

Examiners' Comments on the 2017 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

Part A of this question required candidates to discuss the relevant provisions in the Companies Ordinance concerning deadlock of directors and the mechanism for convening general meetings. Most candidates dealt with this part reasonably well. Part B required candidates to apply the relevant principles of the Listing Rules in the context of an acquisition agreement. While most candidates correctly identified the relevant transaction as a non-exempt connected transaction and a disclosable transaction, not many of them were aware of the need to form an independent board committee to advise the listed company's shareholders on the terms of the acquisition agreement and the related issues concerning the transaction.

Question 2

This question gave candidates the opportunity to demonstrate their knowledge of the applicable legal principles in relation to fixed and floating charges, security over book debts, transaction at an undervalue and the priority of various secured and unsecured creditors in the event of liquidation. Generally, candidates were able to cover issues concerning the validity and priority of various charges. However, weaker candidates were unable to invoke the claw-back provisions (such as s 267 of Cap.32) in the context of the relevant dates of the loans borrowed at different stages. A small number of candidates were completely unaware of the substantial amendment to Cap.32 that came into force in February 2017, and gave incorrect analysis as a result.

Question 3

This question concerned the sale and purchase of shares involving the use of an instrument of transfer and a set of contract notes which attract the *ad valorem* stamp duty under the Stamp Duty Ordinance. It also concerned the legal principles and procedure laid down in the Companies Ordinance regarding the board's approval or refusal to register the transfer of shares proposed by an existing shareholder. Most candidates identified the key principles and applied them correctly in the context of the facts. Weaker candidates, however, overlooked the right of the transferee or transferor to request a statement of reasons from the board.

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 trading in securities and advising in securities. Although most candidates answered this question reasonably well, weaker candidates failed to discuss the relevant enforcement actions that the SFC is entitled to take.

Question 5

Generally candidates were able to cover issues related to share acquisition and business transfer, including the vendor protection clauses, disclosure letter, conditions precedent and liabilities of third parties not privy to the agreement. Regarding business transfer, weaker candidates did not adequately analyse the need to prepare a notice under the Transfer of Business (Protection of Creditors) Ordinance, and the legal effects of the notice within the relevant time frame.

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