BUSINESS AND COMPANY LAW
MIAQUALIFYING EXAMINATION
SEPT 2019

SECTION A

QUESTION 1

a. i. Goods on display

At common law, a display of goods in a shop is an invitation to customers to make an offer to buy the goods. A customer who wants to buy the goods may make an offer at the counter. When the shop accepts his offer, a contract comes into existence.
Case: ***Pharmaceutical Society of Great Britain v Boots Cash Chemist (1952)***.

ii. Auction

An auction is held to attract bids. The auctioneer's request for bids is an invitation to treat. The customer's bid is an offer, and acceptance takes place at the fall of the hammer by the auctioneer.
Case: ***M&J Frozen Food Sdn Bhd v Siland Sdn Bhd (1994)***

(6 marks)

b. Events that causes revocation of an offer:

Section 6 of the **Contracts Act, 1950** provides that an offer is revoked:

i) When the proposer gives a notice of revocation to the acceptor;
ii) By the lapse of time prescribed for acceptance, or if no time is prescribed, by the lapse of a reasonable time after the offer is made;
iii) When the acceptor fails to fulfil a condition precedent to the acceptance; or
iv) By the death or mental disorder of the proposer if the fact of his death or mental disorder comes to the knowledge of the acceptor before acceptance.

(4 marks)

c. The promise made by the company to pay Salim for services rendered was past consideration as the services were rendered prior to the agreement.

As a general rule, English law does not recognise past consideration as good consideration. *[**Re Mc Ardle {1962}**]*.
In Malaysia, however, past consideration is good consideration, due to the effect of the words *"has done or abstained from doing"* in the definition of consideration in **section 2(d)**.

This was illustrated in the case of ***Kepong Prospecting Ltd v Schmidt (1968)***.

Therefore, the consideration in the above situation may be considered as good consideration and renders the contract valid and enforceable.
Salim may be able to successfully claim the promise made by the company.

(10 marks)
(Total: 20 marks)

QUESTION 2

a. Three vital elements under **section 4(1) of the SOGA, 1957**:

i) The seller must intend to transfer the property in the goods sold to the buyer;
ii) The sale must involve goods as defined in section 2. Under the definition, all moveable property are goods. Actionable claims and money are excluded. Stocks and shares are expressly included. Money which has acquired a curio value may be included (as per case law). Growing crops and things attached to, or forming part of the land are goods if they are agreed to be severed before sale or under the contract of sale;
iii) **Section 2 of SOGA** defines price as "the money consideration for a sale of goods". The sale must be for a price in money terms.

(6 marks)

b. Sale by a mercantile agent

This exception applies where a mercantile agent in possession of the owner's goods sells or pledges an owner's goods without the owner's authority. A mercantile agent is a person who, in the ordinary course of his business as such agent, has the authority to buy and sell goods (full definition: **section 2, SOGA, 1957**).

At the time of the sale, the mercantile agent must have possession of the goods, or of a document of title to the goods, with the consent of the owner. In such a case, any sale made by him of the owner's goods when acting in the ordinary course of his business, as a mercantile agent shall be valid to pass a title to the buyer, provided that the buyer acts in good faith and without any notice that the mercantile agent had no authority to sell from the owner.

It must be noted that this exception would not apply if the seller cannot be considered as a mercantile agent *[*case: ***Budberg v Jerwood & Ward (1934)****]*. The section would not operate where the mercantile agent does not appear to be acting in the ordinary course of business of a mercantile agent *[case:* ***Lloyds & Scottish Finance Ltd v Williamson (1965)****; where he asks the buyer to pay the purchase price to the mercantile agent's personal creditors].*

