PCLL Conversion Examination
January 2020
Examiner's Comments
Commercial Law

Part A
Question 1

The answers to each part required an understanding of the rules concerning remedies for breach of a sale of goods contract. The main points to make were as follows:

a) Beta could claim damages for non-delivery; the court would normally apply S53(2)SOGO and award the difference between the contract price and the market price on the date of delivery - $30 per tonne. There is no obligation for the buyer to mitigate his loss by buying elsewhere on a rising market between the date Acme announced the goods were not being supplied and the delivery date White &Carter v McGregor. This is subject to the rule that if Beta accepted Acme's anticipatory breach on 1st January and ended the contract then Acme is under an obligation to mitigate by buying elsewhere on a rising market. Damages would then be $10 per tonne. The resale price is normally ignored Williams v Agius, will only be taken into account if Acme knew of the resale and Beta could not fulfil the resale contract by buying other goods on the market.

b) Many answers wrote too much on what is merchantable quality. The question asked candidates to focus on the remedies available if some of the goods were of poor quality. Thus the main point to make was Beta can accept all or reject all for breach of the implied condition of merchantable quality – but there is no partial acceptance S13(3)SOGO. Credit was also given for making the point that even if the act of reselling the goods was an act inconsistent with the seller's ownership S37 (1) SOGO there could be no acceptance until Beta had a reasonable chance to examine the goods to ascertain in they were in conformity with the contract S37(2).

c) As an incorrect quantity had been delivered Beta could reject all, keep all and pay at contract rate or accept 10,000 and reject the rest S S32(2) SOGO. Most answers got this right.

d) As this was likely to be a severable contract Beta could reject or accept the defective instalment S15. If accepted Beta could reject further instalments if not in accordance with the contract as the rule if you accept part you cannot reject rest does not apply to severable contracts S13(3). If Beta wanted to end the contract completely it would have to establish repudiation of the entire contract S33(2) applying the test in Munro v Meyer – one instalment where there was a short delivery would be unlikely to be repudiation. Many students lost marks by stating the principles correctly but failed to apply them to the facts.

e) Any speculation after the delivery date is the buyer's speculation not the seller's. Bunge SA (Appellant) v Nidera BV. Therefore the fact that the market price rises significantly after the delivery date would be ignored.

Question 2

This was one of those questions were students either knew the law and scored high marks or struggled with the answer.

a) The issue here was whether ZZ got good title under S27 (1) SOGO - resale by the seller in possession? Students should have identified the requirements in particular the seller must retain physical possession and there must be a delivery to ZZ. Whether the email amounts to constructive delivery Michael Gerson (Leasing) Ltd v Wilkinson should have been considered. If title did not pass to ZZ then ZZ had claim against WTD for total failure of consideration Rowland v Divall also breach S14 (1) SOGO.

b) S27 (2) SOGO was the relevant nemo dat exception - resale by the buyers in possession. The requirements of this provision such as the sale must be as if in the ordinary course of business of a mercantile agent, should have been stated. A good answer should have applied this sensibly to the facts in particular raising the issue was KC buying in good faith – does half price reflect lack of good faith?

c) S3 Factors Ordinance was the relevant provision to apply. Issues to be considered was Sandra a mercantile agent? Did the sale take place in ordinary course of business of a mercantile agent? Secondly was there estoppel by conduct S23 SOGO because WTD signed a form acknowledging that someone else was the owner?

d) Two issues should have been raised. There would be a breach s14(1) SOGO if at time of the sale there was patent rights infringement Niblett v Confectioners Materials. Secondly if there was only infringement after the sale then there was a breach of implied warranty of quiet possession Microbeads v Vinhurst Road Markings.

Part B
Question 1

a) It should have been identified that the problem for Royal, if the clauses created a charge over IHL's property, was that Royal will rank as an unsecured creditor unless charge was registered (unlikely) as an unregistered charge is void against the liquidator S337 (4) Companies Ordinance and Royal will rank after the secured creditors on IHL's insolvency.

The main weakness in the answers was that insufficient reasons were given for the conclusions reached as the legal effect of each of the clauses.

Leather on IHL's premises
Recoverable by Royal – ROT cl prevents title passing to IHL (assuming IHL never at any stage paid off all they owed to Royal) thus no charge ever created. Simple application of S19/S21 SOGO. Such clauses have been recognised in ARMOUR v THYSSEN and CLOUGH MILL v MARTIN. As clause is all monies does not matter some of the leather is paid for, Royal can take it all back.

