

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2021 SUPPLEMENTARY INFORMATION PACKAGE

HEAD III: Commercial and Company Law

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- 2. Examiners' Comments on the 2018, 2019 and 2020 Examinations**
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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 2018, 2019 and 2020 Examinations

Examiners' Comments on the 2018 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 concerned the listed companies in Hong Kong, focusing on the application of the relevant principles 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 person”, “connected transaction”, “pro-rata” issue of securities and “continuing connected transaction”.

Question 2

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 fixed and floating charges covered in the question. The rights of the preferential creditors were also canvassed. However, weaker candidates were unable to address the relevant issues of control concerning charges over book debts.

Question 3

The question called for an analysis of the statutory and common law rights of the shareholders and directors to inspect corporate documentation, including the accounts, audited financial statements and minute books of general meetings. This question was answered reasonably well. Weaker candidates failed to discuss the mechanism and legal principles governing the court's judicial power to order an inspection of the corporate documents.

Question 4

This question concerned insider dealing as a criminal offence and a civil market misconduct under the Securities and Futures Ordinance. In addition, candidates were also required to show an understanding of how various types of activities are regulated under the Securities and Futures Ordinance, including the business of asset management. This question was answered reasonably well. Weaker candidates were unable to cope adequately with concepts such as "relevant information", "dealing" in shares and "substantial shareholder".

Question 5

This question invited analysis of various doctrines under the Companies Ordinance such as financial assistance and declaration of dividend out of profits available for distribution. Candidates were also required to analyse issues related to share acquisition, including the need to fulfil the relevant conditions precedent prior to completion, and the need to produce the relevant documents in order to complete the sale and purchase of shares. This question was answered reasonably well. In discussing financial assistance, weaker candidates were unable to identify issues such as the limit capped by relevant proportion of the shareholders' funds, and the need to satisfy the solvency test.

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Examiners' Comments on the 2019 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. The majority of candidates were able to apply the relevant principles concerning the validity and priority of various fixed and floating charges covered in the question. The rights of the preferential creditors were also canvassed. However, weaker candidates were unable to address the relevant issues of control concerning charges over book debts and the concept of “new moneys” and “old moneys” in the context of a floating charge.

Question 2

This question concerned the operation of listed companies in Hong Kong, focusing on the application of the relevant principles in the Listing Rules and practical issues related to an acquisition between related parties. Most candidates were able to identify the relevant regulations from the Listing Rules and discussed the principles in the context of the facts. Weaker candidates were unable to cope adequately with concepts such as “connected person”, “connected transaction”, and failed to identify the relevant condition precedents required in a sale and purchase agreement.

Question 3

The question invited the candidates to explain the mechanism of transfer of shares in a private company and the statutory procedures concerning removal of directors. This question was answered reasonably well. Weaker candidates failed to identify and discuss the operation and effect of s 462 of the Companies Ordinance, procedures for convening a general meeting and a director's right to be heard.

Question 4

This question concerned insider dealing as a criminal offence and a civil market misconduct under the Securities and Futures Ordinance. In addition, candidates were also required to show an understanding of how various types of activities are regulated under the Securities and Futures Ordinance, including the business of asset management. This question was well answered by most candidates. A few weaker candidates were unable to cope adequately with concepts such as "relevant information", "dealing" in shares and "substantial shareholder".

Question 5

This question invited analysis of various doctrines under the Contracts (Rights of Third Parties) Ordinance and Companies Ordinance (on register of significant controllers and financial assistance). Candidates were also required to explain how the common law doctrine of privity of contract is affected by legislation, identify the "registrable person" and "registrable legal entity", and discuss "declaration of dividend out of profits available for distribution" as an alternative to financial assistance. Weaker candidates were unable to identify the relevant issues and follow the required procedures.

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Examiners' Comments on the 2020 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

The question called for an analysis of the legal principles and procedure regarding the convening of board meetings and general meetings, and the passing of resolutions. This question was answered very well. Weaker candidates failed to discuss the issues in the context of the Model Articles and the Companies Ordinance. Also, not all the candidates identified the procedural irregularity from facts and discussed adequately how to deal with the irregularity.

Question 2

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 fixed and floating charges covered in the question. The rights of the preferential creditors were also canvassed. However, weaker candidates were unable to address the relevant issues of control concerning a fixed charge over book debts.

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 “disclosable transaction”, “connected transaction” and “insignificant subsidiary”. Some candidates merely cited the relevant percentage ratios defined under the Listing Rules without any attempt to apply the ratios to the facts.

Question 4

This question concerned insider dealing as a criminal offence and a civil market misconduct under the Securities and Futures Ordinance. In addition, candidates were also required to show an understanding of how various types of activities are regulated under the Securities and Futures Ordinance, including securities trading and asset management. This question was answered reasonably well. Weaker candidates were unable to cope adequately with concepts such as “counseling” or “procuring” another party to deal in listed securities or their derivatives. Some candidates also failed to explain clearly the meaning of “substantial shareholder” and how the exercise of voting power at the general meetings may be controlled directly or indirectly with the “associates”.

Question 5

Generally candidates were able to cover issues related to share acquisition and business transfer, including pre-emptive rights, deed of adherence, conditions precedent and undertakings. Regarding 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.

3. Past Examination Papers from 2018 to 2020

**2018 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Friday, 16 November 2018



2018 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Great Expectations Property Development Limited ("GEPCo") is a company whose shares are listed on the Hong Kong Stock Exchange. Together with its subsidiaries, it is principally engaged in property development, investment and convenience store operations. Kent Enterprises Limited ("Kentco") is a wholly owned subsidiary of GEPCo.

The board of directors of GEPCo (the "Board") is contemplating entering into the transactions set out below and has consulted you on whether those transactions constitute connected transactions as defined under Chapter 14A of the Listing Rules. Mr. Magwitch is one of the directors on the Board.

