Answers

1 The question tested the candidates' knowledge of the laws applicable to the legal capacity of individuals and legal entities.

(a) The provisions of law applicable to civil legal capacity are set out in s.1 of the Civil Code (Articles 14 to 23) and rights flowing from civil capacity are amplified in s.2 under Articles 24 *et seq*. Article 17 states that the capacity for civil acts is the capability to exercise civil rights and discharge obligations.

Article 14 defines civil legal capacity as the capability of the individual to assume civil rights and obligations. All individuals have equal civil legal capacity. The rights and obligations exist from birth until death. However, Article 16 qualifies these rights as not being absolute, in that they may be restricted by law. These restrictions are set down in Articles 22 and 23.

Article 18 distinguishes between adults and minors, defining adults as those who are at least 18 years of age, and minors who have not yet reached this age.

Article 20 restricts the rights of those who are at least 6 years old and under 18 years old. These minors must have the consent of their legal representatives to perform civil transactions, except those necessary for performing the needs of everyday life, or where otherwise provided for by law. Those who are at least 15 years old but under 18 years old who have sufficient property to secure the performance of obligations may execute and perform these obligations without the consent of their legal representatives, except where provided for by law. Article 21 states that those who have not reached six years of age do not have capacity for civil acts, which must be performed on their behalf by their legal representatives.

Based on the opinion of a competent authority and on the request of a person with related rights and interests, a court may take away legal capacity from an individual. This may be decided on the grounds of mental incapacity. The court may subsequently reverse this decision. In such cases, the legal representative of the individual performs civil acts on his or her behalf (Article 22).

Article 23 expands the grounds on which civil capacity may be revoked by the court. The court may take such a decision if the individual suffers addictions that damage the property of the family. Where civil capacity is restricted in this manner, the consent of the legal representative is required in relation to all transactions concerning the property of the individual except those concerning the needs of everyday life. Again, the court may remove the restriction at a future time.

(b) A legal entity has a personality of its own, separate from those who own it (the shareholders or other body, such as the State) and those who manage it (the board of management). Article 84 recognises a body as a legal entity as it has been properly established, has a sophisticated organisation structure, holds property independently of other individuals and organisations, and carries out legal relations in its own name.

Article 86 makes general provisions in relation to the civil legal capacity of legal entities. The capability of the legal entity to assume civil rights and obligations must be consistent with its operational objectives. This capacity starts with the establishment of the entity and terminates on its dissolution. The civil acts of the legal entity are discharged by its legal or authorised representative. Article 91 states that the legal or authorised representative must comply with the provisions of Chapter VII of part 1 of the Civil Code, and must be identified in the founding documents or the Charter.

Article 87 states that every legal entity must have a name in the Vietnamese language that distinguishes it from other bodies, and this name must be used in all civil transactions.

As implied in Article 84, the civil legal capacity of a legal entity is not absolute, being bounded by the lines of business for which it is established. In practice, such activities are set out in the Charter of the entity, the content of which is agreed by the founders on establishment, and amended subsequently by the owners if desired. Article 88 sets out the matters that must be contained in the Charter.

2 The question asked candidates to explain the consequences of failing to fulfil a civil obligation and the grounds on which any adverse consequences of such failure may be lawfully avoided.

(a) The principles governing the performance of civil obligations are set out in Articles 280 to 301 of the Civil Code. The failure to fulfil a civil obligation is a breach of a commitment given to another party, having initially voluntarily agreed to enter into such a commitment. In practice, breaches may take many forms, including failure to deliver goods or services, or not delivering them on time, lack of conformity with the agreed quality standards or other specifications, performing the obligation in the wrong place, and so on. In addition to failing to perform such actions, a breach may also relate to commitments not to act.

Articles 303 and 304 provide legal remedies in the form of specific performance and damages. If a party fails to deliver an object, the counterparty may insist on delivery, or if the subject matter no longer exists, may demand an equivalent financial sum. When the breach is a failure to carry out a specific act, the injured party may insist on performance, or arrange for performance by an appropriate third party. If the obligation requires a party from desisting in performance of a specified act, the injured party may demand that the perpetrator ceases to violate the obligation, and may require compensation to be paid equivalent to losses suffered.

Article 305 states that if an obligation is performed late, such performance may be accepted with or without compensation. A financial obligation performed with a delay entitles the injured party to claim interest at the State bank's published rate.

Damages are financial compensation for losses and missed profit, such as loss of property and reasonable expenses incurred, but may also be awarded for spiritual damage. The latter refers to reputational damage caused by the acts of another as well as harm to life, health, honour or dignity. When spiritual damage is established, Article 307 states that an apology and/or retraction may be demanded.

