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# Answers

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- 1** This question requires candidates to explain the term *judicial interpretation* made by the Supreme People's Court, and state the rule of applicable law which is contained in the Judicial Interpretation on the Application of the Contract to deal with the special circumstances under which a contract was concluded before the date of implementation of the Contract Law but the dispute is brought after that date to the people's courts.
- (a) (i) The term *judicial interpretation* refers to the interpretations, made by the national supreme judicial authorities (the Supreme People's Court and the Supreme People's Procuratorate), toward the general matters, or specific inquiries brought by the local judicial authorities relating to specific application of laws in their judicial practices.
- (ii) The legal basis for the Supreme People's Court and the Supreme People's Procuratorate to formulate a judicial interpretation is the authorisation of the National People's Congress (NPC). On 10 June 1981, the NPC Standing Committee adopted a Resolution on Strengthening the Work of Law Interpretation which authorises these two national judicial authorities to give judicial interpretations on matters of the application of law.
- (b) In accordance with Article 1 of the Judicial Interpretation on the Application of the Contract Law issued by the Supreme People's Court, if a dispute brought to the people's court is relevant to a contract concluded before the date of the implementation of the Contract Law, the former provisions of the three contract laws shall apply, except that this Interpretation provides otherwise. Where there was no provision as contained in any one of the former contract laws, relative provisions prescribed in the Contract Law may apply.
- 2** This question requires candidates to explain the situations that create legitimate possession, state the right of claim of a possessor against various tortuous activities and explain the rules of compensation to a right holder for his property under the Property Law of China.
- (a) In accordance with Article 241 of the Property Law, legitimate possession can be created on the basis of a contractual relationship. Any use, proceeds and liability in relation to the possession of the immovables or movables shall be governed by the contract. However, the provisions of law shall be applied to deal with the matters concerning the use, proceeds and liability that arise from legitimate possession of immovables or movables if there is no such stipulation in the contract or the stipulations are not clear.
- (b) In accordance with Article 245 of the Property Law, where a movable or immovable under possession is infringed upon, the possessor is entitled to request the return of the original property. Where any act impairs the possession, the possessor shall be entitled to request the elimination of impairment or danger. Where any damage is caused by infringement or interference, the possessor shall be entitled to claim damages.
- (c) In accordance with Article 244 of the Property Law, a right holder shall be entitled to request the return of any insurance proceeds, damages or indemnities paid on the damage to or destruction or loss of his property which is under a possession. Where such compensation falls short of adequate compensation for the damage to the right holder, the *mala-fide* possessor shall be liable to indemnify the holder.
- 3** This question requires candidates to explain the relevant restrictions on the period of probation in a labour contract, and state the special matters in relation to the probation under the Labour Contract Law.
- (a) In accordance with Article 19 of the Labour Contract Law, where a labour contract stipulates a term of less than three months, it is not allowed to contain a provision of probation. Where a labour contract is one that will expire upon the completion of certain designated work, it is not allowed to contain any provision with respect to probation.
- (b) In accordance with Article 19 of the Labour Contract Law, if a labour contract contains the term of probation, it shall comply with the following conditions:
- (i) Where the term of a labour contract is not less than three months but less than one year, the probation period may not exceed one month.
- (ii) Where the term of a labour contract is more than one year and less than three years, the probation period may not exceed two months.
- (iii) Where the term of a labour contract is more than three years or non-fixed, the probation period may not exceed six months.

**4** This question requires candidates to explain the terms *withdrawal of an offer* and *revocation of an offer*, make a comparison on these two legal terms and state the formation of a contract if an offer and the withdrawal of the offer reach the offeree simultaneously under the Contract Law of China.