Questions:

- (a) **Advise on the purpose of the so-called connected transaction rules.**
(2 marks)
- (b) **In respect of each of the transactions below being contemplated, advise (and give reasons) whether it is a connected transaction or not:**
- (i) **A rights issue to its shareholders and Ms. Havisham, a substantial shareholder of GEPCo, intends to subscribe for the rights issue;**
(2 marks)

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

(ii) A share option scheme for the benefit of its staff (including Mr. Magwitch);

(2 marks)

(iii) Appointment of a new executive director, Mr. Jaggars, and entering into a directors' service contract with him;

(2 marks)

(iv) Purchases from convenience stores owned by GEPCo by Mr. Magwitch who tells you he regularly buys groceries there;

(2 marks)

(v) A transfer of a parcel of land to Kentco;

(2 marks)

(vi) Leasing of premises from Ms. Havisham to be used as one of GEPCo's new convenience stores.

(2 marks)

(c) If GEPCo were to proceed with leasing premises from Ms. Havisham to be used as one of GEPCo's new convenience stores, advise what procedural requirements under the Listing Rules GEPCo needs to follow.

(11 marks)

[25 marks in total]

Question 2 (25 marks)

Microchip Manufacturing Expert Limited ("Company"), a Hong Kong private company, manufactures microchips for sale in the Asia-Pacific Region.

On 4 May 2017, the Company entered into a four-year term loan facility (HK\$6,000,000) with Goodwill Bank secured by a floating charge over all assets, book debts and undertakings of the Company ("Goodwill Bank Debenture"). The Goodwill Bank Debenture was duly registered under the Companies Ordinance, Cap. 622. The Company also borrowed HK\$5,000,000 from one of its shareholders, Mr. George Wong ("George"). George is also a director of the Company.

Due to the Sino-US trade war, the Company's sales have dropped significantly since June 2018. The Company needed more cash to deal with its financial situation. On 21 June 2018, Rigid Bank provided a HK\$5,000,000 2-year term loan facility to the Company secured by a charge over the Company's book debts ("Rigid Bank Debenture"), which was duly registered under the Companies Ordinance, Cap. 622. According to the terms of the Rigid Bank Debenture, any assignment or disposal of the book debts requires Rigid Bank's consent, and the proceeds of the collected book debts must be paid into a designated account maintained with Rigid Bank. On 30 June 2018, the Company borrowed HK\$3,000,000 (a five-year term loan facility) from Wealthy Bank secured by a fixed charge over all machinery owned by the Company ("Wealthy Bank Fixed Charge"). Due to an administrative oversight, the Wealthy Bank Fixed Charge was not registered under the Companies Ordinance, Cap. 622. Nothing was done to rectify the error.

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

On 12 July 2018, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of George to secure all personal loans provided by George to the Company.

On 28 July 2018, in need of some quick cash, the Company sold its office building in Central ("Central Office") to Mrs. Anita Wong, the wife of George. The consideration was HK\$5,000,000, which was HK\$2,000,000 lower than the market value of the Central Office (as valued by an independent valuation in June 2018). George explained that this is a "good bargain" for the Company, as the Company needed the cash quickly and the market was "sluggish" at the time.

The finances of the Company deteriorated further in August 2018. On 6 August 2018, Goodwill 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 Goodwill Bank Debenture. On 13 August 2018, an unsecured creditor presented a winding-up petition against the Company.

The liquidator, Randy Yip, has learned the following information:

- (i) The Company's main assets are its book debts (HK\$5,000,000), inventory (HK\$500,000) and machinery (HK\$4,000,000).
- (ii) The Company owes 30 of its employees a total of HK\$500,000 wages in arrears. It was also revealed that the Company has failed to pay profits tax (HK\$150,000) in the immediate previous year.

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

- (iii) A trading partner of the Company, Neutron Max Limited ("NML"), 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 NML to the full extent of the claim. NML commenced enforcement actions on 16 August 2018.
- (iv) The Company has 6 unsecured trade creditors, who are owed HK\$3,000,000 in total.
- (v) On 2 August 2018, the Company used the proceeds of sale of the Central Office to fully discharge the shareholder's loan (with interest) owed to George.
- (vi) Evidence shows that the Company has been insolvent since July 2018.

The Company made no early repayment to Goodwill Bank, Rigid Bank and Wealthy 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:

You act for the Company's liquidator, Randy Yip, 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 3 (25 marks)

Super Energy Company Ltd. (the "Company") is a private company incorporated in Hong Kong in 2006 by Mr. and Mrs. Chow. Initially the couple were the only shareholders and directors of the Company which is engaged in the business of providing shipping and associated services between Hong Kong and Mainland China. The initial share capital of the Company was HK\$2,000,000. The total number of issued shares was 20,000 (Mr. and Mrs. Chow subscribed 10,000 shares each at \$100 per share). All issued shares were fully paid up.

In 2013, the Company underwent some structural changes. Mr. and Mrs. Chow invited their twin sons, Jimmy and Peter (who returned to Hong Kong after completing their MBAs in the United States), to join the Company. The parents transferred some shares to their sons as a gift and invited the twins to join the board as directors. By the end of 2013, there were 4 shareholders and 4 directors in the Company:

Mr. Chow 6,000 shares (30%), a director

Mrs. Chow 6,000 shares (30%), a director

Jimmy 4,000 shares (20%), a director

Peter 4,000 shares (20%), a director

To the disappointment of his parents, Jimmy was not interested in the business and management of the Company. He never attended any shareholders' meetings or board meetings although he received dividend (on his 20% shareholding) and director's fee each year since he had joined the Company.

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

The following are the relevant provisions of the articles of association of the Company (which does not adopt the Model Articles) in respect of appointment of directors:

Article 16: a person who is willing to act as a director.... may be appointed to be a director by ordinary resolution in an annual general meeting ("AGM").

Article 17: all directors must retire from office at the next AGM and shall be eligible for reappointment to the office in accordance with Article 16.

