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# Answers

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- 1** This question requires candidates to explain the term *jurisdiction by forum level*, and the court jurisdiction over civil and commercial disputes under the Civil Procedures Law of China.
- (a) In accordance with Articles 18–21 of the Civil Procedures Law, *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. At present there are four levels of courts in the judicial system of China: the basic level courts, intermediate courts, high courts and the Supreme Court.
  - (b) In accordance with Article 19 of the Civil Procedures Law, the intermediate court shall have jurisdiction as a court of first instance over the major cases involving foreign elements. It means that if any party disagrees with the judgement of the first instance this party may appeal the case to the high court.
  - (c) In accordance with Article 22 and Article 34 of the Civil Procedures Law, the general court jurisdictions over the civil and commercial disputes can be divided into the territorial jurisdiction and exclusive jurisdiction. The concrete rules of jurisdiction are as follows:
    - i. Territorial jurisdiction – a civil lawsuit brought against a citizen shall be under the jurisdiction of the court of the place where the defendant has his domicile; a civil lawsuit brought against a legal person or any other organisation shall be under the jurisdiction of the court of place where the defendant has its domicile.
    - ii. Exclusive jurisdiction – a lawsuit brought on a dispute over real estate shall be under the jurisdiction of the court of the place where the estate is located; a lawsuit brought on a dispute over harbour operations shall be under the jurisdiction of the court of the place where the harbour is located; a lawsuit brought on a dispute over succession shall be under the jurisdiction of the court of the place where the decedent had his or her domicile upon death, or where the principal part of the estate is located.
- 2** This question requires candidates to state the legal consequences of immovable registration on the effect of the relevant contract and explain the legal remedies under the Property Law of China.
- (a) In accordance with Article 15 of the Property Law, any contract to create, modify, assign and terminate rights in immovables concluded by the parties thereto shall take effect upon conclusion of the contract, unless otherwise provided for by law or agreed in the contract; the fact of non-registration shall not affect the validity of such contract.

Although the creation, modification, assignment and termination of rights in immovables become effective once duly registered, the non-registration does not affect the validity of a contract in relation to the transaction of immovables. This means that the registration of immovables merely gives the party who has duly registered the property right of a particular immovable, but will not result in the invalidity of the relevant contract, even though it has not been registered.
  - (b) In accordance with Article 19 of the Property Law, if an interest holder or a stakeholder opposes the data recorded in the immovables registry, he/she may apply for a correction of registration. If the interest holder recorded in the registry agrees to the correction in writing or the registry is proved to contain errors, the registration authority shall correct the erroneous data.

If the interest holder does not agree to the correction, the stakeholder who holds himself or herself to have the interests in the particular immovable may apply for a registration of opposition. After the registration of opposition is registered with the registration authority, if the applicant fails to file a lawsuit within 15 days from the date of the registration of opposition, such registration of opposition shall become null and void. The interest holder may claim compensation against the applicant for any damage resulting from improper registration of opposition.

Therefore, Property Law entitles the party to two kinds of legal remedies where the registration is incorrect: Firstly, the relevant party (interest holder or stakeholder) may apply for a registration of correction. Secondly, the stakeholder may file a lawsuit in the competent court after the registration of opposition.
- 3** This question requires candidates to explain the term *takeover of a listed company by offer*, and state the report requirements and the restrictions when a purchaser issued the offer to take over a listed company by offer in accordance with the Securities Law of China.
- (a) In accordance with Article 88 of the Securities Law, *takeover of a listed company by offer* refers to such a form of transaction when an investor, through trading on a stock exchange, comes to hold 30% of the issued shares of a listed company and intends to continue purchasing such shares, the investor shall issue to all the shareholders of the listed company a takeover offer for buying the whole or part of the shares of the listed company.
  - (b) In accordance with Article 89 of the Securities Law, before issuing a takeover offer pursuant to Article 88 of this law, the purchaser shall submit a report on the takeover of the listed company to the securities regulatory authority under the State

Council, which shall contain all the items as required by the law. The purchaser shall also submit a report to the stock exchange simultaneously.

