

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2020 SUPPLEMENTARY INFORMATION PACKAGE

HEAD III: Commercial and Company Law

Contents

- 1. Standards, Syllabus and Materials**
- 2. Examiners' Comments on the 2017, 2018 and 2019 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

The basic elements of, and main differences between, the following

- Sole proprietorship
- Partnership
- Companies
- Unincorporated Associations
- Business Registration

Business Registration Ordinance (Cap 310)

Companies Ordinance (Cap 622)

Partnership Ordinance (Cap 38)

2. COMPANIES

- The types of companies
- No memorandum – only Articles
- Incorporation procedures
- Optional common seal
 - Execution of documents
- The “responsible person”
 - Liability of officers, especially directors
 - *Limitation Ordinance* and directors
 - Attribution and anti-derivation
- Business Rule in the directors’ annual report
- Share capital
 - No par/nominal value
 - Permitted methods of reduction
- Meetings, resolutions, and availability of information
 - Various forms of resolutions and their effect
 - Manner of abolition of meetings
 - Proxies
- Dealing with offences
 - Civil or criminal

- Members' rights and powers
 - Minority shareholders
 - The statutory derivative action
 - Division of power between members and directors
- Transfer and transmission of shares, and debentures
- The common law action – *Foss v Harbottle*

3. ACQUISITION OF A COMPANY OR A BUSINESS AND JOINT VENTURES THE MERGER AND ACQUISITION TRANSACTION

- The undertaking or assets being acquired
 - Share purchase or asset purchase
- Pre-contractual agreements
 - Formalising preliminary negotiations
- Due diligence
- Disclosure letter
- The format of the contract
 - Seller-friendly or purchaser-friendly contract
 - The structure of the formal contract
 - Schedules
 - Anti-assignment clauses affecting the seller in the asset-purchase transaction
 - Assignment and novation where necessary
- Side letters
- Completion and post-completion
- Protection of creditors
 - The *Transfer of Businesses (Protection of Creditors) Ordinance* (Cap 49)
- Records
- Joint venture documentation
 - Basic provisions of a joint ventures/shareholders' agreement
 - Joint venture articles of associations
 - Minority protection

4. THE SECURITIES AND FUTURES COMMISSION

- An overview of the system relating to individuals and companies licensed or registered with the Securities & Futures Commission
- Review of relevant parts of the *Securities and Futures Ordinance*
 - Part IV: Offers of Investments
 - Part V: Licensing and Registration
 - Part VII: Business Conduct, etc. of Intermediaries
 - Part VIII: SFC's Supervision and Investigatory Power
 - Part IX: SFC's Disciplinary Power
 - Section 213: Injunctions and Other Orders
 - Part XIII: Market Misconduct Tribunal
 - Part XIV: Offences Relating to Dealings in Securities and Futures Contracts, etc.
 - Part XV: Disclosure of Interests

5. DEALINGS/TRANSACTIONS WITH LISTED COMPANIES

- Methods of listing (Chapter 7 of the Listing Rules)
- Qualifications for listing (Chapter 8 of the Listing Rules)
- Restrictions on purchase and subscription (Chapter 10 of the Listing Rules)
- Continuing obligations of listed companies (Chapter 13 of the Listing Rules)
- Notifiable transactions and consequences (Chapter 14 of the Listing Rules)
- Connected transactions and consequences (Chapter 14A of the Listing Rules)

6. COMPANY LIQUIDATIONS

The *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32)

- Liquidation
- Dissolution of companies
- The role of various parties
- Avoidance powers
- Grounds for, and procedure of
- Creditors' rights and their priorities
- Costs
- Subsequent events

