ANSWERS

CHAPTER 1

Work Them Out

1. B	2. D	3. D	4. B	5. C	6. B	7. A	8. C	9. A	10. D

Short Questions

1.
- New law proposed by members of the community, government, the Legislative Council, the Law Reform Commission.
- Bill is drafted.
- Then the bill must be read three times by the LegCo to check it is compatible with the Basic Law and does what it is intended to do.
- First reading of Bill: purely formal, just the title of the Bill.
- Second reading — speech by proposer, outline of Bill's principles and main provisions.
- There is then a motion for adjournment for a committee to consider the Bill.
- A committee of LegCo is formed which considers each clause of the Bill.
- The committee may amend the Bill if does not change fundamental principles f the intended legislation.
- The chair of the committee reports to LegCo that the Bill is ready for its second reading.
- The debate on the Bill is resumed in LegCo.
- A vote is then held whether to proceed with 2nd reading.
- If agreed than the Bill is read and given a date for its third reading.
- Third reading in LegCo.
- Chief Executive must sign the Bill.
- Gazetted as an ordinance — recorded and published as law of HKSAR.

2.
- System in HKSAR is adversarial (as in most common-law jurisdictions).
- Parties put their cases against each other, one of the reasons why *versus* is used in case names.
- Party bringing a case is referred to as the "plaintiff" or "claimant".
- Party defending the action is known as the "defendant".
- Plaintiff must prove his case.
- Plaintiff puts case first, providing evidence to the court to support claim.
- The defendant then may reply to this claim and put forward evidence supporting his defence.
- The judge acts as a referee, ensuring both parties abide by the rules of bringing their case.
- The judge also has to decide who has won.
- He does this by deciding if the plaintiff has put forward a case which is true on the balance of probabilities. Is what the plaintiff claims more likely than not?
- If the plaintiff has proved his claim is more likely than not, then the judge will find for the plaintiff and award a remedy against the defendant.
- If the plaintiff has not put forward enough evidence to support his claim, then the judge will find for the defendant.
- Similarly if the defendant has provided evidence which rebuts, or disproves, the claim of the plaintiff, then the judge will find for the defendant.

3.
- First the court should consider the Basic Law.
- If the case involves the laws of the PRC specified in Annex III of the Basic Law, then this should be applied. It is unlikely that a case involving a business matter will concern these.
- Otherwise the court must consider any relevant Hong Kong ordinance or regulation.
- If there is any confusion about the meaning of the ordinance, the court can use the principles of statutory interpretation mentioned below to interpret the ordinance.
- If there is no legislative provision, the court will apply the common law including the rules of equity.
- In using the common law and the rules of equity, the court must follow previous decisions of superior courts in the HKSAR in any relevant matter, this is known as "binding precedent".
- The court may also use comments made in previous decisions of courts throughout the common law world if it considers them appropriate to the circumstances of Hong Kong. This is known as "persuasive precedent".
- The court must also consider any Chinese customary laws that may be relevant. These would mainly be to do with land and inheritance in the New Territories.
- All these laws and principles must be considered in light of their compatibility with the Basic Law.

4.
- The doctrine of precedent is central to the common law.
- Precedent is the principle that courts should decide cases that are similar to previous cases in line with the decision in the previous case.
- To answer this question, a candidate would have to explain binding and persuasive precedents.

- Binding precedent relies on the concept that a lower court can have its decisions appealed to a higher court and must follow the decision of a higher court when it makes a decision.
- In the SAR today, a decision of the Court of Final Appeal (CFA) on a relevant matter must be followed by the Court of Appeal (CA) and the courts below it in this hierarchy.
- Thus if a lower court is faced with a legal question, the judge will consult the case reports of the CFA and CA. If he finds a relevant decision, he must declare *stare decisis*, the law has been declared and must stand. He must follow that precedent and apply that law.
- Persuasive precedent is not binding, i.e. the judge does not have to follow it, he can be persuaded by it.
- It can be in two forms: the following of a judgement from another common law jurisdiction and the following of a statement made alongside the main judgement in a case.
- The courts of HKSAR are no longer bound by decisions of British courts.
- However, decisions of the Supreme Court in England and other superior courts in common law jurisdictions will continue to influence judges' decisions in Hong Kong because they relate to similar legal systems.
- If a judge chooses to rely on a precedent from another legal system to make a judgement, the precedent is merely persuasive, not binding.
- Persuasive precedent also arises when judges make comments (*obiter dicta*) that are not strictly part of the legal principle or *ratio* of the case.
- Judges throughout the centuries have used their judgements to speculate on what they believe the law should be in other circumstances.
- These comments in their judgements do not form the core of their judgement and are often termed *obiter dicta*, meaning comments made alongside the decision (or *ratio*) in the case.
- If a judge has made *obiter* comments, then a judge in a present case can take notice of these when deciding the case in front of him.
- The more important the court and the more important or expert the judge making these *obiter* comments, the more persuasive these will be.
- In future Hong Kong judgements, reference will be made to influential judgements and judges' comments from around the common-law world.
- This is a great strength of the common law as, if a particular issue has not been adjudicated on in Hong Kong, a judge can take note of a decision in other common-law jurisdictions, e.g. Australia and Canada, to make his decision.

5.
- Civil litigation can be a lengthy and expensive process.
- Costs of the lawyers and court time.
- Usually if you win your case, you win your costs from the losing party.
- Therefore if you lose a case, it can be expensive.
- Sometimes even if you win, you do not get your costs: especially if you have delayed or been unhelpful to the court. Or if the costs are unduly high.
- A business may win its case and still face a heavy costs bill.
- In Hong Kong, alternatives to court action are being promoted because it may be more appropriate at times for litigants to use other means to settle disputes.
- These alternatives are known as Alternative Dispute Resolution (ADR).
- ADR comprises such alternatives to court hearings as mediation, conciliation and adjudication.
- Mediation is a process where a trained mediator listens to both sides and tries to help them reach a compromise settlement.
- Conciliation is a process where a conciliator will act very much as a mediator but taking a more active part in the proceedings and suggesting possible solutions.
- Adjudication is a more court-like process, where an adjudicator will actually make a decision, an award, based on the cases put forward by the parties.
- Successful use of these alternatives requires the consent of the parties.
- The benefits of ADR are said to be:
  (i) less stress for the parties because there are no formal court procedures
  (ii) saving of time because the parties do not have to wait for a trial
  (iii) savings in costs because of time saving and expensive lawyers and court appearances are not required
  (iv) the possible continuation of the future business relationship because these are consent based settlements

- Many commercial contracts contain adjudication clauses. If these clauses are there, then the parties have agreed to send any disputes over the contract to an adjudicator for decision. This is particularly appropriate with large commercial contracts and many construction contracts contain such clauses.
- However, it should be noted that ADR is not always more appropriate than a court trial.

Long Question

1(a)
- On 1 July 1997, the British Crown Colony of Hong Kong was returned to the People's Republic of China (PRC).
- The SAR is administered under the "One Country, Two Systems" regime.
- This was included in the constitutional law of the Region: the Basic Law of the Hong Kong Special Administrative System, enacted by The National People's Congress on 4 April 1990.
- The Basic Law came into force on 1 July 1997 and provides for political and legal system.

- Article 5 of the Basic Law provides that the system and policies to be used in the Region would not be socialist but would remain capitalist for 50 years after the handover.
- Article 18: The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided in article 8 of this Law, and the laws enacted by the legislature of the Region. National laws shall not be applied in the HKSAR except for those listed in Annex III of this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the region.
- Article 8: The laws previously in force in Hong Kong, that is the common law, the rules of equity, ordinances, subordinate legislation and customary law, shall be maintained except for those which are inconsistent with this law or have been amended by the legislature of the Hong Kong Special Administrative Region.
- Thus the laws applicable in Hong Kong comprise a mixture of different sources. They are found in the Basic Law itself, some specific laws of the PRC, the common law, the rules of equity, ordinances and subordinate legislation, and customary law. All of these laws may be applicable as long as they do not contravene the Basic Law.
- Candidates should then consider the different sources of law proscribed in the Basic Law.
- Only a few PRC laws are directly applicable as provided in Annex III and are mainly to do with defence.
- Common law is decision made law
- Central to common law is the doctrine of precedent, which means judges apply previous decisions when deciding cases.
- Sometimes they have to apply previous decisions, if the decision is from a higher court in their jurisdiction; this is known as "binding precedent".
- Sometimes they can be persuaded to apply the decision in a previous judgement from another jurisdiction even though they are not bound by it, this is called "persuasive precedent".
- Equity is part of the common law.
- It is that part of the common law which deals with the strictness or rigidity of the doctrine of precedent and the application of common-law rules.
- It is mostly to do with softening the harshness of the common law and is based on conscience and fairness.
- Many remedies are only available in equity.
- Legislation in Hong Kong takes the form of ordinances and regulations.
- Ordinances are the primary or main legislation, whereas regulations are subsidiary or delegated legislation.
- The Basic Law is the supreme source of law in Hong Kong but primary legislation, ordinances, are the next tier of authority under the Basic Law.
- Judges may interpret ordinances that are unclear but cannot question or ignore a provision in an ordinance unless it does not comply with the Basic law.
- Regulations are made under delegated powers in ordinances. Power may be given to the executive to create rules and regulations to carry out the purpose of an ordinance.
- Chinese customary law applicable in HKSAR is mainly to do with the law affecting the family, such as that governing marriage and succession, and land rights in the New Territories.
- Thus the Basic Law is the main constitutional law of the HKSAR.

