
Answers

- 1** This question requires candidates to explain the meaning of a legal person and its capacity, and distinguish a legal person from a partnership in terms of their capacity and the property.
- (a)** In accordance with Article 36 of the General Principles of Civil Law, a legal person shall be an organisation that has capacity for civil rights and capacity for civil conduct; has its own property and independently enjoys civil rights and assumes civil obligations under the law.
- A legal person's civil capacity for civil rights and capacity for civil conduct shall begin when the legal person is established and shall end when the legal person terminates. Since all legal persons are restricted by their articles of associations and law, the capacity for civil rights of the legal persons differ. Therefore, the legal person's civil capacity for civil rights are regarded as the special capacity for civil rights.
- (b)** In terms of the capacity for civil rights, although both a legal person and a partnership shall enjoy the capacity for civil rights, the nature and coverage of them are different in the following aspects:
- (i)** In accordance with Articles 37 and 38 of the General Principles of the Civil Law, a legal person shall set up its own organisation to administrate the internal affairs of the legal person and shall have a legal representative to exercise its functions. Any shareholder or founder of a legal person, without the due authorisation, is not entitled directly to carry out the operational activities of the legal person.
- In accordance with Articles 34 and 35 of the General Principles of the Civil Law, the operational activities of a partnership may be carried out by every partner of the partnership. Partners shall undertake joint liability for their partnership's debts. Therefore, any partner may, in the name of a partnership, carry out the operational activities, without the need to set up an administrative organ in the partnership.
- (ii)** In terms of the property of a legal person, the property contributed by the founders and accumulated in its operation shall belong to the legal person, not to the founders individually or collectively. The founders of a legal person possess only the relevant shares in proportion of their capital contributions. In accordance with Article 32 of the General Principles of the Civil Law, the property accumulated in a partnership operation shall belong to all the partners.
- 2** This question requires candidates to explain the probation period of a labour contract and describe the conditions for employees or an employer to terminate a labour contract under the rules of the Labour Law of China.
- (a)** In accordance with Article 21 of the Labour Law, where employees and the employer enter into a labour contract, they may agree upon a period of probation in the contract. The longest period of probation should not exceed six months. If a labour contract provides for a period of probation longer than the six-month limit, the part that exceeds this limit shall be deemed invalid.
- (b)** In accordance with Article 32 of the Labour Law, an employee may notify the employer to terminate a labour contract at any time during the period of probation. As far as the employer is concerned, it may terminate a labour contract only under the circumstances that the employee can not meet the terms and conditions for hiring in the period of probation.
- (c)** In accordance with Article 32 of the Labour Law, under the following circumstances an employee may terminate a labour contract without an advance notification to the employer:
- (i)** Where an employer forces the employee to work by means of violence, intimidation or illegal restriction of personal freedom; or
- (ii)** Failure on the part of the employer to pay salaries or wages, or failure to provide the working conditions as agreed upon in the labour contract.
- 3** This question requires candidates to explain the term *acceptance*, and state the conditions for an *acceptance* to be effective as well as its legal consequence in accordance with the Contract Law.
- (a)** In accordance with Articles 21 and 22 of the Contract Law, an *acceptance* refers to a manifestation made by an offeree indicating assent to an offer. An *acceptance* shall be made in the form of notification. However, an *acceptance* may be made by actions if there exists the trade usage or the offer indicates that the *acceptance* may be made by actions. Silence or inactivity does not in itself amount to an *acceptance*.
- (b)** In accordance with Articles 23 and 31 of the Contract Law, the following conditions shall be met for an *acceptance*:
- (i)** The *acceptance* shall be made by the offeree to the offeror who issues the offer. Since the *acceptance* is an expression by an offeree to an offeror indicating their intention to enter into a contract, the object of concluding a contract would not be reached if the *acceptance* is made to the person other than the offeror.

