



Examiners' report

F4 Corporate and Business Law (CHN)

June 2008

The examination consisted of ten compulsory questions (10 marks each). This was the second time for candidates to sit the paper F4, seven general questions plus three questions of case analysis.

Most candidates attempted all ten questions although there was some evidence of inadequate time management, particularly affecting Question 1, 6 and 7.

The performance of candidates overall continued to be as expected or improved.

Workings were generally shown but were at times difficult to follow. An obvious improvement in this sitting represents that most of candidates followed the requirement that each question started on a new page and indicated which questions are being attempted.

Specific Comments

Question 1

This question requires candidates to explain the territorial jurisdiction of a Chinese court to deal with civil cases against a natural person and a legal person, and explain the term exclusive jurisdiction as well as cases subject to exclusive jurisdiction.

(a) Territorial jurisdiction is a kind of jurisdiction in relation to the domicile or habitual residence of the defendant. In case a civil lawsuit is brought against a natural person, the court at the place where the defendant has his domicile or his habitual residence shall have jurisdiction. Where a lawsuit is brought against a legal person, the court of the place where the legal person has its domicile shall have the territorial jurisdiction over the dispute.

(b) The term **exclusive jurisdiction** refers to such special territorial jurisdiction under which the court of the place shall have exclusive jurisdiction over the cases, even if such jurisdiction contradicts the jurisdiction based on the rules of the common territorial jurisdiction.

(c) The following disputes are fallen with the exclusive jurisdiction and their jurisdiction shall be decided:

- A dispute over real estate shall be under the jurisdiction of the court at the place where the estate is located;
- A dispute over harbour operations shall be under the jurisdiction of the court at the place where the harbour is located;
- A dispute over succession shall be under the jurisdiction of the court where the decedent had his/her domicile upon his/her death, or where the principal part of the estate is located.

Question 2

This question required candidates to explain the term ownership, state the procedural rules for the change of the property rights in immovables and the general rules governing the effectiveness of the creation and assignment of rights in movables.

(a) The term **ownership** refers to such rights that a property owner shall have concerning the right to possess, the right to use, the right to receipt of proceeds from, and the right to dispose of its immovables or movables.

(b) According the relevant provisions of the Property Law, any changes to the property rights in immovables require the duly registration according to laws and administrative regulations. Otherwise, such changes will not become effective.

(c) Unless otherwise provided by law, the creation and assignment of rights in movables shall become effective upon delivery. If an interest holder is in lawful possession of a movable property prior to the creation and

assignment of the property rights therein, the property rights shall become effective when such legal act takes place.

Question 3

This question required candidates to explain the term open-ended employment contract (a labour contract without a fixed-period of employment), and state the various circumstances under which an open-ended employment contract must be concluded by the employer and employees.

(a) An **open-ended employment contract** (a labour contract without a fixed-period of employment) refers to such kind of employment contract in which the employer and the employee have agreed not to set up a definite expiration date.

(b) Under any of the following circumstances, an **open-ended employment contract** must be concluded by the employer and employee:

- The employee has been working for the employer for a consecutive period of not less than 10 years;
- When an employer introduces the employment contract system for the first time or a state-owned enterprise re-concludes its employment contract with its employees as a result of enterprise restructuring, the employee has been working for the employer for a consecutive period of not less than 10 years and there are less than 10 years from his/her legal retirement age;
- Prior to the renewal, two consecutive fixed-term employment contracts were concluded and the employee does not fall in any of the situations provided in Articles 39, 41(1) and 41(2).
- If an employer fails to conclude a written employment contract with an employee within one year from the date on which he started hiring the employee, the employer and employee shall be deemed to have concluded an open-ended employment contract.

Question 4

This question requires candidates to state the various legal remedies granted by law when the other party breaches the contract, especially state the conditions to be met for a party to be eligible for pursuing specific performance as a legal remedy for breach of contract.

(a) According to the relevant provisions of the Contract Law, a party may take any one of the following remedies if the other party breaches contract:

- If the other party fails to perform his contractual obligations or whose performance fails to conform to the contract, which results in that the purpose of the contract cannot be realised, a party may claim to rescind the contract as a legal remedy.
- The party may request the breaching party to adopt the appropriate remedial measures, such as repairing the defective goods, reducing the price of goods or services, etc.
- The party may claim the damages against the breaching party.
- The party may request the other party to perform the specific contractual obligations as agreed upon in their contract.