1(b)

- For 50 years, the business law and legal system of the Region should be largely independent of the PRC.
- The Basic Law provides for the laws to be used in Hong Kong.
- However, the Basic Law is itself a law of the PRC and, as such, theoretically the laws of the PRC must be superior to any law of the SAR.
- However, except for the PRC laws provided for in the Basic Law, the laws of the PRC do not apply in the Region.
- Importantly the Basic Law does provide that the National People's Congress may change the laws in Annex III that are directly applicable in HKSAR.

1(c)

- Any decisions of courts in the common-law world may influence the law in HKSAR.
- This is because of the doctrine of precedent: persuasive precedent.
- Persuasive precedent is not binding, i.e. the judge does not have to follow it but can be persuaded by it.
- It can be in two forms as described above.
- Thus judges in HKSAR can take note of decisions and developments in the law in other common-law jurisdictions
- The judges of HKSAR may also be influenced by developments on the law of the PRC to do with business.
- This is because of the close ties between the Region and the mainland, and the cross-border nature of business in the Region.
- This may mean that developments in the business law of the PRC may have effects on the law in the Region.
- This is likely and normal for common-law systems because of the peculiar nature of the common law, which means that when judges interpret the business law in the region, it is likely that even though the PRC has a civil law system, notice will be taken of developments in the business law of the mainland where it may affect the SAR.

CHAPTER 2

Work Them Out

1. B	2. A	3. C	4. D	5. C	6. A	7. A	8. D	9. D	10. A

Short Questions

1.

(a) An offer is a definite and unequivocal statement by one party, the offeror, explaining the terms of the agreement by which he is willing to be bound if they are accepted by the offeree, the person to whom the offer is made.

(b) Acceptance is the unequivocal and unconditional intention to be bound by all the terms of the offer.

(c) Capacity: The parties must be able to legally contract, i.e. they must have the legal ability to make a binding promise.

(d) Intention to form legal contract: The courts will not enforce any contract unless they believe the parties intended for it to be legally binding. They decide on this by considering two rebuttable presumptions:

- If agreements are purely domestic or social in nature, there is a presumption that the parties do not intend for the agreements to be legally binding.
- If the agreement is in a business or commercial context, then the presumption is that the parties do intend to be legally bound.
- To distinguish between enforceable and unenforceable social and domestic promises, the courts look for consideration: the price of the promise. Consideration will rebut the presumption that a social bargain was not meant to be enforced.

2. The limited stock theory assumes that the seller only has a limited number of goods and cannot be making unlimited offers to the entire world. There must be a time when he can say: "I cannot sell that item because I have no more." From this comes the principle that not all advertisements for sale with a price are offers for sale.

Examples of cases where this has been used to justify that display or advertisement of goods is an invitation to treat and not an offer for sale would be *Partridge v Crittenden [1968]* and *Fisher v Bell [1961]*. Mention could also be made of *Carlill v Carbolic Smoke Ball Co. [1893]*, where the defendant tried to use the limited stock theory as its defence. The company claimed it could not make a contract with "all of the world" as it could not possibly supply everyone in the world. The court did not accept this argument as it construed the advertisement as an offer to those who undertook the use of the Smoke Ball as prescribed.

3.

(a) A "specialty contract" is a contract under seal or a deed. It is a formal contract. As a general rule, it has to be signed, sealed and delivered. Today, the solemnities formerly used in execution of these contracts have disintegrated in practice. A seal is nowadays nothing more than a red adhesive label appended next to the signature on the document. Delivery appears to be only a matter of intention. There is no formality requirement for a simple contract. The agreement can be made by conduct, word of mouth or in writing.

Some contracts are required to be in the form of a deed. For example, under section 4 of the Conveyancing and Property Ordinance, a legal estate in land may be created, extinguished or disposed of only by deed.

All simple contracts require to be supported by the presence of consideration. Otherwise they will be unenforceable. If an individual wishes to bind himself by a gratuitous promise, he can do so by executing the agreement in the form of a deed. The agreement will then be enforceable.

Under section 4 of the Limitation Ordinance, actions founded on simple contract shall not be brought after the expiry of six years from the date on which the cause of action accrued, whereas an action upon a specialty contract shall not be brought after the expiry of 12 years from the date on which the cause of action accrued.

(b) Consideration which does not move from the promisee (that is, provided by the promisee) is not sufficient consideration.

Where the promisee (the plaintiff) has been given a promise by the promisor (the defendant) which the promisor is not carrying out, the promisee sues the promisor. To succeed in his claim, he has to show that he conferred some benefits on the promisor or that he himself suffered some detriment.

In other words, a person cannot enforce a promise if the consideration for it was supplied wholly by some other person. If A makes a promise to B and C, to pay B $100 if C does the same, B cannot enforce A's promise since the consideration moves entirely from C.

(c) Consideration must be sufficient but need not be adequate. Consideration must be of material value and capable of assessment in financial terms. As Colin has provided the $300 consideration which has some financial value, it is irrelevant that it does not reflect the market value of the iPods. In *Chappell v Nestle & Co. [1959]*, three pieces of chocolate wrappers were held to constitute part of the consideration. Hence, Colin can sue Anthea for the two iPods.

Privity of contract establishes that only the parties to the contract can sue or be sued under the contract. A third party cannot sue nor be sued under someone else's contract because the third party does not assent to the terms of the contract. As Ben has not provided any consideration and there is no intention to enter into legal relations, he cannot sue Anthea under a contract between Anthea and Colin: *Dunlop v Selfridge [1915]*.

Long Question

1.

(a) To answer this question, we must track the various invitations to treat and offers to decide if there has been a valid acceptance of a valid offer and therefore a contract.
- The display of priced items in Brian's catalogue is an invitation to treat. There is no offer here to be accepted: *Harris v Nickerson [1873]*.
- Mary's first fax asks for his lowest price. This is an invitation to treat, e.g. to give further information for her to base an offer on or for Brian to make an offer for sale.
- Brian replies stating a price — this could just be an invitation to treat as in *Harvey v Facey [1893]*.
- However, because it states "I am willing to sell them to you for …", Brian's reply could be an offer for sale.
- Mary's second fax seems to be an acceptance: "I will purchase vases 23 and 24 from you." However, it is qualified by a question about terms. This is not an acceptance, but it has not killed off Brain's offer: *Stevenson v McLean [1880]*.
- Brian's reply then consists of two offers — for two vases and three vases.
- Mary's third fax is not an acceptance; it is a request for time to think.
- Brian gives her until Thursday. Mary gives no consideration for this agreement and so it is not enforceable; Brian is free to revoke his offer at any time: *Routledge v Grant [1828]*.
- Mary then posts a letter accepting his offer to buy all three vases at the stated price. Because of the postal rule, unless they have excluded this form of acceptance, acceptance should be valid on posting: *Adams v Lindsell [1818]*. There should be a contract.
- However, the court may feel that as the parties have been using fax communication, which is almost instantaneous, this should have been the method of communication: *Entores v Miles Far East* and *Brinkibon v Stahag Stahl [1983]*.
- If so, Mary's fax of the letter would be an acceptance but only valid when Brian received it. As Brian did not receive it till after the deadline, there is no contract.
- If the postal rule is strictly enforced, there is a contract.

(b) This is similar to the facts of *Dickinson v Dodds [1876]*, where a reliable third party told the offeree that the property he had been offered had already been sold. The court held this was effective revocation of the offer. There was no contract.