- (ii) The contents of the *acceptance* shall be in conformity with the contents of the offer, without any reservations, modifications or alternations. Generally speaking, a reply or notification purported to be an *acceptance* but contains any reservations, modifications or alternations shall be regarded as a new offer. However, unless the offeror, without undue delay, objects to the discrepancy or the offer has indicated that no modification to the contents of the offer is allowed in an *acceptance*, an *acceptance* which does not substantially alter the contents of the offer is effective. In that case, the contents of the *acceptance* shall be taken as the contents of the contract.
 - (iii) The *acceptance* must reach the offeror within the time limit as fixed in the offer; or, if no time limit is fixed, an *acceptance* shall reach the offeror within a reasonable time limit. Therefore, if the offeree sends an *acceptance* to the offeror but the *acceptance* fails to reach the offeror, it will not take effect.
- (c) In accordance with Article 25 of the Contract Law, a contract is formed when the *acceptance* takes effect. Since the formation of a contract takes a form of offer and *acceptance*, *acceptance* means that the offeree accepts the terms and conditions in the offer and agrees to set up a contractual relationship with the offeror. Therefore, a contract is formed when the *acceptance* comes to be effective.
- 4** This question requires candidates to explain the term *liability for fault in concluding a contract*, and explain the major differences between the *liability for the fault in concluding a contract* and the liability for breach of contract.
- (a) In accordance with Article 42 of the Contract Law, the term *liability for fault in concluding a contract* refers to such a liability of a party who, during the course of the negotiation of a contract but without a contract being formed, causes the losses of the other party in violation of the principle of good faith. Although there is no contract between the parties in negotiation, the nature of such a liability remains a liability under the contract law.
 - (b) In accordance with Article 42 of the Contract Law, a party with the following conducts in concluding a contract shall be liable for the losses caused to the other party:
 - (i) The party, under the guise of concluding a contract, negotiates with the other party so as to prevent the other party from concluding a contract with a third party;
 - (ii) The party intentionally conceals important facts for concluding a contract or supplies false information;
 - (iii) The party conducts any other activities in violation of the principle of good faith which cause the failure of two parties to enter into a contract.
 - (c) The major differences between the liability for breach of contract and the *liability for the fault in concluding a contract* include:
 - (i) The liability for breach of contract is based on an effective contract between the parties. The *liability for the fault in concluding a contract* is based on the fact that the parties cannot reach an agreement between them because of the bad conducts, or on the fact that the contract is deemed as null and void.
 - (ii) The liability for breach of contract can be borne by various forms, such as the specific performance, liquidated damages or damages. However, the party's *liability for the fault in concluding a contract* is a statutory liability and can merely be borne in the form of money compensation.
- 5** This question requires candidates to explain the rules relating to the purchase of its own shares by a company under the Company Law of China.
- (a) This rule is to protect the rights and interests of public investors.
 - (i) A company, by purchasing the shares of its own company and becoming a shareholder of the company, will confuse the legal relations between the company and its shareholders.
 - (ii) The directors and managers of the company are able to easily use inside information to control the prices of the shares. If a company may purchase its own shares without any restrictions, it will certainly damage the interests of public shareholders and the creditors, and distort the order of the stock market.
 - (iii) If a company holds the shares of its own company, the capital of the company, as represented by the shares, will be false and violate the rules of capital under the company law.
 - (b) In accordance with Article 143 of the Company Law, a company may purchase its own shares under any of the following conditions:
 - (i) where the company is to reduce its registered capital;
 - (ii) where the company merges with other companies holding its shares;
 - (iii) where the company is to offer its shares to its staff and workers as a reward; or
 - (iv) where any shareholder of the company, having objection to the resolution on division or merger of the company adopted by the shareholders' general meeting, requires the company to purchase his shares.