(6 marks)

c. Conditions to be fulfilled for an agency by ratification to arise:

i) The contract entered into by the agent must not be a void or illegal contract;
ii) At the time of the contract, the agent must expressly indicate that he acts as an agent to the principal**.** ***Keighley Maxted & Co v Durant (1901)***;
iii) Ratification is not permissible unless the principal is in existence and had the capacity to contract at the time the agent purported to act for the principal;
iv) At the time of ratification, the principal must have full knowledge of all of the material facts of the contract (**section 151**). The ratification is otherwise invalid;

v) If the principal confirms the contract, he must confirm the whole contract. **Section 152** provides that, the whole of the contract, and not part thereof, can be ratified;

vi) Under **section 153**, an act which may have the effect of subjecting a third party to damages, or terminating the third party's rights or interests cannot be ratified;

vii) The act must be ratified within a reasonable time. What is reasonable time may depend on the circumstances of the case. (***Grover & Grover v Matthews (1910)****: a fire insurance policy cannot be ratified after the insured event).*

(8 marks)
(Total: 20 marks)

QUESTION 3

a. Essential elements of a partnership:

i) **Agreement**; the partnership relation is generally based on contract, either expressly agreed upon or as inferred by law.The rights, duties and obligations of partners are determined in the partnership agreement. In the absence of any express agreement, the provisions in **Part IV of the Partnership Act, 1961** will apply;

ii) **Two or more persons**; The business to be carried 'in common' requires the involvement of two or more partners. The maximum number is prescribed in the **Companies Act, 1965 (Revised 1973). Section 14(3)** provides that it shall not be more than 20 persons in a partnership, unless the partnership is formed for the purpose of carrying on a profession prescribed by the Minister charged with the responsibility for companies;

iii) **Carrying on a business in common with a view of profit**; Partnerships are formed to carry on a business. Unlike companies, they cannot be formed for benevolent or artistic purposes. There must be a single and identifiable business associated with the entire partnership. The business carried on by the firm may include every lawful trade, occupation or profession (**section 2, Partnership Act**). The words "business in common with a view of profit" emphasises that partnerships must have a profit motive.

(4 marks)

b. This case involves restrictions on partner's authority.
In a partnership agreement, there is often provisions that restrict or limit a partner's authority to bind the firm.

Section 10, Partnership Act, 1961:
If it has been agreed between the parties that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

If a third party has notice of the restrictions in the agreement, the partnership will not be bound by any act of a partner which contravenes the restrictions.

In the current situation, Racoust Development Bhd was made aware of the restriction as explained by Juliet. Nevertheless, both Racoust Development Bhd and Juliet had decided to proceed with the arrangement without Romeo's knowledge.

Applying the law above, the partnership of Romeo and Juliet & Co, may not be made liable for the losses suffered by Racoust Development Bhd. Only Juliet may be held liable under this circumstances, since her act is not recognized under the law a representing the act of the partnership.

(6 marks)

c. The issue in this case is whether a duty of care is owed by the hospital and Dr Hairani for failure to treat Asiah's husband.

First and foremost, it is necessary to determine whether, as a matter of fact, the alleged damages were caused by the defendant's breach of duty (causation).

The test to be applied to determine causation in fact is the "but for" test. In applying this test, the question is, "but for the defendant's breach of duty, would the plaintiff have suffered the loss or damage?" A causation in fact is only established if the answer to this question is "no".

Case: ***Barnett v Chelsea & Kensington Hospital Management Committee (1969)***

In this case, the plaintiff's husband vomited after drinking tea and went to the defendant's hospital. The nurse telephoned the doctor on-call who instructed the nurse to tell the patient to go home and call his own doctor. The patient died later that day of arsenic poisoning.
The court found the doctor had breached his duty of care to the patient. However, the doctor and his employers were not liable because the breach did not cause his death. It was shown to the court that the patient would have died even if the doctor on-call had treated him.

Applying to the current situation, although Dr Hairan and Hospital Alpa had breached their duty of care towards Asiah's husband, they may not be liable due to the fact that the death of Asiah's husband is not caused by their breach of duty.

