

**2016 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL  
AND COMPANY LAW**

**Monday, 14 November 2016**



# HEAD III: COMMERCIAL AND COMPANY LAW

## TEST PAPER

14 November 2016

### 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.

## 2016 Overseas Lawyers Qualification Examination

### Head III: Commercial and Company Law

#### Question 1 (25 marks)

Amber Auto Holdings Limited ("**Amber Auto**"), Blue Marble (International) Company Limited ("**Blue Marble**") and Yellow Stone Holdings Limited ("**Yellow Stone**") are companies incorporated in the Cayman Islands with limited liability and their issued shares are all listed on the Main Board of The Stock Exchange of Hong Kong Limited.

#### Part A

Black Gearbox Limited, a subsidiary of Amber Auto, is about to enter into a conditional land disposal agreement with Golden Bow Company Limited ("**Golden Bow**") pursuant to which Amber Auto and its subsidiaries agree to sell and Golden Bow agrees to purchase the land use rights of certain parcels of industrial land in the PRC (the "**Land**") for a cash consideration of approximately HK\$90 million. The consideration has been arrived at after arm's length negotiations.

Mr. Huang Ming ("**Mr. Huang**") is an executive director of Amber Auto and he holds 50.32% interest in the issued share capital of Amber Auto. Meanwhile, Golden Bow is beneficially owned as to 50.62% by Mr. Huang and his associates.

You have been told that the applicable percentage ratios (other than the profits ratio) for the land disposal agreement are less than 5% under the Rules Governing the Listing of Securities on the Stock Exchange (the "**Listing Rules**").

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

**Question:**

- (a) **What kind of disclosure obligations shall arise for Amber Auto under the Listing Rules in respect of the transaction contemplated above and what steps or action must Amber Auto take in order to fulfill such obligations?**

**(5 marks)**

**Part B**

Blue Marble is seeking to enter into a facility agreement (the "**Facility Agreement**") with a lender (the "**Lender**") to obtain from the Lender a US\$ term loan facility.

White Jade Limited ("**White Jade**") holds approximately 84% of the total issued share capital of Blue Marble. Pearl Lam, the founder of Blue Marble, holds and beneficially owns 100% of the equity interests in White Jade.

The Lender has now asked White Jade to execute a share charge in favour of the Lender to secure the performance of, among other things, the obligations of Blue Marble under the Facility Agreement, pursuant to which White Jade shall deposit a certain number of shares in Blue Marble held by it into a custodian securities account and charge as beneficial owner by way of first fixed charge in favour of the Lender all White Jade's right, interest and title from time to time in and to such shares. The Facility Agreement provides that an event of default shall occur if:

- White Jade shall cease to hold and beneficially own at least 55% of the issued share capital of Blue Marble;

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

- Any person or persons acting in concert (other than White Jade) shall hold or beneficially own or acquire shares in Blue Marble which is more than the aggregate percentage of shares in Blue Marble that are beneficially owned by White Jade;
- Pearl Lam shall cease to hold and beneficially own 100% of the equity interests in White Jade; or
- Pearl Lam shall cease to be an executive director of Blue Marble.

**Question:**

- (b) **What kind of disclosure obligations shall arise for Blue Marble under the Listing Rules in respect of the transactions contemplated above and what steps or action must Blue Marble take in order to fulfill such obligations?**

**(5 marks)**

**Part C**

Since 2013, Red Brick Bank (the "**Bank**") has made available to Yellow Stone certain banking facilities. Pursuant to the terms of the relevant banking facilities, Yellow Stone is required, among other things, to pay a certain sum to the Bank as compensation in the case of depreciation of Renminbi upon request. Due to the recent depreciation of Renminbi, the Bank demanded Yellow Stone to pay such compensation but Yellow Stone has failed to do so within the prescribed time limit, constituting an event of default under the relevant banking facilities. The Bank has just declared the entire outstanding loan together with interest accrued immediately due and payable and issued a statutory letter demanding the repayment of the amounts outstanding within the next 21 days, failing which, the Bank shall proceed to wind up Yellow Stone.

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

**Question:**

- (c) **In the circumstances, what kind of disclosure obligations have arisen for Yellow Stone under the Listing Rules and what steps or action must Yellow Stone take in order to fulfill such obligations?**

**(5 marks)**

**Part D**

Ruby Cheng is an independent non-executive director of Blue Marble.

**Question:**

- (d) **What kind of disclosure obligations under the Listing Rules as well as the Securities and Futures Ordinance would Ruby need to be mindful of if she is considering buying and/or selling securities in Blue Marble?**

**(10 marks)**

**[25 marks in total]**

## Question 2 (25 marks)

Blackstorm Properties Limited ("**Company**") is a private company incorporated in Hong Kong in 2014 with an issued share capital comprising 100 shares. It has two shareholders, namely Red Star Limited ("**Red Star**") and Blue Sea Limited ("**Blue Sea**"). Red Star is holding 51 shares and Blue Star is holding the remaining 49 shares.