- (c) In accordance with Articles 91 and Article 93 of the Securities Law,
- i. Within the acceptance term as specified in the takeover offer, the purchaser is not allowed to withdraw his takeover offer. If the purchaser needs to alter any item in the takeover offer, he shall submit a report to the securities regulatory authority under the State Council and the stock exchange in advance and, upon approval thereof, he shall make an announcement with respect thereto.
  - ii. The purchaser, during the term as specified in the takeover offer, shall neither sell any shares of the company under takeover, nor buy the same in a way different from, or on conditions in excess of, those as prescribed in the takeover offer.

4 This question requires candidates to state the fraudulent behaviours taken by shareholders of a company in handling the matters of capital, corporate financing, which violate the relevant provisions of the Company Law and the Criminal Law of China.

- (a) In accordance with Article 158 of the Criminal Law, sponsors or shareholders shall be deemed as committing a crime by making a false report of registered capital or making falsely registered capital of a company in the process of incorporation of a company.

The crime for false reporting of registered capital should include the following elements:

- i. The subject of the crime is a natural person or legal entity who is seeking to incorporate a company;
- ii. The person or legal entity commits the acts such as using the false certificate or taking other fraudulent measures to make a false capital report;
- iii. By the false report of registered capital the natural person or other legal entity completes the incorporation of a company, which results in a serious legal consequence.

- (b) In accordance with Article 216 of the Company Law and Article 160 of the Criminal Law, the fraudulent behaviours in issuing stocks or bonds shall be deemed as a crime in the operation of a company.

The crime for fraudulent behaviours in issuing stocks or bonds shall include the following elements:

- i. The person involving the fraudulent behaviours shall act intentionally in taking illegal activities to issue stocks or bonds;
- ii. The person involving the fraudulent behaviours conceals the important facts or makes the false facts in the prospectus, subscription documents or other legal documents for issuing stocks or corporate bonds, etc;
- iii. The fraudulent behaviours in the course of issuing stocks or corporate bonds results in very serious consequences, such as the amount of capital raised being very huge or causing the social instability.

5 This question requires candidates to explain the term *expected profit* and state the conditions to be met for a party to claim the damages against the other party under the Contract Law of China:

- (a) In accordance with Article 113 of the Contract Law, *expected profit* refers to such a kind of profit lost by a party who should have obtained it if the contract has been duly performed, because of the breach of contract by the breaching party in performing his/her contractual obligations. The party is entitled to claim the *expected profit* against the breaching party as a form of legal remedy to compensate the damage suffered.

- (b) In accordance with Article 113 of the Contract Law, when a party to a contract claims the damages against the breaching party, he or she shall prove the following facts and causation:

- i. The other party has broken the contract in the course of performance.
- ii. He suffers loss and/or damage because of the breach of contract by the other party.
- iii. The loss and/or damage shall have been foreseen by the breaching party at the time of entering into the contract.

- (c) In accordance with Article 119 of the Contract Law, the party claiming the damages against the other party is under an obligation to take any appropriate measures to mitigate the loss or avoid the extension of the loss. In case he does not take such measures and causes the extra loss, the extra loss shall be borne by the party claiming the damages.

6 This question requires candidates to explain the term *bankruptcy administrator* and state the major functions of a *bankruptcy administrator* under the Enterprise Bankruptcy Law of China:

- (a) In accordance with Article 22 and 24 of the Enterprise Bankruptcy Law, *bankruptcy administrator* refers to such a person or an organisation designated by, and supervised under, the people's court that performs the various functions in the process of bankruptcy liquidation. The creditors' meeting may apply to the court for replacement of the bankruptcy administrator where the creditors' meeting holds that a bankruptcy administrator fails to perform or fulfil its duties and functions in a lawful manner. Therefore, a bankruptcy administrator can be appointed in two ways: direct designation by the court and replacement by the court under the application of the creditors' meeting.