Throughout the years, AGMs of the Company were held on 31 December each year, at which all directors retired and were reappointed for the ensuing year. Following the usual practice, an AGM was convened on 31 December 2017 at which all directors (including Jimmy) retired. The shareholders present at this meeting (namely the parents and Peter) duly passed an ordinary resolution to reappoint themselves as directors of the Company. However, Jimmy was not reappointed. As a result, Jimmy is no longer entitled to receive a director's fee although he has been assured that he would continue to receive a dividend (on his 20% shareholding).

Jimmy is upset about the outcome of the 2017 AGM and suspects that he has been unfairly treated by other members/directors of the Company. He is eager to find out what has happened to the Company. Jimmy believes that as a director of the Company, he would have been entitled to inspect corporate documents of the Company and investigate the affairs of the Company.

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

Question:

- (a) Advise Jimmy whether a director has the right to inspect corporate documents. If so, can such right be restricted?**

(12 marks)

In September 2018, to save the family from financial disputes, the parents conceded to offer (they have no legal obligation to do so) Jimmy a lump sum of HK\$6,000,000 (being 20% of the Company's net assets according to the audited accounts for the year ended 31 December 2017) to buy out Jimmy's shares in the Company. Jimmy rejected this offer. He believes that the fair market value of his shares should be at least HK\$12,000,000 although he has no evidence to support this valuation.

In order to prove the true value of his 20% shareholding in the Company, Jimmy plans to engage a firm of chartered accountants to conduct an independent review on the financial position of the Company. To have a full picture of the affairs of the Company, the accountants required to see all the relevant documents of the Company. These include books of account, audited accounts, bank statements, minutes of all general meetings and board meetings, all written contracts and all annual tax returns (the "Relevant Documents").

Jimmy approached the Company last week with a formal request to inspect and make copies of the Relevant Documents. Jimmy's request was declined on the ground that he was no longer a director and thus not entitled to inspect any documents of the Company. Jimmy believes that he has the legitimate right to inspect the Relevant Documents. He is now considering taking legal action against the Company.

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

Question:

- (b) Does Jimmy have any legal right to inspect and request copies of any of the Relevant Documents under the Companies Ordinance, Cap. 622 in his capacity as a shareholder of the Company?

(13 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

Michael is the husband of Carrie. Michael is a senior finance manager of ABC Ltd. ABC Ltd. intends to acquire a controlling stake of XYZ Limited, a famous wine distributor in Asia. Michael will be involved in this acquisition. He informed his wife, Carrie of this. Carrie subsequently informed this confidential information to her sister, Minnie. Minnie and Carrie then each acquired shares of ABC Ltd. The share price of ABC Ltd. rose by about 15% on the day that the transaction was announced. At the instruction of Carrie, Minnie sold the shares of ABC Ltd. and obtained some profit.

Question:

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

(13 marks)

Part B

Billy and William are university classmates and worked in different fund houses. Recently, they quit their own jobs and planned to set up a new company (the "Company") in Hong Kong to carry out the business of asset management. Billy and William will be the directors and shareholders of the Company. They will be involved in the day-to-day management of the Company. The Company intends to serve professional clients in and outside Hong Kong.

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

Billy and William come to meet you and want you to advise them on the legislation, procedure and licensing requirements.

Question:

- (b) Prepare a memorandum of advice for Billy and William to advise on the regulatory procedures involved.**

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

NL Retail BV ("Seller") is a company incorporated in The Netherlands. It has one wholly-owned subsidiary called CSH Retail and Distribution Limited ("CSH") which is a company incorporated in Hong Kong. In turn, CSH owns 100% of the shares in a People's Republic of China ("PRC") incorporated Wholly Foreign Owned Enterprise ("WFOE"). The WFOE is engaged in the business of retail and wholesale distribution of "Cape Street" branded apparel and accessories. The WFOE has five stores in shopping malls in selected cities in the PRC and one flagship store in Shanghai. All of these stores are leased, and each lease contains a change of control clause to the effect that the landlord may terminate the relevant lease if the direct or indirect ownership of the WFOE changes without the consent of the landlord. In total, the WFOE employs around 35 staff based in the PRC. The WFOE distributes the "Cape Street" branded apparel and accessories pursuant to a retail distribution agreement ("Distribution Agreement") entered into between the Seller and Cape Street (UK) Limited, which is a company incorporated in England and Wales and which owns the "Cape Street" brand. The Distribution Agreement was signed in 2015, and provides that the Seller and its subsidiaries can distribute "Cape Street" apparel and accessories in the PRC territory. The Distribution Agreement is for an initial period of 10 years, but is renewable, at the option of the Seller, for a further period of 10 years provided that certain conditions in the Distribution Agreement have been met.

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

CSH also has a head office in Hong Kong and employs 10 staff. The management team comprises three people based in Hong Kong and is critical to the ongoing operations of the business. Each member of the management team has an employment contract which states that either CSH or the relevant employee can terminate it on one month's notice. CSH owns its premises in an office development in Kwun Tong, which is free of any mortgage.

NW Holdings Limited ("Buyer") is a Hong Kong incorporated company. The Buyer is also involved in retail and wholesale distribution of apparel and accessories and has a number of other brands in its portfolio. It distributes branded apparel and accessories throughout the Asia Pacific region through various subsidiaries.

The latest audited accounts of CSH are for the financial year ended 31 December 2017 and show that CSH made a small loss in that year. However, the Buyer believes that CSH has many synergies with the Buyer's existing portfolio of brands, and that the Buyer can return CSH to profit in the short term.

The Buyer has approached you to act in connection with the acquisition of the entire issued share capital of CSH.

The Seller and the Buyer have entered into a non-binding Memorandum of Understanding ("MOU").

