

Examiner's report

F4 Corporate and Business Law (CHN)

June 2012

The ACCA logo is a black square with the letters 'ACCA' in white, bold, sans-serif font.

Specific Comments

Question One

This question required candidates to explain the rule of *exclusive jurisdiction* in dealing with civil and commercial cases, and state what disputes that shall be subject to *exclusive jurisdiction*, and the relationship between this rule of jurisdiction and the territorial jurisdiction.

Exclusive jurisdiction refers to such a special territorial jurisdiction under which the court of the place shall have exclusive jurisdiction over certain cases. In accordance with the Civil Procedures Law, disputes over real estate, harbour operation, succession and registration are subject to exclusive jurisdiction. The exclusive jurisdiction is a kind of special territorial jurisdiction. Where a dispute may be heard by two or more courts on the basis of territorial jurisdiction, the court having exclusive jurisdiction shall prevail.

Most of the candidates could explain the rule of exclusive jurisdiction and correctly pick up the key point to exclusive jurisdiction, i.e. the special kind of territorial jurisdiction. Some candidates were also able to state certain disputes which were subject to exclusive jurisdiction, such as disputes over real estate, disputes over harbour operation. Therefore, performance for this question was quite satisfactory.

Some candidates failed to state that disputes over succession and registration were subject to exclusive jurisdiction, even though they could pick up that particular disputes over real estate and harbour operation were under the exclusive jurisdiction. Actually, disputes that are subject to exclusive jurisdiction are limited to four kinds of disputes, as listed above in 2nd paragraph, under the Civil Procedures Law. Furthermore, a few candidates were able to give correct answer to part (a) and (b), however they failed to indicate that exclusive jurisdiction shall prevail if two or more courts might have jurisdiction on the basis of common territorial jurisdiction in part (c). Very few failed to give a correct answer by stating the judiciary structures of China and stating four levels of courts which were nothing to do with the rules of jurisdiction.

Question Two

This question required candidates to explain the term *divided co-ownership interest in buildings*, and state the coverage of such form of ownership as well as the rules with respect to the transfer of residential or commercial properties in a building. Clearly, it was a question in relation to the rule of ownership under the Property Law.

Part (a) required candidates to explain divided co-ownership interest in buildings. This term refers to a situation when an owner has ownership over the exclusive parts within a building (i.e. an apartment in a residential building) and has an undivided ownership and right to common management over the common parts other than the exclusive parts of the same building. It is very common in China and easily understandable. The key point to this part of the question stands for the understanding of the exclusive part and the right to management over the common parts within a building. As a whole, most of candidates were able to give an explanation correctly. However, some candidates answered merely the right to common management over the common parts of a building, without mentioning the ownership over the exclusive parts.

Part (b) required candidates to state any parts within a building or community that should be owned by owners on the basis of co-ownership. The answer to this part relied on a correct understanding of the answer to part (a). Besides the parts were exclusively owned by owners, other parts within a building should be owned by owners of the building on the basis of co-ownership. Such parts included the roads and green fields within the building zone or community, and so on. A lot of candidates gave a satisfactory answer to this part. Some candidates were able to indicate more parts within a building that were fallen within the co-ownership, for instance the lift.

However, a few of them failed to understand the question and failed to state any parts that should be owned by owners on the basis of co-ownership.

Part (c) of this question was to test the rule in relation to the transfer of the privately owned residential in a co-owned building. In accordance with the Property Law, where an owner transfers the residential within a building, the co-ownership and the right to common management enjoyed by the owner over the jointly-owned parts shall be transferred accordingly. Answers to this part were as expected if candidates understand the knowledge of ownership under the Property Law.

Question Three

This question required candidates to state the remedial measures for an employee to take if an employer fails to pay wages according to the labour contract, the legal effect on labour contracts where an employer changes its business name, legal representative or legal personality.

Performance on part (a) was unsatisfactory, although some candidates were able to state the remedial measures for an employee to take if the employer failed to pay wages according to the labour contracts. However, many of them were confused with the meaning of this part by stating the circumstances under which an employee might dissolve a labour contract.