COMMERCIAL LAW

7. REAL SECURITIES

- Assets
 - Land
 - Chose in possession
 - Chose in action

- The underlying loan agreement to which the security is collateral
 - Standard form agreement
 - ♦ The Debenture
 - Standard form terms
 - A Facility agreement
 - The form of the security
 - ♦ Mortgage
 - ♦ Charge
 - ♦ Pledge
 - Perfection of the security
 - Consequences of default
 - The charge back
 - ♦ Section 15A of the *Law Amendment and Reform (Consolidation) Ordinance*
 - Common terms in the loan agreement and/or the security contract
 - ♦ Negative pledge
 - ♦ Anti-assignment
 - ♦ Pre-consent
 - ♦ Subrogation
 - ♦ Subordination
 - ♦ Suspense account
 - ♦ Restrictions on proving in insolvency
 - ♦ Currency

8. QUASI-SECURITIES

- Consideration of capacity to contract
- Effectiveness of these types of securities
- The form of the transaction

- Can the transaction be perfected to protect against other interest holders?
- The Guarantee – the Indemnity
 - The traditional form, independent of the indemnity
 - The combined guarantee/indemnity
 - Effect of the material alteration of the debt contract
 - Contractual relief on default
 - The *Civil Liability (Contribution) Ordinance* (Cap 377)
- The Performance Bond
 - Who issues?
 - Effect of the document
 - Remedies on default
 - The Performance Bond v the Guarantee/Indemnity/Letter of comfort
- Assignment
 - The benefit and the burden of the chose in action
 - Legal/statutory assignment
 - Equitable
 - Novation and the burden
 - Forms of security over the asset

9. RECEIVERSHIPS

- Grounds for, and procedure of the receiver and his powers
- Cessation of the receiver's appointment
- *Companies Ordinance*
- *Conveyancing and Property Ordinance*

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 2017, 2018 and 2019 Examinations

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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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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3. Past Examination Papers from 2017 to 2019

**2017 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Tuesday, 14 November 2017



2017 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Part A

Adam is a director of a private company incorporated in Hong Kong and limited by shares. He tells you that lately he finds himself continuously at variance with other members of the board.

Questions:

- (a) What should he do under these circumstances and from whom (both within the company and externally) can he seek help?
- (b) If he were to requisition a general meeting of the shareholders of the company, what technicalities are involved and what hurdles might he face in the requisitioning of such a general meeting?
- (c) Should he resign as a director and what are the consequences?

(13 marks)

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

Part B

X Holdings Limited (the "Purchaser"), a direct wholly-owned subsidiary of Y Holdings Limited ("Listco") whose issued shares are listed and traded on the Main Board of the Hong Kong Stock Exchange, is contemplating entering into an acquisition agreement with two individuals (the "Vendors") to acquire the entire issued shares of Z Limited (the "Target Company") and the aggregate amount of the loans due and owing by the Target Company to the Vendors (in their capacity as shareholders and directors of the Target Company) at the initial consideration of HK\$255,000,000 (subject to adjustment).

The Vendors are Mr. Lee (an executive director of Listco) and Mr. Chan (a past director of Listco who retired 7 months ago). Mr. Lee has 40% of the voting control of Listco, whilst Mr. Chan has 30% of the voting control of Listco. As regards the acquisition, the highest applicable percentage ratio under Rule 14.07 of the Listing Rules is more than 5% but less than 25%.

The Target Company, a company incorporated in Hong Kong also with limited liability, owns the entire building known as XYZ Group Centre situated in Kwun Tong (the "Property"). The Target Company does not have any business other than the holding of the Property. The Property is free of mortgage.

Question:

- (d) **Given the above facts, what are the Listing Rules implications for the acquisition? Can the acquisition take place immediately upon the signing of the acquisition agreement? If not, why not and how should the acquisition agreement be structured and what kind of conditions precedent would one expect to be in that agreement?**

(12 marks)

[25 marks in total]

Question 2 (25 marks)

Cromwell Elite Toy Limited ("Company"), a Hong Kong company, is a leading plastic toy distributor in Hong Kong. Matthew Hope and Lawrence Baker are the directors and shareholders of the Company. The Company banks with Grand Bank Limited ("Grand Bank") and Bail-Out Bank Limited ("Bail-Out Bank"), both of which are Hong Kong licensed banks. The Company relied heavily on the shareholders' loans provided by Lawrence Baker (HK\$10,000,000 in total) and Matthew Hope (HK\$5,000,000 in total).

