
Answers

Section B

- 1** The question tested the candidates' ability to apply the principles of contract law to a scenario in which three customers of a car dealer responded to an offer to sell cars to them.
- (a)** Bao replied to Cam accepting the offer to sell a car, but then sent another letter cancelling the acceptance.
- Under the provisions of the Civil Code, an acceptance can be withdrawn, but only if the notice of withdrawal reaches the offeror before or at the same time as the original acceptance. The withdrawal of the acceptance reached Cam one day after the letter of acceptance. This was incapable of cancelling the acceptance. Bao could not prevent a binding contract from coming into effect.
- (b)** Khanh's reply to Cam assumed that the usual discount of 5% would apply, and a payment of 95% of the purchase price was sent to Cam.
- Under the provisions of the Civil Code, any acceptance with substantive modifications is regarded as a counter offer. This cancels the offer and brings a new offer into effect.
- Khanh's modification of the offer (in this case, the price) was not an acceptance, and no binding contract was created, even though a remittance was sent. Cam can accept or reject Khanh's counter offer.
- (c)** The Civil Code states that in order for a contract to come into effect, it is necessary for the offeree to comply with all of the terms of the offer. This includes any time limit set by the offeror for acceptance.
- Hai's acceptance was received late by Cam, who can either accept or reject this. No binding contract was created between Hai and Cam.
- 2** The question asked candidates to apply their knowledge of the law relating to pre-incorporation contracts to a scenario.
- (a)** Bien entered into a contract, ostensibly on behalf of a company which had not yet been formed, as the business registration certificate of the company was issued after the contract came into effect.
- Bien could not be an agent for the new company, as the latter was incapable of being a principal if at the time of the contract it had not yet been established. However, Article 14 of the Law on Enterprises states that pre-incorporation contracts can bind the company when entered into by members (shareholders), founders or their authorised representatives.
- The contract signed by Bien was therefore binding on the company once it was registered.
- (b)** The circumstances concerning Cuong's contract with a supplier is similar to that in part (a). However, in this case the company was not established. Article 14 of the Law on Enterprises states that in such cases the person who signs the contract is personally liable, or jointly and severally liable, under the terms of the contract.
- The extent to which Cuong can hold the co-founders liable depends on whether there was any explicit agreement between them that there would be joint and several liability.
- 3** The question required candidates to apply their knowledge of the Law on Enterprises to a situation in which a potential investor made three demands as conditions of providing equity finance.
- (a)** Chi's demand to be allocated a minimum of 10% of the shares of the company would enable her to secure considerable constitutional rights in the affairs of the company. However, the shares are currently fully subscribed, so in order to facilitate her demand only two courses of action are possible.
- First, existing shareholders may be willing to transfer 10% of shares already held to Chi, and this would rely on their consent.
- Second, the company could issue new shares. However, this would mean that existing shareholders would have pre-emption rights to purchase the new shares pro rata their existing holdings. Only if such pre-emption rights were declined could Chi, as a third party, be offered these shares.
- (b)** Chi's insistence on a minimum return of 7% per annum could only be facilitated by issuing bonds, and even this would only guarantee her return on the investment if the company remained capable of meeting the obligation to pay.
- The minimum desired return could not be guaranteed on any shares issued to Chi, as the maximum annual dividend is dependent on post-tax profits which may be distributed. This in turn is contingent on the company generating sufficient earnings, and any decision of the board of management to retain such earnings rather than distribute them. The company could offer Chi a fixed dividend on preference shares, but payments of dividends on these would also depend on the company making sufficient profit to pay a dividend.

- (c) Bondholders always have priority over the shareholders of a company, so as an owner of voting shares Chi would only be able to demand repayment of her capital after such prior demands were satisfied.

In addition, Article 78(6) of the Law on Enterprises explicitly states that each share of the same class entitles holders to the same rights, obligations and interests.

Even if the first rule did not apply, the only way in which Chi's demand could be satisfied would be if she were issued with a unique class of share as the sole owner of such shares.

- 4 The question tested the candidates' ability to apply their knowledge of the rights and obligations of the board of management of a shareholding company to a case scenario.

