

EXAMINATION FOR THE DEGREES OF B.C.L. AND M. JUR

REPORT OF THE BOARD OF EXAMINERS FOR 2009

1 Introduction

This report contains a brief commentary on various central aspects of this year's examinations, and raises a number of points which the Examiners believe may be important for those who have oversight of the examination of BCL and MJur candidates in future years.

2 Timetable

The setting of the timetable for this year's examinations went smoothly. As in 2007 and 2008, papers were sat on two Saturdays in order to avoid, so far as possible, the problem of candidates sitting two papers on the same day.

3 Statistics

Attached at Appendix 2 are the numbers of entrants, distinctions, passes, and fails. The Examiners were very pleased to note the high standard of achievement across the board. There were no failures and the average mark in the majority of papers was above 67%. In one paper, Constitutional Principles of the EU, the average mark was 70% (nine candidates took this paper).

The percentage of candidates gaining distinctions in the BCL was even higher than in 2008, with 45% of BCL candidates (43 students) gaining distinctions, compared with 40% in 2008. There was a marked improvement in the proportion of MJur distinctions, with 34% (12 students) gaining distinctions compared to 15% in 2008. This may reflect a stricter standard of admission for MJur candidates in 2008-9, which the examiners hope will continue in future years.

Previous examiners' reports have noted with concern the gap in the performance of women and men on the BCL/MJur. This year, the examiners were encouraged to note a significant improvement in the performance of women on the BCL: indeed, 50% of female candidates gained distinctions on the BCL, compared with 42% of male candidates on the BCL. However, this still translated into fewer women than men achieving distinctions on the BCL (17 women as against 26 men) because of the marked difference between the numbers of women and men on the BCL (only a third of BCL students were women in 2008- 2009).

By contrast to the BCL, the gender gap on the MJur has worsened significantly, with no women candidates for the MJur achieving distinctions, as against 50% of the men. As on the BCL, there are also considerably fewer women taking the MJur (only 29% of MJur students were women in 2008-9).

There were also markedly fewer women than men among the students on both the BCL and MJur awarded prizes, with only three out of 20 prizes going to women in 2009. The Examiners would like to express their concern at these figures, and hope that in future more attention would be paid to these disparities. In particular, it is a matter of great concern that less than a third of BCL/MJur students are women.

4 Computer software

The computer software worked satisfactorily. However, the databases are urgently in need of modernisation. We understand that the Law Board has agreed to introduce new software for use in 2010, but if it is to be functional for the next round of examinations, it needs to be introduced immediately. The Examiners urge the Law Board to bring forward the date of introduction of the new databases to ensure they are functional in time.

5 Turnitin

As in 2007 and 2008, 'Turnitin' software was used to check for plagiarism. However, given the success of the pilot schemes, it was decided to extend its use this year to include dissertations in addition to Jurisprudence and Political Theory essays. Moreover, instead of submitting all three essays of four randomly selected candidates, it was decided to submit one essay from each of 12 randomly selected candidates. In addition, it was decided to submit six randomly chosen dissertations.

All candidates were required to submit both electronic and hard copies of their work. Turnitin reports were checked by one examiner in each subject. The process worked smoothly and no plagiarism was detected.

6 Setting of papers

The Examiners checked all draft papers line by line. This process yielded a substantial number of further queries on the vast majority of papers, which the Chair of Examiners subsequently discussed and resolved with individual setters of papers. This systematic process, although time consuming, is of great value in achieving consistency of style and standard across papers, as well as obviating queries during the exams themselves. In fact, during the exams, there was only one substantive query and two proof-reading faults. Much credit is due to Julie Bass for her care in formatting the papers.

7 Information given to candidates

The Edict is attached as Appendix 3.

8 The written examinations

The examinations went smoothly. The Chair of Examiners attended at the start of each examination, as did the setter or an alternate. As in previous years, the Examiners wish to emphasise the importance of the Proctors' requirement that the setter or an alternate be present. The invigilators are competent and experienced individuals, but the presence of a person familiar with the content of the paper is sometimes vital. This year, it quickly became obvious that there was no need for the Chair to attend the conclusion of each paper. The same invigilator was present for the vast majority of papers, save on two days, when one other invigilator attended. This provided important continuity and consistency, and the care with which the invigilation functions were performed is commendable.

Because there were examinations on two Saturdays, as last year, Colleges with candidates taking papers on those days were asked to provide contacts available to deal with any problems, including emergencies.

9 Materials provided in the examination room

The Examiners wish to note, in line with previous Examiners' reports, the considerable expense involved in the provision of statutory materials by the University (as well as the waste of paper involved when relevant primary and secondary legislation changes on a year-on-year basis). The possibility that candidates be able to use their own materials should be urgently reconsidered.

10 Illegible Scripts

In the Edict it is stated that the Examiners will make every effort to identify candidates who will need to have their scripts retyped as early as possible, but 'candidates who leave Oxford before 20 July 2009 [the date of the first marks meeting] do so at their own risk.' This year, one candidate was out of the country when the request came through to type two separate scripts. In the event, after considerable negotiation, the two scripts were typed on Saturday 18 July, putting the markers at the great inconvenience of marking the script on the weekend or the morning of the first marks meeting. It is suggested that the Edict should be amended to emphasise the importance of candidates not leaving Oxford until after the first marks meeting so they can be available to dictate any script if necessary.

11 Marking and remarking

The routine marking of scripts prior to the first marks meeting of Examiners included the second marking (blind) of borderline scripts, and of a sample of others. Markers were asked to ensure that all marks ending in 8 or 9 should be double marked. Where a script had been double marked, the markers submitted an agreed mark before the first meeting. Assessors were reminded that the Law Board had decided that a mark ending in 9 would not be an invitation to Examiners to reconsider the grade, but would be the final grade received by the candidate. This year, the vast majority of markers followed this formula, making the Examiners' task more transparent, consistent and considerably quicker. At the first marks meeting, the following principles were followed:

- a) No paper which had already been second marked would be read a third time. This meant that no papers ending in 8 or 9 were re-marked. This is in line with the instructions of the Examinations Committee;
- b) Marks ending in 7 would be remarked if they had not already been re-marked and a higher mark would make a difference to the overall class of degree. Since there were no candidates at risk of failing, this category in practice referred to candidates who had the possibility of a distinction. A second reading was requested if a candidate had one mark of 70 or over, no marks under 60, and one or two marks of 67 which had not already been second marked;
- c) Where a candidate was in line for the Vinerian or Clifford Chance prizes, a single mark under 70 which had not already been re-marked was sent for second reading.