Proceeds of sale of any goods
Clause says IHL holds on trust for Royal. Despite these literal words case law shows unwillingness to find trust (trust incompatible with fact money not put in separate account and the buyer can use the proceeds in course of its business) and the buyer does not collect the proceeds as the seller's trustee. Instead IHL obtains the proceeds as the beneficial owner who is charging these proceeds as security for the debt owed to Royal and thus the charge will be void if not registered. Credit was given for fuller explanation of this together with reference to cases such PFEIFFER V ARBUTHNOT; RE ANDRABELL and COMPAQ COMPUTERS v ABERCORN.

Credit also given for the fact in Australia court more willing to find a trust ASSOCIATED ALLOYS v ACN – clause better worded as money had to be kept separate and cl did not cover all the money only the amount owing thus avoiding a windfall for the seller.

Rights over new products.
Case law says that in principle this part of the clause does not create a charge CLOUGH MILL v MARTIN. However despite this statement of principle, case law is consistent – no matter how clear the wording may be title in the new product passed to the buyer at some stage and thus a charge is created. Credit given for fuller explanation of this and reference to the case law such as PEACHDART - applying this case the leather belongs to IHL from the moment it commenced work on the leather; MODELBOARD v OUTERBOARD.

Credit was given for a clear conclusion that unless Royal has registered the charge each time it contracts with IHL (very unlikely) the clause will only be effective in allowing it to recover the leather supplied to IHL which is still on its premises in its unaltered state. Apart from that Royal will rank merely as an unsecured creditor of IHL and will have no rights to the proceeds of the sale of the leather or any rights over a new product created or the proceeds of the sale of the new product.

b) The main point here was to identify the relevance of S267 C (WU &MP) O which potentially makes the floating charge void. The time limit for the charge being created to come within S267 is normally 12 months from time of commencement of winding up = date petition presented, so on the facts this within time limit however as Alan and Barry are connected persons this period is increased to 24 months. Many answers concluded the clause was totally void but failed to make the important point that it would be valid to the extent of HK$ 2 Million which was the new money supplied at the time the charge was created.

Question 2

a) Answers should have identified that given the fact CP is insolvent Tim may have a claim despite lack of privity of contract with against SC if the facts fit within the Pioneer Container principle. The requirements led down in Pioneer Container to enable the owner to bring a claim against the sub-bailee should have been stated and applied to the facts.

Requirements:
Must have been a bailment and sub-bailment and not a licence. In the case of the Tim – CP and CP = SC there needs to be transfer of possession. Clearly possession transferred to CP - car, keys, returning car at airport, but what about SC has it got sufficient control? If SC did not have the keys, do they have sufficient control over the car given lack of any significant security arrangements – no CCTV or physical barrier at the entrance?

Sub bailee must be aware CP not owner – easily established given nature of CP's business.

If there is sufficient possession for a sub-bailment did Tim consent to the sub-bailment expressly or impliedly.

However even if these requirements are all met and Tim has a claim against sub-bailee it is "warts and all" and SC can raise the ex cl as its defence if there was evidence Tim had consented to the clause. There would be implied consent if the clause is not unusual or unreasonable – quaere whether a total exclusion of all liability would be considered reasonable Max Components v Cyclo Transportation?

b) As is a bailee the normal rule would therefore apply that the onus would be on Fixit (bailee) to prove the fire was not caused by its fault. However many answers failed to make the point that even if Fixit could prove it was not their fault it would still be liable as, if at the end of the bailment period, the bailee refused to return the goods to the bailor for no good reason the bailee becomes strictly liable (becomes " the insurer of the goods") for any loss or damage to the goods.

c) A pledge can only be created over a chose in possession not a chose in action This means a pledge can only be created over goods or a documentary intangible that stands for the goods. Applying this to the facts it is possible to have a pledge over a bill of exchange and bill of lading as both are documentary intangibles. However a bank account is clearly a chose in action Keller v Ying Wah Tak Holdings and a

share certificate is not a pledge over the underlying shares – just pledging a piece of paper Bank of China (Hong Kong) v Kaneshi.

