

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2025 SUPPLEMENTARY INFORMATION PACKAGE

HEAD III: Commercial and Company Law

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Important: The test paper for Head III Commercial and Company Law:

- 1. is open book. Candidates may bring in and refer to any book, document or other written material**
- 2. has a duration of 3½ hours**
- 3. has no specific reading time allocated**
- 4. contains FIVE questions. Candidates should answer any FOUR questions only.**

1. Standards, Syllabus and Materials

Overseas Lawyers Qualification Examination

HEAD III: COMMERCIAL AND COMPANY LAW

Standards, Syllabus and Materials

STANDARDS

General Notes to Candidates

The reading list attempts to be as extensive as possible but there is no one particular comprehensive text available. Students should therefore read as widely as possible over these topics. You cannot assume that by reading only a selection of the texts that you will have read in sufficient detail or depth, and it is recommended that you try to look at all the suggested readings.

Where the reading list consists of materials prepared or written not specifically for Hong Kong legislation, you should be aware of any differences in law and principles in such materials which may not be applicable to Hong Kong.

You should also familiarise yourself with the latest legislative changes and legal developments which may have occurred since the publication of those materials.

Candidates will be expected:

- (i) to have a working knowledge of the commercial and company law listed below;
- (ii) to be able to draft and analyze simple documents and forms; and,
- (iii) to be able to perform many of the tasks of a commercial lawyer, including
 - (a) incorporating a new company
 - (b) activating a shelf company

The test paper for this Head of the Examination is set at the standard expected of a newly qualified (day one) solicitor in Hong Kong who has completed a law degree (or its equivalent), the professional training course (PCLL) and a two year traineeship prior to admission.

SYLLABUS

COMPANY LAW

1. Business Organizations

- (a) The basic elements of, and main differences between, the following types of business organizations
 - Sole proprietorships
 - Partnerships
 - Companies
 - Unincorporated associations
- (b) Business registration
- (c) A sound knowledge of the following Ordinances on business organizations:
 - *Business Registration Ordinance (Cap 310)*
 - *Companies Ordinance (Cap 622)*
 - *Partnership Ordinance (Cap 38)*

2. Companies

- (a) The types of companies
- (b) Incorporation procedures
- (c) Company articles
- (d) Capacity and powers of company
- (e) Execution of documents
 - Optional common seal
- (f) Share capital
 - No par/nominal value
 - Allotment of shares
 - Transfer and transmission of shares and debentures
 - Permitted methods of reduction of share capital
- (g) Directors and the “responsible person”
 - Directors’ powers and duties
 - Liability of officers, especially directors
 - *Limitation Ordinance (Cap 347)* and directors
- (h) Business Review in the directors’ report

- (i) Meetings, resolutions and availability of information
 - Directors' meetings and resolutions
 - Members' meetings and resolutions
 - Annual general meetings and general meetings
 - Procedures of calling meetings and procedure at meetings
 - Various forms of resolutions and their effect
 - Proxies
- (j) Dealing with offences
 - Civil or criminal
- (k) Members' rights and powers
 - Minority shareholders
 - Statutory derivative action
 - Common law action – *Foss v Harbottle*
 - Division of power between members and directors

3. Merger and Acquisition Transactions – Acquisition of a Company or a Business and Joint Ventures

- (a) The undertaking or assets being acquired
 - Share purchase
 - Asset purchase
- (b) Pre-contractual agreements and procedures
 - Formalizing preliminary negotiations
 - Due diligence
 - Confidentiality undertaking/letter
- (c) Structure and format of the sale and purchase contract
 - Seller-friendly vs. purchaser-friendly contract
 - The structure and basic provisions of the sale and purchase contract
 - Schedules
 - Assignment and novation and anti-assignment clauses
- (d) Disclosure letter
- (e) Completion and post-completion
- (f) Protection of creditors
 - *Transfer of Businesses (Protection of Creditors) Ordinance (Cap49)*
- (g) Updating corporate records and registers (including significant controllers register)

- (h) Joint venture documentation
 - Basic provisions of a joint venture/shareholders' agreement
 - Minority protection
 - Joint venture articles of association

4. The Securities and Futures Commission

- (a) An overview of the system relating to individuals and companies licensed or registered with the Securities and Futures Commission
- (b) Offers of investments
 - Part IV of the *Securities and Futures Ordinance*
- (c) Licensing and registration
 - Part V of the *Securities and Futures Ordinance*
- (d) Business conduct, etc. of intermediaries
 - Part VII of the *Securities and Futures Ordinance*
 - Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission
- (e) Supervision and investigatory powers of the Securities and Futures Commission
 - Part VIII of the *Securities and Futures Ordinance*
- (f) Enforcement powers of the Securities and Futures Commission
 - Disciplinary powers: Part IX of the *Securities and Futures Ordinance*
 - General understanding of powers of intervention and proceedings: Part X of the *Securities and Futures Ordinance*
 - Section 213: Injunctions and Other Orders
- (g) Market Misconduct Tribunal
 - Part XIII of the *Securities and Futures Ordinance*
- (h) Offences relating to dealings in securities and futures contracts, etc.
 - Part XIV of the *Securities and Futures Ordinance*
- (i) Disclosure of inside information
 - Part XIVA of the *Securities and Futures Ordinance*
- (j) Disclosure of interests
 - Part XV of the *Securities and Futures Ordinance*

5. Dealings and Transactions with Listed Companies

- (a) Methods of listing (Chapter 7 of the HKEX Listing Rules)
- (b) Qualifications for listing (Chapter 8 of the HKEX Listing Rules)
 - Qualifications for listing with a weighted voting rights structure (Chapter 8A of the HKEX Rules)
- (c) Restrictions on purchase and subscription (Chapter 10 of the HKEX Listing Rules)
- (d) Continuing obligations of listed companies (Chapter 13 of the HKEX Listing Rules)
- (e) Notifiable transactions and consequences (Chapter 14 of the HKEX Listing Rules)
- (f) Connected transactions and consequences (Chapter 14A of the HKEX Listing Rules)

6. Company Liquidations

- (a) Liquidation of insolvent companies
 - Methods, grounds and procedure
- (b) Dissolution of solvent companies
 - Methods, grounds and procedure
- (c) The role of various parties
- (d) Avoidance powers of liquidators on antecedent transactions, including:
 - Transaction at an undervalue
 - Unfair preference
 - Effect of floating charge
 - Extortionate credit transactions
- (e) Creditors' rights and priorities
- (f) Costs
- (g) Subsequent events
- (h) A sound knowledge of the following Ordinances on company liquidations:
 - *Companies Ordinance (Cap 622)*
 - *Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)*

7. Receiverships

- Grounds for receiver
- Procedure for receivership
- Receiver's powers and duties
- Cessation of the receiver's appointment

COMMERCIAL LAW

8. Real Securities

(a) Assets

- Land
- Chose in possession
- Chose in action

(b) Secured loan agreements

- Form of agreement
 - Standard form agreement/the debenture
 - Standard form terms
 - Facility agreement
- Form of security
 - Mortgage
 - Charge
 - Pledge
- Perfection of security
- Consequences of default
- The charge back
 - Section 15A of the *Law Amendment and Reform(Consolidation) Ordinance (Cap 23)*
- Common terms in loan agreements and/or the security contracts
 - Negative pledge
 - Anti-assignment
 - Requirement for lender's consent for certain actions
 - Subrogation
 - Subordination
 - Suspense account

- Events of default
- Currency

9. Quasi-Securities

- Consideration of capacity to contract
- Effectiveness of quasi-securities
- Form of transaction
- Can the transaction be perfected to protect against other interest holders?
- Guarantee and indemnity
 - Traditional form of guarantee
 - Indemnity
 - Distinction between guarantee and indemnity
 - Combined guarantee/indemnity
 - Effect of material alteration of the debt contract
 - Discharge of guarantor's liability
 - Contractual relief on default
 - The *Civil Liability (Contribution) Ordinance (Cap 377)*
- Letter of comfort
- Performance bond
- Assignment of debts and choses in action
 - Benefit and burden of the chose in action
 - Legal/statutory assignment
 - Equitable assignment
 - Novation
 - Forms of security over the asset

SUMMARY OF MATERIALS

1. **Books and articles**

Company law

Materials published by the Companies Registry at the following website:

www.cr.gov.hk : The new *Companies Ordinance*

Company Law in Hong Kong – Practice and Procedure, Sweet and Maxwell, latest edition