(b) There are four grounds upon which an individual who fails to perform a civil obligation may be absolved from the adverse consequences of such actions or inactions.

The individual may escape the consequences if the injured party agrees to forgive the breach. In doing so, the party that has failed to perform the obligation is released from it.

The failure to perform may have been brought about by a *force majeure*. This term generally refers to an unforeseen event that is beyond the control of the parties, rendering performance of the obligation impossible or unreasonable. Some contracts refer to specific events as constituting *force majeure*, in which case their occurrence does not bring about a breach as such. In other cases, it may be up to a court to decide whether an event may be regarded as a *force majeure* within the meaning of Article 302.

If the failure to perform may be attributed to a fault of the affected party, Article 302 states that no responsibility for breach will arise.

Article 283 states that failure to perform an obligation will not give rise to adverse consequences if, as a result of performing the obligation, the outcome will be to contravene the law or social morals.

3 The question asked candidates to explain the grounds for dismissal and the provisions of the Labour Code in respect of the consultation process that must take place after such a decision has been taken.

(a) The general grounds for dismissal of an employee are set down in Article 85 of the Labour Code.

Newly appointed employees may be engaged subject to a probationary (trial) period. This is limited to either 30 days or 60 days, depending on the nature of the work. Article 32 entitles the employer to terminate the contract of the employee at any time during this period. No advance notice is required for the dismissal, and the employer has no obligation to compensate the employee if the work carried out has not met the necessary standards.

Article 36 permits the employer to dismiss the employee when the term of the labour contract expires. This only applies to definite term labour contracts, as other labour contracts are open ended and do not have a date of expiry.

Article 38 lays down five further grounds for dismissal:

(i) The employee may be dismissed if he or she repeatedly fails to perform the work in accordance with the obligations in the contract.

(ii) The employee may be dismissed if he or she is disciplined under the terms of Article 85. This limits dismissal as a sanction against the employee to specified acts or violations. These include theft, embezzlement, disclosure of trade secrets or other conduct detrimental to the enterprise. The employee may also be dismissed for recommitting such acts having been disciplined earlier, or for taking five days off in one month or an aggregate of 20 days off in one year without proper reason.

(iii) Prolonged absence through illness is a ground for dismissal where the illness renders the employee unable to work for 12 months (indefinite term contracts) or 6 months (definite term contracts), or in the case of seasonal jobs, a period of more than half the term of the contract. The employer is obliged to consider a continuation of the labour contract once the employee recovers from the illness.

(iv) When the organisation has to downsize the labour force following a reduction in production brought about by a natural disaster, fire or other event of *force majeure*, this is a valid ground for dismissal.

(v) Dismissal occurs *de facto* when an organisation ceases operations altogether.

(b) Before the employee can be dismissed, the employer must arrange a disciplinary hearing to provide the employee with a right to respond.

The employer must issue a formal notice to the employee that a hearing is to take place. If the employee does not attend the hearing after three notices have been served, the meeting may be held in the absence of the employee.

The hearing is attended by the employer, the employee and a representative of the executive committee of the trade union. Not all organisations have a trade union, and if this is the case, the district level trade union representative must attend.

Formal minutes must be taken at the hearing. They must be signed by all parties attending as a true and accurate record.

If the employer and the trade union representative agree on the dismissal, the dismissal may go ahead and the relevant labour department is then informed.

The employer and the trade union representative may not agree on the dismissal. If this is the case, a report must be made to the labour department, and 30 days must then elapse before the employer may dismiss the employee.

The employee or the trade union may appeal the dismissal to the Labour Court.

4 The question asked candidates to explain any five differences between unlimited partnerships and shareholding companies.

The essential characteristics of these enterprises are set out in Chapters IV and V of the Law on Enterprises.

Liability:

As the name suggests, unlimited partners are jointly and severally responsible for the obligations of the partnership, and as such, their financial affairs are inseparable from those of the enterprise. Shareholders in a shareholding company bear liability only to the extent of the capital they have agreed to contribute to the company. As the company has a separate personality in law, any obligations over and above the capital base are the responsibility of the company and not its owners, except where the latter may be held accountable for improper actions.

Separation of ownership and management:

Unlimited partners play a full part in the management of the enterprise and are therefore both owners and managers.

By contrast, shareholding companies have a board of management which runs the company on behalf of the shareholders. While members of the body own shares in the company, there may also be shareholders who are not members of the board of management.