(b) The condition for a party to claim for the specific performance is that the other party fails to perform the non-monetary obligation. Even if this condition is met, specific performance as a legal remedy will not be supported by the court under the any one of the following circumstances:

- the obligation cannot be performed in law or in fact;
- the object of the obligation is not suitable for enforcement or the cost for enforcement is excessively high;
- the creditor fails to claim for performance within a reasonable period.

Question 5: This question required candidates to explain the two forms of incorporation of a joint stock limited company, and state the minimum registered capital and the statutory requirement for capital contributions by the sponsors.

(a) According to the relevant provision of the Company Law, the incorporation of a joint stock company may take the following two forms: incorporation by share offering and incorporation by means of sponsorship.

- ***Incorporation by share offering*** means a form of incorporation of a joint stock limited company in which the sponsors subscribe a portion of the shares to be issued by the company and offer the rest of the shares to the general public or to specific investors.
- ***Incorporation by means of sponsorship*** means a form of incorporation of a joint stock limited company in which the sponsors of a joint stock limited company subscribe all the shares to be issued by the company.

(b) The minimum amount of the registered capital of a joint stock limited company shall be RMB 5,000,000 yuan. If a higher minimum amount of the registered capital of a joint stock limited company is required by laws or administrative regulations, such provisions shall prevail.

(c) Where a joint stock limited company is incorporated by means of sponsorship, the amount of initial capital contributions shall not be less than 20% of the registered capital, and the remaining part of the registered capital may be paid up by the sponsors within two years upon incorporation of the company.

Question 6

This question required candidates to state the conditions for a shareholder of a limited liability company to transfer his equity to a third party, and state the procedures and conditions to be complied with when the transfer of the equity of a shareholder is under a court order.

(a) Where a shareholder intends to transfer his equity to an outsider of a company, the consent of over half of all the shareholders must be secured. Such shareholder shall notify other shareholders for consent of the matter on the transfer of his equity. If the other shareholders fail to give a reply within 30 days upon receipt of such notice, they shall be deemed to have consented to such transfer. If over half of the other shareholders disapprove such transfer, then, those shareholders disapproving the transfer shall purchase the equity to be transferred. Failing to make the purchase, they shall be deemed to have consented to the transfer.

(b) Where the transfer of equity is under an order of the court, the competent court shall notify the company and all of its shareholders. Under such circumstances, other shareholders shall have the priority to purchase the equity under equal conditions. If other shareholders fail to exercise their priority to purchase within 20 days upon the date of the notice of the court, they shall be deemed to have waived their priority to purchase.

Question 7

This question was relevant to the composition of the creditors' meeting, and state the rules of the creditors' meeting to approve a resolution during the process of the enterprise bankruptcy under the Enterprise Bankruptcy Law of China.

(a) The creditors' meeting is composed of all the creditors who have declared their creditors' right according to law when an enterprise goes into bankruptcy.

(b) Any resolution of the creditors' meeting shall be approved by the following procedures: 50% or more of the creditors that have right to vote and attend the meeting vote for the resolution concerned, representing 50% or more of the aggregate amount of the creditors' right free from property guaranty, unless it is otherwise prescribed by this law. Any creditor who has the right to guaranty on particular assets of its debtor and that has not given up the priority right to be repaid may not enjoy the right to vote for any matter as prescribed in the present law.

Where any creditor believes that a resolution of the creditors' meeting has violated law or damaged its interest, it may, within 15 days as of the day when the creditors' meeting makes a resolution, plead the people's court to revoke the resolution and to order the creditors' meeting to re-make a resolution according to law.

(c)

- In accordance with Article 65 of the Enterprise Bankruptcy Law, where a resolution involving any matters on the management of the debtor's assets or the conversion plan of the insolvent assets can not be adopted at the creditors' meeting, such resolution shall be ruled by the competent people's court.
- In accordance with Article 65 of the Enterprise Bankruptcy Law, where a resolution involving any matters on the distribution plan of the insolvent assets has not been adopted after a second voting at the creditors' meeting, such resolution shall be ruled by the competent people's court.