A total of 16 papers were re-marked between the first and second marks meetings.

The Examiners wish to stress the importance of availability of both the first and second markers, at least for consultation (if necessary by email), throughout the marking period and between the Examiners' first and second marks meetings. This year, the markers were indeed available in the vast majority of cases, greatly facilitating the task of the Examiners.

12 Medical Certificates, dyslexia/dyspraxia and special cases

A total of 15 medical certificates were forwarded to the Examiners. This included four medical certificates submitted on behalf of a single candidate. In addition, one candidate was certified as dyspraxic.

Three candidates wrote some or all of their papers in their respective colleges. A further two candidates wrote some or all of their papers in a special room in the Examination Schools.

The following additional specific details are included at the request of the Proctors. In the BCL, medical certificates on behalf of seven candidates (two of which referred to the same candidate), or 7.36% of BCL candidates, were forwarded to the Examiners under sections 11.8 – 11.10 of EPSC's General Regulations for the Conduct of University Examinations (see *Examination Regulations 2008*, page 34). In the MJur, two medical certificates (from 5.71% of MJur candidates) were forwarded under the same regulations, making a total of 6.92% of BCL and MJur candidates combined.

13 Thanks

The examiners would like to conclude by expressing their warm thanks to the External Examiner, Nick McBride, for his good judgement and helpful advice in this process. They would also like to thank and pay tribute to the dedication, hard work, skill and good judgment of those who ensure that the examinations process is conducted as smoothly as it is, in particular, the Faculty's Director of Examinations (Mark Freedland). They are particularly grateful to the skill, expertise, and efficiency of the Examinations Officer, Julie Bass, who drives the examinations process with such unstinting commitment and unerring judgement.

S.D. Fredman (Chair)

J. Payne

A.J.B. Sirks

W.J. Swadling

Appendices to this Report: (2) Statistics; (3) Notices to Candidates; (4) Prizes and Awards; (5) Mark distribution on first reading; (6) Reports on individual papers; (7) Report of Nick McBride, external examiner

Statistics for the 2009 Examinations

BCL

	2009						2008						2007						2006						2005					
	Male		Female		Total		Male		Female		Total		Male		Female		Total		Male		Female		Total		Male		Female		Total	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Dist	26	27	17	18	43	45	23	27	11	13	34	40	29	31	12	13	41	44	29	32	9	10	38	42	31	27	9	8	40	35
Pass	35	37	17	18	52	55	27	32	24	28	51	60	25	27	28	29	53	56	26	29	26	29	52	58	42	37	31	28	73	65
Fail	0		0		0		0		0		0		0		0		0		0		0		0		0		0		0	
Total	61		34		95		50		35		85		54		40		94		55		35		90		73		40		113	

MJur

	2009						2008						2007						2006						2005					
	Male		Female		Total		Male		Female		Total		Male		Female		Total		Male		Female		Total		Male		Female		Total	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Dist	12	34	0		12	66	8	13	1	2	9	15	7	11	5	7	12	18	5	8	6	9	11	17	10	16	3	5	13	21
Pass	12	34	11	31	23	34	29	49	20	34	49	83	34	51	20	30	54	81	28	44	23	36	51	80	29	46	21	33	50	79
Fail	0		0		0		1	2	0		1	2	1		0		1	1	1	2	1	2	2	3	1	1	0		1	1
Total	24		11		35		38		21		59		42		25		67		34		30		64		40		24		63	

APPENDIX 5

Raw Marks Statistics, BCL/MJur 2009 Marks distributions on first reading, as percentages

Paper name	Av. Mark	Number sitting	----- Mark rangers (%) -----					
			49/less	50/54	55/59	60/64	65/69	70/over
Advanced Property and Trusts	67.9	17				12	53	35
BCL Dissertation	67.4	15				7	67	27
Comparative and European Corporate Law	67.4	15				13	53	33
Comparative Human Rights	66.9	31		3		13	55	26
Comparative Public Law	67.8	21					67	29
Competition Law	65.2	24			8	33	38	21
Conflict of Laws	64.7	25		8		36	32	20
Constitutional Principles of the European Union	70	9					44	56
Corporate and Business Taxation	68.1	9			22		11	67
Corporate Finance Law	67.2	20			5	5	55	30
Corporate Insolvency Law	67.5	22		5		5	55	36
Criminal Justice and Human Rights	66.8	17				29	29	35
European Business Regulation	69	10					40	60
European Community Environmental Law	66.6	5				40	20	40
European Employment and Equality Law	67.4	5				20	20	60
European Private Law: Contract	63.8	13		8		46	38	8
European Union as an Actor in International Law	66.8	14				29	43	29
Evidence	66.2	15				40	33	27
International Dispute Settlement	67.1	22				23	41	32
International Economic Law	65.8	22				23	59	18
Jurisprudence and Political Theory Essays	68.1	28				7	43	46
Law and Society in Medieval England	61.1	7		29	14	29	14	14
Law in Society	64.6	11		9		27	27	27
Medical Law and Ethics	68	13				23	38	38
MJur Dissertation	67.6	3				33	33	33
Philosophical Foundations of the Common Law	66.4	18				11	67	17
Principles of Civil Procedure	67.9	24				8	58	33
Regulation	66	5				40	20	40
Restitution	65.2	29			7	31	45	17
Roman Law (Delict)	64	2				50	50	
Socio-Economic Rights & Substantive Equality	67.6	16			6	6	50	38
The Law of Personal Taxation	63.7	4		25			50	25
Transnational Commercial Law	66.9	14			7	14	36	43

APPENDIX 6

INDIVIDUAL REPORTS

CORPORATE AND BUSINESS TAXATION

This was a strong set of papers, two thirds of which were awarded a distinction, reflecting an able and enthusiastic class. All questions were attempted. The two problem questions were less popular than the essays but both were well done by those who undertook them. The best essays showed an excellent ability to blend together policy discussion and analysis of the current law. This was pleasing since it is the aim of the course to achieve this level and type of understanding. The most popular essays were those on the debt/equity distinction for corporate tax purposes and on the problems of basing taxable profits on financial accounts. There were some knowledgeable and insightful answers on these difficult topics. The answers to the international tax problem question, which required knowledge of the legislation on controlled foreign companies, thin capitalisation and taxation of foreign dividends, showed a high level of understanding and organisation. This reflected the additional time spent on these topics this year.

