

**2022 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Thursday, 3 November 2022



2022 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Dr. Wolfgang is a German citizen, a researcher and a part-time tutor for the Postgraduate Certificate in Laws course.

Zhang and Williams are two of Dr. Wolfgang's small tutor group students. Zhang is a PRC citizen and Williams is a local born British holding a HKSAR passport and a UK passport.

During the small group tutorial, Dr. Wolfgang always half-heartedly jokes with the students how little he got paid as a part-time tutor and that if the students want to pass his subject with flying colours, Dr. Wolfgang is open to accept cash bribes from the students.

All the staff and students have signed an acknowledgement letter that they are aware that soliciting offering or accepting bribes are illegal acts and be expelled from the institution immediately.

Zhang and Williams discussed amongst themselves and agreed to each offer a cash bribe of HK\$10,000 to Dr. Wolfgang to help them pass the examinations.

They each placed HK\$10,000 notes bills in a brown envelope with their names signed on the envelope and deposited the envelope in the pigeon box of Dr. Wolfgang.

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

Unknown to Zhang and Williams, their acts were all recorded by the CCTV by internal security. The contents of the envelope and the video tapes were reviewed by the Department Head and the matter was reported to The Independent Commission Against Corruption (“ICAC”).

Dr. Wolfgang, Zhang and Williams were all arrested by the ICAC one morning on suspicion of soliciting and offering bribes contrary to the Prevention of Bribery Ordinance, Cap. 201.

Upon cautioned Dr. Wolfgang remained silent.

Zhang was threatened by one ICAC officer of being sent back to China and shame put upon his family that he confessed to offering bribe to Dr. Wolfgang to help him pass the examinations.

Williams upon cautioned explained the idea is Zhang’s and he was simply following Zhang.

Questions:

- (1) Explain to Dr. Wolfgang, Zhang and Williams on their rights to bail and what they can offer the court to get a better chance of getting bail.**

(7 marks)

- (2) Would there be a conflict of interest if one firm of lawyers act for both Zhang and Williams and why?**

(4 marks)

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

- (3) **Zhang cannot afford private lawyers. What help can he get and why?**
(3 marks)
- (4) **Who will be the principal witness to secure a conviction?**
(3 marks)
- (5) **What type of sentence will the three of them get?**
(3 marks)
- (6) **Draft a set of mitigation on behalf of Zhang and Williams.**
(5 marks)

[25 marks in total]

Question 2 (25 marks)

On 1 July 2022, D published a statement in a widely circulated newspaper in Hong Kong advocating that:

“We Hong Kong Guys should join together to fight for all rights from the Government of the Hong Kong Special Administrative Region by all means including resorting to serious violence, bombs and firearms!!!” (“the Advocated Slogan”).

Shortly on 3 July 2022, D was arrested by the police officers of the National Security Department of the Hong Kong Police Force for investigation. In a house search conducted on the same day, some notes and loose papers were found from one of the drawers of his desk, on which there were some notes advocating and suggesting more or less the same as the Advocated Slogan even with the names of certain contact persons and proposed schedules of actions ahead. Certain statements similar to the Advocated Slogan were also found from the database of his computer. All those notes, loose papers and his computer were accordingly seized (collectively “the Seized Items”) for further investigation.

D was since detained in the police station until 5 July 2022 when he was charged with an offence contrary to Article 27 of the National Security Law (“the NSL”), which is a piece of legislation written in Chinese against acts and activities, etc. endangering national security, and passed by the National People’s Congress of the People’s Republic of China and promulgated as the law applicable to the Hong Kong Special Administrative Region (“the HKSAR”) effective from late night of 30 June 2020.

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

The English translation of the relevant part of Article 27 reads as follows:

“A person who advocates terrorism or incites the commission of a terrorist activity shall be guilty of an offence. If the circumstances of the offence committed by a person are of a serious nature, the person shall be sentenced to fixed-term of imprisonment of not less than five years but not more than ten years, and shall be imposed with a criminal fine or subject to confiscation of property;”.

