
**2015 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Monday, 9 November 2015



HEAD III: COMMERCIAL AND COMPANY LAW

TEST PAPER

9 November 2015

Instructions to Candidates:

- 1. The duration of the examination is 3 hours and 30 minutes.**
- 2. This is an open-book examination.**
- 3. There are FIVE questions in this paper.**
ANSWER ANY FOUR QUESTIONS ONLY.
- 4. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER:**
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND**
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS THAT YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 5. Start each question on a separate page of your answer book.**
- 6. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.**
- 7. An examiner will be present for the first 30 minutes of the examination. Any questions relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.**
- 8. Do not take either this question paper or any answer books with you when you leave the examination room.**

2015 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Answer the following question:

Apex Petroleum Limited (“**Company**”), a Hong Kong private company, is a leading local distributor of petroleum in Hong Kong. On 6 April 2014, the Company (as borrower) entered into a three-year term loan facility (HK\$8,000,000) with Wanchai Lenders Limited (“**WLL**”) (as lender) (“**the Loan**”). The Loan was secured by a debenture (“**WLL Debenture**”) granting WLL a floating charge over all assets that the Company owned and would own, and the following charge over the Company’s book debts:

“The charge on the book debts due or owing to the Company both present and future is created as a fixed charge.

During the continuance of this security the Company shall:

- (A) (i) pay into a current account or a separate designated account (as WLL may require) of the Company with Downtown Bank all moneys which it may receive in respect of the book debts hereby charged and pay or otherwise deal with such moneys standing in such account in accordance with any directions from time to time given in writing by WLL;
- (ii) in the absence of any directions from WLL any moneys received by the Company and paid into such account in respect of the book debts hereby charged shall upon such payment be released from the fixed charge on such debts hereinbefore by this debenture created and shall stand subject

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

to the floating charge hereinbefore by this debenture created over the other property and assets of the Company; and

- (iii) any such release shall in no respect derogate from the subsistence and continuance of the said fixed charge on all other book debts of the Company for the time being outstanding;
- (B) if called upon to do so by WLL execute a legal assignment of such book debts to WLL in such terms as WLL may require and give notice thereof to the debtors from whom the debts are owing or incurred and take such other steps as WLL may require to perfect such legal assignment; and
- (C) deal with such book debts in accordance with any directions from time to time given in writing by WLL and in default of and subject to any such directions deal with the same only in the ordinary course of getting in and realising the same (but not sell assign factor or discount the same in any way).”

The WLL Debenture contained a negative pledge clause. The WLL Debenture was properly authorised and executed, and duly registered under the Companies Ordinance. At no time has WLL ever given any directions to the Company requiring the Company to pay the proceeds of collected book debts into a designated account or any other account with Downtown Bank.

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

The Company sales dropped drastically during a global oil crisis between September and November 2014. Desperate to turn around its business, on 13 December 2014 the Company raised further funding by entering into a three-year term loan facility (HK\$9,500,000) with Kowloon Bank secured by a floating charge over all assets, book debts and undertakings of the Company (“**Kowloon Bank Debenture**”). The Kowloon Bank Debenture was duly registered under the Companies Ordinance. Soon afterwards, there were rumours that the Company had difficulties paying its trade creditors on time.

The finances of the Company deteriorated further in June 2015. On 6 June 2015, WLL and Kowloon Bank separately appointed receivers pursuant to their respective debentures (each being an event that crystallized the floating charge pursuant to the terms of the WLL Debenture and Kowloon Bank Debenture respectively). On 8 July 2015, an unsecured creditor presented a winding-up petition against the Company.

The liquidator, Amy Chow, has learned the following information:

- (i) The Company’s main assets are its book debts and machinery. The book debts now stand at HK\$8,000,000, and the market value of the machinery is HK\$1,500,000
- (ii) The Company owes 100 of its employees a total of HK\$6,000,000 for wages in arrears. It was also revealed that the Company has failed to pay profits tax (HK\$4,000,000) in the immediate previous year.
- (iii) The Company has 12 unsecured trade creditors, who are owed HK\$3,000,000 in total.

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

- (iv) On 13 July 2013, Beta Petro Plus Limited (a wholly-owned subsidiary of the Company) (“**BPP**”) provided a term loan of HK\$1,000,000 repayable in full on 12 July 2016 (“**BPP Loan**”). The Company made an early repayment of the BPP Loan (with interest) in full to the BPP on 12 January 2015.
- (v) Evidence shows that the Company was insolvent during December 2014.
- (vi) The Company made no early payment to WLL or Kowloon Bank in connection with the two term loan facilities.
- (vii) A business partner of the Company, Alpha Petro Limited (“**APL**”), initiated proceedings against the Company for breach of contract resulting in the loss of profits (amounting to HK\$3,000,000). The Court of First Instance gave judgment in favour of APL to the full extent of the claim. Due to an oversight, no enforcement actions were taken by APL until 20 July 2015.

Question:

You act for the Company’s liquidator, Amy Chow, 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)

Answer the following questions:

Part A

- (a) Chapter 14A of the Listing Rules sets out what are generally known as the connected transaction rules. **What is the purpose of such rules and how do they provide protection?**

(4 marks)

Part B

Consider the following scenarios:

- (b) Scenario 1

Betty is a director of Connaught Holdings Limited, shares in which are listed on the Hong Kong Stock Exchange. Connaught Holdings Limited has an 85% interest in a subsidiary called Des Voeux Limited and, in turn, Des Voeux Limited has a 75% interest in a subsidiary called Elgin Limited. Glenealy Limited is a wholly-owned subsidiary of Connaught Holdings Limited. Betty owns 15% of the issued share capital of Des Voeux Limited.

- (i) **Is Betty a connected person of Connaught Holdings Limited?**
Explain your answer.