CHAPTER 3

Work Them Out

1. A	2. D	3. D	4. C	5. B	6. C	7. A	8. C	9. D	10. A

Short Questions

1(a)
- A representation is any statement of fact, belief or circumstance relating to the subject matter of a contract made by one party during negotiation to encourage the other party to join the contract.
- A term is a representation incorporated into the contract either expressly or impliedly, which the parties agree to be bound by. Terms are the subject matter of the contract.
- Determining whether a statement becomes a term of the contract depends on the intentions of the parties and is decided objectively.
- The importance in distinguishing between terms and representations, that is whether a representation has been included in the contract as a term, are the consequences of breaking, or breaching, the term or representation.
- If a term is not complied with, the innocent party may sue for breach of the contractual term.
- If a representation is not complied with, there will only be an action available if the innocent party can establish this was a misrepresentation.

1(b)
- A condition is a term of a contract so fundamental to the contract that the whole purpose of the contract depends on it being fulfilled.
- A warranty is a term which is a promise or assurance not fundamental to the fulfilment of the contract but merely an assistance to its performance.
- The most important difference is the effect of breaking the different terms. If a condition is breached then the innocent party may repudiate the contract and sue for damages. If a warranty is breached the innocent party may only sue for damages.

2. Generally the court will respect the sanctity of the contract and not imply terms into the contract.
   - This is especially true of written contracts: parol evidence rule.
   - However, the court has adopted a series of exceptions when it will imply terms into contracts:
     (i) custom: trade practice or professional custom. But the term must be certain, reasonable and well known by person in that trade.
     (ii) to make sense of the agreement
     (iii) to conform to prior conduct or course of dealing
     (iv) to preserve "business efficacy"

- It will only do this if the implying of the term would pass the "officious bystander test".
- A term will only be added to the contract in the recognised situations if it could be concluded that it had only been left out because it was something so obvious it did not have to be expressly included.
- A term will not be implied if the parties have expressly excluded it.
- Terms may also be implied by statute.

Long Question

1.

- An exclusion or exemption clause is a term in a contract which attempts to exclude the liability of the party inserting it for contractual breaches or even torts.
- A limitation clause seeks to limit the contractual or tortious liability of a party to a contract.
- The effects of such clauses may be harsh on the other party in the event of breach or the committing of a tort, such as negligence. This is particularly true of consumers who may be in an unequal bargaining position when it comes to negotiating the terms of a contract. These clauses are often contained in standard form contracts.
- Because of the principle of *caveat emptor*, let the buyer beware, the courts have traditionally been unable to do anything about these unfair clauses.
- This changed in the last half of the 20th century as the courts and subsequently the legislature tried to protect those in an unequal bargaining position from the consequences of a strict application of freedom to contract.
- Judges have done this by adopting these rules when construing if they are effective:
  (i) the clause must be incorporated into the contract to allow it to be relied upon
  (ii) the clause must be worded in such a way that it covers the breach that the party relying on it has committed. There must be no ambiguity, otherwise this will be construed *contra proferentum*, against the interests, of the party seeking to rely upon it.

- In deciding whether a clause is incorporated, the starting point is that parties are bound by the terms of contracts they have freely signed: *L'Estrange v Graucob [1934]*
- However, the courts have limited this principle if the signature was induced by fraud or misrepresentation: *Curtis v Chemical Cleaning Co [1951]*.
- If there is no signed document containing an exclusion clause in another document, the clause will only be incorporated in the following circumstances:
  (i) the document was an integral part of the contract
  (ii) the document was brought to the attention of the other party before the contract was agreed

- An exclusion clause can only be effectively brought to the attention of the other party before agreement if:
  (i) the parties have dealt together before and it was known to the other party from this course of dealing
  (ii) it is pointed out to the other party before agreement

- If parties have previously dealt together and the clause is known to the other party, then it can be relied upon: *Spurling v Bradshaw [1956]*.
- However, if previous dealings are inconsistent, only actual knowledge of the clause will include it in the contract. Knowledge cannot be implied from past dealings: *McCutcheon v David McBrayne Ltd [1964]*.
- If the parties have not dealt together before, the party seeking to rely on the clause must have effectively brought it to the notice of the other party.
- This can be done in a number of ways.
- To attempt to bring the clause to the attention of the other party, it is usually printed on a ticket or notice: *Parker v South Eastern railway Co 1877*.
- However, later cases have doubted whether clauses on a ticket can be validly incorporated into a ticket: *Chapelton v Barry UDC [1940]; Thornton v Shoe Lane Parking [1971]*.
- The usual practice of the courts is to construe these clauses as not part of the contract because they are given after acceptance as a receipt.
- Other cases are usually concerned with notices. Whether an exclusion clause is validly incorporated into a contract depends on when it is brought to the attention of the other party: *Olley v Marlborough Court [1949]*.
- In *Olley v Marlborough Court [1949]*, Lord Denning L.J. commented that the hotel could have incorporated the clause in a number of ways:
  (i) getting the guest to sign a contract with the clause in it
  (ii) pointing out the notice prior to the guest's acceptance
  (iii) prominently displaying the notice in the reception for the guest to read before accepting the room

- Even if a clause is successfully incorporated into a contract, it can fail to exclude liability if it is unclear — this is known as the *contra proferentum* rule.
- The party seeking to rely on the clause must prove that the clause unambiguously properly covers the loss or damage suffered by the other party.
- Any ambiguity will be construed *contra proferentum*: against the interests of the party seeking to rely on it.
- If the clause is unambiguous, it will be strictly construed but will apply: *Photo Productions Ltd v Securicor [1980]*.

Conclusion: A conclusion is necessary as you are asked a question. This could refer to the further protection afforded by statute.

CHAPTER 4

Work Them Out

1. B	2. C	3. A	4. A	5. D	6. D	7. B	8. C	9. A	10. D

Short Questions

1.

- A vitiating factor is a factor that renders the contract faulty or defective.
- The parties may believe they have offer, acceptance, consideration, intention and the correct form but a hidden defect vitiates the agreement of one or both parties.
- If a contract is vitiated it may be void or voidable.
- A contract is void if it is declared to be of no legal effect.
- A contract is voidable if one of the parties may choose to declare it void, of no legal effect, and avoid his obligations under the contract.

2.

- If *restitutio in integrum* is not possible.
- If the innocent party affirms the contract.
- If there is excessive delay.
- If a third party's rights would be adversely affected.
- If the court feels damages under the Misrepresentation Ordinance would be more appropriate.

Long Question

1.

- A misrepresentation is a false or inaccurate representation made by one party to a contract to the other, which induced the other to enter the contract.
- To further break this down, a misrepresentation is made up of several elements:
  (i) a statement of material fact
  (ii) made by one party to a contract to the other party
  (iii) before or at the time of formation of the contract
  (iv) intended to act as an inducement to the other party to enter the contract
  (v) which was such an inducement
  (vi) but not intended to act as a binding obligation
  (vii) and which was falsely or inaccurately stated

- If any of these elements is missing, the statement is not a misrepresentation.
- Mere representations not included as terms of the contract attract no significance if they are accurately stated.
- However, if they are inaccurate, they may be actionable misrepresentations.
- A representation may be misstated because of deliberate falsehood or genuine inaccuracy.
- It is important to distinguish between the motives or reasons behind a misrepresentation as this identifies the class of misrepresentation and the potential remedy available to the injured party.
- Originally there was no common law cause of action available for misrepresentation except where there was proof of fraud.
- Without fraud, it was vital to establish the representation had become a term of the contract. Misrepresentation is therefore a relatively new concept.
- The common law did develop limited recognition of misrepresentation but the most important development was the Misrepresentation Ordinance (Cap 284).
- There are three categories of misrepresentation:
  (i) fraudulent misrepresentation
  (ii) innocent misrepresentation
  (iii) negligent misrepresentation

(iii) **Fraudulent misrepresentation** was originally the only common-law-recognised action. It was only available if deceit could be proved: *Derry v Peek [1889]*. A fraudulent misrepresentation is made where the party making the statement knows it is untrue, has no belief in its truth or is reckless as to its truth. Therefore, to establish fraudulent misrepresentation the other party must prove that the statement was made to deceive. The best defence to a claim for fraudulent misrepresentation is to show an honest belief. This belief need not be reasonable, just honestly held. Therefore, fraud is very hard to prove. When fraudulent misrepresentation is established the injured party may affirm or rescind the contract and sue for damages. The damages payable for fraudulent misrepresentation are all those losses flowing from the statement whether or not they are foreseeable. *Smith New Court Securities Ltd v Serimgeour Vickers (Asset Management) Ltd [1997] AC 254*.