The Company's business suffered as mobile games became very popular among Hong Kong children. Parents were buying less plastic toys. The Company was in desperate need of capital to develop new types of toys to win back the market. On 24 February 2017, Grand Bank provided a HK\$5,000,000 3-year term loan facility to the Company secured by a charge over the Company's book debts. In the debenture that documents this charge, there is clear provision that prohibits the assignment of the Company's book debts without the prior written consent of Grand Bank. Proceeds of the collected book debts must be paid into a separate designated bank account maintained with Grand Bank. Grand Bank is of the view that this is clearly a fixed charge over the book debts, as Grand Bank has control over both the uncollected book debts and the proceeds of the collected book debts.

On 21 April 2017, the Company sold a warehouse in Fanling ("Warehouse") to Julia Hope, wife of Matthew Hope. The consideration was HK\$3,000,000, which was HK\$2,000,000 lower than the market value of the Warehouse (as valued by an independent valuation in April 2017). Matthew said this is justified as Julia had contributed a lot to the success of the Company. He sees this as a legitimate reward for Julia.

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

On 24 April 2017, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Lawrence Baker to secure all personal loans provided by Lawrence Baker to the Company.

It was revealed that Bail-Out Bank has for many years provided an overdraft facility to the Company with a pre-approved standby credit limit of up to HK\$2,000,000. Bail-Out Bank provided a further overdraft facility to the Company (with pre-approved standby credit limit of up to HK\$3,000,000) provided that some form of security is given. On 21 February 2017, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Bail-Out Bank ("Bail-Out Bank Debenture") to secure the previously unsecured loan of HK\$2,000,000 and the new HK\$3,000,000 overdraft facility that was provided to the Company at the same time as the execution of the Bail-Out Bank Debenture. The table below shows movements of funds in the Company's overdraft ("OD") facility account with Bail-Out Bank from 22 February 2017 onwards:

Date	Deposit (HK\$)	Withdrawal (HK\$)	Balance (HK\$)
22 February 2017			2,000,000 OD
11 March 2017		400,000	2,400,000 OD
19 March 2017	1,000,000		1,400,000 OD
8 April 2017		1,100,000	2,500,000 OD
21 April 2017		700,000	3,200,000 OD
1 August 2017	300,000		2,900,000 OD

On 2 August 2017, the business of the Company suffered a fatal blow as a fire broke out in the warehouse in Tsuen Wan. On 4 August 2017, Bail-Out Bank appointed a receiver in accordance with its debenture (an event that crystallized the Bail-Out Bank Debenture).

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

On 15 August 2017, a trade creditor filed with the court a petition to wind up the Company.

The liquidator, Teddy Young, has learned the following information:

- (i) The Company has the following assets: book debts (worth HK\$3,000,000), inventory (worth HK\$2,500,000), delivery trucks (worth HK\$500,000) and cash at bank (worth HK\$200,000).
- (ii) The Company owes 10 employees a total of HK\$4,000,000 for wages in arrears.
- (iii) The Company has 3 unsecured trade creditors, who are owed HK\$2,000,000 in total.
- (iv) Evidence shows that the Company was insolvent and unable to pay its debts during April 2017.

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

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, Teddy Young, 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)

Grand Resources Holdings Limited (the "Company") is a private company incorporated in Hong Kong in 2012 with an issued share capital comprising 10,000 shares. The Company is engaged in the business of property development on the Mainland. It has four members, three of whom are also directors. The respective shareholding and directorship of each member are set out below.

Mr. A (also a director)	3,000 shares
Mr. B (also a director)	3,000 shares
Mr. C (also a director)	3,000 shares
Mr. D	1,000 shares

Article 16 of the articles of association of the Company provides:

"The Directors may at any time in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share in the Company..."