Meetings and decision taking:

Shareholding companies must hold at least one general meeting of shareholders per year. The procedures for calling and conducting general meetings, and the rights and obligations of managers and shareholders, are regulated by detailed provisions set out in Chapter IV of the Law on Enterprises.

The regulations relating to meetings of the members' council of an unlimited partnership are less prescriptive, and it is left to the partners themselves to determine the procedures for calling and conducting meetings.

Share and loan capital:

All shareholding companies have share capital, representing the claims and interests of the owners of the company. Article 130(3) of the Law on Enterprises expressly forbids partnerships from issuing securities. Their capital is made up of the contributions of the partners.

Likewise, while a company may borrow in many different ways, including issuing bonds, partnerships are restricted in the manner in which loan capital may be raised by the prohibition in the same Article.

Share repurchases (buybacks) are governed by detailed rules set out in Article 90 *et seq* of the Law on Enterprises. It is easier for unlimited partners to buy out the contribution of a partner who wishes to leave or when a partner is removed.

Distributions:

Shareholding companies may distribute dividends subject to the detailed provisions of Article 93 of the Law on Enterprises. As unlimited partnerships do not issue shares, their distributions take the form of profits allocated on a *pro rata* basis with reference to capital contribution or as agreed in the Charter.

Transfers of ownership rights:

The shares in a shareholding company are transferable, so the ownership is fluid and may change on a regular basis. The rights of unlimited partners may also be transferred, but only with the consent of other partners.

Termination of the enterprise:

While an unlimited partnership may be terminated by the death of a partner, leaving only one surviving partner, shareholding companies have perpetual succession, with shares passing to the heirs of any deceased shareholder. It should be noted, however, that the heir of a deceased partner may be admitted as a partner with the consent of the surviving partner.

Tutorial note: *Full marks will be awarded for explaining any FIVE differences.*

5 The question asked candidates to explain the legal differences between share capital and loan capital and to explain the rights of those who provide a company with long-term loan capital.

(a) Share capital represents the owners' equity in a company and is made up of their permanent contributions denominated in shares of a specified nominal value.

The legal relationship between the company and the shareholders is contractual in nature. In subscribing for shares, the shareholder obtains an interest in the company. By issuing shares, the company creates legal rights and obligations between itself and the shareholder, governed by the provisions of the Charter of the company, and more broadly by the Law on Enterprises. These provisions can subsequently be changed by shareholders voting collectively, but the rules governing the relationship between each individual shareholder and the company cannot be changed except with the formal consent of other shareholders at a general meeting.

Within the framework laid down in the Law on Enterprises, shares can be transferred by sale or gift, though provisions in the Charter may constrain this right.

The word 'permanent' used in the context above means that shareholders do not have a right to recall the capital, unless the shares are redeemable or due process is followed to reduce capital.

The rights of the shareholder include access to information on the financial and other affairs of the company at least annually, to notice, attendance and voting at general meetings, to a dividend if declared, and return of capital on dissolution of the company, subject to the prior rights of other claimants, such as creditors.

By contrast, loan capital represents the long-term borrowings of the company, so the relationship between the provider of capital and the company is one of creditor to debtor. As such, the relationship is governed by the general provisions of the Civil Code in respect of civil obligations rather than the Law on Enterprises.

Providers of loan capital are not governed by the provisions of the Charter, though the company is responsible for observing the provisions of this document when issuing loan capital.

Though it is possible to issue perpetual bonds that resemble share capital in some ways, most loan capital has a maturity date on which the relationship between the parties is terminated, subject to the company returning the capital due to the investor along with any other monies payable.

(b) The rights of providers of long-term loan capital are set down in the Civil Code, which governs all debtor–creditor relationships. This makes provisions in respect of the rights and obligations of both parties, and the legal remedies available to the creditor in the event of default. If the debt is secured, for example by mortgage, pledge or guarantee, the Civil Code makes additional provisions on these forms of collateral.

Further specific rights and obligations are set out in the contract between the company and the investor. The contract includes the duty of the company to pay interest to the investor and to return capital on maturity of the contract.

The provider of capital may insist on additional financial and/or non-financial covenants that further reduce the risk of the transaction, such as a requirement to provide periodic financial statements and reports, or to notify material changes within the company that may be relevant to monitoring or enforcing the debt.

An event of default triggers the right of a creditor to take legal action against the company. Notably, the right to interest is contractual and may be enforced through the courts, in contrast to the more limited right of shareholders to claim dividends, which are wholly dependent on the recommendation of the board of management, who are in turn limited by the extent to which the company has funds that may be distributed.