Commercial Law

Commercial Law in Hong Kong, LexisNexis, Judith Sihombing, latest edition

2. Legislation

- *Banking Ordinance, Cap 155*
- *Bankruptcy Ordinance, Cap 6*
- *Business Registration Ordinance, Cap 310*
- *Companies Ordinance, Cap 622*
- *The Model Articles set out in the Companies (Model Articles) Notice, Cap 622H*
- *Companies (Winding-Up and Miscellaneous Provisions) Ordinance, Cap 32*
- *Contracts (Rights of Third Parties) Ordinance, Cap 623*
- *Conveyancing and Property Ordinance, Cap 219*
- *Land Registration Ordinance, Cap 128*
- *Law Amendment and Reform (Consolidation) Ordinance, Cap 23*
- *Limited Partnerships Ordinance, Cap 37*
- *Partnership Ordinance, Cap 38*
- *Securities and Futures Ordinance, Cap 571*
- *Stamp Duty Ordinance, Cap 117*
- *Transfer of Businesses (Protection of Creditors) Ordinance, Cap 49*

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2. Examiners' Comments on the 2022, 2023 and 2024 Examinations

Examiners' Comments on the 2022 Examination

Head III: Commercial and Company Law

The examination consists of five questions. Candidates were required to answer any four questions only. The questions focused on corporate and commercial problems that solicitors in Hong Kong encounter in practice.

Overall Comments:

The examination covered a range of questions from the syllabus which enabled candidates to illustrate their knowledge and practical understanding of Hong Kong commercial and company law. Some candidates still provide one unequivocal answer to questions that are designed to solicit an analytical discussion of the various legal issues raised by a set of facts. These “problem-type” questions are designed to solicit a discussion by candidates of the variable possible options available to the client to whom the candidate is required to provide advice. Problems for the weaker candidates include: not directing the answers towards the questions as set; not supporting the answers with adequate reference to legal authorities; and merely citing the rules without sufficient or any analysis. Candidates are expected to demonstrate an ability to analyse the legal issues raised by the questions.

Question 1

This question gave candidates the opportunity to demonstrate their knowledge of the applicable legal principles concerning charges, receivership, avoidance powers, and the priority of secured and unsecured creditors in the event of liquidation. Generally, candidates were able to apply the relevant principles concerning the validity and priority of various securities covered in the question. The rights of the preferential creditors were also canvassed. However, weaker candidates were unable to address the relevant issues regarding the blocked account for the collection of book debts.

Question 2

This question called for an analysis of the legal principles and procedure regarding the rights of the shareholders and directors to inspect certain corporate documents, including financial statements. Most candidates could explain how an application can be submitted to the court for a judicial order of inspection. However, weaker candidates failed to discuss the rights of the shareholders and directors under the Model Articles and the Companies Ordinance without judicial intervention.

Question 3

Generally candidates were able to cover issues regarding a business transfer agreement, the differences between loan financing and allotment of shares, and the key provisions to be included in a shareholders' agreement and the articles of association. Concerning business transfer, weaker candidates did not adequately analyse the need to prepare a prescribed notice under the Transfer of Business (Protection of Creditors) Ordinance, and the legal effects of the notice within the relevant time frame.

Question 4

This question concerned the listed companies in Hong Kong, focusing on the application of the relevant principles (in particular, Chapter 14 and Chapter 14A) in the Listing Rules. On the whole, this question was answered well. Most candidates identified the relevant regulations from the Listing Rules and discussed the principles competently in the context of the facts. Weaker candidates were unable to cope adequately with concepts such as "connected transaction", "connected person", and "disclosable transaction". Not all the candidates clearly discussed the manner of obtaining the independent shareholders' approval, and the need to appoint an independent financial adviser to advise the independent board committee.

Question 5

This question concerned the relevant offences under the Securities and Futures Ordinance (SFO) for creating a false market in the shares in a listed company. In addition, candidates were also required to show an understanding of how various types of activities are regulated under the SFO, including securities dealing and advising on securities. This question was answered reasonably well. Weaker candidates were unable to cope adequately with the disciplinary powers and powers of intervention that the Securities and Futures Commission can exercise under SFO.

Examiners' Comments on the 2023 Examination

Head III: Commercial and Company Law

The examination consists of five questions. Candidates were required to answer any four questions only. The questions focused on corporate and commercial problems that solicitors in Hong Kong encounter in practice.

Overall Comments:

The examination covered a range of questions from the syllabus which enabled candidates to illustrate their knowledge and practical understanding of Hong Kong commercial and company law. Some candidates still provide one unequivocal answer to questions that are designed to solicit an analytical discussion of the various legal issues raised by a set of facts. These “problem-type” questions are designed to solicit a discussion by candidates of the variable possible options available to the client to whom the candidate is required to provide advice. Problems for the weaker candidates include: not directing the answers towards the questions as set; not supporting the answers with adequate reference to legal authorities; and merely citing the rules without sufficient or any analysis. Candidates are expected to demonstrate an ability to analyse the legal issues raised by the questions.

Question 1

This question gave candidates the opportunity to demonstrate their knowledge of the applicable legal principles in relation to fixed and floating charges, security over book debts, unfair preferences, and the priority of various secured and unsecured creditors in the event of liquidation. Generally, candidates were able to cover issues concerning the validity and priority of various creditors, including the preferential creditors. However, weaker candidates were unable to invoke the claw-back provisions (such as s 267 of Cap.32) in the context of the relevant dates of the loans borrowed at different stages.

Question 2

This question called for an analysis of the legal principles and procedure regarding the statutory rights of shareholders to apply to the court for rectification of the register of members, and also the statutory rights to seek court orders directing the Companies Registrar to rectify any information on the Companies Register or to remove any information from it. Unfortunately, weaker candidates failed to identify the relevant provisions from the Companies Ordinance. They also failed to apply the principles in the context of the facts raised in the question.

Question 3

This question concerned the listed companies in Hong Kong, focusing on the application of the relevant principles (in particular, Chapter 14 and Chapter 14A) in the Listing Rules. On the whole, this question was answered well. Most candidates identified the relevant regulations from the Listing Rules and discussed the principles competently in the context of the facts. Weaker candidates were unable to cope adequately with concepts such as “asset ratio”, “consideration ratio”, “connected person”, and “major transaction”. Not all the candidates clearly discussed the manner of obtaining the shareholders’ approval of a major transaction either in a general meeting or by written approval in lieu of holding a general meeting.

Question 4

This question concerned the key elements of insider dealing under the Securities and Futures Ordinance (SFO), the applicable enforcement actions and sanctions (civil and criminal) that can be imposed. In addition, candidates were also required to show an understanding of how various types of activities are regulated under the SFO, including securities trading and asset management. This question was answered reasonably well. Weaker candidates were unable to cope adequately with the concepts concerning “counseling”, “procuring” or “dealing” in listed securities or their derivatives in the context of facts raised in the question.

Question 5

Generally, candidates were able to cover issues regarding the pre-emption rights for existing shareholders under a shareholders' agreement, the board's discretion to refuse to register a transfer of shares in a private company, and the key differences between share transfer and the assignment of the shareholder's loan. Concerning the share purchase agreement, weaker candidates did not adequately analyse the facts given in the question, and failed to point out the need to include various clauses (such as a condition precedent and an undertaking) to protect the purchaser's interests.

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Examiners' Comments on the 2024 Examination

Head III: Commercial and Company Law

The examination consists of five questions. Candidates were required to answer any four questions only. The questions focused on corporate and commercial problems that solicitors in Hong Kong encounter in practice.

Overall Comments:

The examination covered a range of questions from the syllabus which enabled candidates to illustrate their knowledge and practical understanding of Hong Kong commercial and company law. Some candidates still provide one unequivocal answer to questions that are designed to solicit an analytical discussion of the various legal issues raised by a set of facts. These “problem-type” questions are designed to solicit a discussion by candidates of the variable possible options available to the client to whom the candidate is required to provide advice. Problems for the weaker candidates include: not directing the answers towards the questions as set; not supporting the answers with adequate reference to legal authorities; and merely citing the rules without sufficient or any analysis. Candidates are expected to demonstrate an ability to analyse the legal issues raised by the questions.

Question 1

Generally, candidates were able to cover issues regarding a shareholders' agreement and a share sale and purchase agreement. The topics covered included pre-emptive rights, directors' right to refuse a proposed share sale, deed of adherence, conditions precedent, warranties, indemnity and various provisions limiting the liabilities of the vendor. Weaker candidates did not adequately analyse the need, based on the factual scenario, to retain part of the purchase price to be paid on a later date after completion, or deposit part of the purchase price into an escrow account for an agreed period.