(ii) **Innocent misrepresentation** is an untrue representation made by a party believing it to be true. There was no common law remedy available for innocent misrepresentation. The only remedy was the equitable remedy of rescission and this would only be available if the party who had relied on the representation could show it would be unconscionable to make him perform his side of the bargain. However, the Misrepresentation Ordinance now provides that damages may be payable, instead of rescission, if this is more appropriate than rescission bearing in mind the loss to be suffered by both parties if the contract is carried out.

(iii) **Negligent misrepresentation** is made with no reasonable ground for belief in the statement. There is no element of fraud, it is an innocent statement but based on no reasonable belief. A common law action for negligent misstatement or misrepresentation is a type of tort. It requires a special relationship giving rise to a duty of care between the parties. Traditionally all non-fraudulent misrepresentations were classed as innocent. No common law remedy was available, only the equitable remedy of rescission if the innocent misrepresentation made it unconscionable for the representor to make the representee continue with the contract. This changed with the landmark case of Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964]. The Misrepresentation Ordinance has made it much easier to establish that a misrepresentation is negligent if it is untrue. This is because the burden of proof is now on the person making the statement. The burden of proving the case lies with the representor to show the statement was made innocently, that is with reasonable ground for belief. The remedy for negligent misrepresentation is rescission or damages.

- Once misrepresentation is established, rescission may be available.
- Rescission is an equitable remedy and so is available at the discretion of the court if the party seeking it has been acting fairly and in good conscience and will continue to do so.

CHAPTER 5

Work Them Out

1. D	2. A	3. B	4. D	5. C	6. C	7. D	8. A	9. B	10. B

Short Questions

1.

- The doctrine of frustration developed to mitigate the harshness of the common law rule that complete performance of contractual obligations was required regardless of the reason for failure to perform.
- Sometimes an element unknown to the parties at the time of formation and beyond their control would prevent, or frustrate their performance of their obligations.
- If some unforeseen event which is completely beyond the control of the parties prevents them fulfilling their obligations, then they may be relieved of any liability.
- This can come about because of:
  (i) impossibility: because the subject matter has been destroyed or is not available, a party is ill or has died, or a war has broken out and made it impossible to fulfil obligations
  (ii) subsequent illegality: we have seen that the law will not enforce illegal contracts, if the law changes after a contract is formed and the purpose now becomes illegal then the obligations cannot be enforced.
  (iii) failure of the commercial purpose: the means of carrying out the contract exists but the commercial purpose no longer does.

- Frustration is used only in very limited circumstances.

2.

- Liquidated damages are a sum of money fixed by the contract, therefore agreed to by the parties, for this eventuality.
- If there is a liquidated damages clause in the contract which covers this particular breach, then the injured party does not have to prove the extent of his loss, just that the breach of this pre-agreed term has happened.
- It is common to have liquidated damages clauses in commercial contracts.
- If the liquidated damages sum is clearly too high for the breach and could be construed by the court as a penalty clause, it may not be enforced.
- Clauses may also be inserted allowing for the retention of deposits if the contract is not carried out. These will be enforced as long as the amounts are not excessive as compared to the amount of the contract.
- Unliquidated damages refer to damages which have not been agreed to by the parties to the contract. The injured party must prove the extent of his loss to the court.
- To decide how much a party should get if damages are unliquidated, i.e. not agreed to in the contract, the court must ask itself three questions:
  (i) Was the loss caused by the breach of contract?
  (ii) What losses should be compensated for? How remote a consequence will be considered a causal loss? This is known as remoteness of damages.
  (iii) What level of damages will compensate the party claiming? This is known as the measure of damages.

3. The innocent party has an obligation to mitigate or minimise his losses caused by a breach of his contract. He may not recover a loss if that loss could have been avoided by taking positive steps. Whether a plaintiff has failed to mitigate losses is a question of fact to be decided on the circumstances of each case.

   For example, under a contract of sale of tomatoes, if a buyer unreasonably refuses to accept the goods as agreed, while the seller can claim for damages for non-acceptance, he is also expected to go into the market and resell the tomatoes elsewhere. As long as the seller has taken reasonable steps to mitigate the loss, the fact that he may have been unsuccessful does not invalidate the claim.

Long Question

1(a)

- Damages
- Specific performance
- Injunction
- Rescission

1(b)

- Damages are a common law remedy and so available as of right if the injured party wins his case.
- If the injured party wins his case then the court has to award damages.
- If the amount of loss is minimal then only nominal damages will be awarded.
- The other remedies are equitable and therefore discretionary.
- Even if the injured party wins his case he will not necessarily be awarded an equitable remedy.
- The court will consider the principles of equity and the behaviour of the claimant.
- The court will also award damages if this is more appropriate, e.g. the award of an injunction would be unjust to the defendant.

1(c)

- This part of the question needs some consideration of the different types of breach e.g. what sort of term has been breached, to decide on the appropriate remedy.
- It also needs consideration of the different subject matter of contracts, e.g. specific performance is usually only granted for property thought to be unique.
- Again the ability of the courts to award damages instead of the equitable remedies should be considered.
- The remedy of rescission needs a short discussion of the effect of misrepresentation.
- The usual restrictions on the award of equitable remedies need to be discussed: delay, behaviour of the claimant (acquiescence, etc.) and interference with third party rights.
- For rescission, the concept of *restitutio in integrum* needs to be explained.

CHAPTER 6

Work Them Out

1. A	2. D	3. A	4. C	5. B	6. C	7. A	8. B	9. D	10. D

Short Questions

1. Section 2A provides that a party to a contract of sale "deals as consumer" in relation to another party if:
   (i) He neither makes the contract in the course of a business nor holds himself out as doing so.
   (ii) The other party does make the contract in the course of a business.
   (iii) The goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

   S2A(2) specifies that a person buying at auction or by tender is not dealing as a consumer.
   These methods of contracting are more usual for businesses and involve direct individual negotiation.
   Section 2A(3) provides that it is for the person claiming that a party does not deal as consumer to prove that he does not.

2. Section 6 provides that, in deciding whether the contract was unconscionable at the time it was made, the court will give regard, among other things, to the following:
   - the relative strengths of the bargaining positions of the consumer and the other party
   - whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party
   - whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services
   - whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer, by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services
   - the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party

   Section 6 further provides that:
   - The court shall not give regard to any unconscionability arising from the circumstances that were not reasonably foreseeable at the time the contract was made.
   - The court may give regard to conduct engaged in, or circumstances existing, before the commencement of this Ordinance.

Long Questions

1. **Section 14:** Implied undertaking as to title, etc.
   - In every contract of sale there is an implied condition on the part of the seller: that in the case of the sale, he has a right to sell the goods, and in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.
   - If the seller does not have title, the buyer is entitled to rescind the contract and recover the whole of the purchase price.
   - There is also an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods.
   - If it transpires that a third party does have undisclosed interests in the property which affect the buyer then the seller must indemnify him: *Niblett Ltd v Confectioners' Materials Co. [1921] 3 KB 387.*
   - If the seller wrongly interferes with the goods after sale then this will breach the implied term of quiet possession: Gatoil International Incorporated v Tradex Petroleum Ltd (The "Rio Sun") *[1985] 1 Lloyd's Rep 350.*
   - However, if the contract expressly or impliedly only transfers such title as the seller has, e.g. subject to charges, there is an implied warranty that these have been disclosed to the buyer.
   - This may seem unfair but it is to protect third parties with pre-existing interests in the property from losing their interests.
   - The Control of Exemption Clauses Ordinance (CECO) S11(1) provides that parties cannot exclude or restrict this provision by agreement.

   Section 15: Sale by description
   - There is an implied condition that goods shall correspond with the description.
   - If the sale is by sample, as well as by description, then the goods must comply with the description as well as the sample.
   - A sale of goods shall not be prevented from being a sale by description simply because they are selected by the buyer.
   - CECO S11(1) provides that if the buyer is a consumer then the parties cannot exclude or restrict this provision by agreement. Section 11(3) provides that if the buyer is not a consumer then a term excluding or limiting liability must be reasonable.

   Section 16: Implied undertakings as to quality or fitness
   - Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, unless:
   - Defects have been specifically drawn to the buyer's attention before the contract is made.
   - The buyer examines the goods before the contract is made and defects should have been discovered.
   - The contract is for sale by sample and defects should have been discovered upon a reasonable examination of the sample.
   - There is a also an implied condition that if the buyer tells the seller that the goods are required for a particular purpose they will be reasonably fit for that purpose.
   - CECO S11(1) provides that if the buyer is a consumer then the parties cannot exclude or restrict this provision by agreement. Section 11(3) provides that if the buyer is not a consumer then a term excluding or limiting liability must be reasonable.