Question 8

This question requires candidates to deal with the legal issue as to security under the Property Law.

(a) According to the Property Law, the right to the pledge shall be established upon delivery of the pledged property by the pledgor. In this case Mr Zhang and Mr Lee concluded a pledge agreement but Mr Lee did not possess the mini-bus. The right to the pledge would not be established. Therefore, the pledge agreement between Mr Zhang and Mr Lee did not come into effect.

(b) Mr Zhang and Mr Wang entered into a pledge agreement and Mr Zhang delivered the mini-bus as the pledge to Mr Wang. Therefore, the pledge agreement came into effect and the legal relationship of pledgor and pledgee has been established.

(c) During the period of the possession of the movable the pledgee is not allowed to dispose of the pledged property.

(d) According to the Property Law, the pledgee is under the obligation to keep the pledged property in a good condition; and if the pledged property is damaged or lost due to improper keeping, the pledgee shall be liable for compensation. In this case Mr Wang lent the mini-bus to a third party without the consent of Mr Zhang and caused the damage to it, he was liable for compensation. Hence Mr Zhang was entitled to claim for damages against Mr Wang, even though the mini-bus was damaged by the transport company.

Question 9

This question required candidates to deal with the insolvent assets of a bankrupted enterprise in accordance with the Enterprise Bankruptcy Law.

(a) According to the Enterprise Bankruptcy Law, an owner of the right to guaranty on the particular assets of the bankrupt may enjoy the priority right to be repaid by means of the particular assets. The office building had been mortgaged for a loan from Communication Bank. As a mortgagee of the office building, Communication Bank should enjoy the priority right to be repaid from the value of the office building. Since the principal plus the interest were equivalent to the amount of the appraised value of the office building, Communication Bank could be satisfied by the appraised value of the office building.

(b) Where a creditor is indebted with its debtor before an application for bankruptcy is accepted, it may claim to offset such debts with the bankruptcy administrator, provided that the situation falls within the exceptions set forth in this law. Since Hongyan Co owed a debt of RMB 7,000,000 yuan to Company A, while it also had a receivable of RMB 1,900,000 yuan under the rental contract. Therefore, the amount of RMB 1,900,000 yuan could be off-set from the debt of RMB 7,000,000 yuan.

(c) According to the Enterprise Bankruptcy Law, within one year before the court accepts a bankruptcy application, a bankruptcy administrator has the right to plead the court to revoke the act in which the bankrupt enterprise gave up the creditor's right. Hongyan Co had given up a credit in the amount of RMB 1,000,000 yuan within one year before the court accepted the bankruptcy application, the bankruptcy administrator might plead the court to revoke such act and recover this amount.

(d) The common credits of bankruptcy shall be the remaining part of credits after the necessary deduction from the secured credits and settled by means of offset during the process of liquidation. The following credits should be deemed as the common credits of bankruptcy:

- Company A's credit due: RMB 5,100,000 yuan (7,000,000-1,900,000)
- Company B's credit under a sales contract payable by Hongyan Co: RMB 1,500,000 yuan.
- Company C's damages due to the termination of contract by the bankruptcy administrator: RMB 1,400,000 yuan.

Question 10

This question required candidates to deal with the legal issue concerning the demur right of advance performance under the Contract Law.

(a) According to the Contract Law, Dongfang Co was entitled to detain the remaining iron ore. A party who shall perform first may suspend performance when there is evidence proving that the other party is under the circumstances as prescribed by the law. As Steel Co did not carry the processed pig iron because it was short of necessary funds to buy coke, which was a clear indication that its capacity for performance was deteriorating. Therefore, Dongfang Co was entitled to suspend its performance by giving an adequate notification to Steel Co.

(b) Upon receiving the notification, if Steel Co neither recovered capacity for performance nor provided an appropriate guarantee within a reasonable time, Dongfang Co was entitled to dissolve the cooperation contract.

(c) Since Steel Co was a party who broke the cooperation contract and Dongfang Co was entitled to suspend performance and dissolve the contract, Steel Co's claim against Dongfang Co should not be supported by the court.