Providers of long-term capital have no constitutional rights in the company other than any specific terms agreed in the contract between the parties. However, if the company becomes insolvent, the right of the creditor to participate in its affairs is strengthened by the provisions of the Law on Bankruptcy, while the rights of shareholders become significantly diminished. For example, the creditors of the company have a right to participate in the creditors' meeting and may be represented on the committee for management and liquidation of assets.

6 The question tested the candidates' knowledge of the duties of the board of management in convening general meetings of shareholders and the procedures for convening these meetings.

(a) Article 108 of the Law on Enterprises sets down the duties of the board of management of a shareholding company. Specifically, Article 108(2)(I) states that the board of management approves the agenda and contents of documents for the general meeting, convenes the general meeting, and obtains written opinions in order for the general meeting to pass resolutions.

Article 111 goes on to state that it is the duty of the chairman of the board of management to chair the general meeting.

Under the provisions of Article 97, an annual general meeting must be held within four months of the end of the financial year. If deemed necessary, the board of management may extend this time limit by a maximum of two months.

Under the same Article, the board of management must convene an *ad hoc* general meeting if it is considered to be in the interests of the company, the number of members of the board of management falls below the legal number, on request by a shareholder or group of shareholders qualified to do so, and on demand by the Inspection Committee.

The Charter of the company may lay down further instances in which an *ad hoc* general meeting must be convened.

The time-limit for calling *ad hoc* general meetings is 30 days from the date on which the request to do so is received, or from the date on which the number of members of the board of management fell below the mandatory number.

Failure to call a general meeting as required renders the chairman liable, and he or she may be called upon to compensate any losses brought about as a result. It is the responsibility of the Inspection Committee to call a meeting if the board of management fails to do so.

(b) The procedure for calling a general meeting of shareholders is set out in Article 98 *et seq* of the Law on Enterprises.

Article 98 stipulates that a list must be prepared of those entitled to attend the general meeting, and that the list should be based on the register of shareholders. It must be compiled no later than 30 days before the scheduled date of the meeting, and must include detailed particulars of each shareholder as set down in Article 98(2). Shareholders have access to this list and are entitled to demand that amendments be made if the recorded details are incorrect.

Article 99 states that the convenor of the general meeting must prepare a list of shareholders entitled to attend and vote, and an agenda for the meeting together with necessary documents and draft resolutions. The convenor is also responsible for setting the time and date of the meeting and for despatching written invitations to shareholders.

Where a shareholder is entitled to present matters for inclusion in the agenda, they must submit their recommendation to do so no later than three days prior to the opening of the meeting, unless the Charter of the company specifies a different time limit. Article 99(3) lays down the grounds for refusal to include such matters in the business of the meeting.

Article 100 requires that written invitations should be sent to shareholders entitled to vote no later than seven days prior to the opening of the meeting. Again, the Charter may specify an alternative time-limit. The invitation must be sent using a method that is guaranteed to reach the permanent address of each shareholder. It must include a form through which the shareholder can nominate a representative to attend on his or her behalf.

If the company has a website, the invitation must be published on this at the same time as the invitations are despatched to shareholders (Article 100(2)).

Article 101 sets down detailed provisions in respect of shareholders' entitlement to attend general meetings, and also criteria for eligibility of personal representatives who are to attend on behalf of shareholders.

If a personal representative is to attend the meeting on behalf of a shareholder, the authority to do so must be attested by the shareholder in the prescribed manner.

Article 102 states that a meeting must be reconvened if the original meeting has an insufficient number of shareholders to form a quorum, and indeed for a third time if two meetings are inquorate. The reconvened meetings must take place within defined time-limits.

Article 103 lays down various requirements in respect of preparation for the meeting. Voting cards must be made available to shareholders. It is also necessary to put in place a chairman, secretary and vote-counting committee. The chairman will normally be the chairman of the board of management, but if this individual is unable to serve as chairman of the meeting, the members of the board of management must nominate an individual to discharge this duty.

7 The question tested the candidates' knowledge of the provisions of the Law on Bankruptcy in respect of the parties that may petition the court for the bankruptcy of a company. It also asked candidates to explain the grounds on which the court may reject such a petition.

(a) Article 7 of the Law on Bankruptcy defines the competence of courts to deal with bankruptcy petitions, and states that the provincial level people's courts may hear such petitions in respect of enterprises.

Article 13 entitles both secured and unsecured creditors to petition the court for bankruptcy when it becomes apparent that the debtor cannot meet its obligations. The petition must include the date, the parties (debtor and creditor), details of the debt and the grounds for filing the petition.