CRIMINAL JUSTICE AND HUMAN RIGHTS

The examiners were very pleased with the overall quality of the answers this year. While all of the candidates displayed a solid understanding of the key issues and cases at the heart of the course, a sizable minority managed to produce answers that were truly outstanding. We were particularly impressed by the fact that many of the candidates went well beyond a detailed analysis of the relevant domestic and European decisions, and sought to critically engage with the thorny jurisprudential issues raised by the case law. The examiners were also satisfied that splitting the paper into two sections did not appear to affect the range or quality of answered when compared with previous years, and see no reason not to continue with this format in future years.

CONFLICT OF LAWS

It was striking that over 80% of answers written were to the problem questions, a fact which may reflect the way the course is taught. If there was a general point of concern, it was that connections between issues arising on jurisdiction and on choice of law (for example, where the contract in question may have been one made by a consumer) were not always made: it is odd to see a court held to have jurisdiction over the claim as one arising from a contract made by a consumer, but no obvious reference then made to the particular choice of law rules for contracts made by a consumer. And there may have been a little less critical analysis of the rules otherwise accurately applied than one might have expected to see, even in problem questions.

EVIDENCE

The fifteen scripts (up from ten in 2008) were of a similar standard to last year, with four first class marks, several in the high '60s, and nothing less than upper second class. As is traditional, the problems encompassed more than one element of the syllabus, and sometimes several. Candidates coped well with the demands of the paper and the problem answers were generally clear, well-structured and comprehensive. Candidates showed a strong preference for hearsay (Q.7) and bad character of the accused and others (Qs 6 and 8), as usual. They demonstrated an excellent grasp of these important and difficult topics while coping with peripheral issues as disparate as legal professional privilege and entrapment. Everyone answered Q.7, which also raised several issues related to confessions. The essays were less popular. There were no takers for question one but there were good essays on reverse burdens of proof and legal professional privilege. The number of essays was equal to the combined answers to problems 4 (silence and adverse inferences) and 5 (improperly obtained real evidence). It may be that some candidates were put off these two problems because they also required discussion of children, experts and identification evidence. It is worth students knowing at least the basics of these topics so as to maximise question choice.

THE LAW OF RESTITUTION

The results this year were a slight anomaly: only 5 students received a Distinction from the 29 sitting the subject rather than (on the records of past years) an expected 10-15 students. One possible reason for this was that there was insufficient attention paid by students to the questions asked. Many students paid insufficient attention to the question and wrote answers on the subject area generally. For instance, almost every student answered question 4 which asked whether absence of basis was a necessary or a sufficient condition for restitution. Yet most answers used this as an opportunity simply to consider the Birksian thesis on absence of basis (a 'sufficiency' thesis), or just a chance to write on absence of basis generally, without also considering a 'necessity' thesis which tries to marry unjust factors and absence of basis by seeing the latter as a necessary (but not sufficient) condition of restitution. The same was true of question 8 in which only the best few answers considered the different situations in which a contract 'subsists' (eg unenforceable contracts which are not terminated, enforceable contracts where part of the contract can no longer be performed, as well as situations involving restitution of benefits transferred under contracts which subsisted prior to termination). The questions which covered very specific issues were answered by few (or no) students. No student attempted question 1 which concerned ministerial receipt or question 5 which concerned the relationship between undue influence and duress. And very few attempted question 6 which concerned illegality. In contrast, the final two problem questions were fairly popular and generally well answered although few students considered the restitution for wrongs issues in each of the questions.

LAW IN SOCIETY

Ten candidates sat the examination; three gained Distinctions, the rest Passes. The overall standard was very good, with some outstanding answers. Candidates had to choose three questions from ten; the choices ranged widely with all ten questions attracting some interest.

LAW AND SOCIETY IN MEDIEVAL ENGLAND

A larger number of candidates took this paper than in recent years (this was due partly to its becoming available to M. Jur students for the first time this year). The standard of the scripts was variable, with one at Distinction level, one in the high and two in the low-mid 60s, and three in the low-mid 50s.

There was some bunching of questions attempted on questions 2 on entails (4 attempts), 3 on the introduction of statutory controls on the alienation of land (6 attempts) and 6 on statutory debt registration and enforcement under the statutes of Acton Burnell and Merchants (five attempts). One or two candidates each attempted question 1 (on the different interests helping to shape the canons of inheritance), 5 (distrain and the usurpation of services), 8 (the nature of thirteenth century trespass) and 9 (legislative reinforcement of seignorial rights to feudal wardship). There were no attempts made to answer the other three questions. However, there were no specific features of candidates' ability to deal with the specific questions attempted: individual scripts showed considerable consistency across the different questions attempted.

The stronger scripts displayed effective integration of the use of the statutes, cases and other doctrinal material with the secondary literature in answers well-focussed on the question set. The weaker scripts tended to provide sketchy outline answers and to display substantial misunderstandings of the law and legal development shown in the primary sources studied during the year.

PRINCIPLES OF CIVIL PROCEDURE

The number of candidates taking this paper was 24. Of these, 8 obtained a Distinction, 14 obtained marks of between 65 and 69, and 2 marks between 61- and 65. No candidate fell below 61.