- (b) In accordance with Article 24 of the Enterprise Bankruptcy Law, the post of bankruptcy administrator may be assumed by a liquidation group comprised of the relevant institutes or organs, such as a law firm, an accounting firm and a bankruptcy firm established according to law. On the other hand, to deal with a particular bankruptcy case, the court may designate the relevant personnel having a good command of expertise and obtaining the practice qualification as the bankruptcy administrator. Therefore, a bankruptcy administrator may be either an institute or a natural person.
- (c) In accordance with Article 24 of the Enterprise Bankruptcy Law, any natural person who meets one of the following circumstances shall not assume the post of bankruptcy administrator:
- i. Having been given a criminal punishment for any intentional crime;
  - ii. Having been deprived of the professional certificate;
  - iii. Having any interests in relation to the particular bankruptcy case.
- 7 This question requires candidates to explain the terms *non-competition clause* in a labour contract, and state the various matters relating to the *non-competition clause* in a labour contract under the Labour Contract Law of China.
- (a) In accordance with Article 23 of the Labour Contract Law, the term *non-competition clause* refers to a clause in a labour contract under which the employee promises not to take a position in any other employments that compete with the current employer within a fixed period of time after his/her leaving the current employer. The incorporation of the non-competition clause in the labour contract is to protect the trade secrets and intellectual properties of the employer.
- (b) In accordance with Article 23 of the Labour Contract Law, when an employee and employer incorporate a non-competition clause in the labour contract, the contract shall also stipulate that the employer shall pay the financial compensation to the employee on a monthly basis during the term of the non-competition after the termination or ending of the labour contract. Without such financial compensation the non-competition clause shall be null and void. That means the employee will not be under a contractual obligation of non-competition with the current employer after the termination or ending of a labour contract.
- (c) In accordance with Article 24 of the Labour Contract Law, the term of the non-competition clause shall not exceed two years. The term of two years shall count from the termination or ending of the labour contract, in terms of his working for a competing employer that produces the same type of products or is engaged in the same type of business as his current employer, or in terms of his establishing his own business to produce the same type of products or engage in the same type of business.
- 8 This question requires candidates to deal with the various legal issues relating to the registration of real estate, mortgage and ownership under the Property Law of China.
- (a) In accordance with Article 187 of the Property Law, Investment Co should be a lawful mortgagee to the building. Since Investment Co, as *bona fides* third party, concluded the mortgage agreement relying on its trust to Dongda. The mortgage agreement has been registered with the Registered Centre. Therefore, the mortgagee's right has been established on the date of registration and Investment Co should enjoy the lawful right of mortgage.
- (b) In accordance with Article 9 of the Property Law, Guanghua could not have the ownership of the building. Since Dongda has made real estate registration under its name according to law and became the lawful owner of the property right of the building. The said cooperation agreement was merely an internal agreement between Guanghua and Dongda. The contractual right of the internal agreement could not oppose the registered property right. Therefore, Guanghua was not entitled to claim the ownership of the building.
- (c) In accordance with Article 186 of the Property Law, prior to the expiry of the term for debt repayment, the mortgagee shall not reach any agreement with the mortgagor whereby the mortgaged property shall be transferred to the creditor when 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 it failed to settle its debt. This kind of provision was null and void. The objective of this provision is to protect the mortgagor, who is in the comparatively weak position in concluding the mortgage agreement with the mortgagee.
- 9 This question requires candidates to deal with the legal issues as to the transfer of equity under the Company Law of China.
- (a) In accordance with Article 72 of the Company Law, when one shareholder intends to transfer his equity of a limited liability company, under the equal conditions the other shareholders shall have the priority to purchase the equity to be transferred. 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. As both Mr Zhang and Ms Zhao held 20% of the equity of the company, therefore, they should have the priority to purchase an equal proportion of equity from Mr Liu.

- (b) In accordance with Article 75 of the Company Law, any shareholder of a limited liability company may require the company to purchase his equity for a reasonable price if he meets any one of the following circumstances:
- i. where the company fails to distribute profits to its shareholders for a continuous five years, while the company has been continuously profitable for such five years and meets the conditions on distribution of profits;
  - ii. where the company merges, divides or transfers its substantial assets;
  - iii. where the term of operation of the company expires or other events occur for the dissolution of the company as stipulated in the articles of association, while the shareholders' meeting adopts a resolution to make the company continue to exist.

