

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

9084 LAW

9084/31

Paper 31 (Law of Contract), maximum raw mark 75

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

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

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

CIE is publishing the mark schemes for the October/November 2009 question papers for most IGCSE, GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.

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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

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

Analysis, Evaluation and Application

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

Communication and Presentation

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

Specification Grid

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

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

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Mark Bands

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

Indicative content for each of the questions follows overleaf.

Band 1

The answer contains no relevant material.

Band 2

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

OR

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

Band 3

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

OR

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

OR

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

Band 4

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

OR

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

Band 5

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

Maximum Mark Allocations:

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

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Section A

- 1 The formation of commercial contracts commonly results in a 'battle of the forms'. With reference to case law, analyse the rules that have emerged to determine when a contract comes into existence in these circumstances and on what terms.**

Responses should be contextualised: this statement addresses the issue of the formation of a contract. Candidates are expected to explain briefly the conditions of offer and acceptance on which a binding contract is formed, but this should not form the main focus of the response.

The expression 'battle of the forms' must be explained in relation to negotiating contract terms and reliance on standard written terms to save time and money and the fact that standard terms commonly conflict. The general rule of 'last shot wins' should be explored in terms of offer and counter offer with delivery of goods or performance of service equating to acceptance of the offer represented by the last form.

Case law such as *British Road Services v Crutchley*, *Butler Machine Tool Ltd v Ex-Cell-O Corp* and others must be examined in detail and candidates should identify rules and approaches which have developed to help determine if and when contracts come into existence when standard terms and determine their effectiveness.

- 2 'The performance of an existing contractual duty can never amount to consideration'. Critically assess the truth of this statement today.**

Consideration should be defined and briefly explained. Candidates are then expected to discuss the reason why the performance of an existing duty should theoretically not amount to consideration (the concept of bargain).

Distinction should be drawn between the court's treatment of contractual duties owed to the promisor (*Stilk v Myrick*, *Hartley v Ponsonby*) and of duties owed to third parties (*Scotson v Pegg*, *Shadwell v Shadwell*, *The Eurymedon*).

The principal focus of the candidate response should be the effect of the decisions in *Williams v Roffey Bros*. The case should be explained and the new rule on practical benefit created by it must be examined. Candidates might also explore the possible future effect on the decisions in *Pinnel's case*, *Foakes v Beer* and *Re Selectmove*.

Candidates must draw clear, concise conclusions based on a critical assessment to score marks in band 4.

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3 Compare the purpose and effect of liquidated damages clauses and penalty clauses. Evaluate the extent to which their aim may be met.

Candidates should introduce their response by explaining that both liquidated damages and penalty clauses are means by which parties to a contract might attempt to fix the damages payable should the contract eventually be broken by any of the parties to it.

The two types of clause should then be compared and contrasted in terms of purpose and effect. Liquidated damages represent a genuine attempt to estimate the loss likely to accrue in the event of a breach. If there is disagreement following breach, a court is likely to allow recovery of the agreed amount without proof of loss, regardless of the size of actual loss relative to the liquidated sum agreed.

Penalty clauses usually result from attempts to enforce contract performance through threats of large compensation in the event of breach. The case of *Dunlop Pneumatic Tyre Co v New Garage & Motor Co* should be explored and the resultant principle as to when pre-determined damages should be considered a penalty explained. If considered a penalty, the clause containing the agreed damages would be ignored and court makes its own award of unliquidated damages based on actual losses flowing from the breach.

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Section B

- 4 Consider the liability of Mr Dhaliwal should Mr Hussain decide to buy the business and discuss any remedies that Mr Hussain might have against him.**

Candidates should identify the crux of the issue as potential misrepresentation. Misrepresentation should be identified as a vitiating factor, which if deemed actionable, has the effect of rendering the subsequent contract voidable at the misrepresentee's option.

The main issue to be discussed is what amounts to an actionable misrepresentation and whether Mr Hussain would have any grounds for avoiding any contract to purchase the business.

Principle areas for debate are whether or not silence can amount to misrepresentation and, if so, in what circumstances and what its effects are, and what effect a deliberate attempt to mislead would have. Would the maxim of caveat emptor apply here?

Potential remedies would be dependent on the class of misrepresentation committed and the full range ought to be addressed as there are suggestions in the facts that any of the three types may have been committed.

Informed debate followed by clear, compelling conclusions is expected.

- 5 Advise Elizabeth of her legal liability and the potential remedies that may be awarded against her.**

Discussion of contractual capacity as an essential of a valid simple contract. Particular attention to be paid to the capacity of minors (those under 18 years of age) to make valid simple contracts. Distinction to be drawn between valid contracts (executed contracts for necessities – *Nash v Inman*, and beneficial employment contracts – *Doyle v White City Stadium*), voidable contracts (e.g. contracts of a continuing nature such as leases – *Corpe v Overton*) which can be avoided before or within a reasonable time after the 18th birthday and those unenforceable (Minors Contracts Act 1987).

Elizabeth would be liable to pay a reasonable price (SOGA 1979) for any goods deemed necessary to her in terms of actual need. Did she need either the books or the dresses or was she adequately supplied already (*Nash v Inman*)? Assuming that she hadn't got copies of the books and that they were required for her course, she would be liable to pay whatever the court thinks a reasonable price for them. Likewise the two dresses. If the dresses are deemed not to be necessities, then no action for the price is possible, but the equitable remedy of specific restitution may be awarded to enforce the return of the dresses.

The issue of the lease would seem more clear-cut: it takes her past her 18th birthday, therefore could be avoided by her, without incurring further liability, on or within a reasonable time after her attaining the age of majority.

Informed debate followed by clear, compelling conclusions is expected.

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6 With reference to the situation outlined above, consider the legal entitlement, if any, that Joanna would have to pursue the reward if Gildenstern fails to give it to her upon recovery of the dog.

This scenario requires candidates to focus on the formation of contract and in particular of the rules relating to offers. The advertisement in question appears to amount to a unilateral offer rather than an invitation to treat. Candidates should define and distinguish between these two terms and illustrate the legal principles (e.g. *Partridge v Crittenden*, *Carlill v Carbolic Smoke Ball Company*). Contracts are only valid and enforceable if there has been a firm offer that has been unconditionally accepted. Candidates need to discuss and conclude whether in fact the ad for the reward does amount to a firm offer.

Furthermore, it is fair to say that offers must have been communicated to an offeree before (s)he is then able to accept the offer. Candidates need to debate, therefore, when acceptance would take place in this case and to decide whether Joanna was aware that the offer had been made to her.

Candidates are told that at the time that Joanna finds the dog, she is unaware that the reward has been offered. The offer intimates that acceptance can be made in person or by post. Joanna posts a letter telling Gildenstern that she has found the dog, so provided that the letter has been properly stamped and addressed, posted in the proper manner and proof of posting exists, the posting rule would dictate that acceptance took place on posting, in spite of its late arrival (*Henthorn v Frazer*, *Household Fire Insurance v Grant*).

The main issue here, however is that she was never aware of the offer and thus would probably not be entitled to the reward if Gildenstern decided not to give it to her

Informed debate followed by clear, compelling conclusions is expected.