Question 2

This question concerned the key elements of insider dealing under the Securities and Futures Ordinance (SFO), the applicable enforcement actions and sanctions (civil and criminal) that can be imposed. In addition, candidates were also required to show an understanding of how various types of activities

are regulated under the SFO, including leveraged foreign exchange dealing. This question was answered reasonably well. Weaker candidates were unable to explain clearly the concept of “dealing” in shares, as dealing in shares not only involve buying and subscribing for securities, but also extend to using the relevant information to “counsel” or “procure” others to deal with the securities.

Question 3

This question concerned the listed companies in Hong Kong, focusing on the application of the relevant principles in the Listing Rules governing a proposed private placing. Only a small number of candidates correctly identified the relevant regulations from the Listing Rules and discussed the principles competently in the context of the facts. Weaker candidates were unable to cope adequately with concepts such as “general mandate”, placing of securities for “cash consideration”, “serious financial position” and “benchmarked price”. Some candidates also failed to clearly discuss how a “connected transaction” can be fully exempt from shareholders’ approval and disclosure if certain prescribed conditions are met.

Question 4

Generally, candidates were able to cover issues regarding non-pro-rata allotment of shares to existing shareholders, and how the rights for the existing shareholders concerning voting and dividend can be affected. Weaker candidates failed to identify the need to obtain prior approval by the shareholders in a general meeting. Most candidates were able to explain how a written resolution can be effectively passed by all the eligible shareholders without a general meeting, and without any previous notice to convene the meeting.

Question 5

This question required candidates to demonstrate an adequate understanding of the legal principles and procedure in respect of financial assistance, reduction of share capital, and company deregistration. Some candidates were unable to identify the relevant provisions from the Companies Ordinance. Weaker candidates failed to discuss the need to provide the requisite board resolutions, shareholders’ resolutions and the solvency statement.

3. Past Examination Papers from 2022 to 2024

**2022 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Tuesday, 15 November 2022



2022 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Solar Panel Supreme Limited (“Company”), a Hong Kong private company, manufactures solar panels. The Company’s main clients are based in the United States, Europe and India. Sun God Incorporated and Sun Ray Incorporated, operators of solar power plants in the United States, are major clients of the Company.

On 18 May 2021, the Company entered into a five-year term loan facility (HK\$20,000,000) with Great Bank secured by a floating charge over all assets, book debts and undertakings of the Company (“Great Bank Debenture”). The Great Bank Debenture was duly registered under the Companies Ordinance (Cap. 622) (“Ordinance”).

On 20 May 2021, Mrs. Rain Kwan (“Rain”), a shareholder and director of the Company, lent HK\$5,000,000 to the Company.

Towards the end of May 2021, Sun God Incorporated decided to change its supplier to another solar panel company. As a result, the Company’s revenue dropped significantly.

On 18 June 2021, the Company borrowed HK\$6,000,000 (a four-year term loan facility) from Careless Bank secured by a fixed charge over all machinery owned by the Company (“Careless Bank Fixed Charge”). Due to an administrative error, the Careless Bank Fixed Charge was not registered under the Ordinance. Nothing was done to rectify the error.

(See over the page for a continuation of Question 1)

On 21 June 2021, Cheerful Bank provided a HK\$9,000,000 6-year term loan facility to the Company secured by a charge over the Company's book debts ("Cheerful Bank Debenture"), which was duly registered under the Ordinance. According to the terms of the Cheerful Bank Debenture, any assignment or disposal of the book debts requires Cheerful Bank's consent and the proceeds of the collected book debts must be paid into a designated account maintained with Cheerful Bank.

On 6 August 2021, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Rain to secure all personal loans provided by Rain to the Company. This charge was duly registered under the Ordinance.

On 27 August 2021, the Company sold its factory in Tsuen Wan, Hong Kong ("Factory") to Mr. Raymond Kwan ("Raymond"), the husband of Rain. The consideration was HK\$6,000,000, which was HK\$5,000,000 lower than the market value of the Factory (as valued by an independent valuation in July 2021). Rain explained that Raymond had contributed a lot to the Company and it is only right that "he gets something in return".

The Company suffered another financial hit in September 2021 when Sun Ray Incorporated decided not to buy from the Company anymore.

On 6 September 2021, Great Bank appointed a receiver upon an event of default, which is also an event that crystallized the floating charge pursuant to the terms of the Great Bank Debenture.

(See the next page for a continuation of Question 1)

On 14 September 2021, an unsecured creditor presented a winding-up petition against the Company.

The liquidator, Ron Kwok, has learned the following information:

- (i) The Company's main assets are its book debts (HK\$12,000,000), machinery (HK\$8,000,000), inventory (HK\$3,000,000) and cash (HK\$6,000,000).
- (ii) The Company owes 20 of its employees a total of HK\$800,000 for wages in arrears. It was also revealed that the Company has failed to pay profits tax (HK\$4,000,000) in the immediately previous year.
- (iii) The Company has 9 unsecured trade creditors, who are owed HK\$12,000,000 in total.
- (iv) On 3 September 2021, the Company used the proceeds of sale of the Factory to fully discharge the shareholder's loan (with interest) owed to Rain.
- (v) A trading partner of the Company, Sunburn Limited, initiated proceedings against the Company for breach of contract resulting in a loss amounting to HK\$8,000,000. The Court of First Instance gave judgment in favour of Sunburn Limited to the full extent of the claim. Sunburn Limited commenced enforcement action on 17 September 2021.
- (vi) Evidence shows that the Company was insolvent since early August 2021.

(See over the page for a continuation of Question 1)

The Company made no early repayment to any of the banks in connection with the term loan facilities.

For the purpose of this question, assume that there is no negative pledge clause in any of the debentures or charges.

Question:

You act for the Company's liquidator, Ron Kwok, who has drawn your attention to all of the above points. **Prepare a letter of advice to the liquidator, addressing the rights and priorities of all the creditors of the Company.**

(25 marks)

[25 marks in total]

Question 2 (25 marks)

Background information

Rich Resources Limited (the “Company”) is a private company incorporated in Hong Kong in 2016. Its shares are held by 5 shareholders, namely, Patrick Wong (“Patrick”) (60%), Kingston Cheung (“Kingston”) (20%), Eric Au (“Eric”) (10%), Wilson Chow (“Wilson”) (5%) and Fred Chan (“Fred”) (5%). The directors are Patrick, Kingston and Wilson.

Kingston plays a limited role in the management of the Company as he is busy with his family business. Day-to-day management and important decisions of the Company are mainly carried out by Patrick and Wilson. Wilson is the cousin of Patrick and usually agrees with Patrick on important issues in board meetings. Eric is a passive investor in the Company and never attends any general meetings of the Company.

The Company has not made any profit since its incorporation. By October 2022, it has accumulated huge trading losses. Kingston and Fred are not happy with the way that the Company was run under the stewardship of Patrick and Wilson. They are also dissatisfied with the fact that important information concerning the affairs of the Company has not been disclosed to all shareholders.

(See over the page for a continuation of Question 2)

Kingston and Fred decided to engage a firm of chartered accountants to conduct an independent review of the accounts and books of the Company. In order to have a full picture of the affairs of the Company, the accountants required to see all the relevant documents of the Company including books of accounts, audited financial statements, bank statements, written contracts, annual tax returns, minutes of all general meetings and board meetings (the “Relevant Documents”). Fred approached Patrick with a written request to inspect and make copies of the Relevant Documents. Fred’s request was denied by Patrick on the ground that Fred is not a director of the Company and therefore is not entitled to inspect any of the Relevant Documents.

For the purposes of this Question, you should assume that the Company adopts the Model Articles for Private Companies Limited by Shares set out in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H) as its articles of association.

Questions:

Answer the following questions:

- (a) Is there any legal basis for Patrick to deny Fred’s request on the ground that Fred is not a director of the Company and therefore is not entitled to inspect any of the Relevant Documents?**

(7 marks)

- (b) Under what circumstances will Fred be entitled to inspect all the Relevant Documents?**

(8 marks)

(See the next page for a continuation of Question 2)

- (c) Fred no longer wants to be involved in the Company's affairs and he asks Kingston to follow up. Kingston is now considering making an application to the court for an order under the Companies Ordinance (Cap. 622) to allow him (as a shareholder but not as a director) to inspect the Relevant Documents. **Would you advise him to do so? Why?**

(10 marks)

[25 marks in total]

Question 3 (25 marks)

Tina previously worked as a junior associate for a reputable Hong Kong law firm. During the coronavirus pandemic, work was scarce for Tina's firm and the partners decided that they needed to let some people go. Unfortunately, Tina was made redundant.