At the first appearance on 5 July 2022 in the West Kowloon Magistrates’ Courts before the Chief Magistrate, being a designated Magistrate assigned to handle cases of NSL offences, the case was adjourned for 4 months for further enquiries and investigations with high possibility of laying additional charges against D for other offences under the NSL, and D (being unrepresented) was refused bail upon his bail application.

D through his family has approached you as a Hong Kong lawyer for assistance. You have since taken instructions from D in the detaining institution. From the instructions you have obtained, you learn that:

1. D, being a permanent Hong Kong resident at the current age of 55, is a practising medical practitioner specializing in gynaecology with his operated clinic in Central. He has been in the profession for about 28 years;
2. He is married with 2 children both at universities. His wife is a housewife. He resides with his family in a house at Mid-Levels, Hong Kong Island;
3. He has no previous criminal conviction record both in Hong Kong and elsewhere, neither has he ever been subject to any disciplinary enquiry or proceedings in his profession;

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

4. He has been suffering from long-term heart-disease;
5. He professes certain belief in dissatisfaction with the current Government of the HKSAR in many aspects;
6. He did not say or express anything when being asked about the Advocated Slogan or the Seized Items; and
7. He intends to apply for bail again in the upcoming adjourned hearing before the Chief Magistrate.

Questions:

- (1) On the issue of bail, D is anxious to know the following:
 - (a) **What is your advice on the chances of success in the bail application?**
(6 marks)
 - (b) **What proposed bail terms and conditions you may submit to the Chief Magistrate?**
(3 marks)
 - (c) **If the Chief Magistrate refuses bail again, what can D do?**
(2 marks)
 - (d) **If the Chief Magistrate grants bail to D and the Prosecution is dissatisfied with it, what can the Prosecution do?**
(2 marks)

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

- (2) Assuming that D's case is to be tried in the Court of First Instance of the High Court of the HKSAR, and in connection with the mode of trial, the Secretary for Justice ("SJ") has issued a Certificate in exercise of the power vested in him under and pursuant to Article 46(1) of the NSL directing that:

"D's case shall be tried without a jury on the following ground(s) having taken into account and considered all the relevant circumstances and information:

- (1) Protection of personal safety of jurors and their family members; and/or
- (2) If the trial is to be conducted with a jury, there is a real risk that the due administration of justice might be impaired."

("SJ's Certificate").

As a result, D's case shall be tried before a panel of three Judges designated to handle cases of the NSL offences without a jury.

Advise D on how he can challenge SJ's Certificate if he prefers to have the trial conducted with a jury.

(8 marks)

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

- (3) Assuming that the trial is ultimately to be conducted before a panel of three designated Judges without a jury, and shortly before the first day of trial, D instructed that he was determined to plead guilty to the offence and admit the whole contents of the summary of facts pertaining to the offence. A single designated Judge in the Court of First Instance was accordingly assigned to handle D's plea and sentence. Consequently, D was convicted of the offence contrary to Article 27 of the NSL on his own plea of guilt, followed by a term of imprisonment of nine years imposed by the Judge ("the Sentencing Judge"), who held the view in connection with the sentence that the circumstances of the offence are of a serious nature.

- (a) **If the Prosecution is dissatisfied with the sentence, how can it be challenged?**

(2 marks)

- (b) **If D is dissatisfied with the sentence, how can he challenge it?**

(2 marks)

[25 marks in total]

Question 3 (25 marks)

In January 2021, Belfast (BVI) Limited (“Belfast”) commenced a claim in the High Court against Win Win Company Limited (“WWCL”) for damages for misrepresentation and breach of warranties in relation to the sale of company, ABC Limited, from WWCL to Belfast, in the sum of HK\$15 million.

Belfast is a BVI company with a sole shareholder and director, Amy Chan, who is ordinarily resident in Hong Kong. WWCL and ABC Limited are both Hong Kong companies.