- (a) Article 96 of the Law on Enterprises states that the powers to sanction an increase in share capital by issuing a new class of preference share lies with the general meeting of shareholders. The board of management therefore has no right to implement this decision without first putting the proposal to the shareholders.

The power to sanction the disposal of non-current assets, representing 35% of the value of total assets of the company, is within the competence of the board of management under Article 108 of the Law on Enterprises.

- (b) Article 118 of the Law on Enterprises compels, *inter alia*, all members of the board of management to disclose relevant interests to the company.

Article 119 of the same law requires members of the board of management to be loyal to the company and serve its best interests.

The board of management should have been made aware of Anh's conflict of interest at the earliest opportunity, and should have considered the matter without Anh's involvement in the decision.

Anh's failure to disclose a conflict of interest is a breach of Article 118. This is a ground for dismissal from the board of management.

If the assertion of the dissentient shareholder is correct, Article 119 has been violated and Anh may be personally liable to the company for any damage to its interests.

- 5 The question tested the candidates' understanding of the criminal offences of insider dealing and bribery.

- (a) Insider dealing occurs in relation to companies whose securities are listed on a recognised capital market. Insider dealing is committed when an insider buys or sells shares on the basis of holding price sensitive information which is not generally available to the public. In order for information to be regarded as price sensitive, it must relate to a specific company or matters concerning the company which if known would have a material impact on the prices of securities.

There are two further offences which can be committed in relation to inside information. An insider should not disclose confidential information which is not in the public domain, and should also not encourage others to deal.

Chau herself did not deal, and is therefore not guilty of this offence. However, she disclosed information to her brother and also encouraged him to deal, thereby committing two offences.

Hien has committed an offence only if it can be established that the advice given by his sister was knowingly used to obtain an advantage on the basis of Chau's inside information. His best defence is ignorance that the information provided by Chau was actually inside information.

- (b) Bribery arises when an individual offers an advantage to a counterparty with a view to influencing that person's behaviour. An individual who is offered a bribe may therefore be induced to behave differently to what they would have done had the bribe not been offered.

By offering an expensive gift to her company's customer, it is quite clear that this could have a favourable effect on future buying decisions by that company. However, corporate gifts and hospitality are common practice, and by offering the gift as a 'thank you' for past business, Chau could argue that the gift was a reasonable gesture for helping the company achieve favourable results. The gift was offered only after the previous year's results were announced.

Therefore, although the gift might be regarded as unethical if disproportionate to the value of business acquired, Chau would not be guilty of an offence unless it could be proven that the gift was made in expectation of future advantages.

Section B

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| 1 | (a) Knowledge of the Civil Code provisions
Application to the scenario | 1 mark
1 mark
(2 marks) |
| | (b) Knowledge of the Civil Code provisions
Application to the scenario | 1 mark
1 mark
(2 marks) |
| | (c) Knowledge of the Civil Code provisions
Application to the scenario | 1 mark
1 mark
(2 marks)
(Total 6 marks) |
| | | |
| 2 | (a) Knowledge of the law on pre-incorporation contracts
Application and correct conclusion | 1 mark
2 marks
(3 marks) |
| | (b) Knowledge of the law on pre-incorporation contracts
Application and correct conclusions | 1 mark
2 marks
(3 marks)
(Total 6 marks) |
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| 3 | (a) Provisions of Law on Enterprises
Application to scenario | 1 mark
1 mark
(2 marks) |
| | (b) Provisions of Law on Enterprises
Application to scenario | 1 mark
1 mark
(2 marks) |
| | (c) Provisions of Law on Enterprises
Application to scenario | 1 mark
1 mark
(2 marks)
(Total 6 marks) |
| | | |
| 4 | (a) Correct conclusion on each decision | 1 mark
(2 marks) |
| | (b) Provisions of the Law on Enterprises
Consequences | Up to 2 marks
Up to 2 marks
(4 marks)
(Total 6 marks) |
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| 5 | (a) Price sensitive information
Three insider dealing offences
Discussion of offences committed | 1 mark
1 mark
2 marks
(4 marks) |
| | (b) Bribery as an offence
Application to the scenario | 1 mark
1 mark
(2 marks)
(Total 6 marks) |