



Examiners' report

F4 Corporate and Business Law (CHN)

December 2008

The examination consisted of ten compulsory questions (10 marks each). This was the third 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 evidence of inadequate time management, particularly affecting Question 2, 3 and 4.

The performance of candidates overall continued to be as expected.

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 required candidates to explain the term *jurisdiction by forum level*, and the court jurisdiction over civil and commercial disputes.

Jurisdiction by forum level means that the court of first instance shall be based on the considerations of the importance of cases as well as the impact of cases on the area, etc. As a general rule, if a case is more important or wider area of its impact, the higher court will have the jurisdiction as the court of first instance. The character of this jurisdictional rule rests with the determination of the court of the first instance.

Overall, the average marks for this question were satisfactory. Some candidates were able to give all the points to this question. However, other candidates did not clearly understand the meaning of this kind of jurisdiction. Candidates sometimes were confused with another major rule of jurisdiction, namely the territorial jurisdiction.

Part (c) of this question required candidates to explain the general court jurisdictions over the civil and commercial disputes. It covers the territorial jurisdiction and exclusive jurisdiction.

However, common errors in this question included:

- Failing to explain the rule of jurisdiction by forum level;
- Confusion of territorial jurisdiction and jurisdiction by forum level; and
- Failing to describe the particular civil cases which are under the coverage of the exclusive jurisdiction.

Question 2

This question required candidates to state the rules in relation to the legal effects of immovable registration on contracts involving the disposal of immovables, and state the legal remedies where the information on the immovable registry is incorrect.

This question was a difficult one and was not answered as expected. As many candidates could not distinguish the legal effect of immovables on property contracts from the property right of a particular immovable. According to the relevant provisions of the Property Law, the non-registration of a property contract does not result in the invalidity of the property contract. Registration of a property contract merely gives the party the property right of a particular immovable. Suppose a property owner concluded two contracts with party A and party B to sell the same property, but only has the contract with party B been duly registered. Although the contract with party A was not registered, both the two contracts were effective. However, only party B shall be the legitimate owner of the property. Party A cannot possess the property right of the property under his contract with the original property owner. The legal remedy for party A is to claim the breach of contract, not to claim the property right of the property under transaction.

A common error in Part (a) was that most of candidates did not distinguish the legal effect of the property contracts from the property right of a particular property as above-mentioned.

Part (b) of the question required candidates to state the various legal remedies where the information on the immovable registry is incorrect. According to the relevant provisions of the Property Law, a holder or stakeholder may take the following measures: to apply for a correction of registration, to apply for a registration of opposition, to claim compensation. Some candidates were able to state only one of the statutory remedies but failed to point to other forms of remedies, especially the registration of opposition.

Question 3

This question required candidates to explain the term ***takeover of a listed company by offer***, and state the report requirements and the various restrictions on such transactions.

This question was a straightforward one and has been tested previously. Part (a) of the question required candidates to explain the term ***takeover of a listed company by offer***, which could be found directly from the relevant provision of the Company Law. To simplify the answers to Part (b), candidates needed merely to state the general requirement of making reports to the Securities Regulatory Authority under the State Council and the stock exchange. As to Part (c), candidates were required to state the restrictions on the withdrawal of the takeover offer and the selling or buying of shares of the company under takeover.

The performances for this question were below the expectation. Several candidates did not attempt this question, might be they were not familiar with this field of law.

Generally speaking, candidates could more or less explain the term ***takeover of a listed company by offer***, because the term itself tells candidates what the basic meaning of this term is. However, common errors in Part (b) and (c) of this question still included:

- Failing to state the report requirements both to the Securities Regulatory Authority under the State Council as well as the stock exchange;
- Failing to state the restrictions on the purchaser to withdraw his offer in the period as specified in the takeover offer. Candidates should be aware that an offer with a specified term of acceptance shall be deemed as an irrevocable one under the Contract Law. This rule of law is also applicable in the Company Law.

Question 4

This question required candidates to state the fraudulent behaviours that may be deemed as a crime in the course of incorporation of a company and in relation to corporate financing.

It was a difficult question in this paper. Although the fraudulent behaviours of company have been fallen within the examinable content for years, this legal issue has never been tested in the previous sessions. Therefore, candidates were not familiar with this legal issue. Furthermore, the fraudulent behaviour is a corporate issue as well as a criminal law issue. Most of candidates paid their all attention to the business law, paid less or no attention to the corporate-related crime. In terms of the average marks for an individual question, the performance for this question was not satisfactory.