As these statistics suggest, the standard of scripts was high. The most popular questions were 4(a) and 7. The former dealt with the justification for corporate legal professional privilege and the latter was concerned the court's approach to ADR. All the answers were of good quality, as one would expect since the topics had received considerable attention during the year, some were exceptionally good. Question 9 on the enforcement of compliance, question 8(a) on conditional fee agreements, and question 9 on the indemnity rule also proved popular. The interest in costs was not surprising seeing that the subject of costs has been in the news due to Lord Jackson's report and his visit to the class. Two questions though had no takers at all: question 4(b) on the effects of accidental disclosure of privileged documents, and question 8(b) on the new legislation concerning protective costs orders. Otherwise, answers were spread fairly evenly between the remaining questions, except for question 10 which called for a comparative analysis of disclosure, which receive only one answer. The great majority of the candidates showed not only good grasp of the materials but also signs of independent and critical thinking. By this measure the standard this year was better than in the past and quite exceptional.

COMPETITION LAW

Papers submitted by candidates this year were of a high standard. As in the previous year, the majority of candidates tackled problem questions. The four problem questions covered the enforcement of Article 81 EC, Article 82 EC, the European merger regulation and UK

Competition Law. Most popular were the problem question dealing with Article 82 EC and the abuse of dominant position and the problem question dealing with vertical distribution. The majority of answers to problem questions were of very high standard and included references to market definition and structure, to the substantive provisions and to enforcement considerations. Out of the four essay questions the most popular was the question dealing with the interface between the public and private enforcement of competition law. The other essay questions dealt with competition law and intellectual property rights, Article 81 EC and the finding of anti-competitive object, and the Commission Guidance on Article 82 EC. Essay answers were of a very high standard.

Overall 21 percent of students achieved a first class mark in the exam, 71% a 2:1 mark and 8% a 2:2 mark.

THE LAW OF PERSONAL TAXATION

There were four candidates, who answered a wide spread of questions. Generally, their performance was very impressive.

Attention should be drawn to one factor. Though the paper requires only three questions to be answered, two candidates wrote scripts which contained some distinctly short answers to individual questions (certainly so, relative to their other answers). Candidates should be aware that it is difficult to attain high marks if one of three answers is unreasonably short.

EUROPEAN COMMUNITY ENVIRONMENTAL LAW

Generally the scripts were of very pleasing quality. The very good scripts were those in which candidates addressed questions with an impressive attention to legal detail and displaying excellent powers of critical independent analysis. Weaker answers were more general and engaged less with the case law, legislation, and academic commentary.

COMPARATIVE HUMAN RIGHTS

There were thirty-one BCL and M.Jur candidates taking this paper. All of the ten questions were answered. Question 8 (on dissenting judgments) was the least popular (with three answers), whilst Question 10 (on the comparative method) attracted the most (with 16 answers). All other questions were answered by between 6 and 12 candidates. In general, the quality of the answers was very high, with few scripts being marked below 60%, and a pleasing number of marks over 70%. Candidates seem to know that the best answers are those that demonstrate an excellent knowledge of the case law, a sophisticated comparative understanding, and strong conceptual skills. Answers that used the same case law in more than one question were rewarded less than those that demonstrated a wider knowledge across answers. More specific comments on particular questions were: Q.1: Weaker answers considered only the sodomy cases, and not the wider range of cases involving issues of sexual orientation, including the marriage cases. Q. 2: Weaker answers seemed to use prepared answers on freedom of expression, without sufficiently engaging with the question asked. Stronger answers provided interesting contrasts between those jurisdictions adopting proportionality and the United States approaches. Q. 3: Good answers began with a strong understanding, and explanation, of what deference involves. Q. 4:

Good answers identified the range of techniques used in the case studied, including proportionality, margin of appreciation. Q. 5: Weaker answers gave general accounts of how subversive speech was considered in different jurisdictions without focusing on the appropriateness of the specific test identified in the question. Q. 6: Weaker answers concentrated primarily on the US death penalty cases, and were less compelling in their analysis of cases in other jurisdictions. Stronger answers considered different ways in which public opinion is manifested and considered. Q. 7: Stronger answers identified the differences between the Torture Convention and the ECHR, and the implications of these differences for the question asked. Q. 8: Good answers identified those jurisdictions in which dissents are not permitted and contrasted these with those that do permit them in order to structure their answer. Q. 9: Weaker answers did not fully consider the 'should' element in the question. Q. 10: Weaker answers discussed lots of cases, and did not attempt to define what the comparative method involves. Stronger answers engaged with the academic literature, whilst taking a critical view of it. Weaker answers focused on the debate in the United States only.

SOCIO-ECONOMIC RIGHTS AND SUBSTANTIVE EQUALITY

This is the second year that this course has run, and the examiners were again impressed at the high quality of candidates' work in this subject. There were 16 candidates who took the course this year, one M Jur and 15 BCL. Seven candidates gained first class grades, including the M Jur candidate. A further 8 were classified between 65 and 69%, and there were no grades below 55%, giving a good average over all the candidates of 67.6%.

Examiners paid particular attention to the extent to which candidates were able to answer the question, structure their argument, make use of a wide range of material, appropriately use comparative law methodology and provide a critique of their own. The best answers were those which were able to synthesise the material into an argument which addressed in a critical and even innovative way the specific challenges raised in the question, rather than simply providing a discussion of the whole area. On the other hand, candidates at times focussed too much on a particular jurisdiction, or a specific aspect of the issue without displaying as much breadth of knowledge or comparative technique as they could have. It was disappointing to see a handful of candidates rushing the last question, particularly when bad timing may have cost them a first class grade. Overall, however, the level of knowledge, the grasp of the complex and sometimes interdisciplinary issues and the interest and enthusiasm displayed by candidates were all of a very high standard, making it a pleasure to mark this subject.

CORPORATE FINANCE LAW

The standard of answers was very good, with a high proportion of marks above 65 and 30% at 70 or above. The most popular questions were questions 2, 3, 6, 7, 8 and 9 but there was a pleasing spread of questions answered. Every question on the paper had takers, with most candidates answering questions on both the debt and equity financing aspects of the course. Candidates generally had a strong grasp of the principles at work in this subject, though at times greater detail of the specifics would have been helpful. The questions on this paper were often quite specific and candidates who were able to confine themselves to the precise issue identified by the question and to deal with it in detail were rewarded. For example Q1 asked for a discussion of the advantages and disadvantages to a creditor of taking security for the debt owed to it by a company. Weaker answers strayed into a general discussion of security including the

advantages /disadvantages to other creditors, other stakeholders or society generally. Similarly in question 7 the question invited a discussion of a particular aspect of floating charges (their underlying theoretical nature) rather than a more general discussion.