- (c) Where a company purchases the shares of its own based on the conditions as set forth under part (b), a resolution thereupon shall be adopted at the shareholders' general meeting. The amount of the shares bought by the company shall not exceed 5% of the total amount of the shares issued by the company. The funds for the purchase shall be paid from the after-tax profits of the company. The shares purchased shall be transferred to the employees or management within one year after the purchase.
- 6** This question requires candidates to state the rules for providing guarantee for a third party by a company, and as well as the shareholders or the actual controller of the company in accordance with rules of the Company Law.
- (a) In accordance with Article 16 of the Company Law, where a company is to provide a guarantee for others (legal persons or natural persons), it shall be decided by the board of directors or the shareholders' meeting or the shareholders' general meeting in accordance with the provisions of its articles of association.
- If the articles of association of a company stipulate the limit of the total amount of the guarantee, or the amount of the guarantee in single item, then, the limit shall not be exceeded.
- (b) Where a company is to provide a guarantee for its shareholders or the actual controller, a resolution of approval must be adopted by the shareholders' meeting or the shareholders' general meeting.
- The shareholder who is seeking the guarantee by the company or the shareholder who actually controls the company and is seeking to receive the guarantee by the company shall not participate in the voting for the matter in this regard. Such voting shall be passed on simple majority of the voting rights held by other shareholders attending the meeting.
- According to Paragraph 3 of Article 16 of the Company Law, the resolution of approval and the restrictions on the parties concerned to participate in the voting are the compulsory requirements for a company to provide a guarantee to the shareholders or the actual controller of the company. No articles of association are allowed to provide for otherwise in contradiction to this rule.
- 7** This question requires candidates to explain the terms *general suretyship guaranty* and *joint and several suretyship guaranty*, and distinguish the major differences between the two forms of suretyship guaranty in accordance with the relevant provisions of the Guaranty Law of China.
- (a) In accordance with Articles 6 and 17 of the Guaranty Law, the terms *general suretyship guaranty* refers to such a kind of transaction under which a surety and a creditor, by a suretyship agreement, agree that the surety shall undertake suretyship liability to perform the obligation or bear the liability according to the agreement in case the debtor defaults to perform his obligation.
- In accordance with Articles 6 and 18 of the Guaranty Law, the term *joint and several surety guaranty* refers to such a kind of transaction under which a surety and a creditor, by a suretyship agreement, agree that the surety and the debtor shall be jointly and severally liable to the creditor if the debtor defaults to perform its obligation.
- (b) (i) A general suretyship allows the surety to refuse to undertake the suretyship liability towards the creditor before the assets of the debtor are executed. Therefore, only when the assets of the debtor are not adequate to pay off the debt can a creditor request the surety to undertake its suretyship liability.
- (ii) While under a joint and several suretyship guaranty a surety may not refuse to undertake its suretyship liability within the scope of the suretyship agreement on the ground that the assets of the debtor shall be executed before the creditor demands the surety to undertake the suretyship liability.
- 8** This question requires candidates to deal with the legal issue as to the formation of a contract in accordance with the Contract Law of China.
- (a) (i) The purchase order of Oriental Company was an invitation to offer, not an offer. In accordance with Article 15 of the Contract Law, an invitation to offer is a manifestation of willingness to be sent an offer by another person. Since the purchase order did not contain the price of the wooden plate which constituted one of the necessary elements to be an offer, it could not be a valid offer but an invitation to offer.
- (ii) The fax of Wooden Company constituted an offer. In accordance with Article 14 of the Contract Law, an offer is a manifestation of willingness to enter into a contract with another person. The manifestation of willingness shall be subject to the following conditions: Its contents are ascertained, and in case of acceptance by the offeree, it will have binding force on the offeror. Since the fax indicated the manifestation of willingness to enter into a contract with Oriental Company and contained the necessary element for a valid offer, it is an offer.
- (iii) The fax of Oriental Company was a counter-offer, not an acceptance. As it requested a written confirmation letter signed by Wooden Company as the additional term, although the fax accepted the general terms and conditions. It meant that Oriental Company did not show its consent to the fax of Wooden Company without any reservation.

- (b) In accordance with Article 30 of the Contract Law, the contents of the acceptance shall be in conformity with those of the offer. A substantial modification to the contents of the offer made by the offeree constitutes a new offer. Modifications on contract object, quantity, price or remuneration, time limit, place and method of performance, liabilities for breach of contract and methods of disputes settlement shall be deemed as substantial modifications to the contents of the offer.

Wooden Company's written confirmation letter contained the provision as to the liability for breach of contract, which represented a substantial modification to the contents of the offer made by Oriental Company, it still constituted a counter-offer. Since Oriental Company did not give a notification of acceptance, therefore, there was not a sales contract between the two parties.

9 This question is to test the knowledge of candidates with respect to the rules of the Company Law and the Securities Law of China.