Question:

- (a) In early 2017, Mr. D agreed to sell his 1,000 shares in the Company to Mr. E (an outsider) for HK\$10 million. Mr. E is eager to replace Mr. D as a member of the Company as soon as possible, but he does not understand what steps and procedures that should be taken in order to give effect to the transfer of the shares and to enable him to become a member of the Company. **Advise Mr. E on these steps and procedures.**

(10 marks)

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

On 15 April 2017, Mr. E's solicitors (Fu & Co.) issued a letter to the Company on the following terms:

"...Mr. D is currently holding 1,000 shares in the Company (the "Shares") and he intends to transfer the Shares to our client (Mr. E) at the price of HK\$10,000,000. Accordingly, Mr. D and our client hereby jointly request the Board of the Company to confirm in writing within two months from the date hereof whether the Board agrees that the Shares be registered in our client's name after the transfer is duly completed.

If the Board agrees to the proposed transfer, we shall arrange for the execution of the relevant transfer documents by Mr. D and our client and submit the duly executed documents to the Company for registration in due course"

The Company did not respond to Fu & Co. until 8 July 2017. In its written reply, the Company stated that:

"Please be informed that the Board of Directors of the Company held a Board meeting on 4 July 2017 to discuss the transfer of 1,000 shares from Mr. D to your client. The Board came up with an unanimous decision that the Company would refuse to register such a transfer...."

On 11 July 2017, Fu & Co. wrote to the Company to request for a statement of reasons for the refusal and demanded that the statement be furnished within 28 days. The Company did not respond to this request.

On 4 September 2017, Fu & Co. made an application to the court pursuant to section 152 of the Companies Ordinance (Cap. 622) for an order to compel the Company to register the transfer of the 1,000 shares from Mr. D to Mr. E.

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

Questions:

(b) Advise the Company the possible legal basis of the application.

(8 marks)

(c) Advise the Company whether it has any ground to resist the application made by Fu & Co.

(7 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

Andrew is a good friend of Billy. Billy is a senior finance manager of ITC Limited. ITC Limited is a controlling shareholder of ABC Limited which is a listed company. ITC Limited intends to privatise the shares of ABC Limited. Billy was involved in this privatisation proposal. He informed Andrew of ABC's privatisation proposal and procured him to trade in shares of ABC Limited. The share price of ABC Limited rose by about 20% on the day after the privatisation was announced. Andrew sold the shares of ABC Limited and obtained a substantial amount of profit.

Question:

- (a) **What are Andrew's and Billy's liabilities under Part XIII of the Securities & Futures Ordinance, Cap.571?**

(13 marks)

Part B

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

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

Alan and Tim want to know about the legislation procedure and licensing requirements.

Question:

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

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Sally owns 100% of the shares in Quality Meats (Hong Kong) Limited ("Quality Meats").

Quality Meats has two lines of business. The first line (the "Meat Business") is the importation of meat and seafood products from Japan and Australia for supply to restaurant chains in Hong Kong. Quality Meats has recently won a long-term supply contract with a major hotel chain operating in Hong Kong. The second line (the "Pet Business") is the importation of pet foods and accessories from Australia for sale in the Hong Kong market. Both businesses are supported by 10 head office staff operating from leased premises in Aberdeen. In addition, the Pet Business has two leased retail outlets in Kennedy Town and Wanchai.

As a result of the new long-term supply contract in respect of the Meat Business, Sally wishes to devote her time and attention to this. She wishes to sell the Pet Business and has started reorganising her operations (the "Reorganisation"). She set up a separate limited liability company called Pet Supplies Limited ("Pet Supplies"), which is a wholly-owned subsidiary of Quality Meats. In August 2017, Sally transferred the Pet Business and all assets in the Pet Business to Pet Supplies and transferred all relevant contracts to Pet Supplies other than the leases in respect of the two retail outlets. She has not yet transferred any employees to Pet Supplies as she wants to ensure that a binding sale and purchase agreement is in place before informing employees of a pending sale. However, Sally is confident that all relevant employees (who comprise all the employees at the retail outlets and three of the head office staff) will move over to Pet Supplies once a sale has been agreed.