- (a)** In accordance with Article 17 of the Contract Law, the term *withdrawal of an offer* refers to such an expression made by an offeror to the offeree to withdraw an offer before or at the same time as the arrival of the offer.
- (b)** In accordance with Article 18 of the Contract Law, the term *revocation of an offer* refers to such an expression of invalidating the offer made by the offeror to the offeree after the arrival of the offer but before the offeree has despatched an acceptance.
- (c)** The major differences between withdrawal of an offer and revocation of an offer are the following:
  - (i)** Withdrawal of an offer can only be made before or at the same time as arrival of an offer; while revocation takes place at the time when an offer has already reached the offeree but this party has not yet despatched an acceptance. The key difference between the two terms rests with the time when the expression not to set up a contractual relationship by the offeror reaches the offeree. Therefore, if such an expression reaches the offeree later than that of the offer, the offer cannot be withdrawn.
  - (ii)** Even if an offer is an irrevocable one, it may be withdrawn by the offeror through an expression of withdrawal of the offer. On the other hand, an offer cannot be revoked by the offeror if the offer is an irrevocable one or if it meets the conditions of irrevocability as set forth in the law. The circumstances of irrevocability of an offer include that the offer indicates itself to be irrevocable or sets forth a time limit for acceptance.
- (d)** In accordance with Article 17 of the Contract Law, an offer may be withdrawn if the notice of withdrawal reaches the offeree before or at the same time as the offer. Therefore, no contract is formed if an offer and a notice for the withdrawal of the offer reach the offeree simultaneously.

**5** This question requires candidates to explain the major rights of a shareholder of a limited liability company under the Company Law of China.

A shareholder of a limited liability company shall have the following major rights:

- (a)** According to Article 34 of the Company Law a shareholder shall have the right to look up and copy the articles of association, the minutes of shareholders' meetings, the resolutions of the meetings of the board of directors and the supervisory board, as well as the financial statements of the company. A shareholder may also request to look up the accounting books of the company.
- (b)** According to Article 35 of the Company Law a shareholder shall have the right to draw dividends in proportion to his equity in the company. Where a company increases capital, the shareholder as one of the existing shareholders shall have the priority to subscribe for new shares in proportion to his equity in the registered capital. A shareholder shall also have the right of priority if other shareholders transfer their equity to a third party.
- (c)** According to Article 37 of the Company Law a shareholder shall have the right to attend the shareholders' meeting, according to Article 42 a shareholder should be notified 15 days before the shareholders' meeting, and according to Article 43 a shareholder shall have the right to vote for any substantive matters of the company.
- (d)** According to Article 187 of the Company Law a shareholder shall have the right to receive the distribution of the remaining assets of the company in proportion to the shareholder's equity after the completion of liquidation.

**6** This question requires candidates to state various circumstances under which a creditors' meeting shall be held, and the major functions and duties of it under the Enterprise Bankruptcy Law.

- (a)** In accordance with Article 67 of the Enterprise Bankruptcy Law, the first creditors' meeting shall be held by the people's court within 15 days of the expiration of the term for declaration of creditor's right. Subsequent creditors' meetings may be held when the people's court deems it necessary. A creditors' meeting shall also be held under the circumstances where the bankruptcy administrator, the creditors' committee or any creditor representing one-quarter or more of the total creditor's right proposes the chairman of the creditors' meeting to hold one.
- (b)** In accordance with Article 68 of the Enterprise Bankruptcy Law, the creditors' committee shall perform the following functions and duties:
  - (i)** Supervising the management and disposal of the debtor's assets;
  - (ii)** Supervising the distribution of the insolvent assets;
  - (iii)** Making proposals to hold a creditors' meeting; and
  - (iv)** Performing other functions and duties as entrusted by the creditors' meeting.