Tina decided that she didn't want to work as a lawyer any more, and wanted instead to pursue her dream of running a bakery with a focus on South American baked goods.

She rented a small property in Sai Ying Pun (a pleasant location on the west of Hong Kong island), signed contracts with suppliers to provide her ingredients, and purchased some second-hand freestanding baking ovens and equipment. She even hired an assistant, Turner, to help her run the bakery's front-of-house whilst she was busy baking in the kitchen, and signed a contract with a friend to supply her baked goods to the friend's hotel for their daily breakfast buffet. Tina called her bakery "Mexims Bakery".

On 1 December 2021, Mexims Bakery opened its doors to paying customers for the first time. Tina was ecstatic. All of her dreams were coming true.

Questions:

- (a) **When Tina started her business, what form of business organisation was she using? What steps should she take to register the business and in what timeframe?**

(2 marks)

(See the next page for a continuation of Question 3)

- (b) On 1 April 2022, Tina had decided she should set up a Hong Kong company to run the Mexims Bakery business. Tina bought an off-the-shelf company and changed its name to “The Mexims Bake Company Limited” (“MeximsCo”).

What documents does she need, who should sign and what steps should Tina take to complete the transfer of the Mexims Bakery business to MeximsCo? Assume that Tina’s lease contains a prohibition on transfer/sharing use, and that no public notices will be made.

(5 marks)

- (c) Tina completed the transfer in April 2022. All was going well for MeximsCo until June 2022, when Tina had a major argument with one of her suppliers. The supplier was upset because he had not been paid for a large order she had made in December 2021 shortly after Mexims Bakery opened. Tina thought she didn’t need to pay the supplier because she had ordered the wrong products by mistake. She had tried to return the supplies, but by that time, they had already spoiled.

The supplier was aware that Tina had no cash in hand, so he initiated legal proceedings against MeximsCo instead. Tina tried to argue that the supply contract was not with MeximsCo, and MeximsCo was not even in existence when she purchased the supplies, but her arguments failed and the court found in favour of the supplier.

Explain how this claim is possible and give details.

(3 marks)

(See over the page for a continuation of Question 3)

- (d) **Would the court’s judgment in (c) have been different if the supplier had waited until 2023 before commencing proceedings against MeximsCo?**

(2 marks)

- (e) **What could Tina have done to prevent the supplier’s claim against MeximsCo?**

(3 marks)

- (f) Despite the dispute with its supplier, MeximsCo went from strength to strength, but there came a day when MeximsCo needed more funds in order to buy bigger ovens and expand the business. Tina now had some cash in hand, and wanted to use this to fund MeximsCo’s business.

What options does Tina have in order to inject funding into MeximsCo? Briefly outline the procedures for properly documenting and implementing each option.

(5 marks)

During the 5th coronavirus wave, many businesses went bust, but MeximsCo was a local favourite and came to be known for its extremely tasty egg tarts. Tina met a master baker named Tom at a culinary convention. Tom had also recently been made redundant but had some savings and was looking to start his own bakery too. Tina and Tom decided they wanted to go into business together. They reasoned that with Tom’s additional funds, they could open several more bakeries across Hong Kong Island and Kowloon.

(See the next page for a continuation of Question 3)

Tina and Tom signed a simple non-binding letter saying that Tom should be the 70% owner of MeximsCo, on the basis that he was putting in a lot of money for the expansion, and that funding should be provided to MeximsCo in exchange for new shares. Both Tina and Tom would be directors and agreed that they would try to make the business work for at least 3 years, and after that, either party could sell its shares to the other for whatever they were worth. Tom wanted to keep the terms of their agreement private to avoid competing bakeries in the cut-throat industry knowing the terms of their deal. Tina is excited, but unsure how to document Tom's investment in MeximsCo.

- (g) Advise Tina on the documentation and procedures required in a way that protects her interests and addresses Tom's concern.**

(5 marks)

[25 marks in total]

Question 4 (25 marks)

Meimei Group Holdings Limited (the “Company”) is an exempted company incorporated in the Cayman Islands whose shares are listed and traded on the Main Board of The Stock Exchange of Hong Kong Limited.

Mr. A holds 75% of the issued shares in the Company. On 30 June 2022, he sold 15% of the issued shares in the Company to Mr. B. The sale and purchase of shares was completed on the same day.

In July 2022, Company G, a company wholly-owned by Mr. B, entered into a sale and purchase agreement with a wholly-owned subsidiary of the Company in relation to the acquisition by the wholly-owned subsidiary of a property located in Hong Kong at a consideration of HK\$150,000,000.

As regards the acquisition, the highest applicable percentage ratio under Rule 14.07 of the Listing Rules is more than 5% but less than 25%.

Questions:

- (a) Briefly explain the purpose of so-called connected transaction rules.**
(5 marks)
- (b) Advise whether or not the sale and purchase of shares between Mr. A and Mr. B is a connected transaction under the Listing Rules.**
(2 marks)

(See the next page for a continuation of Question 4)

- (c) Advise whether or not Mr. B is a connected person under the Listing Rules upon completion of the sale and purchase of shares in the Company.

(3 marks)

- (d) Advise the Listing Rules' implications regarding the acquisition of the property by the wholly-owned subsidiary of the Company from Company G.

How should the sale and purchase agreement be drafted taking into account the Listing Rules' implications?

(15 marks)

[25 marks in total]

Question 5 (25 marks)

Jack and Jill are employed as brokers in a brokerage firm licensed by the Securities and Futures Commission in Hong Kong (“SFC”). They have been paying close attention to Balinese Resorts Limited (“BRL”) which is a relatively small company listed on The Stock Exchange of Hong Kong Limited. Trading in the shares of BRL is very light. The shares currently trade at around HK\$1.3.

Jack and Jill together incorporate five companies in the British Virgin Islands. In turn, each of these five companies owns a wholly-owned subsidiary company incorporated in Hong Kong.

Jack and Jill decide to use the Hong Kong companies to buy shares in BRL. They contact some clients of the brokerage firm saying they have some “hot tips” relating to BRL and also use the trading accounts of those clients to buy shares in BRL. Jack and Jill also arrange for the Hong Kong companies to buy and sell shares among themselves to drive up trading volume.

Jack and Jill then anonymously start to spread rumours on various social media platforms relating to the activities of BRL, and also suggest that the price of shares in BRL is undervalued and that buying shares would be a good investment. Among these rumours is one that BRL has recently acquired a plot of land in Bali at a price of US\$1,500,000. The rumour further goes on to say that at this time, planning restrictions are such that the land cannot be developed. However, based on inside information and connections at the relevant planning authorities in Bali, the planning restrictions are soon to be lifted and this would allow the land to be developed as a luxury resort. The enhanced value of the land with the permission to develop a luxury resort would be in the region of US\$20,000,000. There is no truth whatsoever to these rumours and BRL does not even own a plot of land which is the subject of the rumour.

(See the next page for a continuation of Question 5)

The rumours begin to attract some attention on the relevant social media platforms, but are not reported in any mainstream media. As a result, trading in the shares in BRL begins to gather pace and the share price starts increasing. As the share price increases, Jack and Jill use the trading accounts of clients to sell shares in BRL, realising a profit for these clients. The share price reaches a peak of HK\$115. At this time, Jack and Jill decide to sell all of the shares in BRL held by the Hong Kong companies and all remaining shares in BRL held in the trading accounts of clients. This realises further profit, but causes the share price in BRL to collapse to HK\$0.8.

The rapid rise and fall in the share price of BRL attracts the attention of the SFC who commence an immediate investigation. Following a tip off during this investigation, they are able to track the source of the anonymous rumours back to Jack and Jill and manage to uncover the ownership structure of the Hong Kong companies.