   Section 17: Sale by sample
   - For a contract for sale to be by sample there must be an express or implied condition in the contract that this is so.
   - Purely showing a sample during negotiations does not by itself make the sale a sale by sample, unless it is the custom of that particular business: *Syers v Jonas [1848] 2 Exch 111.*

   If it is a contract for sale by sample, there is an implied condition:
   - That the bulk shall correspond with the sample in quality.
   - That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
   - That the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.
   - The supply of a better quality product, which still provides the goods as contracted for, would not be a breach of the implied term: *Microsport GMBH & Co. KG v Pactland Ltd [2006] 53 HKCU 1.*
   - CECO S11(1) provides that if the buyer is a consumer, then the parties cannot exclude or restrict this provision by agreement. Section 11(3) provides that if the buyer is not a consumer then a term excluding or limiting liability must be reasonable.

2.

(a) Geoffrey may argue that Gibson should have ensured that the pipe was fit for a foam concrete (i.e. alkaline) environment on the basis that the sub-contract between them contained an implied term under S16 of the Sale of Goods Ordinance that the pipe would be fit for that particular purpose.

Section 16(3) of SOGO provides as follows: "Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment."

The parties agreed that there was an express term of this contract that the pipe would be fit for the purpose for carrying potable water. There was therefore an express term that the pipe would be fit for the purpose of carrying potable water. But that is not the thrust of the issue as to fitness for purpose. The point is: was there a term of the contract, implied by reference to S16(3) of the SOGO, that the pipe would be fit for its purpose in connection with the use of foam concrete?

It may be contended that the pipe ought to have been fit for a foam concrete environment. But the express purpose stated in the contract was only to carry potable water. If the buyer intends to use the goods for a particular purpose, that the particular purpose should be clearly identified by the buyer to the seller: *Griffiths v Peter Conway Ltd [1939]*. Geoffrey did not make any reference to foam concrete to Gibson, nor did they provide Gibson with any drawing or specification which indicated that foam concrete might be used around the pipe. The particular purpose was therefore not made known by Geoffrey to Gibson. There was nothing which Gibson knew or ought reasonably to have known about foam concrete in general: *Grant v Australian Knitting Mills [1936]*. Finally, there is no evidence that Geoffrey relied on the skill or judgment of Gibson in relation to any decision connected with foam concrete. Again, S16(3) provides that a fitness for purpose provision will not be implied where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller. Thus, on the basis of the facts, Geoffrey never made known to Gibson the alleged "particular purpose" of the pipe, and the term could not be implied in accordance with the SOGO: *J Murphy & Sons Ltd v Johnston Precast Ltd [2008]*.

Section 16(2) of the Sale of Goods Ordinance provides that where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality. Section 2(5) of the SOGO provides that goods of any kind are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought; of such standard of appearance and finish; as free from defects (including minor defects); as safe; and as durable, as it is reasonable to expect having regard to any description applied to them, the price and all the other relevant circumstances. There was therefore an implied term of the contract that the pipe would be of merchantable quality by operation of the SOGO. But again, on the basis of the facts, since there was no alleged weakness of the pipe, the pipe was therefore of merchantable quality in accordance with the implied term pursuant to S16(2) of the SOGO.

(b) Clause Z is an exemption clause. It is a clause commonly found in commercial contracts and is sometimes known as an exclusion clause. It purports to exclude either in whole or in part liability for certain breaches of contract or the consequence of certain events. In this case, Clause X will seek to exempt Gibson from liability if there are defects in the goods or for any loss caused by such defects, and in particular liability for breach of the obligations arising from S16 of the Sale of Goods Ordinance is excluded.

Usually, exemption clauses are imposed by the contracting parties with stronger bargaining power. They are sometimes open to considerable abuse. The Control of Exemption Clauses Ordinance (CECO) seeks to protect the weaker party such as the consumers and determines whether exemption clauses will be binding on the parties. Under S11(3) of the CECO, as against a person dealing otherwise than as consumer, liability for breach of the obligations arising from sections 15, 16 or 17 of the Sale of Goods Ordinance (Cap 26) can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness. Since Geoffrey is not a consumer, the clause is only effective if the term is reasonable.

Under Schedule 2 of CECO, the matters to which the court shall consider in determining whether a clause is reasonable are:

(i) the strength of the bargaining positions of the parties relative to each other, taking into account alternative means by which the customer's requirements could have been met
(ii) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term
(iii) whether the customer knew or ought reasonably to have known of the existence and extent of the term
(iv) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable
(v) whether the goods were manufactured, processed or adapted to the special order of the customer

CHAPTER 7

Work Them Out

1. C	2. D	3. D	4. A	5. C	6. C	7. D	8. A	9. B	10. D

Short Questions

1.

- Unintentional defamation: The newspaper may claim it is unaware of the defamatory nature of the statement and offers an apology immediately after it discovers it is defamatory. This may be a defence. S25 Defamation Ordinance
- Justification: Truth is an absolute defence. If the statement is general and some of it is true, this may also be a defence. S26
- Fair comment: Opinion based on fact may be expressed if it is in the public interest. S27
- Privilege from prosecution is given to reports of legislative reports and court reports. Sections 10–14

• The newspaper may mitigate the damage caused by offering to publish an apology.
• This may mitigate the harshness of damages awarded against the newspaper: Sections 3 and 4.

2.
• The doctor and his patient is a recognised relationship of duty of care. Even if it were not, it would easily satisfy the *Caparo* test.
• The question gives you the fact that the act or omission has caused the injury so the doctor cannot argue that there is no causation.
• The doctor's only chance to avoid liability is therefore to argue that he has not fallen below the standard expected of him.
• A doctor will be judged as a reasonably competent professional performing the duties he is performing.
• However, a doctor or other professional will not fall below the standard expected of him if he performs some act or omission which causes the plaintiff harm if other reasonable practitioners would have done the same in the circumstances. *Bolam v Friern Hospital Management Committee [1957] 2 All ER 118.*
• Therefore if the doctor can show that a reasonable, responsible body of medical opinion supports his act or omission in this treatment then he will not have fallen below the standard of care expected of him and thus will not have breached his duty of care.

Long Question

1.
• This is a problem question so we must identify the issues, explain the relevant law and then apply the law to the facts of the scenario.
• This question deals with the tort of negligence.
• The law here is that to be successful in a claim for negligence, Fiona must prove on the balance of probabilities:
  (i) that the defendant owed the plaintiff a duty of care
  (ii) that the defendant breached that duty
  (iii) and that the act or omission in breach of this duty caused the damage or loss being claimed

• Here Fiona will probably sue TelKong because its employee has forgotten to replace the cover and it may be vicariously liable for his actions while working for them.
• Therefore, Fiona will be the plaintiff and TelKong, the defendant.
• The modern law of negligence and concept of duty of care comes from *Donoghue v Stevenson [1932] AC 562*, where Lord Atkin made an obiter statement of his "neighbour principle".
• This principle is that my neighbour in law is any person so closely and directly affected by my act or omission that I ought reasonably to have him in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
• The modern test for whether the defendant owed the plaintiff a duty of care comes from *Caparo v Dickman [1990] 2 AC 605.*
• The court must consider three factors:
  (i) Was the harm suffered by the plaintiff foreseeable because of the act or omission?
  (ii) Was there a relationship of proximity? (This is based on Lord Atkin's neighbour test)?
  (iii) Would it be just, fair and reasonable to impose the duty of care?

• Applying this law, Fiona's tripping in the hole, her injury and the damage to her coat were foreseeable consequences of the failure to replace the cover.
• Pedestrians such as Fiona are people that George should have had in mind when he carried out his work. They were his legal "neighbours".
• There is no reason the court should not think it just, fair and reasonable to find there is a duty of care.
• Therefore George, and vicariously TelKong, did owe Fiona a duty of care.
• Next we must consider the standard that George should be judged by.
• He will be judged by the standard of care expected of a reasonably competent man performing his work.
• He has not carried this out competently and so has breached his duty.
• Causation: But for George's failure to replace the cover, Fiona would not have suffered her injuries. Therefore factual causation is satisfied.
• The damage is not too remote, as previously stated it is of a type foreseeable. Therefore it satisfies legal causation.
• George, and therefore TelKong, are liable for Fiona's injuries and damage.
• Fiona can apply for damages. These will be ordinary damages for the injury to her arm, the cost of replacing her coat and, if she is unable to work, her lost wages.