Since Mr Guan's request to purchase his equity by the company was not fallen within any circumstances of the above provision, his request should not be supported by the court if he brought a law suit in the court. His request was also against the general rule under the Company Law that any shareholder is not allowed to withdraw his capital contribution from the company if it is duly incorporated.

- (c) Mr Liu was entitled to transfer his equity to the private enterprise.

In accordance with Paragraph 2, Article 72 of the Company Law, where a shareholder intends to transfer its equity to persons who are not shareholders of the company, the consent of over half of all the shareholders must be secured. If the other shareholders fail to give a reply within 30 days upon their receipt of notice, they shall be deemed to have consented to such transfer. Based on the facts as given, Mr Zhang and Ms Zhao agreed with transfer; Ms Wang did not give a reply within 30 days upon receipt of the notice, which should be deemed to have consented to the transfer. They held 60% of the equity of the company and met the conditions to transfer the equity to an outsider. Furthermore, Mr Guan exercised his right of priority but his price was lower than that of the private enterprise. Under such circumstances Mr Liu has met all the conditions to transfer his equity to the private enterprise.

10 This question requires candidates to determine the legal nature of the sales promotion plan and the formation of contract under the Contract Law of China.

- (a) The promotion plan issued by the department store was an invitation for offer. In accordance with Article 15 of the Contract Law, an invitation for offer refers to the expression by a party to the others to send an offer. The commercial advertising is an invitation for offer, not an offer. As the department store did not give any price of a particular commodity, lacking the necessary element of price for an effective offer. Therefore, the announcement for the bonus sale promotion itself was only a commercial advertising – an invitation for offer.
- (b) 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, as there was a contract between Mr Zhou and the department store. Since Mr Zhou went to the department store, upon the invitation of it, to consume about RMB 1,000 yuan. His action constituted an effective offer. The action of the department store by handing over the commodities plus the bonus coupons to Mr Zhou constituted an acceptance. They have entered into a contract with a special condition: If the number of the bonus coupons matched the number opened through the lucky-draw, the department store was under a contractual obligation to pay the bonus. The contract did not contain a time limit.
- (c) The action of the department store to set forth the time limit for cashing the bonus was to alter the contract. As mentioned above, Mr Zhou and the department store entered into a special contract. The department store did neither indicate the time limit for cashing the bonus upon announcing the bonus sale promotion, nor did it indicate the time limit for cashing the bonus when handing over the bonus coupons to Mr Zhou. Furthermore, the department store did not describe the time limit for cashing the bonus when it opened the lucky numbers after the lucky-drawing. Considering the contractual obligation, it was not allowed for the department store unilaterally to add an extra condition for cashing the bonus.

- 1** 8–10 A thorough answer which explains the jurisdiction by forum level and the jurisdiction rule over the major cases involving foreign elements, as well as the territorial jurisdiction and the exclusive jurisdiction over the civil and commercial disputes with their detailed rules.
- 6–7 An answer which explains the meaning of jurisdiction by forum level and the jurisdiction over the major cases involving foreign elements, as well as indicating the territorial jurisdiction and exclusive jurisdiction, but failure to give the detailed rules as to the territorial jurisdiction and exclusive jurisdiction over the civil and commercial cases.
- 4–5 An answer which explains the meaning of jurisdiction by forum level or the jurisdiction over the major cases involving foreign elements, but failure to explain the territorial jurisdiction and exclusive jurisdiction.
- 0–3 An answer which only explains any one form of jurisdiction, but fails to give the details of the jurisdiction.
- 2** 8–10 A good statement on the significance of registration of immovables and the legal effect of the registration on the contracts; a clear and complete understanding of the two forms of legal remedies granted to the interest holder or stakeholder if the data in the registry being incorrect.
- 5–7 A sound understanding of the registration of immovables and the legal remedies for the incorrect data in the registry, although perhaps lacking in detail.
- 3–4 Some understanding of the area, but lacking in detail, perhaps failing to state the impact of registration on the contract or failing to describe the legal remedies to oppose the incorrect data in registry.
- 0–2 Little or no knowledge of the area.
- 3** 8–10 A correct explanation of *takeover of a listed company by offer*, and a thorough statement of the report requirements for a purchaser and the various restrictions on the purchaser when he issued a takeover offer.
- 5–7 A correct explanation of the term takeover of a listed company by offer, and a sound statement of the report requirements for a purchaser and any one of the restrictions on the purchaser when he issued a takeover offer.
- 3–4 A very unbalanced answer, focusing on only one aspect of the question and ignoring the others, or one which shows little understanding of the subject matter of the question.
- 0–2 Little or no knowledge of the area.
- 4** 8–10 A thorough statement of the various crimes committed by the shareholders of a company in the process of incorporation and corporate financing and a complete description of the various elements to be constituted as such crimes.
- 5–7 A sound understanding of the area and most of the elements to constitute a corporate crime, although perhaps lacking in detail.
- 3–4 Some understating of the area but lacking in detail, perhaps failing to state most of the elements to constitute a crime.
- 0–2 Little or no knowledge of the area.
- 5** 8–10 A clear and complete explanation of the term expected profit, a thorough statement of the conditions to be met for a party to claim damages, as well as the statutory obligation for a party to claim damages.
- 5–7 A sound understanding of the rules relating to damages and expected damages but lacking in detail, perhaps failing to state completely the conditions to be met for a party to claim damages, or failing to state the statutory obligation to mitigate the loss for a party to claim damages.
- 3–4 Some understanding of the rule of damages but lacking in detail, perhaps failing to state the conditions to be met for a party to claim damages and the statutory obligation to mitigate the loss.
- 0–2 Little or no knowledge of the area.

