
Answers

- 1** This question requires candidates to state the procedural ways to deal with the various situations when an assignment of contract takes place and a dispute, between the assignee and the other party to the contract, is brought to the people's court under the Judicial Interpretation on Contract by the Supreme People's Court.
- (a) In accordance with Article 27 of the Judicial Interpretation, where an obligee has assigned his rights to a third party and a dispute between the obligor and the assignee regarding the performance of contract is brought to the people's court, the court may add the original obligee as the third party in the litigation if the obligor raises a protest against the rights of the original obligee.
 - (b) In accordance with Article 28 of the Judicial Interpretation, where an obligor has assigned his obligations to a third party, with the consent of the obligee, and a dispute between the assignee and the obligee regarding the performance of contract is brought to the people's court, the court may add the obligor as the third party in the litigation if the assignee raises a protest concerning the right of the obligor against the obligee.
 - (c) In accordance with Article 29 of the Judicial Interpretation, where after one party has assigned both his rights and obligations under the contract to an assignee and a dispute between the other party and the assignee regarding the performance of contract is brought to the people's court, the court may add the assignor as the third party if the other party raises a protest concerning the rights or duties under the original contract.
- 2** This question requires candidates to explain the non-competition clause, and state the persons who are subject to non-competition obligations and the conditions for a labour contract to include a non-competition clause under the Labour Contract Law of China.
- (a) The non-competition clause refers to a clause contained in a labour contract or a confidentiality agreement, under which an employee agrees to maintain the trade secret of the employer and the confidentiality of matters relating to the industrial properties of the employer for a period of time after the termination or dissolution of a labour contract.
 - (b) In accordance with Article 24 of the Labour Contract Law, the persons who are subject to non-competition obligations include the employer's senior management, senior technicians and other personnel with confidentiality obligations.
 - (c) In accordance with Articles 23 and 24 of the Labour Contract Law, where a labour contract contains a non-competition clause, the same contract shall also stipulate that the employer pays monetary compensation to the employee on a monthly basis during the term of non-competition after the termination or dissolution of the labour contract. The term, counted from the termination or dissolution of the labour contract, shall not exceed two years.
- 3** This question requires candidates to explain a pre-contractual liability, distinguish between this and liability for breach of contract and state the conduct of a party that will result in pre-contractual liability under the Contract Law of China.
- (a) Pre-contractual liability refers to the liability incurred by a party's conduct, as prescribed in the Contract Law, which causes a loss or damages to the other party during the process of negotiating a contract but the contract is finally not concluded.

The major difference between the pre-contractual liability and the liability for breach of contract is: under the pre-contractual liability there is no contract by the two parties who have negotiated to conclude a contract; while under the liability for breach of contract an effective contract has been concluded but one of the parties breaches it. Under pre-contractual liability the form of liability is compensation for loss while under liability for breach of contract the form of liability includes specific performance, liquidated damages and damages.
 - (b) In accordance with Article 42 of the Contract Law, a party with the following conduct in negotiating a contract shall be liable for the losses caused to the other party:
 - (i) under the pretext of concluding a contract, to negotiate in bad faith;
 - (ii) deliberate concealment of the important facts relating to concluding a contract or providing false information;
 - (iii) other conduct in violation of the principle of good faith.
- 4** This question requires candidates to state the composition of the board of directors in different forms of limited liability companies, and the ways to deal with the situation where the number of directors is less than a quorum under the Company Law of China.
- (a) In accordance with Article 45 of the Company Law, a general limited liability company shall set up a board of directors which shall be composed of 3 to 13 members, unless otherwise stipulated by the law. The method of the creation of the chairman and vice-chairman of the board of directors shall be stipulated in the articles of association of the company.

- (b) In accordance with Article 45 of the Company Law, where a limited liability company is invested and established by two or more state-owned enterprises, its board of directors shall include representatives of the employees of the company. Such representatives of employees shall be elected by the employees of the company through the staff and workers congress, workers' assembly or other forms of election.
- (c) In accordance with Article 46 of the Company Law, where the members of the board of directors are/is less than the quorum because re-election is not conducted upon expiry of the term of office of a director, or a director resigns during his term of office, the said director shall still perform his functions as a director.
- 5** This question requires candidates to explain the term rectification, and state the legal effect of rectification on the right of guarantee during the period of rectification and the ways to deal with the situation that may damage the rights of a guarantor under the Enterprise Bankruptcy Law of China.