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

The MOU includes the following provisions:

- The Seller and the Buyer will sign a binding sale and purchase agreement following completion of the Buyer's due diligence exercise and within six weeks following the date of the MOU.
- Completion of the sale and purchase of shares ("Completion") will take place within four weeks following satisfaction of conditions precedent. If Completion has not taken place within four weeks following the signing of the sale and purchase agreement, the sale and purchase agreement will terminate.
- The consideration for the transfer of shares is HK\$230,000,000, of which HK\$180,000,000 is payable on Completion and HK\$50,000,000 is payable three months after Completion.
- If net current assets are more than HK\$10,000,000 at Completion, then the Buyer will pay an amount equal to the excess, as verified by completion accounts. However, if net current assets are less than HK\$10,000,000 at completion, then the Seller will pay an amount equal to the shortfall.
- It is anticipated that the net current assets position at completion will be approximately HK\$12,500,000. As such, it is agreed that the Seller is able to extract a pre-Completion dividend of HK\$2,500,000.

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

In accordance with the Buyer's instructions, you are preparing the sale and purchase agreement, assisting in negotiations, undertaking legal due diligence in respect of the Hong Kong company and its head office operations and liaising with PRC lawyers in connection with the due diligence in respect of the WFOE and its operations.

Questions:

(a) Explain how the maximum amount of dividend is calculated and procedure for CSH to pay the pre-Completion dividend to the Seller.

(6 marks)

(b) Based on the facts outlined above, identify the three main conditions precedent that the Buyer should insist on to ensure that it can continue to run the operations of CSH and the WFOE.

(3 marks)

(c) Identify the documents that the Seller should provide to the Buyer at Completion.

(6 marks)

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

Part B

The Buyer has an existing loan facility of HK\$20,000,000 from its bank. The facility is currently unsecured. The Buyer has spoken with its bank to borrow a further HK\$50,000,000 in order to fund the second tranche of the consideration. The bank has agreed to provide the further finance in principle, but subject to CSH guaranteeing repayment of the full amount of US\$70,000,000 plus interest, to be secured by way of a mortgage of CSH's premises in Kwun Tong.

Question:

- (d) Explain with reasoning whether or not the guarantee and security can be given. Explain the procedure that CSH and its directors must go through in order for the guarantee to be given and for the security to be approved. What are the consequences if the procedures are not followed?**

(10 marks)

[25 marks in total]

END OF TEST PAPER

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Wednesday, 20 November 2019



2019 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Future Printing Limited ("Company"), a Hong Kong company, is a leading manufacturer of printing paper in Hong Kong. Donald Wong and Mike Lo are the directors and shareholders of the Company. They provided shareholders' loans to the Company (Donald in the amount of HK\$20,000,000 and Mike in the amount of HK\$6,000,000).

On 17 April 2017, the Company borrowed HK\$7,000,000 (a seven-year term loan facility) from Mighty Bank secured by a fixed charge over all delivery vans owned by the Company ("Mighty Bank Fixed Charge"). Due to an administrative oversight, the Mighty Bank Fixed Charge was not registered under the Companies Ordinance (Cap. 622). Nothing was done to rectify the error.

The Company's financial position worsened as many offices in Hong Kong have gone paperless. The Company was in desperate need of capital to diversify its business. On 12 February 2018, Brilliant Bank provided a HK\$35,000,000 4-year term loan facility to the Company secured by a charge over the Company's accounts receivables. The debenture contains a provision that prohibits the assignment of the Company's book debts without the prior written consent of Brilliant Bank. Proceeds of the collected book debts must be paid into a separate designated bank account managed by Brilliant Bank.

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

On 7 April 2018, the Company transferred an office building in Tai Wai ("Office") to Janice Wong, the wife of Donald Wong, for HK\$9,000,000, which was HK\$21,000,000 lower than the market value of the Office (independently valued in April 2018). Donald said Janice had done a lot for the Company without remuneration and the sale of the Office was a way for the Company to show its "appreciation" for her contribution.

On 26 April 2018, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Mike Lo to secure all personal loans provided by Mike to the Company.

Shark Bank has for many years provided an overdraft facility to the Company with a pre-approved standby credit limit of up to HK\$30,000,000. Shark Bank provided a further overdraft facility to the Company (with pre-approved standby credit limit of up to HK\$20,000,000) provided that some form of security is given. On 3 March 2018, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Shark Bank ("Shark Bank Debenture") to secure the previously unsecured loan of HK\$30,000,000 and a new HK\$20,000,000 overdraft facility that was provided to the Company at the same time as the execution of the Shark Bank Debenture. The table below shows movements of funds in the Company's overdraft ("OD") facility account with Shark Bank from 3 March 2018 onwards:

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

| Date | Deposit (HK\$) | Withdrawal (HK\$) | Balance (HK\$) |
|---------------|----------------|-------------------|----------------|
| 3 March 2018 | | | 30,000,000 OD |
| 13 March 2018 | | 4,000,000 | 34,000,000 OD |
| 20 March 2018 | 10,000,000 | | 24,000,000 OD |
| 9 April 2018 | | 2,000,000 | 26,000,000 OD |
| 19 April 2018 | | 20,000,000 | 46,000,000 OD |
| 5 August 2018 | 3,000,000 | | 43,000,000 OD |

On 6 August 2018, the business of the Company suffered a devastating blow as a fire broke out in the Company's factory in Fanling, New Territories, destroying the whole production line. On 8 August 2018, Shark Bank appointed a receiver in accordance with its debenture (an event that crystallized the Shark Bank Debenture).

On 21 August 2018, a trade creditor filed with the court a petition to wind up the Company.

The liquidator, Mandy Wan, has learned the following information:

- (i) The Company has the following assets: book debts (worth HK\$8,000,000), inventory (worth HK\$20,000,000), delivery vans (worth HK\$1,000,000) and cash at bank (worth HK\$2,000,000).
- (ii) The Company owes 10 employees a total of HK\$7,000,000 for wages in arrears.

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

- (iii) The Company has 3 unsecured trade creditors, who are owed HK\$15,000,000 in total.
- (iv) Evidence shows that the Company was insolvent and unable to pay its debts during April 2018.

The Company made no early repayment to Brilliant Bank in connection with the term loan facility.