(10 marks)
(Total: 20 marks)

SECTION B

QUESTION 4

This question tests the candidates' knowledge of the principle in *Salomon* v *Salomon & Co Ltd[1897] AC 22* as well as the exceptions where the courts will be prepared to lift the veil of incorporation.
(Candidates are only required to state any FIVE (5) instances of lifting the veil of incorporation.)

a. The case of *Salomon* v *Salomon & Co Ltd [1897] AC 22* established a very important principle in company law, that once a company is incorporated, it is clothed with a veil of incorporation and becomes in law a separate legal entity distinct and separate from the members.

Although the company is a separate legal entity, there are a number of circumstances where this principle will be disregarded by the courts. This is often referred to as the lifting of the veil of incorporation. The veil of incorporation may be lifted either by virtue of a statutory provision or by established case law as follows:

Under Case Law:

1. Fraud
Use of a company to evade legal obligation or to commit fraud. The separate personality doctrine cannot be used for evading legal obligation. If a person tries it, the court can lift the veil i.e. disregard the separate legal personality doctrine.
Case: Gilford Motors Co Ltd v Horne
Case: Jones v Lipman

2. In times of war to determine the enemy character of the company.
This is illustrated by the case of *Daimler Co Ltd* v *Continental Tyre & Rubber Co.(Great Britain) Ltd* (1916) 2 AC 307 where the court lifted the veil of incorporation to look at the nationality of the persons in effective control of the company.

3. For tax purposes
See: *Unit Construction Ltd* v *Bullock* (1960) AC 351. In this case the court held that three subsidiary companies in Kenya were in fact resident in the UK for purposes of tax because central control and management was with the holding company in the UK.

4. On the basis that a company is in fact the agent of its controllers.
This may be illustrated by the case of *Smith Stone & Knight Ltd* v *Birmingham Corporation* (1939) 4 All ER 462, where the court held that the subsidiary company was acting as the holding company's agent in carrying on a business, thus enabling the holding company to get compensation for the disruption of business following a compulsory acquisition of its land.

5. Group Enterprise
Sometimes the courts are prepared to treat groups of companies as one.

See: *DHN Food Distributors Ltd* v *Tower Hamlets LBC* (1976) 3 All ER 462; *Hotel Jaya Puri Bhd* v *National Union of Hotel Bar & Restaurant Workers* (1980) 1 MLJ 109.

Under Statute:

6. Section 186 CA 2016

This section prohibits the allotment of shares by a public company unless (i) the minimum subscription and (ii) the amount payable on the application for the share subscription have been received by the company. Under section 186(4)(a), if these two conditions are not fulfilled within 4 months from the issue of the prospectus, the company is required to refund all moneys received to the applicants of the shares. This refund must be made 5 months after the issue of the prospectus. Section 186(4)(b) states that if the company fails to refund the moneys as above, the directors will be jointly and severally liable to refund the moneys with interest at the rate of 10% per annum unless they can prove that the default was not due to their misconduct or negligence.

7. Section 123 CA 2016

This section prohibits a company from giving financial assistance for the purchase of its own shares or shares of its holding company. This is a prohibited transaction and any officer of the company who authorizes such a transaction will be convicted person will have to pay compensation to the company or another person who has suffered loss as a result of the contravention.

8. **Section 244 and 247 CA 2017**

Although a holding company and its subsidiary are separate entities, s 247 provides that the directors of every holding company should take steps to ensure that the financial year of its subsidiary coincides with its own financial year. This must be done within two years of the commencement of the holding company-subsidiary relationship. The purpose is to enable group accounts to be prepared.

9. **Section 539(3) and 540(2) CA 2016 (Wrongful Trading)**

Wrongful trading occurs when, in the course of winding up or in any proceedings against the company, the officer of the company knowingly contracts a debt on behalf of the company at a time when he had no reasonable or probable expectation of the company being able to pay the debt. The officer concerned is guilty of an offence and shall on conviction, be liable to imprisonment for a term not exceeding five years or a fine not exceeding RM500,000. The Court on the application of the liquidator or any creditor or contributory of the company may, if the Court thinks proper so to do, declare that the person shall be personally responsible for the payment of the whole or any part of that debt.

