UNIVERSITY OF CAMBRIDGE INTERNATIONAL EXAMINATIONS

GCE Advanced Level

MARK SCHEME for the May/June 2012 question paper

for the guidance of teachers

9084 LAW

9084/31 Paper 3, 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.

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

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International Examinations

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 Critically examine the common law controls implemented by the courts to regulate the use of exclusion clauses in contracts.

Candidates should introduce their response with a brief explanation of what an exclusion clause is and why the use of such clauses needs to be controlled at all. Candidates might also explain that use is controlled by both common law and statutory means.

Candidates should identify that there are two ways in which the courts have found to regulate exclusion clauses. Firstly, they may question whether a particular clause has actually been incorporated into the contract and secondly, whether the words used can be construed as covering the alleged breach of contract. These two controls need to be examined in some detail. Other common law limitations such as misrepresentation of a clause's effect (e.g. *Curtis v Chemical Cleaning & Dying Co*) and inconsistent oral promises (e.g. *Mendelssohn v Normand Ltd*) might also be addressed.

Incorporation by signature (e.g. *L'Estrange v Gaucob*), incorporation by reasonable notice (e.g. *Parker v SE Railway, Thornton v Shoe Lane Parking, Capelton v Barry UDC, Interfoto Picture Library v Stiletto Visual Programmes Ltd)* and incorporation by a previous course of dealing (e.g. *Spurling v Bradshaw*) should all be examined critically.

Candidates should then address the issue of interpretation, the contra proferentem rule and its special application to negligence arising out of a contract.

Descriptive responses should be limited to maximum marks in band 3. A critical examination of the common law controls and recognition that additional statutory controls have been required is necessary for marks in band 4 and beyond.

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2 Discuss the meaning of the term 'contract uberrimae fidei' and explain the implication for the rules relating to misrepresentation as a vitiating factor in the formation of contracts.

Candidates might introduce their responses by explaining that whenever statements are made in order to persuade the other party to enter into a contract, those statements are called representations, but if they turn out to be untrue they are known as misrepresentations. Active misrepresentations of fact are recognised as vitiating factors undermining the consensus ad idem required and thus render a contract voidable at the innocent party's option: key points to be emphasised – untrue statement should be of fact; made before the contract was made and did not become a term of the contract; one of the causes to induce the contract. Active misrepresentations render contracts voidable.

Candidates must then focus on the issue of the extent to which a person with knowledge of facts that s(he) knows would affect another party's decision whether to enter a contract or not has a duty to disclose those facts. The maxim of caveat emptor suggests not: it is up to parties to ascertain information for themselves. In general, silence cannot amount to an actionable misrepresentation even if one contracting party knows that the other party has misunderstood some aspect of the situation (e.g. *Fletcher v Krell*).

Candidates might highlight that there are four circumstances under which a duty to disclose information exists resulting in misrepresentation if a person remains silent. They are contracts of utmost good faith (uberrimae fidei), cases of subsequent falsity, partial revelation and fiduciary relationships. Only the first of these requires expansion. Examples such as contracts of insurance and for the sale of company shares might be given. Candidates must explain the basis for the exception, i.e. that the relevant facts are likely to be difficult if not impossible for the other party to establish for themselves, such as medical conditions in the case of health insurance, and that the other party should not be placed in an unfair bargaining position over the other.

3 Common law damages compensate for losses suffered and are available as of right if a contract is breached. Assess the truth of the above statement.

Candidates should introduce their responses by clarifying that an award of damages is the usual remedy for breach of contract and highlight that it aims to compensate for pecuniary losses suffered as a result. The crux of candidate responses must then focus on an assessment of the extent to which the aim is achieved because of limitations imposed on such awards.

Candidates should discuss in some detail the limitations of causation, remoteness (e.g. *Hadley v Baxendale, Victoria Laundries v Newman Industries, The Heron II*) and mitigation (e.g. *Brace v Calder*).

No credit will be given to candidates who digress into discussion about measures of quantifying or calculating loss.

Candidates must make the assessment and draw conclusions as required by the question to achieve marks in band 4 and beyond.

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Section B

4 Using case law to support your answer, analyse the rules relating to formation and breach of contract and advise Jackson Textiles of the possible outcome of any legal action that might be pursued.