CORPORATE INSOLVENCY LAW

Twenty-two candidates (twenty BCL and two MJur) attempted this paper. The overall standard of the scripts was impressive. Eight candidates were awarded marks of 70 or above, and the average mark was 67%. All questions were attempted, with the essay questions being significantly more popular than problems. Questions 1, 3, 4 and 6 were particularly popular.

As in previous years, candidates were generally very successful in structuring their answers to essay questions so as to engage directly with the particular question set. Most candidates were able to synthesise effectively a wide range of materials including primary sources, secondary literature and in some cases empirical studies. However, the most impressive scripts were characterised by candidates taking carefully-reasoned positions of their own, demonstrating clear evidence of independent thought.

TRANSNATIONAL COMMERCIAL LAW

There were a number of excellent scripts this year and only very few disappointing ones. A surprisingly high number of candidates attempted the (difficult) problem question (question 3), with some very pleasing results. However, very few of these discussed the interesting question whether the breach of a contractual term to open a commercial credit on time would constitute a fundamental breach under the CISG.

There was a good spread of answers of the essay questions, although not a single candidate attempted question 4. Question 1, on the significance of the old *lex mercatoria* for the modern law, was frequently attempted, although only a minority of candidates engaged with *both* the historical law merchant *and* the modern *lex mercatoria*. Question 2, on the possibility of using the UNIDROIT Principles as a source of ‘general principles’ for purposes of Art 7 of the CISG, was equally popular, with many good answers. Question 5, on the Draft Common Frame of Reference, was tackled by just one candidate (who produced an excellent answer). Question 8 on arbitration was the most popular question of all. However, a large minority of candidates failed to engage with the question properly, some taking the concept of the ‘*lex arbitri*’ for granted (without explaining what it is), others simply equating it with delocalisation. Only a few excellent answers discussed whether a universal *lex arbitri* might not already be close to reality, given the success of the Model Law.

A general observation is that, with only three questions to answer in three hours, candidates tended to lose focus, frequently resorting to writing down everything they knew about a given topic while failing to engage with the question, resulting in very long-winded, unfocused essays.

COMPARATIVE PUBLIC LAW

The general standard of the papers in Comparative Public Law was very good, with approximately 30% securing Distinctions in this paper. There were no weak papers, and most of the candidates achieved marks in the high 60s or above. The most popular questions were those

on proportionality, legitimate expectations, constitutional principles, and process rights. The candidates were well-prepared and had clearly done the reading and research required for the course. They displayed a good understanding of the positive law, and most were adept at conveying the complexities of the material from three different legal systems within the time allotted for each question. Many candidates were also well able to complement their discussion of the positive law with interesting and instructive arguments concerning the conceptual issues that were of relevance for the question asked.

EUROPEAN BUSINESS REGULATION

The examination paper as usual reflected the fairly diverse content of the course, and included questions on competence and subsidiarity, mutual recognition, consumer protection, “golden shares”, the role of minimum harmonisation in the internal market, harmonisation of professional qualifications, state aids, and public procurement. The overall standard of answers was decidedly high. The best answers showed grasp of principle, knowledge of academic literature and, where appropriate (and it was appropriate for most questions) detailed knowledge of the reasoning of the European Court of Justice. Most questions invited candidates to demonstrate not only knowledge of the current state of the law but also an ability to assess the law critically and the best answers were those which examined arguments for and against the main propositions under discussion rather than simply asserting a preference.

EUROPEAN EMPLOYMENT AND EQUALITY LAW

There were five candidates for this paper. Overall the performance was of a pleasingly high standard, with three candidates scoring first class marks. No candidate attempted question 1 (policy agenda for EU employment law) or 6 (prohibitions of discrimination); only two candidates attempted questions 2 (the Charter of Fundamental Rights), 5 (sex equality) and 8 (social dialogue under Article 139). Question 3 on collective bargaining was popular, and the better answers demonstrated keen insight into the underlying rationale of collective bargaining considering, for instance, whether collective bargaining is inherently conflictual in nature. Weaker answers simply discussed the legislative framework without investigating its theoretical underpinnings. Question 4 was also popular, with very good answers. The best answers linked the impact and significance of the case law to the wider policy goals of EU. Question 7, also popular, was generally well done. The best answers not only identified the tensions underlying flexicurity, but also offered suggestions on how these tensions might (where possible) be resolved.

INTERNATIONAL ECONOMIC LAW

There were 22 students who wrote the International Economic Law examination paper. The level of performance of these students was, in overall terms, very good. The average mark was just under 66%. In terms of a more detailed breakdown, there were 18% of students who obtained a Distinction class mark, 59% of students who obtained a mark between 65-69%, and 23% of students who obtained a mark between 60-64%.

Among those who obtained a high 2:1 class mark (above 65%), there were a number of students who were just under the Distinction level. These students may likely have achieved a higher,

possibly Distinction class, mark if they had been more consistent in employing an analytical, as opposed to a descriptive, approach to the material being considered in their answers.

More generally, a number of papers would have scored higher if they had answered more specifically question being asked rather than providing a formulaic, general essay on the topic of the question.

INTERNATIONAL DISPUTE SETTLEMENT

This year's paper was answered well by the majority of candidates, as was reflected in the unusually high proportion of marks over 70. Every question was answered by at least one candidate, and there were no general areas of the subject in which scripts were particularly strong or particularly weak.

The main weakness was, as ever, a failure to address the precise question set. The weaker papers tended to offer general descriptions of the law or institutions relevant to the topic on which a question was set, without marshalling evidence in support of an argument in answer to the question. The best papers showed two characteristics. First, evidence of reading around the topic into the primary and secondary literature and their precise identification of points relevant to the question; and second, the avoidance of general descriptions of basic facts and the rapid development of an argument (often taking elementary propositions as read) in support of a particular response to the question set. They were, in other words focused and analytical rather than discursive. That said, the general level of answers was impressively high.