10. Section 540(1) CA 2016 (Fraudulent trading)

Fraudulent trading happens when an officer of the company carries on any business of the company with the intent to defraud the creditors or for any fraudulent purposes. S 540(1) imputes criminal liability to any person who was a knowing party to the carrying on of any business of the company with the intent to defraud the creditors of the company or for any fraudulent purposes. Such a person may also be made personally liable for all or any of the debts of the company and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one million ringgit or both.

(11 marks)

This problem-based question tests the candidates' knowledge (i) the effect of pre-incorporation contracts; and (ii) the duties of promoters on secret profit and remedies for breach of such duties.

b. i. The question concerns pre-incorporation contracts. A pre-incorporation contract is one which is purportedly made by or on behalf of a company at a time when the company has not yet been formed.

At common law such contracts were totally void. This was because until a company was incorporated it had no capacity to contract. Further, it also could not ratify the contract after its incorporation. This is illustrated in the case of *Kelner* v *Baxter* (1866) LR 2 CP 174.

The Malaysian position is governed by s.65(1) and (2) of the Companies Act 2016.

By section 65(1) A contract or transaction that purports to be made by or on behalf of a company at a time when the company has not been formed has effect as a contract or transaction made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract or transaction accordingly.

By section 65(2), Notwithstanding subsection (1), a contract or transaction referred to in that subsection may be ratified by the company after its incorporation and the company shall be bound by the contract or transaction as if the company had been in existence at the date of the contract or transaction and had been a party to the contract or transaction.

Thus, in Malaysia, a pre-incorporation contract is ratifiable by the company after its incorporation. Once ratified, either party can sue the other upon the contract. This is illustrated in the case of *Cosmic Insurance Co Ltd* v *Khoo Chiang Poh* (1981) 1 MLJ 61. If the company does not ratify, the person purporting to act on behalf of the company will incur personal liability.

In conclusion, as the contract has not been ratified by the company (Sunstone Sdn Bhd.) after it was incorporated, Kala Sdn Bhd may be advised to sue Patrick personally on the contract.

(4 marks)

ii. Promoters are persons who are likely to influence or affect the future of the company after its incorporation. Promoters are regarded as fiduciaries in relation to the company. As such they are in a position of trust and must at all times act honestly and for the benefit of the future company. Very importantly, promoters must not take a profit from the promotion of the company unless they make adequate disclosure. Such disclosure must be made either to an independent board of directors or to all the present and intended shareholders (if necessary, through a prospectus).

Where a promoter has made secret profits, the company has several remedies available to it.

First, the company may seek to rescind the contract made with the promoters. For example, in the case of *Erlanger* v *New Sombrero Phosphate Co* (1878) 3 App.Cas. 1218, the promoters had bought an island for £55,000 and later sold it to a company they formed, for a price of £110,000. No disclosure had been made as to the profit they were making. The court held that the company was entitled to rescind the contract of sale. (see also: *Habib Abdul Rahman* v *Abdul Cader* (1886) 4 Ky 193.

The company may also seek to recover the secret profit made by the promoters. This is illustrated in the case of *Gluckstein* v *Barnes* (1900) AC 240, where the promoters had made a profit of some £20,000 without making the necessary disclosure. The court ordered them to repay such profit to the company.

The promoters may also be held liable for damages for breach of fiduciary duty. See: *Re Leeds & Hanley Theatres of Varieties Ltd* (1902) 2 Ch 809.

Based on the law as stated above, Sunstone Sdn Bhd may therefore be advised that as Anand and Zarif, being promoters, made a profit of RM100,000 from the sale of the land to it without making the necessary disclosure, it may be entitled to rescind the sale, or alternatively to recover the secret profit of RM100,000 from Anand and Zarif.