CHAPTER 8

Work Them Out

1. D	2. A	3. D	4. C	5. B	6. D	7. C	8. A	9. A	10. D

Short Questions

1.
• If the agent breaches his duty to the principal, the remedy available to the principal depends on the duty breached.

- The agency relationship is based on contract and so the same principles as apply to breach of contract apply. Any loss caused by the breach can be recovered by the principal.
- The fiduciary duty is a condition of the agency contract and breach is therefore very serious.
- If an agent breaches his fiduciary duty the principal can:
  (i) dismiss the agent without notice
  (ii) repudiate the contract with the third party
  (iii) refuse to pay any money owed to the agent
  (iv) recover any money already paid to the agent
  (v) recover any secret profit or bribe taken by the agent

- Other serious breaches may give rise to the right of the principal to dismiss the agent and refuse to pay him.
- If the third party had knowledge of the breach and still helped the agent in the breach then the principal may avoid the contract with the third party.

2.
- The agent has the right to be paid for his work for the principal if this has been agreed to. This may be specified in the agreement. If the agency relationship is a commercial arrangement and has not specified payment for the agent the court will imply a term into the agreement requiring a reasonable amount of payment for the work performed.
- The agent has the right to be paid for all reasonably incurred expenses in carrying out the work for the principal.
- The agent has the right to a lien over the principal's property until the agent has been paid all monies owed under the contract of agency. A lien is a charge over the property which allows it to be retained until the amount owed is paid.

Long Question

1.
- The first issue is whether Tom is Harry's agent.
- This requires explaining how agency relationships can be created: express, implied, estoppel, ratification, necessity.
- The order from Dick may involve agency by implication.
- An agency by implication arises because the parties have a pre-existing relationship.
- Often agency by implication arises because the party thought to be an agent of the principal is an existing employee of the principal.
- Here, Tom is Harry's employee.
- Because of the pre-existing relationship it is assumed that the principal has given the agent authority to contract on his behalf.
- As a bar manager who has ordered similar goods from Dick for many years. it is likely that the authority of Tom to contract on Harry's behalf will be implied.
- There may also be an issue as to agency by estoppel and the apparent or ostensible authority of Tom because of his position.
- The circumstances are very similar to those in *Watteau v Fenwick [1893] 1 QB 346*, where the owners of the bar attempted to restrict the authority of their manager.
- However, unless the restriction has been communicated to the third party the principal will be bound.
- In this case Dick appears to have no knowledge of Harry's restriction on Tom's authority to contract on his behalf.
- Therefore Harry will be bound by Tom's contract on his behalf and will have to pay for the drink.
- He may take a personal action against Tom to account for any loss he makes.
- The second order involves a third party who knows of the restriction.
- This would seem to relieve Harry of any liability for Tom's actions.
- Sean would have to take a personal action against Tom for the cost of the drink.
- However, there is a chance that Tom could argue agency by necessity.
- Agency by necessity arises when:
  (i) there is a pre-existing legal relationship between the parties
  (ii) there is an emergency
  (iii) the agent cannot communicate with the principal
  (iv) the agent is acting in the best interests of the principal

- Here Tom has a pre-existing legal relationship as he is an employee.
- There is an emergency for Harry's business as he is losing money because the bar cannot serve drinks.
- Tom cannot communicate with Harry and he is acting in his best interests.
- If this can be successfully argued, then Harry will be bound by the order and liable to pay for the mixer drinks.
- *Great Northern Rly Co v Swaffield [1874] LR 9 Exch 132.*

CHAPTER 9

Work Them Out

1. B	2. D	3. B	4. A	5. C	6. C	7. D	8. A	9. B	10. C

Short Questions

1.

- The partnership is a contractual relationship and the partners are agents of the firm and each other.
- The partnership agreement can vary the terms of the contract between the partners, and thus the duties and liabilities of the partners between themselves, but not with outsiders.
- The provisions in the Partnership Ordinance concerning the relations between the partners are default provisions — they apply if there is nothing in the partnership agreement to the contrary — but they can be departed from by express provision in the partnership agreement.

2.

- All property originally brought into the partnership or acquired on behalf of the firm for the purposes and in the course of partnership business, constitutes partnership property, and must be held and applied as such, in accordance with the partnership agreement (S22).
- The Partnership Ordinance implies a term into the partnership agreement regarding partnership property unless a contrary intention appears that property bought with the firm's money is deemed to have been bought on account of the firm and so is partnership property (S23).

3.

(a) Formality in the formation

A contractual alliance is based on a simple contract between the parties and is unincorporated. The agreement can be oral or written. There is no formality in forming the venture. Partnership is the relation which subsists between persons carrying on a business in common with a view of profit, S3 Partnership Ordinance. It is an unincorporated association subject to partnership laws. No formality or registration is required in setting up a general partnership but it is advisable for a partnership agreement to be drawn up. A corporate joint venture is a registered company created by registration at Companies Registries under the Companies Ordinance. A limited company should be used. Strict formalities such as the requirements of a memorandum and articles of association have to be observed in the incorporation process.

(b) Management

A contractual alliance does not have a firm organisational structure such as a senior management. It is therefore less cumbersome as each contractual party will retain management of its own personnel and resources. But it is advisable that in the contract, each party will define its key responsibilities and the agreement states clearly how decisions are made in relation to the joint venture business e.g. whether a steering committee should be established to make decisions. For a general partnership, each partner may take part in the management of the partnership business, S26(e) Partnership Ordinance. A corporate joint venture has less flexibility in its governance structure. There are directors of the corporation appointed to oversee the management and monitor various business activities of the venture. In general, the shareholders' agreement between the parties will spell out how the joint venture will be governed and consider matters like the management structure, appointment and removal of directors.

(c) Liability

As the individual party in a contractual alliance owns and manages its resources, each party will be severally liable for its own liability. However, the parties should consider whether there will be any joint activities for which liabilities should be shared. Liability of a partnership is unlimited. Each partner will be liable for liabilities incurred by the partnership or by any partner acting within the scope of the partnership business. Under S11 of the Partnership Ordinance, partners are jointly liable with the other partners for all debts and obligation of the partnership. Under S5 of the Civil Liability (Contribution) Ordinance, in an action for debt, if judgment is obtained but the debt is still not fully paid and some other person is jointly liable for the debt, the creditor may bring an action against that other person. A corporate joint venture is liable for its own debt and the company's liability is without limit. In the event of a company being wound up, every present and past member shall be liable to contribute to the company's assets to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves: S170(1) Companies Ordinance.

(d) Ownership of property

For a contractual alliance, each party will retain ownership, management and control over its own assets. Partnership property is all property brought into the partnership stock or acquired on account of the firm. Property bought with money belonging to the firm is deemed to have been bought on account of the firm. Partnership property belongs to the partnership and each partner has an interest in the partnership property which eventually can be realised on dissolution. The partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement, S22 Partnership Ordinance. A limited company is in law a legal entity distinct from its members, *Salomon v Salomon Ltd [1897]*. A company can enter into contracts in its own right and can own property. It, rather than its shareholders, has a proprietary interest in its property. In Macaura v Northern Assurance Co. Ltd, Macaura was the owner of a timber estate. He sold all his timber to a one-man limited company of which he was the only shareholder. Macaura was also a substantial creditor of the company. After the sale, he insured the timber owned by the company against fire in his own name. Subsequently, the timber was destroyed by fire. Macaura claimed on the insurance policies but failed. The decision in Macaura pivoted on the separate legal personality accorded to companies. The House of Lords held that the timber was owned by the company and not by Macaura and as such, Macaura had no insurable interest in the timber. Macaura and the company were separate legal entities.

Long Questions

1.

