國立交通大學八十九學年度碩士班入學考試試題

科目名稱：法律文獻評述（731）

考試日期：89年4月22日 第3節

系所班別：管理學院碩士在職進修專班 組別：企業法律組

第1頁 共7頁

＊作答前，請先核對試題、答卷（試卷）與准考證上所列組別與考試科目是否相符！！

一、請於閱讀下列裁定後回答問題（本題30分）

最高法院民事裁定

再抗告人 保証責任台中市第七信用合作社
法定代理人 000

再抗告人因與相對人000等間強制執行聲明異議事件，對於中華民國八十六年七月三十一日台灣高等法院台中分院裁定（八十六年度抗字第000號），提起再抗告，本院裁定如左：

主文

原裁定廢棄，應由台中高等法院台中分院更為裁定。

理由

按「土地所有人，於設定抵押權後，在抵押之土地上建造建築物者，抵押權人於必要時，得將其建築物與土地併付拍賣。但於其建築物之價金，無優先受清償之權。」民法第八百七十條規定有明文，又非訴事件法第三十二條規定：「聲請或陳述，除另有規定外，得以書面或言詞為之。以言詞為聲請或陳述時，應送法院書記官處為之。前項情形，法院書記官應作成筆錄，並於筆錄內簽名。」

本件相對人主張：伊等購買附屬於所設借物，僅為土地部分為擔保債務人趙00之債務而設定抵押權予再抗告人，建築部分既未設定抵押權予再抗告人，自非執行名義效力及於伊等未有具欠債再抗告人債務，如何能對伊等如附表之建築物執行，台中地方法院（下稱台中地院）依再抗告人之聲封查封伊等如附表之建築物，自屬違誤等情，聲明異議，請求撤銷上開建築物所為查封處分。台中地院Denied相對人之異議。相對人不服提起抗告，原法院以：相對人對所有如附表所示之建築物，係在其土地於民國八十二年設定抵押權後始營建，該等建築物雖非債務人即原土地所有人趙00所建，惟於再抗告人在八十五年一月十五日實行抵押權確認強制執行拍賣抵押物，上開土地及建築物已分別歸同一相對人所有，有土地及建築物登記簿謄本，建造及使用執照影本在卷可稽，衡此情形，因應解為有首開民法第八百七十條之適用，惟查封之土地是否足以清償所擔保之抵押債權，有無將建築物併於查封拍賣之必要，尚未查明，又再抗告人提出之強制執行聲請狀，亦未聲請將建築物併付拍賣，台中地院遂予查封相對人之房屋，自屬不當，因而將台中地院裁定，予以廢棄。

查本件台中地院八十五年二月一日查封筆錄既記載：「經債權人聲報查封債務人魏00等所有不動產，詳如後附物品清單…」，指封切結記載：「聲請…等強制執行事件，當場查封債務人魏00等所有如後查封標的物清單所列之財產…查封標的物清單詳列附表（內容與本件附表）」，查封筆錄顯然包括指封切結，查封標的物清單，按著聲請非訴事件法第十三條聲請得於法院書記官前以言詞為之規定，於此種情形，是否不當認為再抗告人已聲請就附表所示之建築物與土
地併付拍賣，殊有疑義。又本件如僅賣土地時，是否足以清償所擔保再抗告人之債權，以及有無將建物與土地併付拍賣之必要，原法院未予調查審認，竟認相對人之聲明異議為有理由，而將合中院所為駁回相對人異議之裁定廢棄，自屬可議。再抗告論旨，求予廢棄原裁定，非無理由。

據上論結，本件再抗告為有理由，依民事訴訟法第四百九十二條第二項，裁定如主文。

問題：（每小題各 15 分）

1. 以本件判決的觀點，民法第八百七十七条規定：「土地所有人於設定抵押權後，在抵押之土地上營造建築物者，抵押權人於必要時，得將其建築物與土地併付拍賣，但對於建築物之價金，無優先受償之權利。」中所指的「土地所有人」與「營造建築物者」，應否為同一人？

2. 民法第八百七十七条規定之宗旨，是為保護土地之抵押權人，避免因土地所有人於設定抵押權後，因對土地之利用而損害抵押權人之利益。你認為以該條文義，應如何解釋最為恰當？
二、請於閱讀下列判決後回答問題（本題 30 分）

台灣高等法院台南分院判決

上訴人 臺灣雲林地方法院檢察署檢察官

對上訴人因被告妨害公務案件，不服臺灣雲林地方法院八十五年度易字第 000 號中華民國八十五年 000 月 000 日第一審判決（起訴案號：臺灣雲林地方法院檢察署八十四年度偵字第 0000 號），提起上訴，本院判決如下：