(5 marks)
(Total: 20 marks)

QUESTION 5

This problem-based question tests the candidates' knowledge of and ability to apply, the law on company charges and the order of priority of such charges in the event of the company becoming insolvent.

a. i. Applying the above law to the facts given, and presuming that all the charges have been duly registered, the liquidator may be advised as follows:

Nuro Bank Berhad was the first creditor to create a floating charge over all the company's assets and undertakings. It contains a negative pledge, which prohibits the company (chargor) from creating any other subsequent charge to rank in priority to or in *pari passu* with the earlier floating charge.

This clause will be effective against subsequent charge/s who have notice of the restrictive clause. In Malaysia, the courts recognize the principle of constructive notice i.e. in merely through the registration of Form 34 done at the Companies Commission of Malaysia - ***Malaysia International Malaysia International Merchant Bankers Bhd (No 2) v Highland Chocolate &***

Confectionary Sdn Bhd & Anor[1998] MLJU 477 and ***Bank Utama (M) Sdn Bhd v Voon Ming Seng SB 7 Ors [2009] 7 CLJ 26***.

Based on this constructive notice, Dime Bank Berhad should have known about the existence of the negative pledge and should apply for Nuro Bank Berhad's consent first prior to the creation of its own floating charge. Dime Bank Berhad has not obtained consent from Nuro Bank Berhad. It has been held in the case of ***Re Benjamin Cope & Sons Ltd*** **(1914) 1 Ch 800** that a company cannot create a subsequent floating charge ranking in priority to, or in *pari passu* with, the first floating charge unless the first floating charge permits it. See also ***Danaharta Managers Sdn Bhd v Khee Cheong Mesin Jahit & Letrik Sdn Bhd & Ors [2008] 8 MLJ 28; [2009] 7 CLJ 26.***

It is important to highlight that, the relevant forms for registration of charges have been amended to require particulars of restrictions on the creation of subsequent charges to be stated. Where such particulars have been included in the relevant registration form, it would amount to notice of the restriction and such a chargee will be able to safeguard his priority. (see sections 39, 352 and 362 Companies Act 2016)

In conclusion, it could be argued that the subsequent lender (Dime Bank Berhad) had constructive notice of the negative pledge clause and did not take its charge in a good faith if the prior approval from the existing floating chargee (Nuro Bank Berhad) was not obtained. This will have an impact on the priority of the charges.

(8 marks)

ii. A negative pledge clause is a type of negative covenant that prevents a borrower from pledging any assets if doing so would jeopardize the lender's security. A floating chargee may seek to protect the priority of his charge by the use of a negative pledge. It can be effected by incorporating a clause which expressly stipulates that the company (chargor) is prohibited from creating any other subsequent charge to rank in priority to or in *pari passu* with the earlier floating charge.

(2 marks)

iii. As a general rule, secured creditors will rank in priority over other unsecured creditors in the event any particular company is unable to pay its debts to all its creditors. Secured creditors can be divided into two (1) secured by fixed charges and (2) secured by floating charge.

The fixed charge (Dolla Bank Berhad) although it is second in time, will have priority. However, the outcome may be different where there is a negative pledge clause in the floating charge document. Thus, it can be argued that the subsequent lender (Dolla Bank Berhad) had constructive notice of the negative pledge clause and did not take its charge in a good faith if the approval from the existing floating (Nuro Bank Berhad) charge was not obtained. This will have an impact on the priority of the charges.

