

PCLL Conversion Examination
June 2010
Examiner's Comments
Business Associations

Overall Comments

1. Overall the candidates performed quite well in the exam and showed good understanding of the applicable substantive/academic legal principles and the ability to apply them to the relevant facts in the questions. More importantly, when compared to the past exams, the candidates showed better grasp of practical and procedural matters, which has been the major emphasis of the PCLL course in the recent years.
2. In particular, Questions 3 and 4 were widely chosen by the candidates. These questions, essentially procedural questions, required a good understanding of the winding up proceedings, had been well received by candidates, reflecting the increased confidence in confronting issues that called for a mastery of practical knowledge.
3. In this exam, there was no clear preference by the candidates over the 5 questions.

Question 1

4. Questions 1 tests the general knowledge of the candidates regarding notice for Board meetings. No knowledge of PRC law is needed to answer the question.
5. For Part (1), it must be first identified that since ABC had adopted Table A, Regulation 100 would apply which is silent as to the length of notice required to be given for directors' meetings. Therefore reference to case law is necessary.
6. Case law requires due notice to be given for Board meetings. Cases that may be cited include **R v' Byrnes**, **Boardview Commodities Pte Ltd v. Boradview Finance Ltd** [1983] 2 HKC 578, **Yick Hong Wing v. Chan Yook Ming** [1997] 1 HKC 49. Candidates should be able to spot the issue that since David was not in HK at the time whether Reg 100 may excuse giving notice to him.
7. For Part (2), it is pretty straightforward that under the circumstances the 1-day notice was likely to be sufficient.

Question 2

8. This question, although appeared to be the most straightforward question in the exam, was surprisingly not overwhelmingly chosen by the candidates.
9. The performance by candidates in Part (A) varied. A number of candidates missed or were confused with the requirements for approving removal of a director and change of number of directors for a quorum for a Board meeting.
10. For Part (B), it was mostly answered well by the candidates. The **Re Cheuk Nang** case is helpful in the topic.

Question 3

11. For Part (1), in a question asking for general winding up procedure, it is expected that the candidates will discuss the process from the issuance of a statutory demand to the making up of the winding up order. The main reason is that the involvement and role of legal advisors will be reduced to the very minimal after the winding up order is made, as everything basically goes into the hands of the official receiver or liquidators.
12. For Part (2), discussion of and reference to Sections 184, 186 and 269 of the Companies Ordinance are necessary.
13. For Part (3), Sections 181, 182, 186 should be discussed and applied to the facts given.

Question 4

14. Generally answered well by candidates. The usual grounds should be listed as well as the burden on the company to dispute the debt on bona fide substantial grounds.
15. In this case, the potentially applicable grounds included dispute on liability and quantum, abuse of process etc. The company may even consider not to oppose the petition but simply ask for time from the Court to make payments to LMN since it was expecting a large payment from a customer in 4 months.

Question 5

16. The candidates must be able to understand that the allotment of shares (if not a pro rata allotment) must require prior approval of the company in general meeting under Section 57B of the Companies Ordinance.

17. The attempted ratification is also bad. The meeting was called on short notice but the facts tell us that the consent of not less than 92% of the outstanding shares under Section 114(3) of the CO cannot be met.
18. As to the removal of B as a director, reference should be made to Section 157B of CO. The resolution was invalid, although it may be rectified by observing the proper process in the another meeting.
19. Candidates did not appear to have any problem tackling the various reliefs available, under common law and statutes.
20. For Section 168A relief, the candidates must understand that conduct of majority shareholder (or the other shareholder(s) in a deadlock) must be shown to be both unfair and prejudicial. Section 177(1)(f) should be raised. Although winding up of the company may be sought, the outcome is usually that one party (the wrongdoer) will be ordered to buy out the shares of the other(s) (most likely the minority shareholder(s)). Extra marks will be given if procedural requirements are discussed, and when mediation under the new Practice Directions 3.4 is raised.
21. A common law derivative action based on fraud on minority came about when decisions are not made in the best interests of the company, and the minority (or deadlock) may bring an action on behalf of all shareholders, naming the company as a nominal defendant so that orders made by the Court may bind the company as well.
22. Regarding the statutory derivative action, under Companies Ordinance Part IV AA, leave is required to commence. Malfeasance (which although includes fraud in the definition) is a less restrictive requirement than the fraud required in the common law derivative action.
23. Personal action could possibly be instituted against the majority shareholders/directors directly for breach of fiduciary duties and the consequential damages.
24. The preferred choices among the remedies expected from candidates should be the relief under Section 168A, followed by the statutory derivative action.