- (a) Article 27 of the Company Law provides that a shareholder may make his capital contributions to a company in currency or by contributing such non-currency property as material objects, intellectual property rights and land-use rights, at their appraised value that may be evaluated in currency and may be transferred according to law. The non-currency property contributed as capital shall undergo an appraisal, valuation and verification. The amount of capital contribution in currency by all shareholders shall not be less than 30% of the registered capital of the limited liability company. The capital contributions by Mr A, Mr B and Mr C would be in currency and exceeded 30% of the registered capital. Their capital contributions were in conformity with the rule of the Company Law.

However, Mr D's capital contribution was not in conformity with the Company Law since his technology did not undergo the evaluation and verification process.

- (b) In accordance with Article 51 of the Company Law, where a limited liability company has a small number of shareholders or is comparatively small in amount of registered capital, it may have one executive director instead of a board of directors. According to Article 23 and 25 of the Company Law, to incorporate a limited liability company all the shareholders shall jointly formulate the articles of association and designate the legal representative of the company in their articles of association.

Therefore, the proposals to have one executive director and to appoint Mr A as the legal representative of the company were in conformity with the Company Law.

- (c) In accordance with Paragraph 4 of Article 52 of the Company Law, directors and senior executives of the company shall not concurrently serve as supervisors. In this case, Mr B was appointed as the chief finance officer. It was a position of a senior executive. Therefore, he could not concurrently be the supervisor of the company.
- (d) In accordance with Article 154 of the Company Law, the issuance of corporate bonds shall conform to the conditions as stipulated in the Securities Law of China. Under the relevant provision of the Securities Law, a limited liability company shall have the minimum assets of RMB 60 million yuan to apply for issuance of corporate bonds. Therefore, the company, with a total registered capital of RMB 400,000 yuan, was not qualified to issue corporate bonds.

10 This question requires candidates to deal with the legal issue as to the disclosure of information by a listed company.

In accordance with Article 67 of the Securities Law, when a major event occurs that may considerably affect the price at which a listed company's shares are traded and that is not yet known to the investors, the listed company shall immediately submit an ad hoc report on the details of such a major event to the securities regulatory authority under the State Council and to the stock exchange and make the same known to the general public. This provision also listed the various matters which shall be deemed as the 'major event'.

- (a) The contract with the instrument company and the management fee received shall be a major event to be disclosed to the public. Since under this contract Stock Company would expand its scope of business and the compensation from the management of the instrument company would account for 10% of the net profit of Stock Company. Therefore, this contract fell within Paragraph 3 of Article 67 of the Securities Law, which had a substantive impact on the company's assets, liabilities, rights, interests or business results.
- (b) Stock Company should disclose the pending case of the second instance. Although Stock Company has already disclosed the judgement of the first instance, both parties disagreed with the result and appealed. This meant that the dispute had not yet been finally settled by the end of 2006. The judgement of the second instance would possibly give rise to the legal liability of the Stock Company. According to Paragraph 10, Article 67 of the Securities Law, the major litigation involving the company, or lawful cancellation by a court of a resolution adopted by the shareholders' general meeting or the board of directors shall be the major event to be disclosed to the public.
- (c) In accordance with Paragraph 8, Article 67 of the Securities Law, a considerable change in the shares of the shareholders holding not less than 5% of the company's shares or any of the company's actual controllers, or a considerable change in the situation that they control the company shall be deemed as the important information. In this case the shareholder holding 3% shares of Stock Company placed its shares as guarantee for a loan agreement. Obviously, the percentage of shares held by this shareholder was less than the 5% requirement. Therefore, this information did not fall within the category of the statutory disclosure.