At a case management conference on 13 April 2022, the court gave leave for the parties to exchange supplemental witness statements by 31 May 2022 and for experts’ reports on the valuation of ABC Limited to be exchanged by 31 August 2022. The hearing of the case management conference was adjourned to 11 November 2022.

On 1 November 2022, WWCL changed its solicitors to your firm. By this time, the parties had already complied with all the directions as set out above and your partner considers that the matter should be ready for trial. However, your partner would like to advise WWCL on the merits of a security for costs application against Belfast.

Question:

- (1) Write a memorandum of advice to your partner in relation to the merits of a security for costs application against Belfast at this stage of the proceedings. In case you need further information/instructions, set out the same in square brackets in your draft memorandum of advice.**

(10 marks)

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

Assume it is now 12 May 2023.

Your firm did not make the security for costs application and the matter proceeded to trial from 24 to 27 April 2023. On 12 May 2023, Yoda J handed down his judgment in relation to the case and awarded damages to Belfast in the sum of \$10 million (inclusive of interest). In addition, Yoda J made an order nisi for costs to be taxed if not agreed.

Your partner reminds you that on the WWCL file,

- (i) On 9 September 2022, WWCL filed a Notice of Sanctioned Payment in the sum of HK\$8 million (inclusive of interest) in satisfaction of all of Belfast's claims.
- (ii) On 14 October 2022, the former solicitors of WWCL wrote a letter to Belfast's solicitors marked "without prejudice save as to costs", offering to pay HK\$3 million to top up the previous sanctioned payment, in full and final settlement of the matter.
- (iii) On 16 January 2023, on behalf of WWCL, your firm paid into court a further sum of HK\$3.5 million and filed a further Notice of Sanctioned Payment on Belfast's solicitors on the same day. The HK\$3.5 million was inclusive of interest and paid in addition to the amount paid on 9 September 2022, in satisfaction of all of Belfast's claims.

All of the above have not been accepted by Belfast.

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

Question:

- (2) Draft a letter of advice to WWCL to advise them whether an application should be made to vary the costs order nisi of Yoda J and if so, what would be the most appropriate costs order to be made.

(15 marks)

[25 marks in total]

Question 4 (25 marks)

You are a newly admitted solicitor in an international firm known as Featherstone & Silverman LLP (“F&S”). F&S acts for China International Megabank (“CIMB”). CIMB recently acquired an office building in Central to serve as its headquarters in Hong Kong. After renovation, the building was renamed “CIMB Tower”. Of the 50 floors in the Tower, CIMB occupies 10. 30 others have been taken up by commercial tenants and 10 floors remain vacant. CIMB approached F&S to take up at least one of the vacant floors. Somewhat reluctantly F&S agreed to move to CIMB Tower because CIMB is one of its major clients.

The relocation of F&S to CIMB Tower was carefully arranged. The old office was scheduled to close after business hours on Friday, 6 May 2022 and the new one to open on the following Tuesday, 10 May 2022, after the long weekend. A vital part of the relocation was to shift and set up all the computer systems including internet and intranet in the new office so that all would be ready to go when it opened for business (the “IT work”).

On the recommendation of one of the partners, who had met Ivan Chong (“Ivan”) on a hike over Lamma Island, Hong Kong, F&S appointed Ivan to handle the IT work. Ivan had said he had considerable experience in this type of IT work, and that he had a group of friends who collaborated with him. A single page contract between F&S and Ivan was signed to complete the IT work. The contract stipulated that the IT work must be completed by 9:00 a.m. on Tuesday, 10 May 2022 in order that the new office could be up and running seamlessly after the move.

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

Unfortunately, the IT work did not go well. Over the long weekend, there were thunderstorms and heavy rain resulting in an interruption of power supply. As a result, installation of F&S's IT equipment in the new office was delayed until the lift service resumed. Also, one of Ivan's friends had failed to turn up. F&S was finally up and running in the new office, all IT work completed, by the morning of Wednesday, 11 May 2022, a delay of 24 hours.