Questions:

- (a) What compliance actions should have been taken by Jack and Jill for the Hong Kong companies to undertake the activities described above?**

(4 marks)

- (b) Describe, with reference to the facts outlined above, what offences Jack and Jill have committed.**

(15 marks)

- (c) What enforcement action might the SFC take against Jack and Jill and the brokerage firm for which Jack and Jill work?**

(6 marks)

[25 marks in total]

END OF TEST PAPER

2023 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD III: COMMERCIAL AND COMPANY LAW

Friday, 17 November 2023



2023 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Prime Coffee Limited (“Company”) is a coffee wholesaler based in Hong Kong. It is a Hong Kong private company limited by shares. The Company has four shareholders and directors, Titus Chiu (“Titus”) (holding 40% of the shares), Peter Chiu (“Peter”) (holding 20% of the shares), Rob Chiu (“Rob”) (holding 20% of the shares) and Maggie Chiu (“Maggie”) (holding 20% of the shares). The Company began business on 13 March 2020. Titus provided a personal loan of HK\$3,000,000 to the Company on 18 June 2020. About one month afterwards, Peter provided a personal loan of HK\$2,000,000 to the Company. On 18 August 2020, Rob and Maggie provided personal loans to the Company in the amount of HK\$1,000,000 and HK\$500,000 respectively.

The Company faced financial difficulties when Big Bucks and Atlantic Coffee (two of the leading coffee retailers in Hong Kong) stopped buying from the Company. On 6 May 2021, Titus provided a further personal loan (HK\$2,000,000) to the Company. Titus hoped that by providing further funds, the Company could reach out to small and medium coffee retailers in Hong Kong. The plan did not work out. The Company’s rival, Challenger Coffee Limited, had monopolized the market for small and medium coffee retailers. The Company was late in paying the rent for its office in Tsuen Wan, Hong Kong in October 2021.

On 8 November 2021, Bulldozer Bank advanced HK\$20,000,000 (a five-year term loan facility) to the Company secured by a fixed charge over the Company’s warehouse in Fanling, Hong Kong (“First Bulldozer Bank Fixed Charge”).

(See over the page for a continuation of Question 1)

On 3 December 2021, a further five-year term loan (HK\$15,000,000) was provided by Bulldozer Bank to the Company secured by a charge over the book debts of the Company. At the top of the charge instrument, it is stated that the charge is a “Fixed Charge over Book Debts” (“Second Bulldozer Bank Fixed Charge”). Under the terms of the charge instrument, the proceeds of collected book debts must be paid into a designated account maintained with Bulldozer Bank. Bulldozer Bank explained that this is a “blocked account”. However, the Company is at liberty to withdraw and use the proceeds of the collected book debts without Bulldozer Bank’s consent. The Second Bulldozer Bank Fixed Charge was duly registered under the Companies Ordinance, Cap. 622.

On 21 February 2022, the Company entered into a two-year term loan facility (HK\$4,000,000) with Titanic Bank secured by a floating charge over all assets, book debts and undertakings of the Company (“Titanic Bank Debenture”). The Titanic Bank Debenture was duly registered under the Companies Ordinance, Cap. 622.

In April 2022, the Company suffered financially as one of its major suppliers ended the contract with the Company. On 23 April 2022, Titanic Bank appointed a receiver in accordance with its debenture (an event that crystallized the floating charge pursuant to the terms of the Titanic Bank Debenture).

On 17 June 2022, a trade creditor filed for the compulsory winding-up of the Company.

(See the next page for a continuation of Question 1)

The liquidator, Jonathan Kwan, has learned the following information:

- (i) The Company has the following assets: account receivables (worth HK\$3,000,000), machinery used for packaging (worth HK\$2,000,000), the warehouse in Fanling (worth HK\$25,000,000), and cash at bank (worth HK\$500,000).
- (ii) The Company owes 8 of its employees a total of HK\$1,600,000 for wages in arrears.
- (iii) The Company has 7 unsecured trade creditors, who are owed HK\$2,000,000 in total.
- (iv) On 28 January 2022, the Company transferred HK\$3,000,000 to Titus' personal bank account.
- (v) On 8 June 2020, Techno Coffee Limited (a wholly-owned subsidiary of the Company) ("TCL") provided a term loan of HK\$500,000 to the Company repayable in full on 10 July 2023 ("TCL Loan"). The Company made an early repayment of the TCL Loan (with interest) in full to TCL on 3 May 2021.
- (vi) A competitor of the Company, Bad Coffee Limited ("BCL"), initiated proceedings against the Company for breach of contract, claiming HK\$8,000,000 in damages. The Court of First Instance gave judgment in favour of BCL to the full extent of the claim. No enforcement actions were taken by BCL until 20 June 2022.

(See over the page for a continuation of Question 1)

(vii) First Bulldozer Bank Fixed Charge was not duly registered under the Companies Ordinance.

(viii) Evidence shows that the Company was insolvent during January 2022.

The Company made no early payment to Bulldozer Bank and Titanic Bank in connection with the term loan facilities.

For the purpose of this question, please assume there is no negative pledge clause in any of the debentures or charges.

Question:

Prepare a letter of advice to the Company's liquidator, Jonathan Kwan, addressing the rights and priorities of all the creditors of the Company.

(25 marks)

[25 marks in total]

Question 2 (25 marks)

Part A

Big Profit Ltd. (the “Company”) is a private company founded in Hong Kong in 2013 by Mr. Wong (“Wong”) and Mr. Chan (“Chan”). The Company is engaged in trading business. It has 10,000 issued shares which were held by Wong and Chan in equal numbers and the two founders were also the only directors of the Company.

In September 2018, Wong decided to emigrate to the U.S. with his family. Before Wong’s departure, Wong and Chan reached an agreement whereby Wong would continue to hold 50% interest in the Company but Wong would no longer be involved in the management of the Company. To enable Chan to run the Company smoothly in the absence of Wong, Wong transferred his 5,000 shares in the Company (the “Shares”) to Chan on 18 September 2018 and cancelled the original share certificate in respect of the Shares issued in his name. On the same day, Wong also resigned as a director of the Company. In return, Chan executed a declaration of trust in favour of Wong on 19 September 2018 (the “Declaration of Trust”) which contains the following terms:

- Chan was holding the Shares as a trustee only;
- Wong was the beneficial owner of the Shares;
- Chan would, whenever called upon to do so by Wong, transfer the Shares to Wong or such other person as Wong directs.

(See over the page for a continuation of Question 2)

As a result of the above arrangements, Chan became, on record, the sole shareholder and sole director of the Company since 19 September 2018 although in reality, the Company is still 50:50 beneficially owned by Wong and Chan.

Over the past three years, the Company has suffered huge losses due to the Covid-19 pandemic. The relationship between Wong and Chan turned sour. Shortly after his return to Hong Kong from the U.S. in September 2023, Wong contacted Chan and demanded the latter to return the Shares. When this demand was not answered, Wong instructed his solicitor to issue a letter to Chan on 16 October 2023 demanding Chan to execute the instrument of transfer (enclosed in the same letter) to transfer the Shares back to Wong. On 20 October 2023, Wong's solicitor also wrote to the Company and demanded the Company to register Wong's name in its register of members. Neither Chan nor the Company respond to these letters.

Question:

- (a) Advise Wong if there is any course of action that he can take against Chan and the Company to recover the Shares and to ensure that his title to the Shares is properly recorded.**

(12 marks)

Part B

Springfield Properties Ltd. (the "Company") is a private company incorporated in Hong Kong in 2020 with an issued share capital of HK\$1 million (comprising 100 shares). It has two shareholders, namely Red Sun Ltd. ("Red Sun") and Blue Sky Ltd. ("Blue Sky"). Red Sun is holding 51 shares and Blue Sky is holding the remaining 49 shares.

(See the next page for a continuation of Question 2)

The Company was set up as a joint venture to develop certain properties in Guangzhou, China. It has two directors, namely Mr. Red (appointed by Red Sun) and Mr. Blue (appointed by Blue Sky).

Since mid-2023, the relationship between Red Sun and Blue Sky has broken down due to disagreement on the business strategies of the Company. To avoid further disputes, Red Sun offered to buy out Blue Sky's interest in the Company. However, after several rounds of negotiation, the parties are still unable to agree on the main terms of the sale and purchase agreement. To exert some pressure on Blue Sky, Red Sun unilaterally filed a ND2A form (the Notice of Change of Company Secretary and Director (Appointment/Cessation)) on 4 September 2023 which indicated that Mr. Blue ceased to be a director of the Company as at 1 September 2023 and Mr. Red became the sole director of the Company. The ND2A form was purported to be signed by Mr. Red as a director of the Company. After Mr. Blue found out the filing of the form, he immediately wrote to Mr. Red and the Company in protest and insisted that he had never filed such a form to the Companies Registry and that he was still a director of the Company.