The Company is set up as a joint venture to develop certain properties in Guangzhou, China. There is no written shareholders' agreement between Red Star and Blue Sea but it is agreed that each shareholder has the right to appoint one director.

The relevant parts of the articles of association of the Company are set out below:

- Art 2            The directors may in their discretion refuse to register the transfer of a share.
- Art 11           The quorum for directors' meetings..... is two.
- Art 12           ... Questions arising at any directors' meeting shall be decided by a majority of votes. The chairman shall not have a second or casting vote.
- Art 32           The directors may, if they think fit, call a general meeting of the Company.
- Art 34           Two members present in person or by proxy constitute a quorum at a general meeting. No business is to be transacted at a general meeting if the persons attending it do not constitute a quorum.

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

Art 36 If a quorum is not present within half an hour from the time appointed for holding a general meeting, the meeting must:

- (a) if called on the request of members, be dissolved; or
- (b) if called by the directors, be adjourned to the same day in the next week, at the same time and place. If at the adjourned meeting, a quorum is not present within half an hour from the time appointed for holding the meeting, the member or members present in person or by proxy constitute a quorum.

Art 38 A resolution put to the vote of a general meeting must be decided on a show of hands unless a poll is duly demanded in accordance with these articles.

Since mid 2015, the relationship between Red Star and Blue Sea has turned sour due to disagreement on the business strategies of the Company. At a recent board meeting, Mr. Red (the director appointed by Red Star) proposed to convene a general meeting (which is not an annual general meeting) to increase the share capital of the Company. However, this is rejected by Mr. Blue (the director appointed by Blue Sea). As a result, the board is unable to convene the general meeting due to the deadlock at the board meeting.

**Answer the following questions:**

- (a) **If the board is unable to convene the general meeting, can Red Star proceed to convene the general meeting in its capacity as a shareholder of the Company?**

**(6 marks)**

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



- (b) **Blue Sea does not want to attend the general meeting proposed by Red Star. Is it possible for Blue Sea to "prevent" the general meeting from taking place in accordance with the articles of association of the Company?**

**(6 marks)**

- (c) **In order to counter the uncooperative position of Blue Sea, Red Star transferred one share in the Company to its wholly-owned subsidiary, Red Sun Limited ("Red Sun"), on 2 July 2016. The transfer documents were properly executed and stamped and were lodged to the Company for registration on 5 July 2016. In a board meeting held on 8 July 2016 attended by both Mr. Red and Mr. Blue, the board was unable to pass a resolution to register the transfer due to another deadlock. Mr. Red proposed that the Company should register the transfer but Mr. Blue disagreed.**

**As of today (14 November 2016), the transfer is not registered by the Company, nor has the transferor (Red Star) or the transferee (Red Sun) received any notification (in respect of the registration of the transfer) from the Company.**

**Mr. Blue believes that the board has effectively refused to register the transfer at the board meeting of 8 July 2016. Is this the case?**

**(5 marks)**

- (d) **In light of your answer to (c) above, can Red Star and Red Sun compel the Company to register the transfer?**

**(8 marks)**

**[25 marks in total]**

### **Question 3 (25 marks)**

Futuristic App Computing Limited ("**Company**"), a Hong Kong private company, develops 3D rendering smart phone applications for sale in the global app market. The Company has three shareholders, Johnny Hung (holding 30% of the shares), Eric Lai (holding 30% of the shares) and Enoch Wang (holding 40% of the shares). Johnny, Eric and Enoch are all directors of the Company. The Company commenced business on 8 May 2014. As the share capital was limited, the Company's operations depended on debt financing. Enoch advanced a personal loan of HK\$2,000,000 to the Company on 13 May 2014.

The Company suffered losses when the 3D rendering app market became saturated after hundreds of competitors entered the market. On 9 April 2015, Enoch advanced a further personal loan (HK\$1,000,000) to the Company. Enoch hoped that by providing additional funds, the Company could develop a new app using the latest 4D rendering technology and move its business to a relatively niche market ("**New App**"). The New App was a disaster due to poor marketing strategy and as a result the Company made further losses. The Company was late in paying the rent for its R&D laboratory at Science Park in October and November 2015. On 3 December 2015, the Company reached out to Venture Bank and borrowed HK\$1,000,000 (a two-year term loan facility) secured by a fixed charge over the 4D rendering computer system (which the Company has developed) and all of the Company's R&D machinery ("**First Venture Bank Fixed Charge**"). On 19 January 2016, the Company entered into a three-year term loan facility (HK\$1,000,000) with Richie Bank secured by a floating charge over all assets, book debts and undertakings of the Company ("**Richie Bank Debenture**"). The Richie Bank Debenture was duly registered under the Companies Ordinance.

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

On 25 January 2016, a further two-year term loan (HK\$1,000,000) was provided by Venture 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 Venture 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 Venture Bank. However, the Company is at liberty to withdraw and use the proceeds of the collected book debts without Venture Bank's consent.