主文

原判決撤銷。

林 000 違反審判員所發維持法庭秩序之命令，致妨害法院執行職務，經制止不聽，處拘役拾日，如易科罰金，以百元折算壹日。

據此判決，對於公務公然侮辱部分無罪。

事實

林 000 係臺灣雲林地方法院所受理八十四年度重訴字第 000 號分冊共有物案件之被告，於民國八十四年 000 月 000 日上午 000 時 000 分許，在該院民事第 000 法庭進行該事件之訴訟辯論程序，承審法官 000 向其提示維持法庭秩序義務，並詢之有何意見時，其竟不發一語以手拍擊其站立處前方桌板，法官為維持法庭秩序出言阻止，仍不改其態勢，法官繼續進行法庭程序，並於該日上訴人林 000 因妨害法院執行職務，案經臺灣雲林地方法院移送臺灣雲林地方法院檢察署檢察官偵行起訴。

理由

一、就據被告林 000 口供否認所為違反法院組織法之犯行，自辯稱其於上開民事事件進行辯論時，未曾以手拍擊其站立處前方桌板云云。然查其自應於組織法之相關條文，並有上開民事事件之八十四年 000 月 000 日言詞辯論筆錄及訊問筆錄所附影本附件，盡有足證，事證已甚明確，所為為上開辯解，無非事後卸責之詞，不足採信。其行為堪以認定，應依法條科刑。核其行為係違反法院組織法第十五條之妨害法院執行職務罪。

二、公訴書意旨另錄以；被告不服法院判定為前揭嫌於法庭桌板時，復同時對於法院尊稱：法庭有什麼了不起之語，隨即轉身欲離庭而去，法官遂令法官聲稱其行為違反法庭秩序之規定，於上開民事事件之八十四年 000 月 000 日言詞辯論筆錄及訊問筆錄所附影本附件，盡有足證，事證已甚明確，所為為上開辯解，無非事後卸責之詞，不足採信。其行為堪以認定，應依法條科刑。核其行為係違反法院組織法第十五條之妨害法院執行職務罪。
國立交通大學八十九學年度碩士班入學考試試題

科目名稱：法学文獻評述(731) 考試日期：89年4月22日 3節
系所班別：管理學院碩士在職進修專班 組別：企業法律組 第 4 頁, 共 7 頁
作答前, 請先核對試題、答案卷（試卷）與准考證上之組別與考試科目是否相符！

無大小之分，無何特別了不起之處。被告所為上間對法庭之言語，尚難認有輕蔑之意，且基於法院難堪之地方，致法院之被告，應為其犯罪構成要件不齊，不能證明其有此部分之犯罪。

三、原審著處被告公然侮辱公署之罪刑，另認被告所為不構成妨害法院執行職務之罪刑，自有未合理，應應著處被告妨害法院執行職務之罪刑不當，顯有理由，且原則之所在處於可議之處，自應由本院將原則予以撤銷改判。爰就被告所犯妨害法院執行職務罪部分，審酌其犯罪之動機、目的、手段、所生危害、犯後未能坦白認罪等一切情狀，重處如主文第二項所示之刑，並諭易科罰金折算之標準。另其被訴第一次公然侮辱公署不成立犯罪部分，因公訴人認為妨害法院執行職務罪部分，係出於同一行為，為想像難合，屬判斷上一罪，依原則不可分之原則，爰不另為無罪之論知。至其被訴第二次公然侮辱公署不成立犯罪部分，自應依法於主文為無罪之論知。

＊刑法第一百四十條第二項規定：「對於公署公然侮辱者，處六月以下有期徒刑、拘役或一百元以下罰金。」
＊法院組織法第九十五條規定：「違反審判長、受命法官、受託法官所發維持法庭秩序之命令，致妨害法院執行職務，維制止不聽者，處三月以下有期徒刑、拘役或三千元以下罰金。」

問題：（每小題各 15 分）

2.1 你認為本件被告在法院旁，當著許多法律的面對法官說：「如要判我，我沒有意見，法庭沒有什麼了不起！」這句話是針對法院還是針對那位法官？會構成侮辱公署嗎？

2.2 本件判決以「法庭係為法官審理民刑案件之地方，與其他公務機關之辦公場所相類，本無大小之分，更無何特別了不起之處。」為由，認被告說：「法庭沒有什麼了不起！」不構成侮辱公署。從犯罪構成要件之觀點，你同意嗎？
Mergers and acquisitions in Taiwan

Mergers and acquisitions are common in Taiwan. "Merger" generally refers to a "Statutory Merger" where two or more companies are consolidated into one company pursuant to the relevant statutes. The term "Acquisition" refers to the purchase by one company of either the shares or assets of another company.