- 7** This question requires candidates to explain the term *controlling shareholder*, and state the civil liability of the controlling shareholder for his illegal activities causing damage to the company as well as in relation to corporate behaviour and legal liabilities.
- (a)** In accordance with Article 217 of the Company Law, the term *controlling shareholder* refers to any shareholder whose equity accounts for 50% or more of the registered capital of a limited liability company, or any shareholder who holds 50% or more of the total amount of share capital of a joint stock company. It also refers to any shareholder, although whose equity or shares is less than 50%, who may have a major impact on the resolutions of the shareholders' meeting or the shareholders' general meeting through his or her voting powers.
  - (b)** In accordance with Article 20 of the Company Law, where the shareholder of a company abuses the independent status of a corporate legal person and limited liability of shareholders to avoid company's debts and damages the interests of the creditors of the company, the creditors may bring a lawsuit against that shareholder and the company jointly. This kind of legal action is under the doctrine of disregard of corporate personality or piercing the corporate veil.
  - (c)** In accordance with Article 21 of the Company Law, the controlling shareholder of a company shall not, by taking advantage of the affiliate relationship, damage the interests of the company. He shall be liable for any loss or damage to the company. Under such circumstances other shareholders of the company are entitled to bring a lawsuit, in the name of the company and for the interests of the company, against the controlling shareholder if the company refuses or fails to take the necessary legal action. Such a kind of lawsuit against the controlling shareholder, in the name of the company, by other shareholders is in the character of subrogate litigation.
- 8** This question requires candidates to deal with the legal issues of the transfer of contract and the secured interests under the Property Law and the Contract Law of China.
- (a)** In accordance with Article 176 of the Property Law, as regards a secured credit involving both guarantees of mortgage and pledge, where the obligor fails to pay its due debts, the obligee shall realise the obligee's rights according to the relevant contract. In case the contract does not stipulate or merely stipulates an unclear provision, and where the obligor provides his/its own property as the security, the obligee's rights shall be realised firstly by the security in property. In the present case, Mr Ding provided a pledge of general liability. According to the above provision of law, OAM, as a transferee of the loan agreement and the obligee of the secured credit, shall realise its right firstly by the security in property. Therefore, the defence of Mr Ding should be supported by the court.
  - (b)** In accordance with Article 81 of the Contract Law, if the creditor transfers the rights, the transferee acquires rights affiliated to the creditor's right, unless the affiliated rights are exclusive for the creditor himself. In the present case, when Industry Bank (as the original creditor) transferred its credit of RMB 20 million yuan to OAM, it did not transfer the right of mortgage to OAM simultaneously. It was obviously against the statutory requirement for the simultaneous transfer of the main credit and affiliated rights. Such a failure caused damage to OAM. Therefore, Industry Bank is the party liable for the debt.
- 9** This question requires candidates to deal with the rules in relation to the issuance of corporate bonds under the Securities Law.
- (a)** In accordance with Article 16 of the Securities Law, to issue the corporate bonds publicly one of the following conditions shall be satisfied by the issuer: the accumulated value of the bonds issued shall not exceed 40% of the value of the net assets of the company. In the present case, the net assets of Ronger Properties Joint Stock Co were RMB 80 million yuan and the accumulated value of the bonds issued were RMB 12 million yuan. This means that the bonds issued accounted for 15% of the net assets of the company. Therefore, the maximum amount of the proposed issuance would be RMB 20 million yuan (80m x 40% = 12m).
  - (b)** In accordance with Article 32 of the Securities Law, securities to be offered to unspecific parties with a total face value exceeding RMB 50 million yuan shall be underwritten by an underwriting syndicate. Since the maximum amount of the proposed issuance would be RMB 20 million yuan, Ronger Properties Joint Stock Co could issue the corporate bonds with a form other than that of underwriting syndicate.
  - (c)** In accordance with Article 33 of the Securities Law, the maximum period for any forms of underwriting shall not be more than 90 days.
- 10** This question requires candidates to deal with the legal issue in relation to the revocation of an action of giving up credit by a debtor before the application of bankruptcy against whom is accepted by the court under the Enterprise Bankruptcy Law of China.
- (a) (i)** In accordance with Article 31 of the Enterprise Bankruptcy Law, a bankruptcy administrator is entitled to request the court to revoke the act of giving up the creditor's right. Therefore, Jianshe Co's act of giving up its creditor's right was within the category of applicable acts by the bankruptcy administrator for revocation in the process of liquidation.