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

Question:

You act for the Company's liquidator, Mandy Wan, 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 in total]

Question 2 (25 marks)

Listco A is a company incorporated in Hong Kong with limited liability, the shares of which are listed on the Main Board of The Stock Exchange of Hong Kong Limited (the "Stock Exchange").

Listco C is an exempted company incorporated in Bermuda with limited liability, the shares of which are also listed on the Main Board of the Stock Exchange.

Listco A and Listco C are both indirectly controlled by the Chan Family Trust - a private discretionary trust set up by Dr. Eddie Chan.

Subco B, a direct wholly-owned subsidiary of Listco A, is planning to enter into a sale and purchase agreement (the "Sale and Purchase Agreement") with Subco D, a direct wholly-owned subsidiary of Listco C, to purchase the entire equity interest of Targetco for HK\$1,800,000,000 (the "Acquisition").

Targetco is a company incorporated in the British Virgin Islands and indirectly wholly-owned by Listco C. Its principal business is investment holding and it is, through its subsidiaries, the indirect beneficial owner of various adjoining ground floor shops on Queen's Road East, Hong Kong (the "Property").

You are told that one or more of the applicable percentage ratios (as defined in the Listing Rules) in respect of the Acquisition are greater than 25% but all of them are less than 100%.

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

Questions:

Advise Listco A:

- (a) **the implications that shall arise under the Listing Rules for the Acquisition and the steps Listco A must take to comply with the Listing Rules;**

(8 marks)

- (b) **what role should Ms. Daisy Chan, executive Chair of Listco A as well as the daughter of Dr. Eddie Chan and an eligible beneficiary of the Chan Family Trust, play within Listco A in connection with the Acquisition?**

(2 marks)

- (c) **given the nature of the Acquisition (and, in particular, the implications arising under the Listing Rules for the Acquisition), what conditions precedent and practical terms should appear in the Sale and Purchase Agreement for the benefit of Listco A?**

(12 marks)

- (d) **What purpose does the Listing Rules serve for transactions such as the Acquisition?**

(3 marks)

[25 marks in total]

Question 3 (25 marks)

Great Flyer Company Ltd. (the "Company") is a private company incorporated in Hong Kong in 2010 by Mr. and Mrs. Chow ("the Chows"). Initially the Chows were the only shareholders and directors of the Company which is engaged in the business of trading. The initial share capital of the Company was HK\$2,000,000. The total number of issued shares was 20,000 (the Chows subscribed 10,000 shares each at \$100 per share). All issued shares were fully paid up.

The Company performed quite well in the first few years after its incorporation. However in 2014, it experienced serious cash flow problems. In order to keep the business of the Company afloat, the Chows approached their uncle, Jimmy Chow, a wealthy businessman. Jimmy eventually invested HK\$3,000,000 in the Company by subscribing for 30,000 new shares (at the price of \$100 per share) in the Company. As a result, the issued share capital of the Company was increased to HK\$5,000,000. Jimmy became a 60% majority shareholder of the Company and the Chows together hold the remaining 40%. The Chows remain the only directors of the Company as Jimmy was not interested in running the Company. There is no shareholders' agreement between Jimmy and the Chows. During the period from 2016 to 2018, the Company was successful and Jimmy received substantial dividends.

In August 2019, Jimmy indicated his intention to transfer all his shares in the Company to his girlfriend, Jay. The Chows did not support the idea as they were worried that Jay would interfere with the management of the Company. Instead, they offered to buy out Jimmy's shares in the Company at market price but this was rejected by Jimmy.

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

Note:

In this question, you should:

- (1) 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;
- (2) fully explain your answers with reasons for each part (including where applicable the relevant legislative provisions and necessary steps involved).

Questions:

Part A

- (a) The Chows warned Jimmy that if he insisted on transferring his shares to Jay, they would do everything to prevent Jay from becoming a member of the Company. **Can the Chows do this?**

(5 marks)

Part B

In view of the uncooperative behaviour of the Chows, Jimmy is considering taking control of the Company. He plans to remove the Chows as directors of the Company.

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

- (b) Is he entitled to do so? If so, advise him on the procedures and steps that he should follow or take under the Companies Ordinance and the articles of the Company to achieve this.**

(15 marks)

Part C

- (c) Are there any possible procedures or steps that the Chows can follow or take if they wish to resist any attempt to remove them as directors by Jimmy? Will these procedures and steps be effective?**

(5 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

Marcus is the husband of Mandy. Marcus is the chief financial controller of ABC Ltd., a company listed on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited. ABC Ltd. intends to acquire a project company which in turn holds a piece of land in a residential district with good potential. Being the chief financial controller of ABC Ltd., Marcus possesses confidential and financial information in relation to this acquisition. He informed his wife, Mandy of this. Mandy subsequently gave this confidential information to her brother, Simon. Simon and Mandy together acquired shares of ABC Ltd. However, as a result of a change in circumstances, the acquisition was suspended. Prior to the suspension, Marcus informed them that the acquisition was to be suspended. Simon and Mandy sold the shares of ABC Ltd. and avoided losses arising from the drop in share price of ABC Ltd. caused by the suspension.

Question:

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

(13 marks)

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

Part B

Alfred and Minnie are secondary school classmates and worked in different asset management companies. Recently, they had the idea of setting up their own asset management company (the "Company") in Hong Kong to carry out the business of asset management and securities trading regulated activities. Alfred and Minnie will be the shareholders of the Company. However, the day-to-day management and operations of the Company will be mainly dealt with by Alfred. The Company intends to serve professional clients in and outside Hong Kong.

Alfred and Minnie are not familiar with the legislation, procedure and licensing requirements involved. They engage you to advise them in preparation of setting up an asset management company.