Questions:

Answer the following questions:

- (b) Mr. Blue is considering taking legal proceedings against the Registrar of the Companies for the registration of the unauthorised ND2A form. Will he succeed?**

(3 marks)

(See over the page for a continuation of Question 2)

- (c) In light of the registration of the unauthorised ND2A form, is there any mechanism under the Companies Ordinance, Cap. 622 that will possibly enable Mr. Blue to remove this document from the register of the Companies Registry?**

(10 marks)

[25 marks in total]

Question 3 (25 marks)

Perseus Limited (“Perseus”) is a company incorporated in the Cayman Islands whose shares are listed and traded on the Main Board of The Stock Exchange of Hong Kong Limited, principally engaged in wastewater treatment. Perseus is contemplating the acquisition of certain fixed assets, namely equipment and machinery for its own use in its ordinary and usual course of business, from Angelos Limited (“Angelos”) (the “Acquisition”). Mr. A holds 65% of the issued shares of Perseus. Additionally, he serves as a director of Perseus. Furthermore, Mr. A is one of the five directors comprising the board of Angelos.

Perseus and Angelos have agreed upon a price of HK\$5,000,000,000 for the equipment and machinery. Perseus will make the payment in cash. Angelos is satisfied with this price, considering that the equipment and machinery were valued at HK\$4,000,000,000 in the most recent audited accounts. Perseus is also content with the price, as they have engaged a specialized valuer who has determined the fair market value of the equipment and machinery to be HK\$6,000,000,000.

The following figures are extracted from Perseus’ most recent audited financial statements:

	HK\$ Million
Revenue	3,000
Profit before tax	500
Taxation	(50)

(See over the page for a continuation of Question 3)

	HK\$ Million
Non-current assets	10,000
Current assets	10,000
Current liabilities	(5,000)
Net current assets	5,000
Total assets less current liabilities	15,000

Perseus currently has a market capitalization of HK\$20,000,000,000.

Questions:

Based on the given information above, advise Perseus on the following:

- (a) **Perform a size tests calculation for the Acquisition. No adjustment or modification is required for the purpose of assets ratio.**
(10 marks)
- (b) **Determine the classification of the Acquisition under Chapter 14 and Chapter 14A of the Listing Rules.**
(3 marks)
- (c) **Explain the applicable compliance requirements and manner of approval for the Acquisition under the Listing Rules.**
(5 marks)

(See the next page for a continuation of Question 3)

Mr. B, who is the son of Mr. A, holds 20% of the issued shares of Heleus Limited (“Heleus”). Ms. C, who is Mr. B’s wife, holds 60% of the issued shares of Heleus. Two months after the completion of the Acquisition, Heleus acquired 15% of the issued shares of Angelos from an independent third party (the “Heleus Share Purchase”).

Question:

(d) Explain whether Heleus is a connected person of Perseus.

(3 marks)

At the Annual General Meeting of Perseus, held two months after the completion of the Heleus Share Purchase, Mr. A retired as a director of Perseus, and Mr. B was elected as a director of Perseus. Currently, Perseus is contemplating the purchase of 5% of the issued shares of Angelos from an independent third party (the “Angelos Share Purchase”).

Question:

(e) Explain whether the Angelos Share Purchase constitutes a connected transaction for Perseus.

(2 marks)

The Angelos Share Purchase has been successfully completed. Perseus is now deliberating the possibility of granting a loan to Angelos.

Question:

(f) Explain whether the granting of the loan will constitute a connected transaction for Perseus.

(2 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

Horace is the company secretary of CC Financial Holding Ltd. (the “Company”), a company listed on the Main Board of The Stock Exchange of Hong Kong Limited.

The controlling shareholders of the Company are in the course of negotiating with a potential purchaser about the proposal to sell their controlling stake, representing 60% of the issued shares in the Company. If the potential purchaser enters into an agreement to acquire all the shares held by the controlling shareholders of the Company, the potential purchaser is required to extend a general offer to acquire the shares of all other shareholders pursuant to The Code on Takeovers and Mergers and Share Buy-backs.

The Chairman of the board of directors of the Company instructed Horace to prepare an application to suspend trading of shares in the Company in relation to a possible general offer.

Having possessed this material information, Horace informed his brother, Charles, of such information who then purchased a total of 100,000 shares in the Company through his own securities account before the trading suspension took place. Charles subsequently sold some of the shares after resumption of trading and made a profit of approximately HK\$20,000. The notional profit of the remaining unsold shares was approximately HK\$40,000.

(See the next page for a continuation of Question 4)

Question:

- (a) Are Horace and Charles liable under Part XIII of the Securities and Futures Ordinance, Cap. 571?**

(13 marks)

Part B

Alicia works in an asset management company. One day, she met her university classmate, Ruby, who works in a securities trading company. They are interested in establishing their own asset management company (the “Company”) in Hong Kong to carry out the business of asset management and securities trading regulated activities mainly for professional investors in and outside Hong Kong. Both of them will own 50% of the issued shares in the Company. The day-to-day management and operations of the Company will be jointly managed by both of them.

Alicia and Ruby need you to advise them on the legislation, procedure and licensing requirements involved in setting up the Company and applying for the licence to become a licensed corporation.

Question:

- (b) Prepare a memorandum of advice for Alicia and Ruby to advise on the legislation requirement, procedures and licensing requirements involved.**

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Mud Studio Limited (“MSL”) is a Hong Kong private limited company which operates a very popular ceramic studio in Hong Kong called “Mud Studio”. Mud Studio conducts ceramic workshops and regular classes for both adults and children in its ceramic studios located in Mongkok and Wanchai, Hong Kong. Toby is the sole director of MSL, and MSL is currently 90% owned by Toby and 10% owned by Toby’s friend, Justin. Toby will emigrate to Canada and has agreed to sell his shareholding in MSL to Janet. Janet is trying to persuade Justin to sell his 10% shareholding in MSL as well, but Justin seems reluctant as he would like to keep his investment in MSL, seeing its growth in the past few years. Toby would like to sign the share purchase agreement with Janet in 4 weeks’ time. You act for Janet.

Question:

- (a) **Advise Janet if there is anything that she should check, be aware of or concerned about at this stage if she is only going to buy the 90% shareholding in MSL from Toby. If there is anything she should check further, state what it is and how it would affect your advice.**

(7 marks)

(See the next page for a continuation of Question 5)

Part B

After your advice given in part (a) above, Janet continued to negotiate with Toby and Justin. Assume for Part B that it was finally decided by the parties that Justin would sell his 10% shareholding in MSL to Toby first, and then Toby will sell the 100% shareholding in MSL to Janet for a consideration of HK\$5,000,000.

During the negotiation between the parties and due diligence, the following matters and instructions were brought to your attention.

- Toby has lent a shareholder's loan to MSL in the amount of HK\$1,000,000 last year to finance the general working capital of MSL. Janet would like to acquire the shareholder's loan on a dollar-for-dollar basis from Toby (at the same time when she purchases the 100% share capital in MSL from Toby); and
- "Mud Studio" has an in-house ceramic artist, Priscilla Chin, who is a primary school friend of Toby and has been working in MSL for over five years. Priscilla is the most popular ceramic teacher at "Mud Studio" and she would also help to organize ceramic exhibitions at the studio from time to time. Priscilla has not signed any formal contract with MSL, all her remuneration over the years has been based on oral agreements with Toby. Janet finds Priscilla a key person of MSL and would like to make sure that Priscilla will continue to work at "Mud Studio". Toby said Priscilla had agreed to stay with MSL after Janet takes over the company.

(See over the page for a continuation of Question 5)

Questions:

- (b) Advise Janet on the stamp duty implications (under the Stamp Duty Ordinance (Cap. 117)) of the share purchase transaction based on the above information. Briefly explain your advice, but you do NOT need to calculate the exact amount of stamp duty payable by the parties.
- (5 marks)
- (c) Advise Janet what should be done in order to carry out her instructions above and to protect her interest, including provisions that can be included in the share purchase agreement and documents and/or mechanisms that should be put in place.
- (8 marks)
- (d) Which internal registers of MSL will need to be updated upon/after completion of the share purchase transaction? Briefly explain your answer.

(5 marks)

[25 marks in total]

END OF TEST PAPER

2024 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD III: COMMERCIAL AND COMPANY LAW

Tuesday, 19 November 2024



2024 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Part A

Happy Bakery Limited (“HBL”) is a private company in Hong Kong that produces bakery products for sale locally. HBL’s issued share capital is 80% owned by Angel Limited (“AL”), a private company in Hong Kong wholly owned by Amy, and 20% owned by Barbara. Amy and Barbara are the only directors of HBL. Amy, AL, Barbara and HBL have entered into a shareholders’ agreement regarding HBL. Amy is the sole director of AL.