Part C
Question 1

The standard was very mixed mainly due to the fact that in the area of consumer protection there is much statutory law and failure to identify the relevant statutory law will mean the answer is missing the point.

a) It should have been identified that the Pawnbrokers Ordinance applied and ABC committed an offence under S21 Pawnbrokers Ordinance in not requiring from Wong proof of identity. The main focus of the question was on S23 Pawnbrokers Ordinance which gives court wide powers to apportion the loss between the parties depending on their respective degree of fault. Applying this to the facts a good answer should have highlighted there is fault on both sides, Wong has failed to act as "a reasonably sensible owner" in not checking the references of his new employee and equally there is fault on the part of ABC in not requiring proof of ID. The court would use its discretion here ranging from returning the diamond to Wong without repayment by him of the $90,000 to only getting the diamond back if he repays the full $90,000. Credit was given for consideration of Legrand Jewellery (Manufacturing) v Wo Fung Pawnshop.

b) The first point that should have been made was whether the clause was incorporated at common law – would the 'no refund' clause be regarded as harsh/ unusual and therefore should have been highlighted to Agnes before the contract was made? The Unconscionable Contracts Ordinance (UCO) should then have been considered. Firstly does it apply? It overs contracts for goods and services but Agnes needs to be a consumer. Was she? Applying s3 UCO she is presumed a consumer S3 (3) but could it be argued that as she is a fashion model she is making the contract in the course of a business (UCO defines business as including profession). Applying the test in Customs Brokers v UDT is this contract integral to her business? Any sensible discussion of this received full credit. Too many answers did no consider Agnes consumer status. If UCO did apply was the 'no refunds' part unconscionable? Applying S6 the criteria (which are not exhaustive) (a) – (d) seem in favour of Agnes – it was held to be unconscionable in Shum Kit Cheng v Caesar Beauty Centre but does the cooling off period make a difference? Could be argued 'no' as at the time the contract was made the beauty salon did not inform the customer there was a cooling off period. Any sensible discussion of this received full credit. Finally a good answer would have stated if UCO applied and the refund part was found to be unconscionable the court had a wide range of powers S5 refuse to enforce the contract; enforce the remainder of the contract without the unconscionable part; limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable.

c) The first point to consider was whether Martin was a moneylender? Against the view was he did not lend money "to all and sundry" but if there is evidence he lends money on a frequent basis this could make him a money lender - all a question of degree. Charging of interest has no relevance as to whether he was a moneylender.

   If not there appears to be no legal restriction on the loan and no defences available to Norman as the rate of interest does not exceed 48 %. S24 (exceeding 60%) and

S25 (exceeding 48% presumption extortionate) do not apply. Too many answers thought the interest rate was extortionate but the question stated the interest rate was 48 % and the extortionate rule only applies above this figure. If Martin was a moneylender then if he had no license S23, or he does not comply with the S18 formalities, the court has the discretion to enforce the agreement to the extent it considers equitable. Here there is clear non - compliance with the formalities S18 (1)(a). "…within 7 days after the making of the agreement, a note or memorandum in writing of the agreement is made in accordance with subsection (2) and signed personally by the borrower, and a copy of such note or memorandum is given to the borrower at the time of signing" "no such agreement or security shall be enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or the security was given".

Question 2

a) The first point to consider was whether the clause was incorporated at common law, it would needed to be highlighted as it is a very harsh clause. Answers should have identified that the clause is an exclusion clause under S5(1) (b) CECO as it excludes remedies for breach of S16 SOGO. In which case the clause is void if Acme is a consumer S11(2) CECO, if Acme is not a consumer it is then subject to the reasonableness test S11(3).

Clearly it is then very important to know if Acme is a consumer. Too many answers did not give enough attention to this issue. Applying the wording of S4 CECO the goods are clearly of a type ordinarily supplied for consumer use but is Acme acting "in the course of a business" as interpreted by Customs Brokers v UDT and Feldarol Foundries v Hermes Leasing (applied in HK in Fung Hing Chiu Cyril v Henry Wai) – a very narrow definition is given to this phrase - the car must be integral to the business which is clearly not the case here, or the car bought to resell at a profit - no or Acme buy these sort of goods on a regular basis – clearly not. This means that even though Acme is a company and vehicle is purchased with company money, Acme would be regarded as a consumer. It should also have been mentioned that there is a presumption Acme is a consumer and the onus is on IC to prove the contrary.

c) Clearly on these different facts Acme is more likely to be a non – consumer and the clause subject to the reasonableness test S11 (3) – though not a given, does this potential benefit to the business make it an integral part of the business?

d) The first thing to consider was whether the wording of the clause covered negligence e.g. in Chau Kei Man Rayman v Chaters Auction the court refused to conclude that a clause saying "Our company will not be liable for any loss or damage caused ... under any circumstances" covered negligence applying the contra proferentem rule. If yes the best remedy for Tony was to rely on the implied term of care and skill under S5 SOS(IT) O as under S8 this cannot be excluded if Tony a consumer which he clearly is. Some credit was given for reference to the tort of negligence and that the clause would be subject to the reasonableness test under S7 CECO but clearly this is less favourable to Tony than the clause being declared void under s 8 SOS(IT)O.