Common errors for this question included:

- Failing to understand the meaning of the question. For instance, some candidates did not know clearly the difference between the incorporation of a company and in the course of company operation. They stated the various behaviours that may be deemed as a crime, which take place in the course of company operation, instead of the behaviours in the course of incorporation of a company.

- Failing to state the most of the fraudulent behaviours that may be deemed as a crime, both in the course of incorporation of a company and in the course of operation.

Question 5

This question required candidates to explain the ***term expected profit***, and state the conditions to be met for a party to claim damages and the statutory obligations upon the party who claims damages.

As a whole, the answers to this question were not satisfactory. In terms of the examinable contents, it constitutes one of the major rules under the Contract Law. Candidates must familiarise themselves with this rule. However, the performance of candidates who did not answer this question satisfactorily demonstrated that there is room for improvement in the future.

Common errors for this question included:

- Failing to explain the term by giving the main points of this term;
- Failing to state clearly the burden of proof for the party who claims the expect damages, such as the facts of breaching by the other party, the loss and/or damages suffered and the foreseeable loss and/or damages by the breaching party;
- Failing to state the statutory obligation to mitigate the loss or avoid the extension of the loss by the party who claims the expected damages.

Question 6

This question required candidates to explain the term ***bankruptcy administrator*** and how one can be appointed, state the qualifications of a bankruptcy administrator and the persons who are not permitted to be appointed as a bankruptcy administrator.

This question was answered quite satisfactorily. Candidates were able to give the most of the points to the question.

Even though, the common reasons for unsatisfactory answer included:

- Failing to give a full explanation of the term, merely stating that a bankruptcy administrator should be appointed by the court;
- Failing to state the various qualifications of a bankruptcy administrator, especially failing to know that an institute such as an accounting firm or law firm may be appointed as a bankruptcy administrator;
- Failing to indicate the persons who are not permitted to be appointed as a bankruptcy administrator, especially failing to state a person having been deprived of the professional certificate could not be appointed as a bankruptcy administrator.

Question 7

This question was to test candidates of the knowledge of the ***non-competition clause*** in a labour contract, and state the preconditions for a non-competition clause in a labour contract to be effective and the restriction on the duration of the time for such a clause.

The performance of this question was quite satisfactory, as most of candidates were able to answer the key points of this question.

Most of candidates were able to give an explanation to the term non-competition in a labour contract. However, some candidates could not state the precondition for a non-competition clause to be effective, namely the financial compensation. Furthermore, Part (c) required candidates to state the duration of a non-competition clause in a labour contract. The two-year limitation for such a clause was very straightforward, but some candidates failed to state this time limitation, merely stating that the duration should abide by law.

Question 8

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

Compared with the performances for the same forms of question in the previous sessions, the performance for this question was not satisfactory. Since this question was not relevant to a rule of law currently introduced. For several years mortgage has been the examinable content and tested for several times in the form of case analysis.

In part (a), candidates should determine which party should be a lawful mortgagee to the building. Since the mortgage agreement concluded by Investment Co was duly registered with the Registered Centre, the mortgagee's right has been established on the date of registration. Obviously, Investment Co should be a lawful mortgagee. However, some candidates did not give a correct answer to this part. As they did not pick up the key reason to give a correct answer by failing to pay attention to the substantive facts: Investment Co being a bona fides third party and the registration of the mortgage agreement.

Part (b) was to test the rule in relation to the ownership. Many candidates did not make a correct conclusion to this part, because they did not adequately distinguish the contractual rights based on the internal agreement from the property rights based on the property registration. According to the Property Law, the contractual rights of the internal agreement between Guanghua and Dongda could not oppose the registered property rights. Therefore, Guanghua was not entitled to claim the ownership to the building. However, some candidates held that Guanghua should have ownership, as a co-owner, over half of the building. Although Guanghua could not be a co-owner of the building, it might claim its contractual rights against Dongda for breach of contract, such as the damages suffered from Dongda's failure to comply with the internal agreement, or the expected damages, etc.

Part (c) of the question was to test candidates of the statutory restriction on the mortgage agreement. According to the Property Law prior to the expiry of the term for debt repayment, the mortgagee shall not conclude any agreement with the mortgagor whereby the mortgaged property shall be transferred to the creditor if the debtor defaults on the debt. Therefore, the two parties were not allowed to agree in their mortgage agreement that the building should be transferred to Investment Co if failure to settle its debt. However, some candidates did not give the determination based on the rule as set forth in the Property Law and held that the building should be transferred to Investment Co.