ROMAN LAW: DELICT

The results of the BCL/MJur exam were satisfying. The questions appeared to be well-balanced and provided ample opportunity to demonstrate knowledge and insight.

PHILOSOPHICAL FOUNDATIONS OF THE COMMON LAW

There were 17 candidates for this paper (after one withdrawal). Three obtained marks of 70 or above, one of whom achieved 73 with a consistently excellent trio of answers. The lowest overall mark was a 60, although this fact conceals that, in the less good scripts, some individual answers languished in the 50s. The overall profile of results was disappointing. There were more impressive students on the course than there were impressive answers in the examination. Perhaps the questions failed to inspire. The most popular question – question 4 on moral luck – was maybe a bit predictable. In any event it elicited some predictable answers. Most were competent literature surveys, although a few branched out in interesting directions. For example, there was an admirable attempt by one candidate (in a not otherwise distinction-worthy script) to strengthen this unstable corner of the Weinrib edifice. Another popular question was 1b, on the 'but for' test of causation. Most candidates had more or less mastered the tricky literature on this topic but only one candidate (the best candidate) went beyond it. Question 3, a moderately popular question, was not especially well handled. Candidates tended to jump straight to the question of whether only public wrongs should be criminalized, without noticing that if the prior conceptual question were answered in the affirmative, then no non-public wrong *could* be criminalized. There was similar lack of attention to the interplay between conceptual and

normative questions in answers to question 6, on duress, another moderately popular question. Other questions attracted only a scattering of answers, insufficient to allow any general comment to be made. Overall, however, the examination gave the impression that students work hard to master and survey often complex material but are less ready to make a philosophical argument in their own voice.

EUROPEAN PRIVATE LAW: CONTRACT

Thirteen students sat the exam, nine of them MJur. They had a choice between ten questions. All of the questions were attempted, apart from the one on contract formation, with those on pre-contractual liability and change of circumstances most frequently chosen. Contractual interpretation and good faith also proved to be popular topics. Almost all candidates displayed good or very good knowledge of the subject-matter and delivered answers in the 60s or better. This was the first year in which BCL candidates were required to answer three, rather than four questions, following the decision of the Faculty to require an equal number of answers from both BCL and MJur students. Perhaps surprisingly, the answers in the BCL papers were not necessarily of correspondingly greater depth or breadth than in previous years.

THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL LAW

The course ran for the fourth time this year. The examination was taken by fourteen candidates. The examination performance by students was generally very good. There were four distinction class marks (29%); six marks between 65 and 69 (42%) and four mark between 60 and 64 (29%). With the exception of questions 6 and 10 every question was answered by one or more candidates. There was a clear preference for questions 3, 4b and 8 which each attracted seven or more answers.

The general standard of exposition in the answers was high with an in depth treatment of the substantive issues. There was a truly outstanding script (78%). The performance of some students could have been further enhanced if they had engaged more fully with the case law of the ECJ and had put forward their own position on the question more distinctly.

ADVANCED PROPERTY AND TRUSTS

Seventeen students, (16 BCL, 1 MJur) took the paper. Six were awarded 70 or more, and the best three of these were quite exceptional, showing the kind of fluent knowledge and originality that we look for in our very best graduate students. The other candidates' marks were distributed between the mid to top 60s: it was a strong set of results in the first year of this course.

Each of the twelve questions attracted answers, with the surprising exception of Question 9 (on the economic analysis of property). Some of the 9 students answering the popular Question 3 (numerus clauses) did discuss economic ideas, and there was also scope to use economics in Question 10 (on the commons) which was answered by 2 candidates. The class discussions of economics had been very lively and students seemed to appreciate knowing the terrain without necessarily wishing to write about it.

Question 1 on the nature of ownership (3 takers) and Question 2 on exigibility and assignability (1 taker) were the most purely analytic and open-ended questions, and attracted interesting and creative answers, though perhaps more concrete grappling with the details of Hohfeld and other theorists would have been useful, together with exemplification from legal materials. Skilled use of theory and legal example was in strong supply in Question 3 on the *numerus clausus*. Questions 4 and 5 on (in)corporeal property and the fund concept only attracted one or two takers each, and good detailed answers were given. There was some temptation, not completely resisted, to recycle detailed caselaw on the floating charge without bringing a more theoretical angle to bear, but the work was still impressive.

Question 6 on the nature of the trust was easily the most popular topic (14 takers), and this reflected the currency and ferocity of debate in the field and the accessibility of the subject which links to so much else in private law. Answers were sometimes merely competent, efficiently presenting the standard extant arguments, but some students managed to develop their own insights into models of the trust, bringing comparative insights to bear and showing a creative approach. Question 7 on fiduciaries was also popular and well done (8 takers), but some students wrote polished essays summarizing the law post-*Mothew* which read more like skilled Finals answers than deeper theoretical explorations engaging with the range of recent theories. Question 8 on appropriation (also 8 takers) showed a range of quality, with some students seizing the opportunity to assay legal, historical and political-philosophical angles on the problem; others wrote a little off-topic, suggesting poor preparation. Question 11 on native title attracted one taker and Question 12 on human rights protection two takers; all answers were well done, though the huge terrain of each subject demanded skills in synthesis as well as polemical ability.

The examiners were pleased by the quality of the candidates' work, showing a serious engagement with the themes of the subject and an impressive ability to understand the demands of a new course.

COMPARATIVE AND EUROPEAN CORPORATE LAW

Fifteen candidates (seven BCL and eight MJur) attempted this paper. The overall standard of the scripts was very pleasing. Five candidates were awarded marks of 70 or above, and the average mark was 68%. The examiners were particularly pleased by the absence of any really weak scripts at the bottom end. All questions were attempted, with questions 1, 3, 4, 7 and 9 proving the most popular.