(3 marks)

This question tests the candidates' knowledge of and ability to apply, the law on raising of capital by a private and public company.

b. i. Raising of capital by a public company

A public company may raise its capital privately or by inviting the public to subscribe for its shares. Large public companies with varied and substantial business may need a considerable amount of capital and it may be necessary for the company to raise capital by inviting the public to subscribe for its shares. This is done by issuing a prospectus which satisfies the requirements under Capital Market and services Act 2007 Section 212 of the CMSA 2007 provides that a company which intends to issue shares must submit its prospectus for approval and registration by the Securities Commission

ii. Raising of capital by a private company

By section 43 Companies Act 2016, a private company is prohibited from offering shares or debentures to the public. As a result of this provision, a private company cannot issue a prospectus and invite the public to subscribe for its shares. A private company must raise its fund privately. Thus, a promoter of a private company may offer shares to friends, relatives and customers without contravening section 43. This would not be an invitation to public.

(5 marks)

This question tests the candidates' knowledge of and ability to apply, the topic of prospectus.

c. Persons who authorize or cause the issue of a prospectus that contain false or misleading statements or material non-disclosure may made liable to pay compensation for loss suffered by individuals who had relied on the relevant parts of the prospectus (section 248 CMSA 2007). In addition to the civil liability under the Act, the common law provides several remedies to persons who had suffered loss after relying on false and misleading statements or by material omissions in the prospectus. Remedies are available at common law against the company and those responsible for the issue of the prospectus.

(2 marks)
(Total: 20 marks)

QUESTION 6

This problem based question on company law tests the candidates' knowledge and application of the law relating to directors' duties.

a. Directors are persons who are in a fiduciary position in relation to the company. *Inter alia*, the fiduciary duties are:

(i) to act *bona fide* for the benefit of the company as a whole.
(ii) to act for a proper purpose.

(iii) to avoid conflict of duty and personal interest.

In relation to the contract made in September 2019 with Steelwood & Co, the directors, Leo and Lily are in breach of their fiduciary duty to the company. One well established principle at common law is that directors must not put themselves in a position of conflict between their duties to the company and their personal interest. Such conflict may arise where the directors are interested in a contract with the company or where they make use of their position as directors to obtain a profit or advantage for themselves.

At common law where a company has entered into a contract in which a director is interested the contract is voidable at the option of the company. This is illustrated in the case of ***Aberdeen Rly Co* v *Blaikie Bros* (1854) 1 Macq 461**. Here the railway company ordered a quantity of chairs from the firm of Blaikie Bros. It was later discovered that one of the directors of the company was a partner in Blaikie Bros. The court held that the company was entitled to avoid the contract.

Applying the abovesaid principle, Tigmo Sdn Bhd will be entitled to avoid the contract with Steelwood & Co. as Leo and Lily are partners of that firm. Further, by **Section 221 of the Companies Act 2016**, every director of a company, who is in any way interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.

It was noted that a director who breaches **section 221**; (i) commits a criminal offence; (ii) the relevant contract is voidable at the option of the company; and (iii) the other party to the relevant contract may enforce it if he has given valuable consideration and had no actual notice of the breach. Under this section also stipulated that a director interested in a contract or proposed contract under **Section 221 will commit a criminal offence** if he participates in any discussion on the contract at a board meeting and votes it. As Leo and Lily have failed to comply with this section they will be liable as mentioned.

In relation to the second matter all the directors are in breach of the fiduciary duty to avoid conflict of duty and personal interest by usurping for themselves a corporate opportunity. **(Section 218(1)(d) Companies Act 2016).**

The facts given are rather similar to the case of ***Cook* v *Deeks* (1916) AC 554.** In that case there were four shareholders who were also directors. Three of them negotiated a contract on behalf of the company but later diverted the contract to another company formed by them. When the fourth director (Cook) protested, resolutions were passed by the three of them as shareholders approving the transaction. The Privy Council held that the three directors had breached the duty to avoid conflict of duty and personal interest. The purported ratification was not valid as it constituted a fraud on the minority. The company was entitled to get back the benefit of the contract.

However, under **Section 218(1)(d)** it was seen that where a director breaches one of the prohibitions stated under the section, the breach may be ratified by a general meeting of the company. Although section 218(1) does not refer 'fraud on the minority doctrine', it is submitted that the courts may continue to use the doctrine in the case of attempted ratifications of the prohibitions mentioned in the said section to prevent blatant abuses of majority power.