In February 2016, a price war broke out in the 3D rendering app market. This caused the Company to suffer further financially. On 27 February 2016, Richie Bank appointed a receiver in accordance with its debenture (an event that crystallized the floating charge pursuant to the terms of the Richie Bank Debenture).

On 9 June 2016, a trade creditor filed for the compulsory winding-up of the Company.

The liquidator, Mike Leung, has learned the following information:

- (i) The Company has the following assets: account receivables (worth HK\$1,000,000), R&D machinery (worth HK\$1,000,000), the 4D rendering computer system which the Company developed (worth HK\$1,500,000), and cash at bank (worth HK\$200,000).
- (ii) The Company owes 5 of its employees a total of HK\$800,000 for wages in arrears.
- (iii) The Company has 5 unsecured trade creditors, who are owed HK\$1,200,000 in total.

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

- (iv) On 17 May 2014, Futuristic Rendering Limited (a wholly-owned subsidiary of the Company) ("**FRL**") provided a term loan of HK\$500,000 to the Company repayable in full on 17 May 2017 ("**FRL Loan**"). The Company made an early repayment of the FRL Loan (with interest) in full to FRL on 1 May 2015.
- (v) On 30 January 2016, the Company transferred HK\$3,000,000 to Enoch Wang's personal bank account.
- (vi) A competitor of the Company, Ultimate App Limited ("**UAL**"), initiated proceedings against the Company for breach of contract, claiming HK\$3,000,000 in damages. The Court of First Instance gave judgment in favour of UAL to the full extent of the claim. Due to an oversight, no enforcement actions were taken by UAL until 18 June 2016.
- (vii) It was revealed that due to internal miscommunication, the First Venture Bank Fixed Charge was not duly registered under the Companies Ordinance.
- (viii) Evidence shows that the Company was insolvent during January 2016.

The Company made no early payment to Richie Bank and Venture Bank 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**

**Prepare a letter of advice to the Company's liquidator, Mike Leung, addressing the rights and priorities of all the creditors of the Company.**

**(25 marks)**

**[25 marks in total]**

#### **Question 4 (25 marks)**

Weather Limited ("**Weather**") is a company incorporated in Hong Kong with limited liability and is engaged in the business of selling paper tissue products. The products Weather sells are manufactured by Factory Limited ("**Factory**"), a company incorporated in the PRC with limited liability. The shares in Factory are wholly owned by Astrology Limited ("**Astrology**"), another company incorporated in Hong Kong with limited liability. Aside from holding Factory, Astrology has no other business. Both Weather and Astrology are jointly owned by Andy personally and by Betty LLC, who each holds 50% of the shares in each of the respective companies. Betty LLC is a company incorporated in the USA with limited liability and its shares are wholly owned by Betty.

Weather does not purchase paper tissue products directly from Factory (and other napkin manufacturers), but through Opportunity Trading Limited ("**Opportunity**"), a company incorporated in the PRC with limited liability and wholly owned by Chase, Andy's brother.

A purchaser intends to acquire Andy's and Betty's entire paper tissue products manufacturing and selling business.

**Answer the following questions:**

- (a) **List 3 areas of, and the corresponding method of confirming, information that you would advise to be covered in a due diligence exercise concerning the existence and good standing of the target entities to be conducted by the purchaser.**

**(3 marks)**

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

**(b) List 5 of each of the (i) representations and warranties and (ii) undertakings from the vendor that are expected to be contained in a sale and purchase of shares agreement.**

**(10 marks)**

**(c) Make suggestions as to how the purchaser can ensure that it can acquire the entire business from Andy and Betty.**

**(2 marks)**

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

**(3 marks)**

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

**(7 marks)**

**[25 marks in total]**

## **Question 5 (25 marks)**

### **Part A**

Ian, a senior manager of ABC Limited ("ABC"), a company whose shares are listed on the Hong Kong Stock Exchange, knew certain information about a potential acquisition project contemplated by ABC. If the acquisition project materializes, it is expected that the share price of ABC will rise. Ian passed on such information to his wife, Mimi, who then bought shares in ABC. The share price of ABC rose by about 15% a day later when the acquisition project was announced. Mimi sold the shares in ABC and made a significant profit.

### **Question:**

- (a) **What are Ian's and Mimi's liabilities under Part XIII of the Securities and Futures Ordinance?**

**(13 marks)**

### **Part B**

Billy and Ceci have recently set up a new company (the "**Company**") which is incorporated in Hong Kong and intends to carry on the business of advising clients on asset management and providing securities trading services. Billy and Ceci will be involved in the day to day management of the Company. They are also the directors and shareholders of the Company. The Company intends to serve clients in and outside Hong Kong as Billy and Ceci are optimistic about the economic development of Asia Pacific region.

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

Billy and Ceci engage you to advise them on the legislation procedure and licensing requirements.

**Question:**

- (b) Prepare a memorandum of advice for Billy and Ceci on the regulatory procedures involved.

(12 marks)

[25 marks in total]

**END OF TEST PAPER**