Candidates might be expected to introduce their responses with an outline of the essentials of a valid contract; emphasis expected on implied offers, and acceptance and intention to create legal relations. No credit will be given for expansive coverage of other essentials of valid contracts.

Binding contracts require a definite offer and corresponding, unconditional acceptance. Was there an offer made, whether in express terms or implied from circumstances? There appear to be two separate contractual issues: was there a long term supply contract and were there separate contracts to supply particular orders? Clearly orders were placed and honoured, thus giving rise to separate contracts on each occasion. The main issue, however would appear to be whether there was an overarching long term supply contract and if so what the terms of it actually said. The situation is made all the more difficult because, even if such a contract's existence can be established, it would be difficult to establish the nature and extent of terms without written evidence.

Oral contracts are just as binding as written ones (evidence permitting), so could it be argued that the repeated placing of orders and the fulfillment of those orders was evidence of a long term implied overarching contract (e.g. *Baird Textile Holdings Ltd v Marks & Spencer plc*)?

Binding contracts also require an intention to create legal relations. Whilst this intention would ordinarily be presumed in commercial agreements such as this (if indeed agreement can be deduced), the presumption can be rebutted by evidence to the contrary (e.g. *Rose & Frank v Crompton Bros*).

Candidates need to conclude whether agreement can be implied 'to give business reality to the transaction' and whether an argument that no binding agreement was intended might succeed.

General, all-embracing and ill-focused responses are to be awarded a maximum mark within mark band 3. Any advice given to the parties should be clear, concise and conclusive.

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5 Discuss Mayfair Estates' legal rights to the additional payment promised by SPI.

The principal focus anticipated is that of whether or not an agreement might fail in law for want of supporting consideration. Whilst candidates may be allowed some credit for discussing consideration as a whole, the key to the scenario rests with the rule which says that consideration must be real and not simply something which the promisor is already bound to do for the promise.

In this instance, Mayfair Estates are under a legal obligation to build an athletics stadium for SPI by an agreed date for an agreed sum of money. Consideration has been furnished on both sides and thus, other thing being equal, a binding contract exists on those terms.

Mayfair Estates will want to establish that the promise made by SPI to pay extra was binding because there was consideration given for it. Candidates should recognise that if Mayfair Estates has given consideration, it has not been in the traditional sense (e.g. *Stilk v Myrick, Hartley v Ponsonby*). The ruling in *Williams v Roffey Bros* suggests that if it can be established that by finishing on time, a practical benefit has been conferred on SPI, then consideration is provided and the promise to pay extra would be binding.

One issue would still remain, however – was the promise to pay extra induced by economic duress? If so, it would be voidable and thus could be avoided by SPI without liability.

Some candidates may raise the fact that Mayfair Estates were in effect in anticipatory breach of contract. It is not expected, but some credit will be given for discussing the issue.

General, all-embracing and ill-focused responses are to be awarded a maximum mark within mark band 3. Any advice given to the parties should be clear, concise and conclusive.

6 Analyse the respective rights of the parties under the contract and advise SFA of the likely success of any legal action to recover damages.

Candidates should indentify the crux of the matter in this question as contract negotiation and the 'battle of the forms'. Candidates should recognise that when negotiation of a contract becomes protracted, it can become more problematic to identify exactly when an offer has been made and unequivocally accepted. In such cases, the courts look at the entire course of negotiation to decide whether it has ever been reached and, if so, when.

Candidates should recognise that in 'battles of the forms' it is a general rule that the 'last shot' wins the battle. The first form is counted as the offer and each subsequent form is a counter offer, such that when one party performs its obligations – delivering the personal buoyancy aids in this case – it is seen as acceptance of terms specified on the final form to change hands (e.g. *British Road Services v Arthur V Crutchley & Co Ltd, Butler Machine Tool Ltd v Ex-Cell-O Corp (England) Ltd*).

If the court was to follow the last shot approach, clearly the goods were supplied on the basis of SFA's terms contained in the order acknowledgement. The question then arises as to the validity of the exclusion clause printed on the back. Candidates need to refer to UCTA 1977 and draw conclusions.

General, all-embracing and ill-focused responses are to be awarded a maximum mark within mark band 3. Any advice given to the parties should be clear, concise and conclusive.

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