In conclusion, Tigmo Sdn Bhd could successfully sue Shah, Manju, Leo and Lily for breach of fiduciary duty and have the benefit of the contract returned to the company.

(12 marks)

This question, contains two parts. Part (a) tests the candidates on qualifications and removal of auditors while part (b) tests their knowledge on company resolutions.

b. i. In order to qualify to be appointed as a company auditor, a person must first obtain approval from Minister charge with responsibility for finance. Section 263 Companies Act 2016 states that the Minister may approve the applicant as a company auditor if he is satisfied that the applicant of good character and competent to perform duties under the Companies Act. According to this section also, the approval is for a period of 2 years. Section 22 of the Accountants Act 1967 provides that a person may practice as an auditor only if he is a member of, and registered as a chartered accountant with the Malaysian Institute of Accountants. Section 264(1) further provides that an approved company auditor may not accept the appointment or act as an auditor for a particular company if he/she falls into one of the categories of person stated in the said provision.

As Lina has just graduated with a degree in engineering, it is unlikely that she is an approved company auditor. If that were so, then she is not qualified to be appointed as a company auditor.

(4 marks)

ii. Even if the appointment is valid, an auditor may be removed from office in accordance with the procedure prescribed in sections 276 and 277 of the Companies Act 2016. By section 276 an auditor of a company may be removed from office by ordinary resolution of the company at a general meeting of which special notice has been given but not otherwise. A special notice is notice of not less than 28 days given to the company by those proposing to pass the resolution.

Where such special notice is received by the company it must forthwith send a copy of the notice to the auditor concerned and to the Registrar. The auditor may, within seven days after the receipt of such notice, make written representation of a reasonable length and request that copies of it be sent by the company to the members. The auditor may request that the representation be read out at the meeting. He is also allowed to make oral representations at the meeting itself.

By section 278, a company shall, forthwith after the removal of an auditor from office, give notice in writing of the removal to the Registrar.

(4 marks)

(Total: 20 marks)

QUESTION 7

This question test candidates knowledge on Bursa Malaysia as a body involved in regulating and monitoring corporate governance in Malaysia.

a. i. 'Material information' is information of a factual nature. It may concern the company's property, business, financial condition and prospects, corporate proposals and significant changes in ownership. It is one that is likely to be considered important by a reasonable investor in determining his course of action.

(2 marks)

ii. Examples of events which may require immediate disclosure as illustrated in the rules.
(Candidates are only required to state any six (6) examples)

(a) the entry into a joint venture agreement or merger;
(b) the acquisition or loss of a contract, franchise or distributorship rights;
(c) the introduction of a new product or discovery;
(d) a change in management;
(e) the borrowing of funds;
(f) the purchase or sale of an asset;
(g) a change in capital investment plans;
(h) significant litigation;
(i) the entry into a memorandum of understanding; or
(j) the entry into any call or put option or financial futures contract.

(3 marks)

This question test candidates knowledge on Corporate Rescue Mechanism(s) as a body involved in regulating and monitoring corporate governance in Malaysia.

b. JM is a Court supervised rescue plan that:

(a) places the management of a company under a judicial manager (insolvency practitioner) appointed by the Court;
(b) the judicial manager shall prepare a workable proposal to achieve one of the objectives mentioned in section 405(1)(b) of the CA 2016; and
(c) the plan shall be implemented after being approved by seventy-five per centum of the total value of the creditors.

Under section 404 and 405 of the CA 2016, the application for JM may be made by: (a) a company or its directors; (b) under a resolution of its members; or (c) the board of directors; or (d) a creditor, including any contingent; or (e) prospective creditor; or (f) all or any of those parties.

*It should be noted that the judicial management procedure is not available to a bank, finance company or an insurance company or to a company which is subject to the Capital Market and Services Act 2007.