Performance on part (b) was unsatisfactory. Candidates were required to state the legal effect on labour contracts. It meant that such changes took place by an employer, such as the change of its business name, legal representative or legal personality. It was not to test the circumstances under which a labour contract might be modified or terminated. However, many candidates stated various circumstances under which labour contracts might be modified or terminated. This was the reason why they failed to receive a satisfactory answer.

Question Four

This question required candidates to explain the provisions with respect to exemption in a contract that should be deemed as invalid. Candidates were also required to state the rules that deal with the consequences where a contract was decided to be invalid. Performance for this question was unsatisfactory, since many candidates failed to understand the question in accurate manner.

Part (a) required candidates to state the provisions that exempted one party's liability for personal injury caused to the other party and one party's liability for property loss caused to the other party by its intentional misconduct or gross negligence. The key point to this question stands for the provisions contained in a contract that exempts one party's liability. According to the Contract Law, even if such provisions are decided to be invalid by the court, the contract as a whole is still valid. Obviously, it was not relevant to the circumstances under which a contract might be deemed as invalid, including the contract harming the interests of a third party and the interests of the state, the parties intending to conceal an illegal purpose under the guise of a legitimate transaction, etc. However, many candidates merely stated the various circumstances under which a contract might be deemed as invalid. For this reason performance on this part was unsatisfactory.

Part (b) required candidates to state the rule relating to deal with the consequences where a contract is decided to be invalid. According to the Contract Law, where a contract is decided to be invalid the parties shall return any properties acquired from such an invalid contract, make monetary compensation if the returning in kind is impossible and indemnify the other party by the party at fault. Most of candidates were able to state the monetary compensation, but failed to state the returning of the properties as a way in priority.

Question Five

This question required candidates to state the matters for a listed company to be decided at the general shareholders' meeting with the special voting requirements for a resolution to be passed, and the special voting requirements for a listed company if a director of the company is affiliated with another enterprise, and related matters to be voted by the board of directors.

Part (a) was relevant to the special voting requirements to be decided by the general shareholders' meeting for some matters. Candidates were not required to state the functions of the general shareholders' meeting, but the matters subject to the special voting requirements. According to the Company Law, purchase or sales of any important assets, or the amount of guarantee provided by a listed company exceeds 30% of the total amount of its assets within one year, the relevant matters shall be decided and approved on an affirmative vote of two-thirds of the voting rights held by the shareholders attending the general shareholders' meeting. It was obvious that the key point to this part of question was relevant to the matters to be decided by a special voting at the general shareholders' meeting due to their importance to the listed company. It was nothing to do with the functions of the general shareholders' meeting. However, many candidates failed to gain the satisfactory marks on this part because they merely stated the functions of the general shareholders' meeting of a listed company.

Part (b) of this question required candidates to answer the special voting requirements to deal with the matters to be decided by the board of directors. This is a very important rule to prevent the illegal transactions between a listed company and the enterprises under a resolution decided by directors who have an affiliated relationship with such enterprises. Comparatively speaking, this is a difficult question to answer, as it covers several matters to be dealt with by different ways. According to the Company Law, where a director of a listed company has an affiliated relationship with the enterprises related to the matters to be decided at the meetings of board of directors, such director may not exercise his voting right upon the particular resolution nor may exercise the voting right on behalf of other directors. The relevant provisions of the Company Law further provides for the ways to deal with the special situations that are involved with directors having the same relationship with the enterprises related to the matters to be decided by the board of directors. Some candidates were able to state the restriction of the voting right on the director who has an affiliated relationship with the enterprises related to the matters to be decided by the board of directors, but unable to state other ways to deal with the situation in which more directors have such kind of affiliated relationship with the matters to be decided by the board of directors.

Question Six

This question required candidates to state the duties and functions of a bankruptcy administrator with respect to the conversion plan of insolvent assets, and the means of the conversion of assets during the process of bankruptcy liquidation.