- The partnership is a contractual arrangement and thus the normal rules applying to ending contracts apply.
- Therefore, a partnership contract, like any other contract, may be rescinded on the grounds of fraud or misrepresentation.
- The partnership may be ended at the will of the partners. Generally, there must be agreement of all parties to the contract, i.e. all of the partners, to end the partnership.
- No partner can be expelled by the majority unless such a provision is expressly provided in the partnership agreement, as this would not be by agreement of all the parties (S27).
- However, if a partnership is formed for an undefined term rather than for a specific purpose or limited term, any partner may, in the absence of contrary agreement, dissolve the partnership by giving notice to the others (S34).
- The Partnership Ordinance also provides statutory provisions for ending the partnership:
  (i) where a partner dies or becomes bankrupt (S35)
  (ii) where it becomes unlawful for the business of the firm to be carried on or for members of the firm to carry it on in partnership (S36)
  (iii) when the business can only be carried on at a loss (S37)

- The court may end the partnership:
  (i) when a partner has become permanently incapable, or has been guilty of misconduct, or has committed a breach of the partnership agreement (S37).
  (ii) when a partner becomes mentally incapable (Mental Health Ordinance (Cap 136) S19)
  (iii) when it would be just and equitable that it be dissolved (S37)

- When the partnership is dissolved, the partnership property is applied as follows (sections 40 and 46):
  (i) in the payment of the firm's debts and liabilities
  (ii) then if there is anything left, in the payment rateably to each partner, first for advances, then for capital
  (iii) finally if there is anything left, this is divided among the partners in the proportion in which profits are divisible

- Therefore the losses of the partnership are paid out of the profits if there are any. If there are no profits, then the losses are paid out of capital. If there is no capital, then the partners and their estates are liable for the losses in proportion to their entitlement to profits (S46).

2.

(a) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit, S3 Partnership Ordinance.

In this case, the ordering of the goods is preparatory to the formation of the company. The question is whether that involves in itself a partnership.

Are Gavin, Stacey and Peter carrying on a business in common at the material time? Not every transaction between two people preparatory to the formation of a company is sufficient to constitute a partnership. Gavin, Stacey and Peter are merely working together to form a company; they are not carrying on business in common with a view of profit or with the intention to trade as partners prior to incorporation. There is only evidence of the buying of the goods by Peter and it does not appear that there is any other evidence of carrying on a business in common. Accordingly, Gavin, Stacey and Peter were not partners.

A statement of the relevant law is to be found in Lindley on Partnership:
"Persons who are working together to form a company, although they may intend to become members of the company after its formation, are not partners if this be the only relation between them; they are, it is true, engaged in a common object, and that object is ultimately to acquire profit; but their immediate object is the formation of a company, and if the company is not incorporated they are only in the position of persons who intend to become partners after the company is formed."

(b) Unlike a registered company, there is no formality in setting up a partnership. But Gavin and Stacey would be advised to negotiate a partnership agreement with Peter. The agreement will provide the terms of relationship between them and set out their rights and duties in the business, such as how to conduct the business, how to obtain finance and how a partner would retreat from the business if they were not on good terms. The partnership agreement should also specify the respective responsibilities of each partner. The Business Registration Office of the Inland Revenue Department must be notified of any admission or retirement of partners within one month of such change.

(c) Section 7 of the Partnership Ordinance provides that every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. Thus, if the transaction is entered into for the purposes of the partnership business, it will be binding on Gavin, Stacey and Peter.

Further, every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner (S11 Partnership Ordinance). Under S5 of the Civil Liability (Contribution) Ordinance, in an action

for debt, if judgment is obtained but the debt is still not fully paid and some other person is jointly liable for the debt, the creditor may bring an action against that other person. Nowadays proceedings on a "joint liability" or "joint and several liability" may be brought against any one or all partners. Also, the liability of a general partner for partnership debts is unlimited, although it is possible for one or more partners to limit their liability provided there remains at least one general partner.

CHAPTER 10

Work Them Out

1. D	2. A	3. C	4. A	5. D	6. B	7. B	8. C	9. A	10. D

Short Questions

1. Section 121(1) of the CO requires every company to keep accounting records which must:
   - be maintained by the directors to give a true and fair view of the company's state of affairs and explain its transactions
   - record all sums of money received and expended by the company and the reasons for these
   - record all sales and purchases of goods by or on behalf of the company
   - record the assets and liabilities of the company
   - be kept for seven years from the end of the financial year in which the last entry was made

2.
- The company is an artificial legal entity and can continue in legal existence indefinitely.
- It has perpetual succession: new members can buy or be given the shares of old members; new directors can replace those who have resigned, been removed or died.
- However, the company can be brought to an end by a number of methods and circumstances.
- The most common is winding up, the process by which the company's assets are collected and realised, that is sold, its debts paid and any surplus distributed in accordance with the company's articles of association.

(a) Members' voluntary winding up:
   (i) Usually occurs when a company has fulfilled the purpose it has been established for.
   (ii) The directors make a statutory declaration that the company is able to pay its debts.
   (iii) The members in general meeting adopt a special resolution to wind up the company.
   (iv) The members appoint a liquidator.
   (v) The liquidator takes over the company from the directors, sells the assets, pays the debts and distributes any surplus in accordance with the articles of association.

(b) Creditors' voluntary winding up:
   (i) Usually occurs when the creditors are concerned that they will not be paid or will receive less than they will at present if the company continues trading.
   (ii) There is no statutory declaration that the company can pay its debts.
   (iii) Unlikely that there will be any surplus to distribute to members after paying the debts.

(c) Compulsory winding up:
   (i) Commenced by court proceedings and is subject to court supervision throughout.
   (ii) The court orders the appointment of a liquidator and the winding up of the company.
   (iii) Usually done on the application of a concerned person, e.g. a creditor, a member or a director.
   (iv) Court usually has to be satisfied that the company is unable to pay its debts although mismanagement by the directors may allow a successful application by the members for the winding up of the company because it is "just and equitable" to do so: S177(1).

(d) Removal from the register of companies

Long Question

1.
- S5A CO: the company is a legal person, it exists in its own right.
- The separation of the company from its members and management is likened to a veil or curtain being drawn between them.
- The case of *Salomon* was the seminal case exemplifying this separate legal existence.
- *Aron Salomon v A Salomon & Co. Ltd [1897] AC 22*: The House of Lords unanimously held that A Salomon & Co. Ltd was validly formed according to the legislation.
- When the company was formed there was a curtain or veil of incorporation between the company and its members, Mr Salomon and his family.
- The business thus belonged to the company and not to Mr Salomon.
- Mr Salomon was an agent of the company; the company was not an agent of Mr Salomon.
- Unlike the Court of Appeal, the Lords held that Mr Salomon had not formed the company for fraud. If he had created the company for fraud then the curtain or veil would have been lifted and he would have been liable for the debts of the company.
- This case gave us the most important concept in company law: the corporate entity

- When a company is incorporated it becomes a separate legal entity, it exists on its own, it can contract, sue and be sued.
- When a company is formed in accordance with the requirements in the Companies Ordinance, and it has not been incorporated for the purposes of fraud, then the process of incorporation (forming the company) creates a separate legal entity, a legal non-living body which exists separately from its members (shareholders). The members have no liability for the company's debts other than the paid-up value of their shares.

Consequences of the separate corporate entity:

- A registered company is a person for the purposes of the Partnership Ordinance and thus can be a partner in a partnership.
- A registered company can take part in joint ventures.
- The separation of the company from its members and management means that the company may exist forever.
- The members of the company, owning all the shares in the company, together own the company. However, because of the separate entity of the company, the members do not own the property of the company. The company owns its own property.
- A shareholder of a company, even though he owns all or nearly all the shares in a company, can be guilty of theft of company property: *A.G. Ref (No 2 of 1982) [1984] QB 624, CA*.
- The company's ownership of its own property causes most problems when a single individual, as in the *Salomon* case, owns most of the shares and is identified as the business. Most people would consider these one-man businesses to be the owners of the property of the company, but they are not and this is what protected Mr Salomon from liability for his company's debts.
- In effect the protection afforded members by the separate entity also prevents them treating and using the company property as their own: *Macaura v Northern Assurance Co. [1925] AC 619: Re Lewis Wills Trust [1985] 1 WLR 102.*
- Once a company is incorporated, the court will generally refuse to look behind the corporate veil: *Lee v Lee's Air Farming Ltd [1961] AC 12.*
- The principle of corporate separation is enforced quite rigidly. However, there are times when the courts have decided to lift or pierce the corporate veil. This has the effect of making the members or directors liable for the liabilities of the company or the company liable for the liabilities of the members or directors.
- Before the decision in *Adams v Cape Industries [1990] Ch 433* it seemed the courts had the power to dislodge the corporate veil in the following circumstances:
  (i) in times of national emergency or for public policy
  (ii) when the company has been incorporated for fraud, façade or sham
  (iii) when a company is merely the agent of another
  (iv) when a group of companies is operating as a single economic entity
  (v) when a statute so provides

(i) National emergency or for public policy: The case of *Daimler Co. Ltd v Continental Tyre & Rubber Co. (Great Britain) Ltd [1916] 2 AC 307, HL,* in which the House of Lords lifted the veil to hold that as the shareholders of Continental were almost all German, the company, even though incorporated in England, was German and therefore an "enemy".