On that Wednesday morning, the responsible partner of F&S discovered that a potential client, INJSEEKER, had given instructions by e-mail to take immediate proceedings for an urgent *ex parte* interlocutory injunction to restrain an alleged creditor from issuing a winding-up petition. Because F&S internet systems were down, the responsible partner was unaware of INJSEEKER's instructions until too late. INJSEEKER instructed another firm of solicitors to handle the matter. INJSEEKER had earlier been given, by F&S, a fee estimate of HK\$250,000 for this work, plus counsel's fees and other disbursements. F&S lost this fee income of HK\$250,000 and potentially much more if the matter were to go on to substantive dispute.

INJSEEKER was unsuccessful in the interlocutory injunction application. It is not yet known whether INJSEEKER will proceed.

F&S has now issued and served a generally indorsed writ of summons against Ivan claiming damages for breach of contract. The firm decided to handle the matter in-house rather than instruct another firm to act for it. Notice of intention to defend has been given and the file has been passed to you for further action.

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

Question:

Prepare a draft statement of claim seeking damages on behalf of F&S. Your draft should:

- (a) comply with necessary formalities;**
- (b) include a heading naming the Court and the parties;**
- (c) plead the material facts in accordance with the Rules of Court;**
- (d) include an appropriate prayer for relief; and**
- (e) indicate where and by whom the document should be signed.**

(5 out of the total 25 marks will notionally be allocated to each of the above heads. However, the final mark may be adjusted to take into account the examiner's overall impression of the quality of the draft.

Candidates who include accurate notes to explain why any part of the pleading is drafted in any particular way may expect to receive above average marks.)

(25 marks)

[25 marks in total]

Question 5 (25 marks)

Questions:

Existing clients of your firm, the Chan brothers, who own Chan Brothers Company (Hong Kong) Limited, visit your office to show the e-mail chain on pages 16-20 to the managing partner of your firm. **The managing partner asks you to draft:**

- (1) The heading of the Writ of Summons (showing the name of the Hong Kong court in which the proceedings should be issued and the parties);**

(5 marks)

- (2) A draft Statement of Claim, identifying with blanks and notes where further information will be required from the Chan brothers, in order to complete the Statement of Claim.**

(20 marks)

[25 marks in total]

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

Email chain:

“To: noriyuki.morita@gmail.com
Cc: johnny.chan@changbroscos.com
From: daniel.chan@chanbroscos.com
1 April 2022 @ 21:45:13
Re: Proposal - hiring Infinity Wars Endgame Iron Man suit for Hong Kong Avengers
Fan event - July 22 - 24, 2022

Dear Morita-San,

My brother, Johnny and I, through our company, Chan Brothers Company (Hong Kong) Limited, are planning a high-profile Marvel Avengers fan event in Hong Kong for the weekend of July 22 - 24. We are very excited about this. We held a similar event last year, which was also quite profitable. We made HKD 800,000 net profit from that event. This year, we believe the event will be bigger and better. But to achieve this, we need your support. We know you are the proud owner of the original Iron Man suit used at the end of the Avengers Infinity Wars Endgame movie - the one that Tony Stark was wearing when, sadly, he died. With this suit as the centre-piece of the event, we are confident that we can at least double, if not triple, our profits this year. We know the suit is a very precious object. Our company is prepared to pay you a flat fee of HKD 250,000 for the use of the suit, just for the duration of the event, plus five per cent of the net profits.

Johnny and I look forward to your favourable response.