- (ii) In accordance with Article 31 of the Enterprise Bankruptcy Law, one of the conditions for a bankruptcy administrator to plead for the revocation of such an act is that it takes place within one year before the acceptance the application of bankruptcy by the court. In the present case, although the act of giving up a creditor's right was within the category of acts that might be revoked by the court, the court should not grant an order to revoke such an act. This is because the act had taken place in August 2009, more than one year before the court accepted the bankruptcy application.
- (b) In accordance with Article 35 of the Bankruptcy Law, where the relevant court accepts an application for bankruptcy and finds that the shareholders of the debtor fail to discharge their capital contributions, the bankruptcy administrator shall request that these shareholders make the full capital contributions they have subscribed to, irrespective of the term for capital contributions. Therefore, the bankruptcy administrator shall request that shareholders of Jianshe Co make full capital contributions. The rule of prescription or time limitation is not applicable to the obligation of shareholders to make full capital contributions.

- 1** 8–10 A thorough answer which explains the term judicial interpretation, the legal basis of the national supreme authorities to issue judicial interpretations, and explains the rule relating to the matters of the application of law under the Judicial Interpretations on the Contract Law by the Supreme People's Court.
- 6–7 An answer which explains the term judicial interpretation or its legal basis in part (a), and states correctly any one of the rules in part (b) relating to the application of the contract law to deal with the contractual dispute that is brought to the court after the implementation of the Contract Law. Or as an alternative, an answer which correctly explains both the term judicial interpretation and its legal basis in part (a), but states no or limited contents as to the rule in part (b).
- 3–5 An answer which explains the term judicial interpretation or its legal basis in part (a), and states limited points in part (b); or as an alternative, an answer which fails to explain any points in part (a), but states correctly the rule, based on the Judicial Interpretation on Contract Law by the Supreme Court, in relation to the application of the Contract Law in part (b).
- 0–2 An answer which does not explain or explains limited points in part (a), but fails to state the rule in relation to the application of the Contract Law.
- 2** 8–10 A thorough answer which explains the situations that create the legitimate possession, and states the right of claim against the various tortuous acts that infringe upon or impair the possession, or damage the properties under a legitimate possession as well as the time limit for a possessor to exercise the right of claim.
- 6–7 An answer which explains and states several points in part (a), (b) and (c). As an alternative, an answer which explains and states any two parts of the three parts.
- 3–5 An answer which deals with either part (a) or part (b), plus the statement of part (c). As an alternative, an answer which deals with some points in part (a) and part (b), but fails to state the time limit to exercise the right of claim in part (c).
- 0–2 An answer which shows little or no knowledge of this area. Or an answer which fails to deal with both part (a) and part (b), but explains the time limit for a possessor to exercise the right of claim.
- 3** 8–10 An answer which explains correctly the restrictions on the period of probation in a labour contract and the circumstances in which a labour contract is not allowed to incorporate a provision of probation.
- 5–7 An answer which explains at least two points in part (a) and explains the circumstances in which a labour contract is not allowed to incorporate a provision of probation.
- 3–4 An answer which explains merely limited points in part (a) and part (b); alternatively, an answer which fails to explain any points in part (a) but explains the circumstances in which a labour contract is not allowed to incorporate a provision of probation in part (b).
- 0–2 An answer which shows little or no knowledge of this area.
- 4** 8–10 An answer which explains both the meanings of withdrawal and revocation of an offer, distinguishes between withdrawal and revocation of an offer, and states whether a contract is formed where an offer and the notice of withdrawal of the offer reach the offeree at the same time.
- 5–7 An answer which shows a sound understanding of the meanings of withdrawal and revocation of an offer, distinguishes any difference of the two points in part (c), and gives a correct conclusion as to the formation of a contract. As an alternative, the answer explains either part (a) or part (b), and distinguishes some points concerning the differences between withdrawal and revocation of an offer in part (c), and gives a correct conclusion in part (d).
- 3–4 An answer which shows a limited understanding of the rules on withdrawal of an offer or revocation of an offer, fails to distinguish the differences between the two terms, but gives a correct conclusion as to the formation of a contract in part (d). Alternatively, the answer explains correctly any one of the terms in part (a) as well as the conclusion in part (d), but fails to state any point in part (c).
- 0–2 An answer which shows little or no knowledge of the area.
- 5** 8–10 An answer which shows a thorough understanding of the major rights of the shareholders of a limited liability company, by stating the rights to look up the legal documents of the company, to draw dividends and the priority to subscribe for new shares, to attend the shareholders' meeting and vote for substantive matters, as well as to receive the distribution of the remaining assets after the completion of liquidation.
- 5–7 An answer which states at least two kinds of rights of a shareholder of a limited liability company correctly.
- 3–4 An answer which states any two of the four parts with some points.
- 0–2 An answer which shows little or no knowledge of the area.