- (a) The term rectification refers to such a system under which a debtor or an investor whose investment accounts for 10% or more of the registered capital of the debtor, after the application for bankruptcy has been accepted and before the declaration of bankruptcy of the debtor by the court, may apply to the court to rectify debts of the debtor. Under the conditions of acceptance of such application by the court and the suspension of the bankruptcy procedures, the debtor may continue its business operations, so as to avoid bankruptcy of the debtor and resume its ability of normal business operations.
- (b) In accordance with Article 75 of the Enterprise Bankruptcy Law, in the period of rectification, the right of guarantee on the particular property of the debtor shall be suspended. However, if there is a possibility for the secured property to suffer damages or significant depreciation of value so that the right of guarantee is endangered, the guarantee may apply to the court for recovering the right to guarantee. A bankruptcy administrator may set a guarantee for a new loan for the purpose of continuing the debtor's business operations.
- 6** This question requires candidates to explain a takeover by offer of a listed company, state the ways to deal with the shares of a listed company purchased after the expiration of the duration of takeover and the ways to deal with the legal status of the listed company purchased after the completion of takeover under the Securities Law of China.
- (a) In accordance with Article 88 of the Securities Law, takeover by offer refers to the form of taking over a listed company where an investor comes to hold or jointly hold with others, through a stock exchange, 30% of the issued shares of a listed company and continues to buy such shares, the investor shall comply with the law to 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 97 of the Securities Law, the trading of the shares of the stock company under takeover shall be terminated on the stock exchange when the distribution of shares does not meet the requirements for listing, upon the expiration of the term of the takeover offer. The holders of the remaining shares of the target company shall be entitled to sell their shares to the purchaser on the same conditions as those in the takeover offer; while the purchaser is under an obligation to buy up these shares. The listed company taken over shall change its enterprise form where this company no longer meets the requirement for a joint stock company, upon the completion of the takeover.
- 7** This question requires candidates to describe various acts relating to the capital of a company that shall be regarded as fraudulent corporate behaviour, and state the reasons why such acts shall be regarded as fraudulent corporate behaviour.
- (a) In corporate management, the following acts relating to the capital of a company, committed by any personnel, shall be regarded as fraudulent behaviour:
- (i) to provide a false statement of the registered capital during the process of establishing a company;
 - (ii) to make false capital contributions;
 - (iii) to withdraw the capital, contributed during the process of incorporation, after the establishment of the company.
- (b) Due to the following reasons, the above-described acts are to be regarded as illegal and fraudulent behaviour:
- (i) providing a false statement of registered capital and making false capital contributions will result in a situation in which the registered capital of the company, as stipulated in the articles of association and registered with the government agency, cannot reflect its genuine situation of capital;
 - (ii) withdrawal of the capital contributed in the process of incorporation after the establishment of the company will reduce its ability to satisfy debts with its own assets, which will increase the risks of other parties doing business with it.

- 8** This question requires candidates to deal with the legal issues relating to the transfer of contract under the Contract Law of China.
- (a)** There was a contract between Aishen Garment Co and Conka Sales. The reasons to support this conclusion include:
- (i) In accordance with Article 89 of the Contract Law, where the rights and duties are transferred together, provisions of Articles 79, 81 to 83 and 85 to 87 shall apply. This means that a party may, subject to the conditions as set in the provisions, transfer its rights and obligations to a third party.
 - (ii) In accordance with the relevant provisions listed in Article 89 of the Contract Law, a creditor shall notify the debtor in the case of the transfer of his credit and a debtor shall obtain the consent from the creditor in the case of the transfer of his obligations. Bulinger Store was a creditor to receive the goods and as a debtor to pay the price. Therefore, Bulinger Store should notify the transfer to and obtain consent from Aishen Garment Co. In this case, Bulinger Store issued a written notice to Aishen Garment Co. Therefore, the transfer of rights satisfied the requirements of the law.
 - (iii) Bulinger Store Co issued a written notice to Aishen Garment Co, but failed to obtain consent from the latter. However, Aishen Garment Co sent a fax to advise Conka Sales to receive the goods, and actually delivered 10,000 pieces of sportswear as well as receiving the price paid by Conka Sales. This meant that Aishen Garment Co acknowledged the transfer of contractual rights and obligations to Conka Sales.
- (b)** In accordance with Article 81 of the Contract Law, where a creditor transfers his rights, the transferee acquires rights accessory to the creditor's rights, unless the accessory right is exclusive for the creditor himself. Conka Sales, as a transferee, acquired the accessory right when it acquired the right to the goods. Hence, it was entitled to claim damages against Aishen Garment Co for the defects of the goods.
- 9** This question requires candidates to deal with the legal issues relating to derivative litigation under the Company Law of China.