Part (a) was to test the knowledge of candidates concerning the duties and functions of a bankruptcy administrator with respect to the conversion plan of insolvent assets. It did not require candidates to state the duties and functions of a bankruptcy administrator during the liquidation process. The requirement verb of this part was "conversion". According to the Bankruptcy Law, after the completion of the registration of assets by the bankruptcy administrator during the liquidation process, he shall take various ways to convert the insolvent assets into the cash, so as to allocate in light of order of priority. A bankruptcy administrator shall draft a conversion plan and submit it to the creditors' meeting; he shall also to sell the insolvent assets by means of conversion at a proper time upon the approval of the conversion plan by the creditors' meeting or the confirmation by the competent court. Obviously, the duties and functions of a bankruptcy administrator as to the conversion plan of insolvent assets are very limited, compared with his general duties and functions during the liquidation process. Common errors of this part included: failing to understand the requirement verb "conversion plan"; failing to state the submission of the conversion plan to the creditors' meeting for examination; and failing to state the selling of the insolvent assets by means of conversion by the bankruptcy administrator.

Part (b) of this question required candidates to state the rules that should be complied with during the process of the conversion of insolvent assets, which included: conversion of insolvent assets to be conducted through public auction; an insolvent enterprise to be sold wholly or partially, intangible assets and tangible assets to be sold separately, etc. The requirements of this part were to state the rules in relation to the conversion of the insolvent assets, nothing to do with the orders of the allocation of insolvent assets at the end of the liquidation process. However, many candidates did not answer the question to the point by stating the orders of priority to allocate the insolvent assets at the end of liquidation process.

Question Seven

This question required candidates to state the statutory conditions to be met to list the stocks of a joint stock company and the relevant organisation that might adopt stricter conditions for such listing. The requirements for this question stood for the statutory conditions to list the stocks of a joint stock company, not the statutory conditions to be met for a stock company to issue shares by the means of public offer (IPO). Therefore, the conditions were substantively different for a stock company to issue shares by means of IPO and the conditions for a stock company to list its stocks on the stock market. With respect to the former, a stock company has not yet issued shares to the public investors through IPO. For the latter, the stock company has already issued its shares through the means of IPO and intended to have its stocks to be listed on the stock market. A lot of candidates misunderstood the requirements of this question by stating the statutory conditions for a stock company to issue the share through IPO. Hence they answered many points irrelevant to the requirements.

Question Eight

This question was to test candidates of the knowledge of the legal relationship between mortgage and lease under the Property Law. As a whole, performance of candidates for this question was satisfactory; some candidates were able to give a correct determination for part (a) with the reasons to support their determination. On the other hand, there were still room to improve, especially the reasons to support their determination.

Part (a) required candidates to give a determination whether Ms Lee's ground for refusal to leave could be established. According to the relevant provision of the Property Law, when the mortgaged property is leased after the mortgage has been established, the leasehold shall not be held against the registered mortgage. However, where the lease agreement had been concluded before the mortgage contract, the original leasehold shall not be affected by the mortgage. It means that the leasehold depends on the time of its conclusion against the mortgage contract. In this case, the lease agreement was concluded after the registration of the mortgage contract, it should not be held against the registered mortgage. Therefore, Ms Lee's ground for refusal to lease the house could not be established.

Common errors of this question included:

- Failing to state the legal relationship between mortgage and lease correctly;
- Failing to provide the reasons to support their determination that Ms Lee should leave the house;
- Failing to give a correct determination by stating that Ms Lee was entitled not to leave the house as she was a *bona fide* third party;
- Failing to understand the time of the conclusion of the mortgage agreement as a substantive element to give a correct determination.

In part (b) candidates were required to deal with the situation in which Ms Lee's lease agreement was still effective but Credit Association advised her to leave. Logically, if the determination for part (a) was that Ms Lee should leave the house thought the lease agreement has not yet matured; she was definitely a *bona fide* party. Under such a circumstance she was entitled to claim for damages caused by Mr Fang under the lease agreement. A few candidates gave determinations with a logical mistake: In part (a) they held that Ms Lee's ground for refusal to leave the house could be established, however, in part (b) they held that Ms Lee was entitled to claim against Mr Fang for compensation. Where Ms Lee's ground for refusal to leave could be established and she was

still entitled to stay in the house under the lease agreement, it meant her rights were not affected. Under such a circumstance she lacked any ground to claim for damages from Mr Fang.