Three general observations are worth making. First, candidates were on the whole successful in structuring their answers so as to engage directly with the particular question set. One exception to this was question 7, for which a some candidates chose to write solely about board responses to take-overs, ignoring the many other dimensions on which shareholder power may impinge on board discretion. Secondly, the better scripts explained theoretical positions in the candidates' own words, rather than simply name-dropping authors, and successfully integrated these with discussion of a range of primary sources. Thirdly, many of the scripts demonstrated careful independent thought on the part of candidates. This was reflected in the fact that candidates sought to defend a range of positions on contentious issues, with no clear consensus emerging from the scripts.

CONSTITUTIONAL PRINCIPLES OF THE EUROPEAN UNION

This was the first year that this paper was examined. There were nine candidates. The general standard was very high with some papers truly exceptional, well above the first class mark. There was an even spread of the questions. Some candidates showed strength in depth of knowledge of the law whereas others were particularly conversant with the philosophical background. Both approaches were awarded with distinctions, wherever appropriate. There were ten questions, of which candidates were asked to answer four. This may change in the future. Three answers may be sufficient, given the nature of the paper.

MEDICAL LAW AND ETHICS

Candidates performed very well in this paper. The quality of answers was generally very high with candidates generally not only displaying an excellent understanding of the legal principles, but also of the broader theoretical and ethical issues raised. The best candidates were able to discuss the complexities that can arise in seeking to use ethical approaches in developing legal responses to the issues raised by medicine.

1. Ownership of Bodies. [7 answers] This question was answered very well. All candidates were aware of the leading case law. The best answers undertook a detailed consideration of the alternative ways of legal regulation over bodies and the legal and philosophical material on the issue.
2. Provision of medical services [0 answers]. No candidates attempted this question.
3. Confidentiality [4 answers]. Generally candidates had a good knowledge of the law. The best answers drew on the debates in the medical ethics literature on the nature of confidentiality.
4. Medical research. [0 answers]. No candidates attempted this question.
5. Abortion [7 answers]. This question was generally well done. There were some very interesting answers examining the extent to which the law may have to take a morally incoherent approach for political reasons. Good answers showed a sophisticated appreciation of the arguments on both sides of the answer.
6. Regulation of the medical profession [2 answers]. This was generally well done. Answers needed to explore the issues of accountability and public confidence in regulation, as well as the effectiveness of it.
7. Advance directive [4 answers]. Good answers to this question were able to provide a detailed discussion on the law on advance directives, as well as an awareness of the theoretical issues raised.
8. Clinical negligence [6 answers]. This question was generally well done. Most candidates were able to provide a detailed discussion of the law and the problems arising from it. The best answers were able to draw on the secondary literature to consider alternative approaches to clinical negligence.
9. Rationing [2 answers]. Candidates did well to focus on the question asked: looking at the role of the courts in rationing decisions, and not get distracted into considering the broader debates over rationing.

10. Death [3 answers]. This question tended to be answered extremely well. Most candidates were able to consider a range of views on the definition of death and analyse carefully the difficulties the law faces in selecting a definition.

11. “Do no harm” [1 answer]. Surprisingly to the examiners this was not a popular question. It would have required a careful consideration of the balance the law and ethics strikes between autonomy and beneficence.

12. Human rights [2 answers]. This was a tricky question to deal with in the exam. There was a danger that it would be used to focus on too narrow a range of topics. Good answers would have considered the responsibilities that may flow from an acknowledgement of rights in the medical context and a consideration of the enforceability of rights in a national health service.

REGULATION

Overall the students performed well in the 3 hour written examination. Marks ranged from the low 60% to a clear first class standard. Weaknesses occurred in three main areas:

- insufficient reference to literature, in particular controversial debates about issues raised in the question and insufficiently wide reading. Given the nature of the course and the discursive essay-type exam questions, detailed and critical engagement with the literature discussed during the course is crucial.
- answers not properly targeted at the question
- answers being too general and descriptive, rather than sufficiently incisive, critical and analytical.

Overall most scripts provided clear and well structured answers. In some of the answers, even to those questions that did not explicitly ask for this, students developed good links between the theoretical perspectives of legal regulation discussed during the first part of the course in MT and the discussion of specific regulatory regimes during the second part of the course in HT.

JURISPRUDENCE AND POLITICAL THEORY

Marks in Jurisprudence and Political Theory this year were bunched. Thirteen of the twenty-eight candidates made it into the 70s, but only one of these (the prize-winner, obviously) scored above 71. At the lower end, only two candidates scored below 65, and neither of these far below. The narrow range of the marks captures the relatively hard-to-differentiate quality of the work. Candidates for this paper continue to reach an admirable level of professionalism over the course of their BCL studies. Every candidate did serious reading and thinking, engaged closely with the questions, and presented sensible ideas cogently. However there is less taste for adventure in the examination than perhaps there once was. Outside the prize-winning script there was little to remind us of the sparks that sometimes flew in the seminars. The overall mood was one of intellectual caution, with virtually all candidates sticking quite closely to an established canon and making relatively familiar moves. No doubt the high stakes have a levelling effect. It is hard to know whether one should bemoan the lack of sizzling scripts in the high 70s when this seems to have as its corollary that nobody festers in the freezing 50s. One

must usually content oneself with distinguishing the good from the better by counting the modest errors.

Interest was rather evenly spread across the topics. Leading by a whisker was the topic of analogy in legal reasoning, on which seventeen candidates wrote. It was a sturdy workaday topic, although in many essays too little was said about analogical reasoning outside the law for us to know whether its role in the law is indeed special (as opposed to pervasive or important). Next in popularity, with fifteen answers, was the question on Rawls as an egalitarian. Most candidates showed a good appreciation of the Rawlsian endeavour although many, in their eagerness to get onto Rawls, spoke too briefly about what is distinctive about an egalitarian view. The questions on freedom, legality, and associative obligations all attracted thirteen or fourteen answers, with the question on the connection between legal normativity and convention bringing up the rear (ten answers). The choice of questions, and the answers, of individual candidates suggests that most were equally comfortable in the 'jurisprudence' and in the 'political theory' parts of the course. Some of the answers, e.g. on legality, showed real agility in bringing several different parts of the course together. Only in the answers on freedom was there a slight sense of candidates feeling their way for the first time – admittedly through a dense thicket of relevant literature, and using the rather obscure later work of Bernard Williams as their main guide.