The most common method to obtain control over a target company in Taiwan is through purchase of its shares. Share purchase is generally preferred to asset purchase and statutory merger based on consideration of tax costs. The purchase of shares of a Taiwan target company is subject only to Securities Transaction Tax. There is currently no Capital Gains Tax on the sale of shares. The purchase of a target company's assets, on the other hand, may give rise to liability for Corporate Income Tax and Personal Income Tax, Business Tax (Value-added Tax ("VAT")), Land Incremental Value Tax, Deed Tax, stamp duties and notarization fees. In the case of a merger, the tax costs are generally more favorable than in an asset purchase.

The purchase of shares of a Taiwan company is subject to the Securities Transaction Tax imposed at the rate 0.3% of the price of the shares. This tax is borne by the seller of the shares unless the parties agree otherwise. Capital gains realized upon the sale of shares of a Taiwan company are currently tax exempt. In the case where a target company is a limited company rather than a company limited by shares (i.e. when there is no share certificate issued to evidence ownership), the seller will be subject to Capital Gains Tax with respect to the transfer of investment in the limited company. To avoid this Capital Gains Tax, it is possible to convert the limited company into a company limited by shares prior to the occurrence of the transaction.

The main drawback of a share purchase is the continuation of the inherent liabilities of the target company. Buyers often insist on thorough due diligence and strict warranties and representations as a condition to a share purchase. However, given the low tax costs in a share purchase relative to other forms of M&A transactions, this method is often still preferred by the seller.

As opposed to a share purchase, the use of an asset purchase typically carries a higher tax cost. When the purchased assets include land, the seller is required to pay Land Incremental Value Tax at rates ranging from 40% to 60% of the amount of the increase in the official appraisal value of the land since the purchase date. When the purchased assets include buildings and other improvements, the purchase price of such assets will be subject to 5% VAT, 1% stamp duty and 6.0% Deed Tax. The parties are also required to pay stamp duty at the rate of 0.1% of the purchase price of the real property. The purchase of any fixed assets, inventory or intangible property will be subject to 5% VAT. Most importantly, any gains or premium received on the sale of the assets (i.e. the amount in excess of the net book value of these assets) except land (which is subject to a separate tax described above), is considered ordinary income of the selling company and taxed at the regular rate of 25%. When the excess gains or profits are then distributed to its shareholders by means of a dividend, the shareholders will be subject to Personal Income Tax.
Because of the higher tax costs, sellers are typically less inclined to agree to an asset purchase. However, in an asset sale the liabilities of the target usually do not transfer to the buyer. The buyer also has the luxury to exclude assets or liabilities that it does not wish to assume. For these reasons an asset purchase is often the preferred route for a buyer.

It is possible to affect a statutory merger of two companies limited by shares under Taiwan's company law. The surviving company can either be one of the existing companies, or may be a brand new company. As a general rule, such a statutory merger will not require any third party consents or transfers, and may be accomplished tax-free. However, unless a special exemption is obtained pursuant to the Statute for Upgrading Industries (the "SUI"), the transfer of land from the merging company to the surviving entity is subject to Land Incremental Value Tax. The transfer of buildings or other improvements to the surviving entity is subject to 5% VAT. The transfer of moveable property from one of the merging companies to the surviving entity is deemed as a sale of moveable property and is thus subject to 5% VAT. The tax authorities have not stated their position as to whether or not stamp duties are imposed upon such a transfer. The transfer of the shares in connection with a merger is not subject to the Security Transaction Tax because the transfer of shares under such circumstances is not considered to be trading.

If the merger is approved by the Ministry of Economic Affairs (the "MOEA") pursuant to the SUI, and all of the proceeds from the sale are used for the purchase of new machinery and equipment, land, and buildings, then the Land Incremental Value Tax may be deferred. In addition, no stamp duties or Deed Tax will be imposed on the transaction.

From a tax perspective and from the perspective of the seller, share purchase is generally preferred over asset purchase given the lower tax costs involved. In the event that the target company will be liquidated after the acquisition of shares or assets, it may be preferable to adopt a statutory merger in order to avoid the imposition of income tax upon the distribution of the remaining assets from the liquidated company. The tax environment for statutory mergers is not particularly favorable, however, because the tax authorities insist on imposing certain transfer taxes such as the Land Incremental Value Tax and VAT upon the transfer of assets from the disappearing entity to the surviving entity. Moreover, the surviving entity is unable to continue to enjoy the favorable tax attributes of the disappearing entity such as accrued losses and investment tax credits.

From a liability perspective and the perspective of the buyer, however, asset purchase is often preferred over share purchase. Because of the interests and objectives of the seller and the buyer are often directly opposed, there is some scope to design more creative "compromise" structures that strive to accommodate both parties.
問題：（每小題各 10 分）

請以中文回答下列問題：

3.1 請根據前開文章內容，依供贷新式逐一說明其優點。

3.2 請根據你的法律知識，說明買方應注意並履行之程序。

Please answer the following questions in English:

3.3 Please explain the meaning of "legal due diligence" and its importance.

3.4 Please itemize the applicable laws in the M&A transaction involving listed high-tech companies.