- (a)** Ms E was entitled to bring a lawsuit against Mr A. The legal basis for this conclusion is Articles 21, 150 and 152 of the Company Law. The controlling shareholders, actual controllers or directors of a company shall not, by taking advantage of their affiliate relationship, damage the interests of the company. Where any of the above-mentioned persons violates laws or articles of association of a company and causes damages to a company, such person shall be liable for the damages. If such a situation occurs, any shareholder may directly bring a lawsuit against the director, subject to the conditions as prescribed by the Company Law.
- (b)** In accordance with Article 152 of the Company Law, the following conditions shall be satisfied:
- (i) Ms E requests the supervisory board in writing to bring a lawsuit against the director who causes the damage;
 - (ii) the supervisory board, upon its receipt of Ms E's request, fails to file a lawsuit within 30 days upon the receipt of such request;
 - (iii) Ms E brings a lawsuit against the Mr A for the interests of the company, in her own name.
- (c)** Assuming Ms E was granted a favourable judgement by the court, the beneficiary should be Tenda Co Ltd. Although Ms E brought the lawsuit in her own name, the legal action was for the interests of the company. Therefore, the result of such a legal action should be attributed to the company.
- 10** This question requires candidates to deal with the legal issues relevant to the declaration of credits and the legal effect of bankruptcy procedures on the pending case under the Enterprise Bankruptcy Law of China.
- (a)** In accordance with Article 20 of the Enterprise Bankruptcy Law, after the people's court accepts an application for bankruptcy, any pending civil action involving the relevant debtor shall be suspended. Hence, the pending case between Construction Company and Dalie Co should be suspended. The action can be resumed after a bank takes over Dalie's assets.
- (b)** Industry Bank should declare its credit with the court accepting the bankruptcy application, submit relevant legal documents to prove its credit and clarify the amount of credit as well as the existence of guarantee on part of the credit. Among its total credit of RMB 20 million yuan, Industry Bank was a general creditor for RMB 8 million yuan.
- (c)** Merchant Bank was entitled to declare its credit and join the bankruptcy procedure. In accordance with Article 50 of the Enterprise Bankruptcy Law, the joint and several creditors may choose one from among them to declare their creditors' right or may jointly declare the creditors' right together. Dalie Co provided guarantee for a loan to Merchant Bank, but the principal, Jiqing Company, failed to settle the debt. Merchant Bank, as a creditor and guarantee, was entitled to choose Dalie Co to declare its credit.

- 1** 8–10 A thorough answer which states the ways to deal with the situations in which an assignment of contract takes place, and a dispute between the assignee and the other party of the contract is brought to the people's court. Especially the answer correctly states that this is a procedural action during the litigation.
- 6–7 An answer which states correctly any two parts among the three parts and the nature of such a way to deal with the said situation, but fails to state the remaining part.
- 3–5 An answer which states correctly any one of the three parts, but fails to give any points for other two parts.
- 0–2 An answer which does not state any point or states very limited points in part (a) or part (b) or part (c).
- 2** 8–10 A thorough answer which explains a non-competition clause in a labour contract, and states the persons who are subject to non-competition obligations and the conditions and term of duration for a clause of non-competition in a labour contract.
- 6–7 An answer which explains a non-competition clause, and states some points in part (b) and part (c). As an alternative, an answer which fails to explain a non-competition clause but states all points in part (b) and part (c).
- 3–5 An answer which explains the basic meaning of a non-competition clause in part (a), but fails to state or states very limited points in part (b) and part (c). As an alternative, an answer which fails to explain a non-competition clause in part (a), but states some points both in part (b) and part (c), or states all points in part (c) but no point in part (b).
- 0–2 An answer which shows little or no knowledge of this area. As an alternative, an answer which fails to explain a non-competition clause, and fails to state any points both in parts (b) and (c), or states limited points in part (b) or (c).
- 3** 8–10 An answer which explains a pre-contractual liability and its difference with the liability for breach of contract, and states the conduct that will result in pre-contractual liability.
- 5–7 An answer which explains the basic meaning of a pre-contractual liability and its major difference with the liability for breach of contract in part (a), and states some points in part (b). As an alternative, an answer which explains some points to pre-contractual liability and its major difference with the liability for breach of contract in part (a), but fails to state any point in both part (b).
- 3–4 An answer which explains some points in part (a), and fails to state or states very limited points in part (b). Alternatively, an answer which fails to explain the term and its major difference with the liability for breach of contract in part (a), but states some points in part (b).
- 0–2 An answer which shows little or no knowledge of this area.
- 4** 8–10 An answer which states the composition of the board of directors of a general limited liability company and that of a limited liability company incorporated by two or more state-owned enterprises, as well as the way to deal with the situation in which the numbers of directors are less than a quorum due to various causes.