Question:

- (b) **Prepare a memorandum of advice for Alfred and Minnie on the regulatory procedures involved.**

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Mary and Juliet own 50% each of the entire issued shares in Pots & Pans (Holdings) Limited ("Holdings"), which is a company incorporated in the British Virgin Islands. In turn, Holdings owns 100% of the entire issued shares in Pots & Pans (Trading) Limited ("Trading"), which is a company incorporated in Hong Kong. The business of Trading is to source domestic kitchen equipment from the PRC and to supply to UK-based distributors and retailers. Trading employs 40 people in its offices in Kwun Tong, Kowloon.

Mary and Juliet have been introduced to George who owns 100% of the entire issued shares in Kitchen Mart Limited ("Kitchen Mart"), a company incorporated in Hong Kong. Kitchen Mart also sources domestic kitchen equipment from the PRC and supplies it to German-based distributors and retailers. Kitchen Mart employs 5 people in its offices in Wanchai. Kitchen Mart has successfully operated for 20 years since its incorporation.

Mary and Juliet are interested in buying Kitchen Mart (indirectly, through Trading as the buyer) as it will give them a customer base in Germany. At some point in the future, they would look to close the Wanchai office and move Kitchen Mart's staff to Trading's office in Kwun Tong. George is 58 years old and looking to retire, but he had not until now had a concrete succession plan. George has agreed to sell the entire issued share capital of Kitchen Mart to Trading for a total consideration of HK\$20,000,000. Of this, HK\$15,000,000 is payable on completion, and HK\$5,000,000 is payable on the first anniversary of completion.

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

James is the financial director of Kitchen Mart and has been in the company with George since its incorporation. James is not a party to the sale and purchase agreement. Notwithstanding, as a result of James' loyalty to Kitchen Mart, George has negotiated a provision in the sale and purchase agreement as follows:

"Trading agrees to pay James a bonus of HK\$1,000,000 on or before 6 months following the date of completion."

There is a separate provision in the sale and purchase agreement as follows:

"Each of George and James agrees that he will not, for a period of 2 years following completion, directly or indirectly deal with any person, who is at the date of completion, a customer of Kitchen Mart."

James resigned from Kitchen Mart just three months after completion and set up his own small company in competition with Kitchen Mart. He has taken a small customer from Kitchen Mart as a customer of his new company.

Mary and Juliet have come to you after completion for advice in connection various issues arising out the transaction.

They do not want Trading to pay the bonus to James as referred to above. In addition, they wish to enforce the provision whereby James agreed not to deal with customers.

Questions:

(a) **Is Trading liable to pay the bonus to James? Explain your answer.**

(3 marks)

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

(b) Can Trading enforce the provision against James whereby he agreed not to deal with customers?

(2 marks)

(c) What is the Register of Significant Controllers? How should it be updated as a result of completion, what detail is to be included and is it open to public inspection? Explain your answer.

(10 marks)

Part B

It is now 11 months after completion, and HK\$5,000,000 (being the balance of the consideration) is due to be paid to George one month from now. Trading does not have sufficient cash reserves to pay the balance. However, as a result of Kitchen Mart winning new customers in Germany, Kitchen Mart has had a very profitable year and has enough cash to pay the balance.

Question:

(d) Can Kitchen Mart lawfully pay the balance of the consideration to George? If so, explain any applicable procedures which Kitchen Mart would need to go through. Is there an alternative mechanism?

(10 marks)

[25 marks in total]

END OF TEST PAPER

**2020 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Thursday, 19 November 2020



2020 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

ABC Investments Ltd. (“Company”) is a private company incorporated in Hong Kong by Allan Au (“Allan”), Billy Bo (“Billy”) and Chris Chu (“Chris”) in 2015. The share capital of the Company was HK\$1,000,000, comprising 100,000 shares. All shares were issued to the shareholders and were fully paid up. Allan is holding 50% of the issued shares and each of Billy and Chris is holding 25% of the issued shares respectively. The three shareholders are also the only directors of the Company.

Things went smoothly since the incorporation of the Company and the three shareholders enjoyed a harmonious relationship for some years. However, disputes have arisen among them since September 2020. Allan and Billy are eager to expand the Company’s business to the Greater Bay Area in Guangdong Province, Mainland China. Chris, on the other hand, believes that the Company should focus only on its existing business in Hong Kong. If the Company decides to expand its business, it will require additional funding of HK\$3,000,000. For this purpose, Allan and Billy approached North Bank (“Bank”) for a term loan. The Bank agreed to provide a loan of HK\$3,000,000 repayable in 3 years on the conditions that the loan would be secured by a floating charge over the Company’s assets and that all directors execute a personal guarantee in favour of the Bank to guarantee the repayment of the loan by the Company.

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.

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

Questions:

- (a) Allan wished to convene a board meeting to discuss the loan as soon as possible. He instructed the company secretary of the Company to convene the meeting that would take place within the next 7 days. Chris understood that he might well be outvoted at the board meeting and thus he attempted to delay the meeting. Chris informed the company secretary upon receipt of the notice that he could attend the board meeting only on 30 November 2020. Allan and Billy did not think that it was a good idea to wait until 30 November 2020. The meeting took place on 15 October 2020 without the attendance of Chris (although he had been fully informed of the time and venue of the meeting on 10 October 2020) and a resolution was passed to approve the loan on behalf of the Company.

Advise Chris whether there is any legal basis for him to invalidate the board resolution on the ground that the meeting was inquorate without his attendance.

(5 marks)

- (b) **Is it possible for Chris to invalidate the board resolution on the ground that the notice of the board meeting was too short?**

(6 marks)

- (c) **Would it have been possible for Chris to invalidate the board resolution if he was unable to attend the board meeting because Allan instructed the secretary of the Company to send out the notice for the board meeting to Allan and Billy only?**

(6 marks)

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

- (d) The proposed loan from the Bank does not materialise because Chris refused to execute a personal guarantee in favour of the Bank. Allan and Billy now believe that the extra HK\$3,000,000 can only be raised by an increase of the Company's share capital. In a recent board meeting, Allan and Billy, outvoting Chris, resolved to convene a general meeting (other than an annual general meeting) of the Company to increase the share capital of the Company from HK\$1,000,000 to HK\$4,000,000 by the creation of 300,000 new shares.