Yours truly,

Danny Chan
Chairman
Chan Brothers Company (Hong Kong) Limited
The Penthouse,
LaRusso Tower,
Mills Street,
Kowloon,
Hong Kong”

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

“To: daniel.chan@chanbroscos.com
Cc: johnny.chan@chanbroscos.com
From: noriyuki.morita@gmail.com
2 April 2022 @ 09:30:14
Re: Proposal - hiring Infinity Wars Endgame Iron Man suit for Hong Kong Avengers
Fan event - July 22 - 24, 2022

Dear Danny-san,

I would be honoured if my Iron Man suit could be part of your event. I propose the following terms:

1. Flat fee - HKD 250,000 - to be paid into my bank account: Okinawa Kairo Bank, Tomigusuku Branch, Account number 001 - 442316 - 888 by no later than July 5, 2022.
2. Net profit share - 15% - to be paid into the same bank account by your company within 15 days after the event.
3. Transportation costs - to be borne by me.
4. Import expenses and cost of insurance (insurable value of suit - USD 500,000) to be borne by you.
5. Re-import expenses back to Japan - to be borne by me.
6. Suit will be delivered to Hong Kong by no later than July 20 and to leave Hong Kong by no later than July 26, to be returned to me.

Yours truly,

Noriyuki Morita
House 17
Tomi Village
Near Naha
Okinawa
Japan”

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

“To: Johnny.chan@chanbroscos.com
From: Daniel.chan@chanbroscos.com
4 April 2022 @ 10:04:15

Danny - great news. I spoke to Noriyuki this morning. He has agreed to a net profit share of 10%. All other terms as he proposed. We can move forward! It's going to be a great event! I will start work on the design of the marketing materials, with the Iron Man suit front and centre. The marketing cost will be the same as last year - HKD 200,000. The bigger and better venue we have in mind is going to cost us HKD 108,000 for all three days. Let me know if you have any questions. Johnny.”

“To: noriyuki.morita@gmail.com
Cc: johnny.chan@chanbroscos.com
From: daniel.chan@chanbroscos.com
July 20 2022 @ 23:45:16
Re: Proposal - hiring Infinity Wars Endgame Iron Man suit for Hong Kong Avengers Fan event - July 22 - 24, 2022

Noriyuki-san - tried to call you but went to voice-mail. The suit has not arrived. We have checked with customs. We have also checked with Cathay Pacific Services. They are double-checking and will come back to us in the morning, but they told us by phone that they have no record of carrying the shipment. Can you call me on +852 3535 7904 urgently? Any time, please.

Yours truly,

Danny Chan”

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

“To: noriyuki.morita@gmail.com
Cc: johnny.chan@changbroscos.com
From: daniel.chan@chanbroscos.com
July 21 2022 @ 11:45:17
Re: Proposal - hiring Infinity Wars Endgame Iron Man suit for Hong Kong Avengers
Fan event - July 22 - 24, 2022

Noriyuki-san - we still have not been able to contact you. The suit has definitely not arrived. We have checked again with customs. We have also confirmed with Cathay Pacific Services that they have no record of carrying the shipment. Again, can you call me on +852 3535 7904 urgently? Any time, please.

If the suit does not arrive in time, what are we going to do? As you know, it was the centre piece of the whole event. We have marketed the whole event based on the suit as a centre-piece. It's not just a matter of lost profits. We will have to offer a refund of the ticket price to everyone and swallow all of the venue costs and our marketing costs. Johnny and I really cannot believe this is happening. We paid you the flat fee on time. This is going to be terrible for our reputation. We may not be able to host any event like this in future, if this does not work.

Yours truly,

Danny Chan”

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

“To: daniel.chan@chanbroscos.com
Cc: johnny.chan@chanbroscos.com
From: noriyuki.morita@gmail.com
22 July 2022 08:48:18
Re: Proposal - hiring Infinity Wars Endgame Iron Man suit for Hong Kong Avengers
Fan event - July 22 - 24, 2022

Dear Danny-san,

I regret that, once I double-checked the insurance policy you have arranged, it was not adequate. I am not prepared to risk the precious suit and must treat our contract as cancelled. I will retain the flat fee as reflecting the lost opportunity, but I am willing not to sue you for my share of the profits I should have earned.

Yours truly,

Noriyuki Morita”

END OF TEST PAPER