- 1** 8–10 A thorough answer which explains the meaning of a legal person and its capacity, and describes the differences between legal persons and partnerships in terms of their capacity for civil rights.
- 6–7 An answer which explains the meaning of a legal person and its capacity, but describes only one difference between the legal persons and partnerships in terms of their capacity for civil rights.
- 0–4 An answer which explains the meaning of a legal person or its capacity, but fails to describe the differences.
- 2** 8–10 A good explanation of the restriction on the length of the probation period of a labour contract, the termination of a labour contract during the period of probation and the conditions for an employee to terminate a labour contract without the advance notification to the employer.
- 5–7 A sound understanding of the area, although perhaps lacking in detail.
- 3–4 Some understanding of the area, but lacking in detail, perhaps failing to explain the condition to terminate a labour contract during the period of probation and the conditions for an employee to terminate a labour contract without the advance notification.
- 0–2 Little or no knowledge of the area.
- 3** 8–10 Thorough explanation of the meaning of the term acceptance, completely stating the conditions for an acceptance to be effective and the legal consequence of an effective acceptance.
- 5–7 Reasonable treatment of the term generally and stating at least one condition for an acceptance to be effective and the legal consequence of an effective acceptance.
- 0–4 Very unbalanced answer, focusing on only one aspect of the question and ignoring the others, or one which shows little understanding of the subject matter of the question.
- 4** 8–10 Thorough explanation of the meaning of the term liability for fault in concluding a contract, completely stating the conducts to be liable in concluding a contract and explanation of the major differences between the two kinds of liabilities.
- 5–7 A sound understanding of the area, although perhaps lacking in detail.
- 3–4 Some understating of the area but lacking in detail, perhaps failing to distinguish the differences or failing to state the conducts that shall be liable in concluding a contract.
- 0–2 Little or no knowledge of the area.
- 5** 8–10 Answers will show a thorough understanding the purpose of setting up the restrictions on a listed company to purchase the shares of its own company, clearly stating the conditions under which a company may purchase its own shares and the relevant procedural measures to be followed.
- 5–7 A sound understanding of the rules as to the purchase of its own shares by a listed company but lacking in detail, perhaps failing to state completely the conditions under which a company may purchase its own shares or failing to state the relevant procedural measures to be followed.
- 3–4 Some understanding of the area but lacking in detail, perhaps lacking to explain the reasons why the Company Law restricts in general the purchase of the shares of its own company and lacking to state the conditions under which a company may purchase its own shares.
- 0–2 Little or no knowledge of the area.
- 6** 8–10 A thorough statement of the rules for providing guarantee for a third party and the shareholders or the actual controller of the company, and the explanation of the voting procedures for a company to provide guarantee to the shareholder or its controller.
- 5–7 A sound understanding of the area, although perhaps lacking in detail.
- 3–4 Some understanding of the area, but lacking in detail, perhaps failing to explain the voting procedures or failing to explain the compulsory requirements for a company to provide guarantee to the shareholders or the controller.
- 0–2 Little or no knowledge of the area.

- 7** 8–10 A good explanation of the meaning of general suretyship and joint and several suretyship, and a clear understanding of the differences of the two forms of suretyship guaranty.
- 5–7 A sound understanding of the area, although perhaps lacking in detail.
- 3–4 Some understanding of the area, but lacking in detail, perhaps failing to explain the joint and several suretyship and failing to distinguish the two forms of suretyship.
- 0–2 Little or no knowledge of the area.
- 8** 8–10 A complete answer to deal with all of the legal issues in the problem section and giving the reasons to support the judgements relating to the formation of contract.
- 5–7 A good understanding of the legal issues in the problem section and give a correct judgement on Part (a) and (b), but failure to give the reasons and rule of law to support the judgements.
- 3–4 Some understanding of the legal issues in the problem section and give some correct judgements, but failure to give any reasons to support the judgements.
- 0–2 Very weak answer showing no, or very little, understanding of the question.
- 9** 8–10 A complete answer, highlighting and dealing with all the issues presented in the problem section. It is most likely that rules of law will be referred to, and they will be credited.
- 5–7 An accurate recognition of the problems inherent in the question, a basic ability to deal with the legal issues, together with an attempt to apply the appropriate legal rules to the situation.
- 3–4 An ability to recognise some of the key issues. A recognition of the area of law but not attempt that law.
- 0–2 Very weak answer showing no, or very little, understanding of the question.
- 10** 8–10 A complete answer, highlighting and dealing with all of the issues presented in the problem section.
- 5–7 A good understanding of the legal issues in the problem section and giving a correct answer on two parts among the three parts, along with some reasons for the answer. However candidates fail to give the correct answer to one part.
- 3–4 Some understanding of the legal issues in the problem section and giving only a correct answer to any one of the three parts.
- 0–2 Very weak answer showing no, or very little, understanding of the question.