Chris received the notice of the general meeting on 27 October 2020 which stated that the meeting would be held on 3 November 2020. The notice was sent to Chris by the company secretary who mistakenly believed that the minimum notice period of the proposed general meeting was not less than 7 days.

Is it possible for Chris to effectively challenge the holding of the general meeting on the basis that the notice is irregular?

(8 marks)

[25 marks in total]

Question 2 (25 marks)

Smart Screen Limited (“Company”), a Hong Kong private company, manufactures smartphone screens and displays. Its largest clients are Eggplant Incorporated and Robophone Incorporated, the two leading smartphone companies in the world.

On 8 April 2018, the Company entered into a three-year term loan facility (HK\$8,000,000) with Ignite Bank secured by a floating charge over all assets, book debts and undertakings of the Company (“Ignite Bank Debenture”). The Ignite Bank Debenture was duly registered under the Companies Ordinance, Cap. 622 (“Ordinance”).

The Company borrowed HK\$7,000,000 from one of its shareholders, Mr. Adam Ip (“Adam”), who is also a director of the Company.

Since June 2019, Eggplant Incorporated decided to change its supplier to another smartphone screen company. As a result, the Company’s sales dropped significantly and it desperately needed more cash. On 23 June 2019, Monopoly Bank provided a HK\$9,000,000 4-year term loan facility to the Company secured by a charge over the Company’s book debts (“Monopoly Bank Debenture”), which was duly registered under the Ordinance. According to the terms of the Monopoly Bank Debenture, any assignment or disposal of the book debts requires Monopoly Bank’s consent and the proceeds of the collected book debts must be paid into a designated account maintained with Monopoly Bank. On 29 June 2019, the Company borrowed HK\$3,000,000 (a five-year term loan facility) from Grand Bank secured by a fixed charge over all machinery owned by the Company (“Grand Bank Fixed Charge”). Due to an administrative oversight, the Grand Bank Fixed Charge was not registered under the Ordinance. Nothing was done to rectify the error.

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

On 9 August 2019, the Company granted an “all-monies” floating charge over all of its assets, book debts and undertakings in favour of Adam to secure all personal loans provided by Adam to the Company. This charge was duly registered under the Ordinance.

On 29 August 2019, the Company sold its warehouse in Fanling, New Territories, Hong Kong (“Warehouse”) to Mrs. Chloe Ip, the wife of Adam. The consideration was HK\$6,000,000, which was HK\$4,000,000 lower than the market value of the Warehouse (as valued by an independent valuation in July 2019). Adam explained that the Company needed the money urgently and the sale price was actually “not too bad considering the downturn in the real estate market”.

The Company suffered further financial hardship in September 2019 when Robophone Incorporated decided not to buy from the Company anymore. On 7 September 2019, Ignite 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 Ignite Bank Debenture. On 15 September 2019, an unsecured creditor presented a winding-up petition against the Company.

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

- (i) The Company’s main assets are its book debts (HK\$7,000,000), machinery (HK\$3,000,000) and inventory (HK\$1,000,000).
- (ii) The Company owes 20 of its employees a total of HK\$400,000 for wages in arrears. It was also revealed that the Company has failed to pay profits tax (HK\$3,000,000) in the immediate previous year.
- (iii) The Company has 12 unsecured trade creditors, who are owed HK\$8,000,000 in total.

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

- (iv) On 6 September 2019, the Company used the proceeds of sale of the Warehouse to discharge in full the shareholder's loan (with interest) owed to Adam.
- (v) On 5 June 2017, the Company borrowed a term loan of HK\$1,000,000 from Millennium Display Limited (a wholly-owned subsidiary of the Company) ("Subsidiary") repayable in full on 5 June 2021 ("MDL Loan"). The Company made an early repayment of the MDL Loan (with interest) in full to the Subsidiary on 2 September 2019.
- (vi) A trading partner of the Company, Smokescreen Limited ("SL"), initiated proceedings against the Company for breach of contract resulting in the loss of profits (amounting to HK\$6,000,000). The Court of First Instance gave judgment in favour of SL to the full extent of the claim. SL commenced enforcement actions on 17 September 2019.
- (vii) Evidence shows that the Company has been insolvent since August 2019.

The Company made no early repayment to Ignite Bank, Monopoly Bank and Grand 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:

You act for the Company's liquidator, Amy Ho, 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 3 (25 marks)

Sky Circle Limited (“Sky Circle”) is a listed company on the main board of The Stock Exchange of Hong Kong Limited. Sky Circle came to seek your advice on compliance matters under the Listing Rules. Sky Circle owns 51% of the entire issued share capital of Small Circle Limited (“Small Circle”). Moon Limited owns the balance of the 49% of the entire issued share capital of Small Circle. The financial year end date of Sky Circle is 31 December. Both Sky Circle and Small Circle are profit making and the profits of Small Circle were more than 10 percent of the profits of Sky Circle during the latest financial year of Sky Circle.

Sky Circle intends to enter into a contract with Moon Limited for the sale of its 51% interest in Small Circle to Moon Limited. The consideration will be satisfied by cash only and payable in full at completion of the transaction.

It has been determined that the transaction would not constitute a very substantial disposal.

Questions:

Describe generally:

- (a) **The parameters for size tests and applicable size tests;** (10 marks)
- (b) **Classification of transaction(s);** (4 marks)
- (c) **Documentation and compliance requirements;** (7 marks)
- (d) **Manner of approval by shareholders.** (4 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

David is the account manager of Happy Ltd., a company listed on the Main Board of The Stock Exchange of Hong Kong Limited. Happy Ltd.'s principal business is manufacturing small-scale electrical appliances such as air purifiers. In view of COVID-19, there was a sudden increase in demand for air purifiers in the first six months of 2020. In the course of preparing the financial results of Happy Ltd. and its subsidiaries for the six months ended 30 June 2020, David noted that there would be a significant increase in net profit. He informed his wife Mandy of this confidential information. Mandy subsequently communicated this confidential information to her close friend, Betty, who had a great interest in investing in stocks. Both Mandy and Betty acquired shares of Happy Ltd. Immediately upon the release of the interim results for the six months ended 30 June 2020, the share price of Happy Ltd. went up by 30% because of the increase in profit. Both Mandy and Betty earned a profit as a result of the increase in the share price.