Last month, Amy met Catherine at a social event. Amy confided in Catherine that she was not on good terms with Barbara and wanted to sell AL’s 80% shareholding in HBL. Catherine expressed interest in acquiring AL’s shareholding. Amy has not informed Barbara about the proposed sale of AL’s shareholding in HBL to Catherine.

Questions:

- (a) **Can Barbara block the proposed sale of AL’s 80% shareholding in HBL to Catherine? Explain the reasons and describe the mechanisms involved.**

(5 marks)

- (b) **Is there any alternative way for Amy to divest her interest in HBL? What should she consider?**

(3 marks)

(See over the page for a continuation of Question 1)

Part B

After extensive discussions, Catherine has proposed to purchase 80% of HBL's share capital from AL. The signing of the share sale and purchase agreement by Catherine and AL is scheduled for 2 December 2024, with completion set for 2 January 2025.

During the legal due diligence, the following was discovered:

- The bakery licence of HBL is due to expire on 31 December 2024. Amy told Catherine that HBL has already submitted an application for the renewal of its bakery licence.
- HBL has entered into a loan agreement with Fortune Bank which has a "change of control" clause.
- A pedestrian, Peter, alleged that he was knocked over by an HBL employee who was pushing a trolley while delivering bakery products in October 2024. Peter has threatened to take legal action against HBL. Amy, however, claimed that Peter fell on his own and that his claim was frivolous.
- In October 2024, HBL renewed the lease of its premises for another 18 months, with no "break clause". The lease is non-assignable except with the landlord's consent.

(See the next page for a continuation of Question 1)

Questions:

- (c) In addition to the share sale and purchase agreement, what agreement(s) is Catherine likely to sign in connection with the proposed purchase, and what Catherine should do in relation to the same?

(2 marks)

- (d) Based on the facts provided in Part A and Part B above, recommend the provisions Catherine should include in the share sale and purchase agreement to address the identified issues, including the matters discovered during legal due diligence.

(6 marks)

- (e) Briefly explain what a “warranty” and an “indemnity” are, and highlight their differences.

(2 marks)

- (f) AL has agreed to include certain warranties and indemnities in the share sale and purchase agreement to provide Catherine with some comfort. However, AL wants to limit its liability under these warranties and indemnities. Advise AL on the provisions it should negotiate to limit its liability.

(3 marks)

- (g) Catherine is concerned about having sufficient protection if she needs to enforce the warranties and indemnities in the share sale and purchase agreement. Advise Catherine on what she can do to enhance her protection.

(2 marks)

(See over the page for a continuation of Question 1)

Part C

Catherine is worried that Amy might start another bakery business in competition with HBL after selling her interest to Catherine. She wants to include a clause in the share sale and purchase agreement prohibiting Amy, at any time during the period of 20 years from completion, in any geographic area in the world, from carrying on, being concerned or assisting in any way, a business which would be in competition with any part of the business of HBL as it was carried on at completion.

Question:

(h) Advise whether this clause is enforceable against Amy.

(2 marks)

[25 marks in total]

Question 2 (25 marks)

Part A

Mansfield Holding Limited (“Mansfield”) is a company listed on the Main Board of The Stock Exchange of Hong Kong Limited. Kizon Technology Company (“Kizon”), a Hong Kong incorporated company, proposed to make an offer to privatise Mansfield by way of a scheme of arrangement at the beginning of 2024 (the “Privatisation”). Ramsey Banking Group (“RBG”) was working on a loan transaction to finance Kizon to make such offer. Mr. Joe Fung (“Mr. Fung”) was a manager of business finance in RBG and attended meetings with Kizon regarding the loan application. The purpose of the loan (i.e. to finance the Privatisation) was mentioned in the loan application documentation and at the meetings.

Mr. Fung had access to a securities account opened and maintained in his wife, Ms. Fanny Wong’s (“Ms. Wong”) name at RBG. Mr. Fung started buying Mansfield’s shares through accounts in Ms. Wong’s name on the day when the credit committee of RBG approved the loan. He also passed the information related to financing the Privatisation to Ms. Wong. Ms. Wong also bought the shares of Mansfield through her other securities accounts at the same time. Prior to that, Mr. Fung and Ms. Wong did not trade in Mansfield’s shares. Mr. Fung finally purchased 1,000,000 shares through accounts in Ms. Wong’s name at an average price of HK\$6.2 and a total cost of HK\$6.2 million. Ms. Wong also purchased 500,000 shares through other accounts in her own name at an average price of HK\$6.4 and a total cost of HK\$3.2 million.

(See over the page for a continuation of Question 2)

Trading in Mansfield's shares was suspended on 4 March 2024 and resumed on 8 March 2024, the day after Mansfield and Kizon issued a joint announcement in relation to the Privatisation. Between 11 March 2024 and 31 May 2024, Mr. Fung and Ms. Wong together sold 1,200,000 Mansfield's shares in the market and thereby gaining a profit in the amount of HK\$2.3 million. The remaining Mansfield's shares were cancelled pursuant to the Privatisation at the cancellation price on 3 September 2024.

Question:

- (a) **Are Mr. Fung and Ms. Wong liable under Part XIII of the Securities and Futures Ordinance, Cap.571? Give reasons.**

(13 marks)

Part B

Demir is a director of Great Glory A.S. ("GG"), which is currently holding a market making licence issued by the Capital Markets Board of Turkey to carry out the business of leveraged foreign exchange trading business ("LFET Business"). GG intends to set up a private company in Hong Kong called Great Glory Asia Limited ("GG Asia") and GG will hold the entire share capital of GG Asia. It is planned that GG Asia will carry on the following activities: (a) marketing the contracts related to LFET Business to potential clients, including Hong Kong and non-Hong Kong people, in its online platform; and (b) performing periodic market analysis related to the situation in global financial markets and trends in their online platform.

Demir asks you if GG Asia needs any licences for carrying out the above activities, and, if required, the legislative requirements, procedures and licensing requirements involved.

(See the next page for a continuation of Question 2)

Questions:

- (b) Prepare a memorandum of advice for Demir to advise on the legislative, procedural and licensing requirements involved, if required.

(10 marks)

- (c) Would your advice above be different if Demir told you that GG Asia will only deal with “professional investors” as defined under the Securities and Futures Ordinance, Cap.571?

(2 marks)

[25 marks in total]

Question 3 (25 marks)

Piling King Group Limited (“Piling King”) is a company incorporated in the Cayman Islands, with its shares listed on the Main Board of The Stock Exchange of Hong Kong Limited. The core business of Piling King involves the construction of buildings, tunnels and roads in Hong Kong and Mainland China. Founded by Mr. Poirot in 1997, Piling King enjoyed considerable success until recent years. Mr. Poirot serves as the chairperson and an executive director of Piling King, holding 70% of the issued shares of Piling King. Despite the recent downturn in business, the financial position of Piling King remains robust.

In light of the anticipated continued decline in the construction industry, Mr. Poirot plans to raise funds through the issue of new shares in Piling King. This strategy aims to provide Piling King with greater flexibility in managing its cash flow and financial position, ensuring sufficient funds are available for any further challenges.

At its recent annual general meeting held on 30 April 2024, Piling King, like other listed companies in Hong Kong, obtained a standard general mandate from its shareholders. This mandate authorizes the directors to allot and issue new shares under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the “Listing Rules”).

Since its listing on the Main Board in 2007, Piling King has not been active in capital markets and has never raised any funds by the issue of new shares. Piling King has a total of 100,000,000 issued shares. Investor interest in Piling King has been low, with trading volumes remaining thin. Over the past 12 months, Piling King’s share price has been relatively stable at around HK\$10 per share.

(See the next page for a continuation of Question 3)

Mr. Poirot's neighbour, Mr. Hastings, is an investment banker and the managing director of Trust Me Corporate Finance Limited. Over a couple of glasses of wine, Mr. Hastings suggested to Mr. Poirot that Piling King could issue new shares and raise funds through a private placing. This method is a common capital-raising exercise in Hong Kong, requiring no prospectus and allowing a swift completion. Mr. Poirot finds this idea appealing.