- 5–7 An answer which states correctly parts (a) and (b), or correctly states parts (b) and (c). As an alternative, the answer states some points in any one of the three parts.
- 3–4 An answer which shows a limited understating of the rules on the composition of directors in different limited liability companies in parts (a) and (b), fails to state the ways to deal with the situation in which the numbers of directors are less than a quorum in part (c). Alternatively, the answer fails to state the composition of the board of directors in a general limited liability company in part (a), but states major points in part (b) or (c).
- 0–2 An answer which shows little or no knowledge of this area.
- 5** 8–10 An answer which explains the term rectification, and states correctly the legal effect of the rectification on the right of guarantee during the period of rectification and the possibility of setting a guarantee during the period of rectification by a bankruptcy administrator.
- 5–7 An answer which explains the term rectification, states some points in part (b). As an alternative, an answer which fails to explain the term rectification, but states correctly the legal effect of rectification against the right of guarantee and the possibility of setting a guarantee by a bankruptcy administrator in the period of rectification.
- 3–4 An answer which explains the term rectification, but fails to state any points in part (b). Alternatively, an answer which fails to explain the term in part (a), but states some points in part (b).
- 0–2 An answer which shows little or no knowledge of the area.

- 6** 8–10 An answer which explains a takeover by offer, states correctly the ways to deal with the shares of a listed company purchased after the expiration of the duration of takeover by offer and the way to deal with the enterprise form of a listed company purchased after the completion of takeover.
- 5–7 An answer which explains a takeover by offer, states some points in part (b). As an alternative, an answer which fails to explain a takeover by offer, but states all or most of points in part (b).
- 3–4 An answer which gives a correct answer to any one of part (a) or (b). As an alternative, the answer gives limited points in both part (a) and (b).
- 0–2 An answer which shows little or no knowledge of the area.
- 7** 8–10 An answer which describes the acts that shall be regarded as fraudulent behaviour, states correctly the reasons why such acts shall be regarded as fraudulent behaviour.
- 5–7 An answer which describes any two kinds of acts that shall be regarded as fraudulent behaviour, states some reasons in part (b). As an alternative, an answer which describes all the acts that shall be regarded as fraudulent behaviour in part (a), but fails to state the reasons in part (b).
- 3–4 An answer which describes any one kind of the acts that shall be regarded as fraudulent behaviour, states limited points in part (b). Alternatively, an answer which describes any two kinds of the acts that shall be regarded as fraudulent behaviour, but fails to state any reasons in part (b).
- 0–2 An answer which shows little or no knowledge of the area.
- 8** 8–10 An answer which correctly deals with the legal issues relating to the conditions for the transfer of contract and the accessory rights along with the transfer of rights.
- 5–7 An answer which correctly states that there was a contract between Aishen Garment Co and Conka Sales and the rules relating to accessory rights but states merely some reasons to support the answer. Alternatively, an answer which correctly states the existence of a contract between Aishen Garment Co and Conka Sales and the reasons to support such a conclusion, but fails to answer the question in part (b).
- 3–4 An answer which shows some understanding of the legal issues and gives only a correct conclusion of part (a) or (b), but fails to give any reasons to support the conclusion.
- 0–2 The answer is very weak, showing no, or very little, understanding of the question.
- 9** 8–10 An answer which shows a complete understanding of the rules as to the issues of derivative litigation in parts (a), (b) and (c), and gives reasons to support the conclusions to the question.
- 5–7 An answer which gives correct conclusions to any two parts among parts (a), (b) and (c), and gives relevant reasons to support such conclusions. Alternatively, an answer which gives correct conclusions to three parts, but fails to state, or states limited, points of reasons to support such conclusions.
- 3–4 An answer which gives merely one correct conclusion among three parts, and states the reasons to support such conclusion.
- 0–2 An answer which shows no, or very little, understanding of the question.
- 10** 8–10 An answer which gives a complete answer to each part of the question and gives correct reasons to support the answer.
- 5–7 An answer which shows a good understanding of the rules to deal with the pending case where the court accepts an application of bankruptcy against a debtor, and any one of the ways to deal with various forms of debts due by the debtor. Or as an alternative, an answer which shows a sound understanding of any one part among the three parts and gives a correct reason to support such conclusion.
- 3–4 An answer which shows limited understanding of the rules to deal with the pending case in part (a) or the ways to deal with the debts secured by mortgage in part (b), or the ways to deal with the debts under a personal guarantee in part (c), but with very limited reasons.
- 0–2 An answer which shows very little or no understanding of the question.