- 6** 8–10 A clear and complete explanation of a bankruptcy administrator and how one can be appointed; a thorough statement of the qualifications of a bankruptcy administrator and the restrictions on the natural person to be designated to take the position of bankruptcy administrator.
- 5–7 A sound understanding of the area, although perhaps lacking in detail.
- 3–4 Some understanding of the area but lacking in detail, perhaps failing to explain the establishment of bankruptcy administrator, or failing to state the qualifications of a bankruptcy administrator and the restriction on the natural person to take the post of bankruptcy administrator.
- 0–2 Little or no knowledge of the area.
- 7** 8–10 A good explanation of the term non-competition clause in a labour contract, and a thorough statement of the precondition – financial compensation – for an effective non-competition clause and the two-year time limit for such a clause.
- 5–7 A sound understanding of the area, although perhaps lacking in detail or lacking to state the precondition or the time limit for the term of non-competition clause.
- 3–4 Some understanding of the area but lacking in detail, perhaps failing to state the requirement for giving financial compensation by the employer as the precondition to validate the non-competition clause in a labour contract and failing to state the time limit.
- 0–2 Little or no knowledge of the area.
- 8** 8–10 A complete answer to deal with all of the legal issues in the problem section and giving the reasons to support the judgements relating to the registration of property, the registration of the mortgage agreement and the prohibition on the automatic transfer of the mortgaged property to the mortgagee.
- 5–7 A good understanding of the legal issues in the problem section and gives a correct answer to the three parts, but failing to give the reasons and rule of law to support the answer; or a complete answer to deal with any two parts of the problem section.
- 3–4 Some understanding of the legal issues in the problem section and one correct answer to any part in the question section, but failing to give any reasons to support the answer.
- 0–2 Very weak answer showing no, or very little, understanding of the question.
- 9** 8–10 A complete answer to deal with all the issues presented in the problem section and invoking the rules of law to support the answer.
- 5–7 A good understanding of the problems in the question section and showing a basic ability to deal with the legal issues, but failing to state all the circumstances under which a shareholder may require the company to purchase his equity for a reasonable price.
- 3–4 An ability to recognise some of the legal issues, but failing to invoke the rules of law to support the answer.
- 0–2 Very weak answer showing no, or very little, understanding of the question.
- 10** 8–10 A complete answer, highlighting and dealing with all of the issues presented in the problem section, especially giving the correct judgement to every part of the question with reasons.
- 5–7 A good understanding of the legal issues in the problem section and giving a correct answer to any two parts out of the three parts, along with some reasons for the answer.
- 3–4 Some understanding of the legal issues in the problem section and giving only a correct answer to any one of the three parts.
- 0–2 Very weak answer showing no, or very little, understanding of the question.