no longer represented by available assets (it has been suffering losses)
 - the company wishes to extinguish / cancel the liability of a class of share - for example a £1 share, 70p paid could become a 70p share fully paid
 - the company wishes to restructure its capital funding and may, for instance, now wish to replace some of its shares by way of loan capital
- the court is involved because creditors' rights could be adversely affected

Share Capital

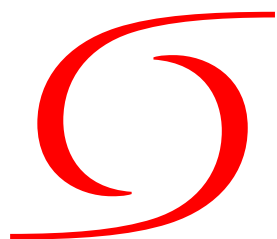
- it is illegal to issue shares for an amount which is lower than the nominal value of the share
- where shares are issued, whether for cash or otherwise, for an amount in excess of their nominal value, an amount equal to that excess shall be credited to the Share Premium Account
- the share premium account is an undistributable reserve and has very limited uses:-
 - finance the issue of fully paid bonus shares to existing members
 - write off preliminary and formation expenses
 - provide for the premium payable on the redemption of shares or debentures
 - write off the expenses of, discounts allowed on or commissions paid on any issue of shares or debentures
- but the combination of 'discounts allowed on' and 'issue of shares' is an illegal combination
- despite the principle that shares may not be issued at a discount, private companies are able to issue shares in consideration for non-cash goods or services received
- the true / fair value of these goods or services could be lower than the nominal value of the shares issued. This is not illegal – but only applies to private companies

Share Capital

- variation of class rights
 - rights attach to a particular class of share and typically refer to:-
 - voting rights
 - entitlement to dividends
 - return of capital in a liquidation
 - if the variation of rights is specified by the constitution, then follow the constitution
 - if not specified by the constitution, then special resolution is needed
 - note, if constitution provides for the variation, it could require merely an ordinary resolution or could even require some greater majority than 75%
 - these provisions apply even for companies without a share capital, for example a company limited by guarantee

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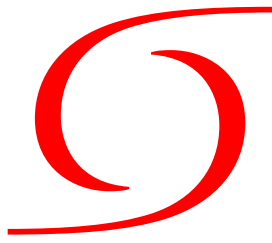
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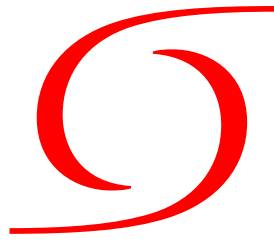
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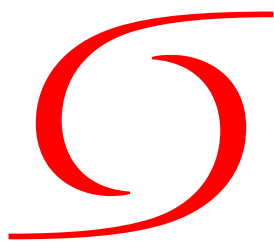
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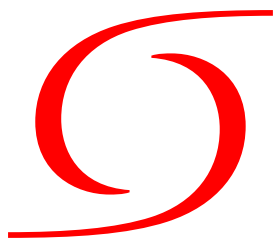
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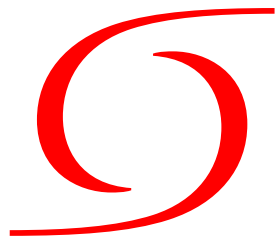


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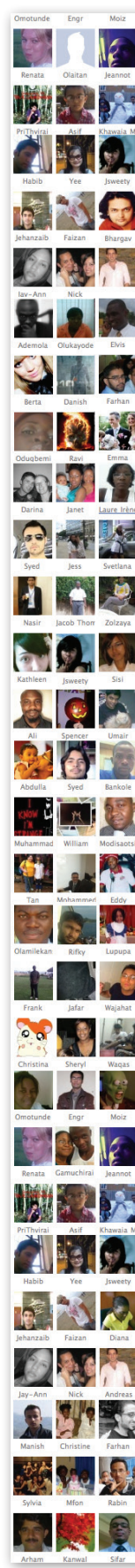
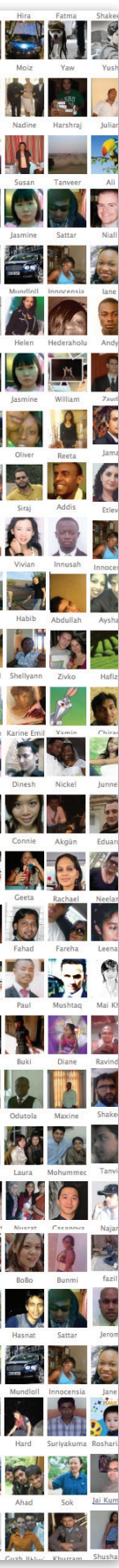
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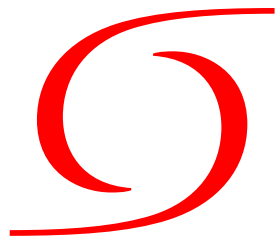
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