- 6** 8–10 An answer which states various circumstances under which a creditors' meeting shall be held, and states all or most of the functions and duties of the creditors' committee.
- 5–7 An answer which states some circumstances for holding a creditors' meeting in part (a), and states some points in part (b) relevant to the functions and duties of a creditors' committee.
- 3–4 An answer which states limited points as to the circumstances for holding a creditors' meeting or as to the functions and duties of a creditors' committee.
- 0–2 An answer which shows little or no knowledge of the area.
- 7** 8–10 An answer which explains clearly the term controlling shareholder, and states the doctrine of disregard of corporate personality as well as the system of subrogate litigation.
- 5–7 An answer which explains the term controlling shareholder, and states any one of part (b) or (c). Alternatively, the answer explains partly the term controlling shareholder, and states the major contents of part (b) or part (c).
- 3–4 An answer which deals with any one part of part (a), (b) and (c). Alternative, the answer states limited points in any two parts among part (a), (b) and (c).
- 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 on security in property and security in pledge, and the transfer of contractual right.
- 5–7 An answer which represents a sound understanding of the legal issues in the problem section and gives complete answers to any two parts of this question, or merely gives the conclusions to every part of this question but fails to give any reasons to support the conclusions.
- 3–4 An answer which shows some understanding of the legal issues and gives only one correct conclusion of part (a) or (b), but fails to give any reasons to support the conclusion.
- 0–2 The answer is a very weak response 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 issue of corporate bonds in part (a), (b) and (c), and gives reasons to support the conclusions to the question.
- 5–7 An answer which explains the conditions of issuing corporate bonds, and gives a correct conclusion in part (a) and part (c) but fails to deal with the question in part (b). Or as an alternative, the answer gives correct conclusions in part (a) and (b), but gives no reasons to support the conclusions.
- 3–4 An answer which gives a correct conclusion in part (b), but fails to give any conclusion in part (a) and part (c).
- 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, especially shows an ability to determine the revocable act of giving up a creditor's right, the time-limit for such an act to be supported by the court and the rule to deal with the situation that shareholders of the debtor fail to fulfil their obligation to make capital contributions.
- 5–7 An answer which shows a good understanding of the rule of revocable act of the debtor by the application of the bankruptcy administrator and a correct conclusion in part (a), but fails to give a correct conclusion in part (b). Or as an alternative, an answer which shows a sound understanding of any point in part (a) and gives a correct conclusion in part (b).
- 3–4 An answer which shows limited understanding of the rule in relation to the revocable act of the debtor in part (a) or the rule relation to the failure of the shareholder to make full capital contributions in part (b), but without any reasons.
- 0–2 An answer which shows very little or no understanding of the question.