(ii) Fraud, façade or sham:

(a) As was stated by the House of Lords in *Salomon v Salomon*, if a company is formed to fraudulently abuse the incorporation process, i.e. the incorporation is a sham or façade, the court will lift the veil.
(b) The motive behind incorporation is crucial when deciding whether incorporation is a sham: the company must have been incorporated for an improper or illegitimate purpose: *Gilford Motor Co. v Horne [1933] Ch 935, CA*: *Jones v Lipman [1962] 1 WLR 832*.

(iii) When a company is merely the agent of another:

(a) The case of Smith, Stone and Knight v Birmingham Corp. [1939] 4 All ER 116.
(b) However, agency will only be found in exceptional circumstances after Adams v Cape Industries [1990] Ch 433.

(iv) Groups of companies: There may be many linked companies, holding companies and subsidiaries, in groups, often formed in different jurisdictions.

(a) Applying the strict principle from *Salomon v Salomon* there is a corporate veil between these different companies and no parent company should be liable for the debts of its subsidiaries. Similarly no subsidiary should be liable for the debts of its holding company.
(b) The general rule is that "each company in a group of companies… is a separate legal entity possessed of separate rights and liabilities", *per* Roskill LJ, *The Albazero [1977] AC 774*.
(c) However, attempts have been made to dislodge the corporate veil in holding company and subsidiary situations. It has been argued that if a subsidiary is completely under the holding company's control, the group should be treated as a single economic entity. This would therefore remove the subsidiary's corporate veil.
(d) Before *Adams* the case of *DHN Food Distributors* represented the highpoint of the English courts' willingness to dislodge the corporate veil between groups of companies: *DHN Food Distributors Ltd v Tower Hamlets L.B.C. [1976] 1 WLR 852, CA*.
(e) However, this judgement, and particularly Lord Denning's comments were criticised in *Woolfson v Strathclyde Regional Council [1978] SLT 159*, by the House of Lords.
(f) The House of Lords doubted the principle of economic reality and preferred to rely on the principle that the veil should only be lifted between a group of companies if there was an agency relationship, i.e. the subsidiary company was merely an agent of the holding company.

(g) In *Adams v Cape Industries [1990] Ch 433*, the English Court of Appeal went even further in restricting the powers of the court to dislodge the corporate veil.
(h) The Court of Appeal claimed to be applying the strict principle from *Salomon v Salomon*. It also rejected the economic entity argument. The court did consider whether the subsidiaries were agents of the parent but held that they had their own controlling directors for day to day business and so were not general agents.

• Thus it seems that the court may now only dislodge the corporate veil in the following circumstances:
(i) in times of national emergency or for public policy
(ii) in cases of fraud façade or sham (e.g. *Jones v Lipman*)
(iii) if there is an agency relationship, relying on straight forward agency principles but requiring almost absolute control of the subsidiary by the holding company
(iv) when a statute allows

• In other circumstances it seems that the single economic unit argument will fail, regardless of the degree of control by the parent company. Therefore *DHN Food* is probably an incorrect decision.
• The court is also given the power in several statutes to dislodge the corporate veil.

CHAPTER 11

Work Them Out

1. A	2. B	3. A	4. D	5. B	6. B	7. C	8. D	9. C	10. D

Short Questions

1.
• Section 2 of the BOEO provides that a "holder" is the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.
• A holder for value is anyone who holds a bill for which he has given valuable consideration or for which valuable consideration has at any time been given: S27(2) BOEO.
• Section 29(1) of the BOEO provides that a holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions:
(i) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.
(ii) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

• If the holder does not meet any of these requirements, he is not a holder in due course and thus not entitled to enforce the bill for payment against the drawer. Any holder may sue the drawer but only the holder in due course is guaranteed payment.
• A holder is a holder in due course if the bill is complete and regular on the face of it, it is not overdue, he has no notice that it has been dishonoured (if it has been), he has given value for it and taken it in good faith without notice of any defect in title of the transferor.

2.
• A cheque must be drawn on a banker but a bill can be drawn on anyone.
• A cheque must be signed by the drawer and only in very limited circumstances, authorised signatories.
• Other bills of exchange may be signed by the drawer or anyone authorised to do so.
• A cheque must be payable on demand.
• A bill may be payable on demand or at a fixed or determinable future date.
• If a cheque is dishonoured primary liability is with the drawer.
• If the drawee has accepted the bill then the drawee (acceptor) may be liable.
• A cheque can be crossed, but not a bill.
• Bankers as drawees are offered more protection by the BOEO than other drawees as long as they meet the requirement to be a licensed banker in Hong Kong.

3. Under S81 of the Bill of Exchange Ordinance, where a person takes a crossed cheque which bears on it the words "not negotiable", he shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. The cheque is freely transferable and the holder of a cheque so crossed could not be a holder in due course.

Every cheque may be transferred by negotiation until it is discharged. A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill, S31(1) Bills of Exchange Ordinance (BOEO). A bill payable to order is negotiated by delivery and indorsement. Mike can negotiate the cheque to his mother by indorsing it and give it to her.

A crossing may be added to a cheque by the drawer or by any person in possession of the cheque. A person in possession of a cheque upon which there is a general crossing may add the words "not negotiable" to it, S77(4) BOEO.

Where a cheque is crossed “not negotiable”, it is freely transferable. However, under such a crossing, a transferee shall not have a better title to the cheque than that which the transferor had, S81, BOEO.

4. Under S76(2) of the Bills of Exchange Ordinance (BOEO), Cap 19, where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

   Where the banker on whom a crossed cheque is drawn pays a cheque crossed specially to someone who is not the banker to whom it is crossed or his agent, the paying bank is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid, S79(2) of the BOEO.

Long Question

1. This is quite a complicated scenario and requires a consideration of the effect of the drawing and each purported transfer of the cheque.

   Post-dating the cheque:
   - S73(1) BOEO provides: A cheque is a bill of exchange drawn on a banker payable on demand.
   - Cheques can only be drawn payable on demand.
   - Therefore a cheque cannot, in effect, be post dated and any holder, even Mike who has agreed not to present the cheque for payment for a month, can present it at any time.
   - If presented Kenny’s bank will pay the cheque at any time even if it is before the date on the cheque if the funds are in the account.
   - As the funds were not in the account Kenny still owes the money for the cheque.
   - Alternatively if the bank had returned the cheque because it was post dated, and technically invalid, Kenny would still owe the money for the cheque.
   - The problem is who has the right of action to enforce the debt that Kenny owes.
   - A cheque, as with any bill of exchange or negotiable instrument, is a chose in action: it represents the right to legal action to enforce the payment of the sum on the cheque.

   Transfer of the cheque:
   - Mike negotiates the cheque with George and so transfers the right to enforce the payment of the $20,000 to George.
   - S29(1) BOEO provides that a holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions:
     (i) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.
     (ii) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.
   - George has no notice of any problems with the cheque or Mike’s title to it and so is a holder in due course of the cheque.
   - Brian steals the cheque and so has no right to be paid the money due under the cheque. He is a possessor of the cheque but has no legal rights.
   - He sells the cheque to Paul and forges George’s signature.
   - Paul, although he only pays half its value, buys it, as far as we know, in good faith and for value without notice of any defect in Brian’s title.
   - Paul is a holder in due course and if this were an uncrossed cheque would be entitled to enforce payment of the cheque as against the drawer Kenny. He would receive good title even though Brian did not have good title.
   - However, this is a crossed cheque.

   Crossing:
   - Crossing is the placing of two parallel lines transversely on the face of a cheque, with or without the writing of words of instruction (to the banker) within them.
   - The cheque is crossed “non negotiable”.
   - This does not mean it cannot be negotiated. All legitimate endorsements of the cheque will transfer the chose in action.
   - However, it does mean that the transferee is on notice that the drawer did not intend it to be transferred and that if there is any defect in title of the transferor then the transferee can obtain no better title.
   - Thus although Paul is a holder in due course and has done nothing wrong the crossing of the cheque “non negotiable” has restricted the rights that the previous holder, Brian, can transfer to him.
   - As Brian had no title to the cheque, neither can Paul.
   - Thus the last legitimate transferee, George, can enforce the right to payment against Kenny, or if Kenny cannot pay him, against Mike, as the person he advanced the money to.
   - He does not have to get Mike to sue Kenny on his behalf.
   - He can do this at any time and does not have to wait until the date on the cheque.
   - Paul can only take action against Brian to recover the money he paid him.