Questions:

- (a) Mr. Poirot intends for Piling King to appoint Trust Me Corporate Finance Limited as the placing agent and to issue 20,000,000 new shares at HK\$10 per share to a select group of investors through a private placing, utilizing its general mandate in accordance with the requirements under the Listing Rules.

Advise Piling King, with reasons and analysis, on whether the proposal is feasible under the Listing Rules, and on the disclosure and reporting requirements under the Listing Rules regarding the launch and completion of the private placing.

(12 marks)

- (b) Given that this proposed private placing is Piling King's first-ever corporate finance fundraising exercise since its listing, Mr. Poirot is keen to ensure its success. On the advice of Mr. Hastings, he believes that offering a reasonable discount to the current trading price per share will provide an incentive for potential investors to subscribe to the new shares under the proposed private placing. Mr. Poirot plans for Piling King to issue 20,000,000 new shares at HK\$6 per share.

(See over the page for a continuation of Question 3)

Advise Piling King, with reasons and analysis, on whether issuing new shares under its general mandate at the proposed placing price is feasible under the Listing Rules.

(9 marks)

- (c) The private placing fails, and no investors subscribe to the new shares in Piling King. The business of Piling King deteriorates more rapidly than anticipated. Mr. Poirot now intends to make a personal loan to Piling King, the amount of which represents approximately 6% of the applicable percentage ratios under Chapter 14/14A of the Listing Rules. However, Mr. Poirot prefers that Piling King does not announce his provision of the loan to Piling King.

Advise Piling King, with reasons and analysis, on the nature of the loan under the Listing Rules, whether obtaining a loan from Mr. Poirot requires any announcement and shareholder approval under the Listing Rules, and what conditions would need to be met for the loan to justify Mr. Poirot's intention of not announcing it.

(4 marks)

[25 marks in total]

Question 4 (25 marks)

ABC Investments Ltd. (the “Company”) is a private company incorporated in Hong Kong by David Au (“David”) and Raymond Chan (“Raymond”) in 2015. It adopts the Model Articles for Private Companies Limited by Shares set out in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H) as its articles of association. The Company is engaged in catering business. It operates two Chinese restaurants in Hong Kong.

The share capital of the Company was initially HK\$10 million, comprising 100,000 shares. All shares were issued to the shareholders and were fully paid up. David and Raymond each had 50% shareholding. They were also the only directors of the Company.

David got married in 2016 but Raymond remains single all along. Since 2017, David’s wife, Ada, has also been involved in the running of the Company. She has been supportive and helpful and has made significant contributions to the operations of the Company. Until 2022, she was employed by the Company as a senior manager and received a fixed monthly salary.

In March 2022, Ada was admitted to the Company as an additional shareholder and appointed as the third director. Both David and Raymond transferred 5,000 shares to Ada. After the transfer, the respective shareholdings of the three shareholders are as follows:

David: 45,000 shares (representing 45% of the issued shares in the Company);

Raymond: 45,000 shares (representing 45% of the issued shares in the Company);

Ada: 10,000 shares (representing 10% of the issued shares in the Company).

(See over the page for a continuation of Question 4)

Differences between the shareholders emerged recently. David and Ada are eager to expand the Company's business to the Greater Bay Area in Guangdong Province. Raymond, on the other hand, believes that Company should only focus on its existing business in Hong Kong.

To expand its business, the Company requires an additional funding of HK\$30 million. David and Ada wish to increase the share capital of the Company from HK\$10 million to HK\$40 million by creation of 300,000 new shares to be issued at HK\$100 each. When they floated this idea to Raymond informally at a lunch gathering, Raymond indicated that he would not subscribe additional shares. In response, David and Ada replied that they would take up all the new shares.

Questions:

Answer the following questions:

- (a) Raymond does not want to subscribe additional shares in the belief that **his rights as a shareholder** of the Company will remain unchanged after the allotments. **Advise him if this is the case.**

(6 marks)

- (b) A board meeting was held last Monday which was attended by David and Ada in the absence of Raymond. The board approved the allotment of the 300,000 new shares to David and Ada in equal shares. **Does the board have the right to approve the allotments?**

(12 marks)

(See the next page for a continuation of Question 4)

- (c) After receiving some advice from an accountant friend, David decided to ask the shareholders to approve the allotments. Instead of convening a general meeting, David instructed the company secretary of the Company to circulate a shareholders' resolution to all shareholders on 2 October 2024 to authorise the allotments of 150,000 new shares to David and Ada each (the "Resolution"). The company secretary requested all shareholders to sign and return the Resolution by 7 October 2024. Only David and Ada signed and returned the Resolution to the company secretary. David and Ada take the position that the Resolution has been duly passed by the majority shareholders (their aggregate shareholdings in the Company amounts to 55%) even though it has not been signed and returned by Raymond. **Is it possible to pass a shareholders' resolution without convening a general meeting? If so, can Raymond challenge the position of David and Ada?**

(7 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Harold has just completed the purchase of the entire issued share capital of a company called Sham Mong Apartment SPV Limited (“SPV”), for a total price of HK\$15,000,000. At completion, the existing directors of SPV resigned and Harold was appointed as the sole director.

SPV’s only physical asset is an apartment in an old residential block in West Kowloon, Hong Kong. The apartment was purchased by SPV in 2023 for HK\$12,000,000. Harold is aware that developers are interested in purchasing the entire building where the apartment is located for redevelopment purposes and believes that he should be able to sell the apartment to an interested developer for approximately HK\$20,000,000.

In order to finance the purchase of SPV, Harold used HK\$10,000,000 of his own funds but also borrowed HK\$5,000,000 on an interest free basis from his friend, Peter. Harold has told Peter that he will be able to repay this loan within three months after completion. Harold has assured Peter that, if necessary, he will procure SPV to sell the apartment shortly after three months in order to raise funds to repay the loan, even though an early sale may result in a lower price for the apartment.

Two months after the completion of Harold’s purchase of SPV, Harold has agreed a term loan with XYZ Bank, whereby XYZ Bank will lend Harold HK\$5,000,000. As a condition of this loan, SPV is to guarantee payment of the loan to XYZ Bank. In addition, SPV is to grant security to XYZ Bank by way of a mortgage over the apartment. Following drawdown of the term loan, Harold will use the proceeds to repay Peter in full.

(See the next page for a continuation of Question 5)

Question:

- (a) **Explain, with reasoning, what procedures Harold and SPV need to comply with in connection with the loan from XYZ Bank and the security to be given by SPV. What are the consequences for non-compliance?**

(12 marks)

Part B

One year after completion of the acquisition of shares in SPV, SPV sells the apartment to a developer for HK\$20,000,000. Upon this sale, SPV realises a profit of HK\$8,000,000. As part of this transaction, XYZ Bank releases the security over the apartment, SPV distributes a dividend of HK\$8,000,000 to Harold and Harold repays the loan to XYZ Bank. The dividend has reduced the distributable reserves to nil.

After paying various costs and expenses, SPV still has a cash balance of HK\$6,000,000. In looking through various paperwork of SPV, Harold came across a contract with the real estate agent who assisted SPV with the acquisition of the apartment for HK\$12,000,000 in 2023. Harold did not know about this contract when he bought the shares in SPV. The contract with the real estate agent provided that a fee was to be paid to the real estate agent upon the ultimate sale of the apartment by SPV. SPV agreed to pay the real estate agent a fee equal to 10% of the difference between the acquisition price and the sale price (i.e., 10% of HK\$8,000,000, being HK\$800,000).

(See over the page for a continuation of Question 5)

Harold has no ongoing need to hold shares in SPV and would like the cash balance of HK\$6,000,000 to be paid to him and then for SPV to be deregistered. Harold has heard deregistration would be cheaper than liquidation. Harold believes that the real estate agent remains unaware of the sale of the apartment to the developer and as such does not believe that the real estate agent will claim the additional commission any time soon. Harold is hoping that by the time the real estate agent becomes aware of the sale of the apartment, SPV will already have been deregistered. Harold has indicated that he is willing to sign whatever papers are necessary in order for SPV to pay the cash balance to him and for SPV to be deregistered.

Questions:

- (b) **Given that SPV has no distributable reserves, explain the procedures that Harold and SPV need to go through in order for SPV to pay the cash balance of HK\$6,000,000 to Harold. What risk would Harold be taking if he refuses to acknowledge the liability to the real estate agent as part of that process?**

(10 marks)

- (c) **What are the requirements for deregistration of SPV? Does SPV qualify and what risk would Harold be taking if he proceeds with deregistration?**

(3 marks)

[25 marks in total]

END OF TEST PAPER