Question Nine

This question was to test candidates of the knowledge with respect to the rules of *force majeure* and the liability for breach of contract. The performance of candidates for this question was satisfactory. Many of them were able to gain very high marks.

In part (a) candidates were required to give a determination with respect to Seller's argument of force majeure. Under the Contract Law, where a party's breach of contract was attributable to a force majeure, it may be exempted from the liability for such a breach. However, where a party's breach of contract was attributable to a third person, it shall nevertheless be liable to the other party for such a breach. Any dispute between the party and such third persons shall be resolved in light of the law or the contract between the parties. Based on this rule of law, one could give a correct determination as to Seller's argument of force majeure for failure to deliver the goods. Since Seller did not suffer from a fire accident but its supplier met the force majeure, it was not entitled to claim for the exemption of liability. The said goods under the sales contract were a kind of general commodity which was easily available in the market. Seller should purchase the goods, through other sources, and deliver the goods to Buyer. It should be liable to Buyer for breach of contract by failure to deliver the goods. Therefore, Seller's argument of force majeure could not be established. Since some candidates have failed to distinguish the difference between Seller's force majeure and its supplier's force majeure, they did not give a correct determination for this part of question.

In part (b) candidates were required to judge the Buyer's claim for liquidated damages and damages concurrently in the proceedings. According to Article 114 of the Contract Law, parties to a contract may prescribe that if one party breaches the contract, it will pay a certain sum of liquidated damages to the other party. Since Seller and Buyer prescribed that the liquidated damages should be 20% of the total amount of the price and Seller was a party in breach, Buyer's claim for liquidated damages should be supported by the court. Further to the same provision of the Contract Law, the damaged party is entitled to petition a court or arbitration institution to make an appropriate adjustment where the amount of liquidated damages prescribed is below the loss, or exceeding the loss, resulting from the breach. By the liquidated damages the loss or damage of Buyer caused by Seller's breach has been compensated. There was no reason for Buyer to claim the damages based on the same ground of the breach by Seller. In addition, where the amount of the liquidated damages was below the loss resulting from the breach by Seller, it was entitled to petition to the court for increase. Under such a circumstance Buyer's claim for damages should not be supported by the court. A lot of candidates were able to give a correct determination for this part, but failed to state the reasons for such determination. Further a common mistake for this part of question included that Buyer's claim for liquidated damages and damages should be supported concurrently.

Question Ten

This question required candidates to determine whether the proposals prepared by the promoters were in conformity with the relevant provisions of the Company Law. As a whole, performance for this question was unsatisfactory.

Part (a) of this question required candidates to determine whether the proposal in relation to the sponsors was in conformity with the law. According to the Company Law, to incorporate a joint stock company, there shall be not less than 2 and not more than 200 sponsors, of which more than half must have their domicile within the territory of China. However, the proposal prepared by the sponsors prescribed that five out of nine sponsors would be domiciled in foreign countries. It was against the compulsory provision of law. A lot of candidates failed to pay attention to the requirement on the domicile of the sponsors, and therefore they were unable to give a correct determination for this part.

Part (b) of this question was to test the rule in relation to share offer by a joint stock company. In accordance with Article 85 of the Company Law, where a joint stock company is incorporated by means of share offer, the shares subscribed for by the sponsors shall not be less than 35% of the total amount of the company's shares. Therefore, the proposal was not in conformity with the Company Law, since the proposed amount of shares to be subscribed by sponsors was RMB30 million yuan, which accounted for 30% of the total shares of the company. Performance for this part was not satisfactory.

Part (c) required candidates to make a determination in relation to the rules of capital contributions. In accordance with Article 27 of the Company Law, a shareholder may make his capital contributions to a company in currency, material objects, intellectual property rights as well as the land use right at their appraised value. Furthermore, the amount in currency shall not be less than 30% of the registered capital. It means that the Company Law merely stipulates the minimum amount of capital in currency; it does not restrict the freedom of sponsors to decide the amount above the minimum requirement in currency. Most of candidates were able to give a satisfactory answer to this part.