(1 mark)

- (ii) **Is Des Voeux Limited a connected person of Connaught Holdings Limited? Explain your answer.**

(2 marks)

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

(iii) Is Elgin Limited a connected person of Connaught Holdings Limited? Explain your answer.

(2 marks)

(iv) Is Glenealy Limited a connected person of Connaught Holdings Limited? Explain your answer.

(2 marks)

(v) Would your answer to (i) be different if Betty tells you she has today resigned as a director of Connaught Holdings Limited?

(2 marks)

(c) Scenario 2

Alan controls 22% of the voting shares of Bonham Strand Holdings Limited, which shares are listed on the Hong Kong Stock Exchange. Alan has a brother, Chris, who controls more than 50% of the voting shares of Duddell Limited. **Are Alan, Chris and Duddell Limited connected persons of Bonham Strand Holdings Limited? Give reasons.**

(6 marks)

(d) Scenario 3

Deborah is a highly-rated executive. The directors of Connaught Holdings Limited are keen on recruiting Deborah to become chief executive officer of Connaught Holdings Limited. To secure her position, Deborah asks for protection to be included in her service contract (including a long duration, an extended notice period and indemnities against liabilities). **Under what circumstances, would such service contract constitute a connected transaction for Connaught Holdings Limited and Deborah? Explain your answer.**

(6 marks)

[25 marks in total]

Question 3 (25 marks)

Answer the following questions:

Part A

Roger, an independent non-executive director of XYZ Ltd., a company whose shares are listed on the Hong Kong Stock Exchange, bought shares in XYZ Ltd. after being told by Stephen, the Chief Executive Officer and an executive director of XYZ Ltd. that at an urgent board meeting of XYZ Ltd. later that day there would be a discussion about an intended acquisition of a piece of prime real estate by XYZ Ltd. The share price of XYZ Ltd. rose by about 25% a day later when the acquisition was announced. Roger has come to you for advice. He claims he bought the shares inadvertently, he was drunk at the time and he has since sold the shares and donated the proceeds to charity.

- (a) What are Roger and Stephen's liabilities under Part XIII of the Securities & Futures Ordinance? (13 marks)**

Part B

Alan and Tim have recently set up a new company (the “**Company**”) which is incorporated in Hong Kong and intends to carry out the business of advising clients on whether and which securities should be invested and disposed of as well as providing securities trading services. Alan and Tim are the directors and shareholders of the Company.

Alan and Tim have come to you for advice on the legislation applicable to the Company’s business.

- (b) Prepare a memorandum of advice for Alan and Tim to advise on the regulatory procedures involved. (12 marks)**

[25 marks in total]

Question 4 (25 marks)

Answer the following questions:

Delicious Limited (“**Delicious**”) is a company incorporated in Hong Kong with limited liability and through its subsidiary, Restaurant Limited (“**Restaurant**”), an entity also incorporated in Hong Kong, is engaged in operating a restaurant in a hotel in Tsim Sha Tsui, Hong Kong. Delicious itself employs some management and accounting personnel. An investor intends to invest in the business by purchasing shares in Delicious and the parties are in discussions on the terms of the investment. The investor is considering the forms of arrangement to secure its investment therein.

Questions:

- (a) **State 3 areas, and the corresponding method of confirming the relevant information concerning items that you would advise to be covered in a due diligence exercise concerning the existence and good standing of Delicious and Restaurant.**

(3 marks)

- (b) **State 5 of (i) the representations and warranties and (ii) the undertakings that are expected to be contained in an agreement for the sale and purchase of the shares.**

(8 marks)

- (c) **Make suggestions as to how the investor can put itself in a favourable position to secure its investment, prior to a final sale and purchase agreement being signed.**

(5 marks)

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

(d) Identify the commercial conditions precedent to completion that may be required in the sale and purchase agreement.

(2 marks)

(e) Identify the documents required at completion of the sale and purchase.

(7 marks)

[25 marks in total]

Question 5 (25 marks)

For the purpose of this Question, you:

- (1) are not required to discuss any repealed provisions under the Companies Ordinance (Cap 32);
- (2) should assume that the Company (as defined below) 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;
- (3) should fully explain your answers with reasons for each part (including where applicable the relevant legislative provisions and necessary steps involved).

Facts

Panda Investments Ltd. (the “**Company**”) is a private company incorporated in Hong Kong by two Mainland based businessmen, Mr. Xi Ping and Mr. Li Qiang in December 2012. Each of them holds 50% of the shares of the Company. They are also the only directors of the Company. Both of them are directly involved in the management of the Company and are familiar with its financial position. However, they do not speak or write English and have little knowledge about the laws in Hong Kong. Mr. Xi handled all compliance matters of the Company until last month when the Company appointed a firm of certified public accountants to be its company secretary. It turns out that the Company has not prepared any audited accounts or convened any annual general meetings (“**AGM**”) since its incorporation in 2012.

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

Answer the following questions:

Questions:

(a) Mr. Xi is unclear about the meeting obligations of the Company under Hong Kong law. **Advise him whether the Company is under any obligations to hold its AGM on a regular basis.**

(10 marks)

(b) Mr. Xi has heard that companies often hold other general meetings of shareholders. He would like to know the nature of these other general meetings and whether the Company is under any obligations to hold other general meetings on a regular basis. **Advise.**

(6 marks)

(c) **Advise Mr. Xi whether the Company is under any obligations to prepare its audited accounts on a regular basis.**

(5 marks)

(d) The current company secretary of the Company suggests that it is possible to seek an order from the court to rectify the Company's failure to prepare the audited accounts and to convene AGMs since its incorporation in 2012. **Advise Mr. Xi how this can possibly be done.**

(4 marks)

[25 marks in total]

END OF TEST PAPER