Question 9

This question required candidates to deal with the legal issues in relation to the rule of the equity transfer of a limited liability company. The performances of candidates for this question were quite encouraging.

Part (a) of this question required candidates to deal with the right of priority in the course of equity transfer. This part of the question was, more or less, a complicated one for candidates to give a correct determination, as they should deal with the special situation under which two shareholders claimed their right of priority to purchase the equity to be transferred. According the Company Law, if two or more shareholders claim to exercise the priority and they fail to reach an agreement as to the respective proportion of purchase, they shall exercise the priority in proportion to their respective equity at the time of transfer. Most of candidates were able to answer the priority but failed to pick up priority in proportion if the transfer met the situation as above-mentioned. This was the main reason for those candidates who did not gain many marks for this part.

Part (b) was relevant to the rule of purchase of equity by a limited liability company. Article 75 of the Company Law provides for the circumstances under which any shareholders may request the company to purchase their equity with a reasonable price. However, Mr Guan's situation did not fall within the circumstances as set up in the Company Law. Hence his request should not be supported by the court. Common reasons for candidates who did not give a correct answer rested with:

- Failing to understand the basic principle in the Company Law that a shareholder is not allowed to withdraw from the company he invests.
- Failing to understand the rule as to the conditions under which a shareholder may request the company to purchase his equity with a reasonable price.

Due to the above-mentioned reasons, some candidates did not answer the question satisfactorily.

Part (c) of the question required candidates to make a conclusion as to whether Mr Liu was entitled to transfer his equity to the private enterprise. Generally, most of candidates were able to make a correct conclusion.

Question 10

This question required candidates to deal with the legal issue concerning the formation of a contract with a special condition under the Contract Law.

It was a complicated question, requiring candidates to have a solid knowledge of the Contract Law and the ability to analyse. As a whole, candidates did not gain marks as expected.

In Part (a), candidates were required to state the action of the legal nature of the announcement for the bonus sale promotion by the department store. In light of the Contract Law, the announcement was an invitation for offer, not an offer. As the announcement did not contain the price of any particular commodity, while the price constituted one of the essential elements for an effective offer. However, many candidates held that it was an offer.

Part (b) of this question was to test candidates of the rule of the formation of a contract. To make a correct answer, candidates should at first determine whether there had been a contract between Mr Zhou and the department store. Then one could make a conclusion whether Mr Zhou was entitled to receive the bonus. Mr Zhou went to buy commodities at a price of RMB 1,000 yuan was an offer. While the action of the department store by handing over the commodities plus the bonus coupons to Mr Zhou constituted an acceptance. The two parties entered into a contract with a special condition: If the number on the bonus coupons matched the number through the lucky-draw, the department store was under a contractual obligation to grant the bonus to Mr Zhou. The contract did not contain a time limit for the bonus when the department store handing over the coupons to Mr. Zhou. Therefore, Mr Zhou was entitled to receive the bonus even though he went to the department store two days later than the time limit set up by the department store unilaterally. However, some candidates held that Mr Zhou was not entitled to receive the bonus because he went to claim the bonus two days later than the time limit fixed by the department store. Also some other candidates who did not gain many marks did not realise that a contract with a special condition had already been concluded.

In Part (c), candidates were required to make a determination as to the legal feature of the action by the department store to prescribe the time limit for cashing the bonus. The department store did neither indicate the time limit for cashing the bonus upon announcing the bonus sale promotion, nor did it indicate such a time limit when handing over the bonus coupons to Mr Zhou. Therefore, it meant that the department store was intending to alter the contract unilaterally after the conclusion of the contract between it and Mr Zhou. In terms of its legal nature, this intention may be a new offer to alter the term of an existing contract. Without the acceptance from the other party (Mr Zhou), this unilateral intention should have no binding force on the contract. This part of answer was closely related to the answer of Part (b). If the time limit put forward by the department store was deemed merely as an intention to alter or modify the contract, the logical conclusion for Part (b) should be that Mr Zhou was entitled to receive the bonus. Since the unilateral intention by the department store would not bind Mr Zhou. However, some candidates on the one side held that the public notice by the department store was an intention to alter or modify a current contract, on the other side held that Mr Zhou was not entitled to receive the bonus. Clearly, there was a contradiction between the two conclusions.