APPENDIX 7

External Examiner's Report

I was extremely impressed with the care, professionalism and efficiency with which the BCL and M.Jur. Examiners and the Examinations Secretary, Mrs Julie Bass, conducted the entire examination process.

The Examiners spent a huge amount of time meticulously going through initial drafts of the exam papers to ensure that they were fairly set and of roughly equal difficulty.

At the marks meetings, the Examiners took great pains to consider the position of each candidate, asking for any paper that had been given a mark of 67 to be double marked if upgrading to a Distinction would make a difference to the candidate's overall class. (Commendably, every paper that had received an initial mark of 68 or 69 was double marked before the first marks meeting so that there was no doubt whether that paper deserved a Pass mark or a Distinction.) The Examiners also dealt carefully and compassionately with the case of one candidate who had failed to take one paper due to illness.

The criteria for classing candidates were clear, fair, and consistently applied. The standard of performance in the exams was extremely impressive, with a high proportion of Distinctions in the BCL. There were five students whose performance was so outstanding that any one of them would have deserved to be awarded the Vinerian Scholarship for best performance in the BCL; the discussion as to whom to award the Scholarship was utterly admirable for the length and care with which the Examiners considered the merits of each candidate before – after much agonising – reaching a unanimous conclusion. I also found it admirable that after such a long discussion, the Examiners remained eager to take the time to have another extensive discussion of how the Faculty of Law could improve still further the performance, and examination of, candidates in both the BCL and M.Jur.

Before making any further comments, I would like to express my especial admiration for the work done by Mrs Julie Bass, as Examinations Secretary, and Mrs Sandy Fredman, as Chair of the Examiners, in ensuring that the entire examinations process went as smoothly as possible. I was in awe of the efficiency with which Mrs Bass processed an enormous amount of information and presented it to the Examiners in a way that made their job as easy as possible. The meetings to consider the draft exam papers, and to class candidates, were conducted by Sandy Fredman with exceptional rigour, good humour and efficiency.

I have three remaining comments to make:

(1) The meeting to discuss the draft exam papers was hampered by the fact that the setters of the exams had in many cases failed to ensure that their papers conformed to the 'house style' adopted by the Oxford Law Faculty for its exam papers. This must be addressed by the time of the next such meeting, in April 2010. The experience of adjusting 30 draft exam papers to ensure that they conform to the Law Faculty 'house style' is so time consuming and draining that it creates a real danger that important issues of substance affecting the draft exam papers will not be properly considered due to mental exhaustion. Steps must be taken to ensure this does not happen again.

Setters must be forcibly reminded that it is their responsibility to ensure that their exam papers conform to the Faculty's 'house style'. Exam paper setters in related subjects should also meet before they set their papers to settle remaining issues of presentation within those subjects – such as whether to refer to the 'European Union' or 'European Community' or 'EU' or 'EC'.

When a draft exam paper in the BCL/M.Jur is received by the Law Faculty, someone should read it through to check that it conforms to the Faculty 'house style'. If it does not, **either** they should adjust the paper – before it is ever seen by the Examiners – to make it conform to

the 'house style' **or** they should be empowered to send it immediately back to the setter with a request that they adjust the paper to make it conform to the Faculty's 'house style'.

To make this system work effectively, the Faculty's 'house style' for setting exams should be reviewed (probably by the end of 2009) to ensure that it provides setters with a comprehensive guide as to the rules they should observe in setting their papers.

(2) In considering the case of the BCL candidate who failed to take one of his papers, the Examiners agreed that in such a case, they should not award a BCL or M.Jur candidate a pass in a paper that has not been taken without (in the words of the Regulations) examining 'the candidate at another place or time under such arrangements as they deem appropriate.' On reflection, I think this is the right stand to take, and would recommend that it be adopted as a rule in all such cases, and that the adoption of this rule should be communicated to the Colleges so that no one is any doubt as to what will happen in such cases in the future.

(3) Some concern was expressed by one of the Examiners in discussion at the second marks meeting that in a three question paper (which most BCL exam papers now are), a candidate can obtain a Distinction in that paper even though only one of their answers in that paper is of Distinction quality. (For example, three questions with marks 74, 68, 68 come to an average mark of 70.) I pointed out that this meant that a candidate can now obtain an overall Distinction in the BCL by only writing two answers of Distinction quality, as would be the case with the following mark spread:

A Law	74	68	68	Average mark: 70	Distinction
B Law	63	62	64	Average mark: 63	Pass
C Law	61	65	63	Average mark: 63	Pass
D Law	69	69	71	Average mark: 70	Distinction

This is concerning – though the possibility, I should stress, remains theoretical, and was not realised this year. To address the problem, the Examiners agreed that it should be recommended that markers bear in mind whether the paper was of overall Distinction quality in awarding their overall final mark. I agree with this recommendation. However, if this solution is thought not to be acceptable (because it introduces an extra level of subjectivity into the marking process), an alternative which occurred to me after the second marks meeting would be to adjust the rubric on when a candidate in the BCL/M.Jur will be awarded an overall Distinction. At the moment, the rubric reads:

'For the award of a Distinction in the BCL or M.Jur a candidate must secure marks of 70 or above on two or more papers. The dissertation counts as one paper for these purposes. In addition, there must be no mark lower than 60.'

The rubric could be adjusted to read:

'For the award of a Distinction in the BCL or M.Jur a candidate must secure marks of 70 or above on two or more papers. The dissertation counts as one paper for these purposes. In addition, there must be no mark lower than 60, and in the case where a candidate has only obtained marks of 70 or above on two papers, the candidate must have obtained **either**:

(i) four marks of 70 or above on the individual questions in the papers for which he or she obtained an overall mark of 70 or above; **or**

(ii) marks of 70 or above on five individual questions across the full range of papers that he or she took for the BCL/M.Jur.'

I would like to conclude by again expressing my utter admiration and respect for the way in which everyone involved in the BCL/M.Jur examinations process conducted themselves.

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