(3 marks)

This question, tests the candidates' knowledge on certain basic aspects of winding up of companies.

c. i. Winding up is a process in which the existence of a company is brought to an end, where assets of a company are collected and realized. The proceeds collected are used to discharge the company's debts and liabilities and the remaining balance (if any) will be is distributed amongst the contributories according to their entitlement.

There are 2 modes of winding up: 1) Voluntary winding up (VWU)&(CVWU); and 2) Compulsory i.e. Winding up by Court.

1) Voluntary winding up

Voluntary winding is divided into 2 categories, namely **members' voluntary winding (MVWU)** and **Creditors' voluntary winding up (CVWU)**: Section 433 of the Companies Act 2016 further defines (MVWU) as A winding up in the case of which a directors' declaration under section 443 has been made; and a winding up in the case of which such a declaration has not been made is a "creditors voluntary winding up". (CVWU)

Applying the law stated above it is submitted that members' voluntary winding up will not be the best option as it is commenced by resolution of members where the company may be wound up voluntarily by special resolution. If the directors (James and Jani) want the winding up to be a members' voluntary winding up they must file a written declaration that the company is solvent as stated in section 433. It is clear from the facts put before us, the company is not solvent when the facts states that between 2016 to 2019 Kwasa Enegi Sdn Bhd. is facing critical financial issues. Hence, directors will be unable to file a declaration of solvency.

Where members have resolved to wind up the company and directors do not want to, or unable to file a declaration of solvency, and the company has to be put through the process of a creditors' voluntary winding up, (the requirements of sections 449-451 must be followed). Here, creditors' voluntary winding up will also not possible to happen as there is no resolution of members (James and Jani) where the company may be wound up voluntarily by special resolution in the first place and there is no declaration of solvency being made.

Hence to apply in this situation put before us this type of company voluntarily winding up by the members themselves and creditors will not be the possible option for Kwasa Energi Sdn Bhd.

2) Company winding up by Court

Winding up by Court is also known as a compulsory winding up. It begins with the presentation of a petition in Court. The petitioners include the company itself, creditors, liquidator, the Registrar of companies or the Official Receiver under section 464 of the Companies Act 2016.

Section 465(1)(a) Companies Act 2016 provides that a company may be wound up by the court if there is a petition to wind it up made by the company itself. Here, Kwasa Enegi Sdn Bhd can proceed to pass a special resolution to wind itself up by an order of the court.

James can also proceed under **section 465 (1) (f) (Directors unfair or unjust to other member)** the court may order the company to be wound up if "the directors have acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole, or acted in any other manner which appears to be unfair or unjust to members". James could argue on the ground that Jani had acted in the affair of the company purely for his own interest by solidifying his position in the company when he terminated employees perceived to be closed to him and using company funds for his personal matters.

One other ground where James can file a winding petition is under **section 465 (1) (h) (Just and equitable to wind up the company)** a company may be wound up by the court if the court is of the opinion that it is just and equitable to wound up the company. James can argue it is no longer just and equitable for the company to remain in operation due to the animosity between him and Jani. This has caused a struggle for control in the company and this consequently had caused the company to cease its operation.

Further, James may be advised that, any creditor may also petition to wind up its debtor (Kwasa Enegi Sdn Bhd.) on the ground that the debtor is **unable to pay its debts. (Section 466(1)**

In conclusion, James may be advised that the above said options under winding up by the court (compulsory winding up) are the possible best options that might be able to wound up Kwasa Enegi Sdn Bhd.

(10 marks)

ii. It is necessary to determine the time of commencement of winding up because of its consequences, for example any transactions performed after that date are void. The commencement date for the winding up by the court is the date of the winding up order (section 467(2) Companies Act 2016.) However, where before the petition is filed, a resolution for winding up has been passed, the time of passing the resolution is deemed to be the time of commencement (section 467(1)).

(2 marks)
(Total: 20 marks)

END OF SOLUTIONS