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

Jane is interested in buying Pet Supplies and has completed a due diligence exercise. In this regard, Sally relied very heavily on her financial controller, Adrian, to provide all relevant information to Jane and in doing so, Adrian has put in long hours outside of normal business hours. It is intended that Adrian will transfer to Pet Supplies.

Quality Meats and Jane have entered into a non-binding memorandum of understanding setting out the main terms of the proposed transaction. The main terms include the following:

- completion is due to take place within one month of signing a binding sale and purchase agreement in order to allow offers of employment to be made to and accepted by the relevant transferring employees
- consideration of HK\$3,250,000 is to be paid on completion. A further payment of consideration will be made in February 2018, the amount of which will be calculated based on the profit made by the Pet Business for the financial year ended 31 December 2017
- Quality Meats and Jane agree that Adrian will continue to be employed by Pet Supplies for at least one year following completion (and in this regard, note that Sally is keen on him remaining in the position as financial controller for Pet Supplies, both out of reasons of loyalty and in order for Adrian to be able to monitor the financial position and verify further consideration payable)
- the sale and purchase agreement will contain customary warranties and limitations
- the retail outlets will transfer to Pet Supplies, however, Jane will lease a small office to accommodate the head office employees transferring.

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

Sally's solicitors have prepared a draft sale and purchase agreement consistent with the above points. The only parties to this agreement are Quality Meats as seller and Jane as buyer. Adrian has also entered into an employment agreement with Pet Supplies, which is terminable by either party on three months' notice.

Jane has come to ask for your advice. However, she has a limited budget and does not want you to go into too much detail on the basis that the memorandum of understanding has been signed, the main commercial points have been agreed and that she would like this to be a very simple and quick deal.

Questions:

- (a) Advise Jane on four main seller protection limitations that she could expect to see in the sale and purchase agreement which would give the seller, Quality Meats, protection in respect of the warranties which the seller is giving.**

(4 marks)

- (b) Advise Jane on the two main conditions precedent which she should insist are included in the sale and purchase agreement.**

(2 marks)

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

Part B

It is now April 2018. Completion proceeded smoothly at the end of September 2017, and Jane was appointed as the sole director of Pet Supplies with effect from completion. Under the sale and purchase agreement, an additional HK\$200,000 consideration became payable. In order to finance this, Pet Supplies took out a bank loan of that amount and paid it to Quality Meats in February 2018. Apart from Pet Supplies signing the loan agreement, no further procedures were undertaken.

Quality Meats had a major problem under its supply agreement with the major hotel chain. As a result, the supply agreement was terminated and Quality Meats became insolvent and ceased trading.

After the additional consideration had been paid, Jane felt that Adrian was not working well and arranged for Pet Supplies to give him three months' notice of termination in accordance with the terms of his employment contract. The notice period is due to expire at the end of April 2018. Adrian is very upset about receiving notice of termination of his employment contract. He believes that Jane should honour the commitment in the sale and purchase agreement that he would be retained for at least 12 months following completion. As such, he is looking to claim damages in the amount of HK\$300,000 which is the salary he would have received for the period between the end of April 2018 and the end of September 2018 (being the anniversary of completion).

Pet Supplies has also recently received notice from a former supplier, Kwai Chung Wholesale Limited, that a number of invoices (from July 2017) totalling HK\$400,000 have not been paid. The original debtor under these invoices is Quality Meats, and the relevant products were supplied to the Pet Business. These are valid unpaid invoices.

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

Questions:

- (c) **Is Pet Supplies liable to Adrian for the HK\$300,000 claimed? Is Jane liable? Is Quality Meats liable? Provide reasoning.**

(6 marks)

- (d) **Explain whether Pet Supplies is liable to Kwai Chung Wholesale Limited for the HK\$400,000 claimed. What steps, if any, could have been taken at or around the time of the Reorganisation to prevent a claim like this? If Pet Supplies is liable, does it have any recourse?**

(9 marks)

- (e) **Explain, with reasoning, if it was lawful for Pet Supplies to make the second payment of consideration using the proceeds of the bank loan. What are the possible consequences for Jane?**

(4 marks)

[25 marks in total]

END OF TEST PAPER

**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