Question:

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

(13 marks)

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

Part B

Mirella and Stephen previously worked in the same asset management company for a few years. They recently met and discussed setting up their own asset management company ("Company") in Hong Kong to carry out the business of asset management and securities trading regulated activities as they see the potential in this. Both of them will be the shareholders of the Company. The day-to-day management and operations of the Company will be jointly carried out by both of them. The Company intends to serve professional clients in and outside Hong Kong.

Mirella and Stephen ask you to advise them on the legislative requirements, procedures and licensing requirements involved in setting up an asset management company.

Question:

- (b) **Prepare a memorandum of advice for Mirella and Stephen to advise on the legislative, procedural and licensing requirements involved.**

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Gourmet Plus Limited (“GPL”), a private company incorporated in Hong Kong, operates a number of European gourmet casual restaurants. GPL’s issued share capital is 30% owned by Vera Li (“Vera”) and 70% owned by Jack Wong (“Jack”). Vera and Jack are the only directors of GPL. GPL was established by Jack and Vera about 10 years ago to operate an Italian restaurant. Since then it has expanded successfully and now owns five restaurants in Hong Kong serving different European cuisines. With the growth of GPL, Jack and Vera entered into a shareholders’ agreement (the “Shareholders’ Agreement”) three years ago to better protect their interests.

Due to the recent pandemic and the resulting social distancing measures, GPL has suffered huge losses since the beginning of the year. Vera would like to cut her losses and retire early by selling her shares in GPL. Vera has been in discussion with her friend, Percy Lim (“Percy”), who is keen to purchase Vera’s shareholding in GPL as she is still very optimistic with the food industry in Hong Kong. Vera has not told Jack about the proposed sale of her shareholding yet.

Before Percy spends more time and money on negotiations and legal due diligence on the proposed purchase of Vera’s 30% shareholding in GPL, she has some concerns and would like to seek your preliminary advice before she proceeds further with the negotiations.

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

For the purpose of this question, since Percy is not able to provide you with a copy of the Shareholders' Agreement, you should assume that the Shareholders' Agreement is in a customary form containing typical provisions for a company in the nature of GPL.

Questions:

- (a) **Advise Percy, with explanations, on the possible barriers to her proposed share purchase which may arise from (i) the Shareholders' Agreement, and (ii) any corporate actions of GPL.**

(8 marks)

- (b) Assume that all the possible barriers that are discussed in Question 5(a) above are cleared, and that Percy has proceeded further with negotiating the proposed share purchase with Vera. Percy thinks some of the terms in the Shareholders' Agreement are unfair to a minority shareholder but is not sure if that matters to her. **Advise Percy.**

(3 marks)

Part B

For the purpose of Part B, now assume that Percy and Vera could not agree on the commercial terms of the proposed sale and purchase of Vera's shareholding in GPL and that the deal did not proceed. Percy came across another investment opportunity and is considering purchasing the entire issued share capital of another private company incorporated in Hong Kong, Bailey Limited ("BL"), which is wholly owned by Ken Bailey ("Ken"). BL was established by Ken four years ago to operate a vegetarian fine-dining restaurant, "The Bailey's", in Wanchai, Hong Kong which promotes innovative vegetarian food and has been

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

making handsome profits. The success of “The Bailey’s” is largely attributed to its dedicated team of chefs and other staff. Last year, BL started another business to operate a juice bar, “Pop Juice”, selling nutritious fruit and vegetable juice in two different locations in Kowloon. Ken is selling BL to move back to Australia to spend more time with his family. With the increasing number of vegetarians and health conscious consumers in Hong Kong, Percy sees great potential in the growth of BL.

After some lengthy discussions, Percy has proposed to purchase the entire issued share capital of BL from Ken for a consideration of HK\$15,000,000. Percy will pay a 10% deposit upon the signing of the share sale and purchase agreement which is scheduled for 4 December 2020, with the balance to be payable at completion which will take place one month after signing.

Percy instructed you to act for her in the proposed share purchase. During the legal due diligence, you discovered the following:

- the liquor licence of “The Bailey’s” is due to expire on 20 December 2020, and according to Ken, BL has already submitted an application for the renewal of its liquor licence; and
- BL has started negotiating with its major supplier of local organic vegetables and fruits, Meng Kee Limited (“Meng Kee”), to renew their supplier contract which is due to expire in early February 2021. According to Ken, there should not be a problem in renewing the supplier contract on similar terms as the existing one, but the negotiation will probably take a while as Meng Kee is usually quite slow in responding.

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

You are about to prepare a draft share sale and purchase agreement for the issued share capital in BL. Percy said she is happy to include the customary warranties.

Questions:

- (c) **What provisions would you recommend including in the share sale and purchase agreement to specifically address the two issues revealed in the legal due diligence? Provide reasoning to support your answer.**

(8 marks)

- (d) After the legal due diligence, it was also revealed that BL had recently received a number of complaints from customers alleging that they suffered food poisoning after their consumption of vegetable juices at “Pop Juice”. Percy is worried about these complaints and how they may adversely affect the business of “Pop Juice”. Percy is therefore considering whether she should just acquire the business of “The Bailey’s” instead of purchasing all the shares in BL, since she is mainly interested in acquiring “The Bailey’s”. **Explain to Percy (i) the key differences between a business purchase and a share purchase, and (ii) the advantages and disadvantages of a business purchase.**

(6 marks)

[25 marks in total]

END OF TEST PAPER