Article 14 entitles the employees of a company to petition for the bankruptcy of the company if they are owed wages or other sums of money. The petition may be submitted to the court by the employees themselves, or on their behalf by a trade union representative. The details to be included in the petition are similar to those laid down in Article 13, together with details of the number of months for which wages have not been paid, the sums outstanding on these, and any other monies owing to them.

Article 15 obliges the owners of an enterprise to submit a petition for bankruptcy once they are aware that it is insolvent. In addition to the basic factual details of the owners and the business, the owners are required to provide a report on the business activities of the enterprise, including a description of the causes and circumstances of the insolvency and the measures already taken to attempt to prevent it. If the insolvent enterprise is subject to mandatory audit, its financial statements must be certified by an independent auditing organisation. The company is also required to provide information on the assets and obligations, including a detailed list of creditors and sums due to them. Article 16 makes similar provisions in respect of State enterprises.

Article 17 entitles the shareholders of a joint-stock company to petition the court for bankruptcy. The procedure for this must be compliant with the Charter of the company, but if the Charter is silent on this, the procedure will be agreed by the general meeting of shareholders. If there are no provisions in the Charter and it is impossible to convene a general meeting of shareholders, those holding no less than 20% of the shares for at least 6 consecutive months may file the petition.

Article 18 entitles the members of a partnership to petition for the bankruptcy of their business.

(b) Article 24 of the Law on Bankruptcy sets down five grounds on which a court may return (reject) a petition for bankruptcy.

(i) The applicant may fail to pay the mandatory charge for filing the petition within the required time-limit.

(ii) The applicant may not have a legal right to submit the bankruptcy petition. This would occur if the applicant was not one of the parties entitled to submit a petition as set out in part (a) above, or if the applicant was such a party but did not meet the conditions set out in the relevant Article.

(iii) The petition will be dismissed if the court learns that an alternative court is dealing with the same matter.

(iv) The petition will be dismissed if there are clear grounds indicating that the petition has, due to non-objective behaviour, caused dishonour loss of prestige or an adverse impact on business operations, or where the applicant has been deceptive in filing for bankruptcy.

(v) The petition will be dismissed if the enterprise that is purported to be bankrupt can clearly establish that it is not bankrupt.

8 The question asked candidates to apply their knowledge of contract law to a scenario in which two prospective buyers made offers to buy a sports car from a car dealer.

(a) In the first situation, Khanh offered to purchase a car from Hai, the car dealer, for the advertised price only to discover the following day that she would be made redundant by her employer. Her circumstances having changed, she faxed the dealer stating that she could not go ahead with the purchase.

In advertising the car for sale, Hai made a general representation to the world at large, expressing his intent to sell the car at a specified price. Under the Civil Code, this cannot be regarded as an offer, as it was not made to a specific person or persons.

Khanh sent a letter to Hai stating that she would purchase the car at the advertised price. This letter was an offer, as it was sufficiently definite and was made to a specific person who had a right to sell the car. The offer was capable of acceptance once it reached Hai (Article 390, Civil Code).

The issue turns on whether Khanh's withdrawal, communicated by fax, reached Hai in time for the offer to be cancelled. Two outcomes are possible.

If Khanh's fax reached Hai before or at the same time as her letter setting out her offer to purchase the car, the offer was cancelled (Article 392).

Hai may have received Khanh's letter by the time that the fax arrived. If he accepted Khanh's offer before having any knowledge of Khanh's intention to withdraw it, a legally binding contract was formed.

If the offer had not been accepted, Khanh would still be obliged to complete the purchase, as she specified that she would keep her offer open for a week. In doing so, Khanh issued an offer that was irrevocable within that period.

In the second case, if Hai wished to commit Khanh to the contract and she was unable to fulfil it, she would be in breach of contract and could be liable to pay damages if Hai subsequently had to sell the car for a lower price.

(b) Mai expressed her intention to purchase the second car from Hai but was not prepared to pay the full advertised price.

In offering 450 million dong instead of the full 500 million dong sought by Hai, Mai made a counter-offer, as defined in Article 395 of the Civil Code. The counter-offer has two effects. It cancels Hai's original offer to sell the car for 500 million dong. It creates a new offer in which the roles of the offeror and the offeree are reversed. Once Mai offered 450 million dong, Hai was in a position to accept or reject Mai's offer.

In rejecting Mai's offer of a lower price, Hai made a further offer to sell the car for the full price and to keep the car for two further weeks. By committing himself to keep the car, Hai made an irrevocable offer, so when Mai returned within the two week period expressing her wish to purchase the car for the full price, she was accepting Hai's offer. Had the offer not been irrevocable, Hai would have been free to revoke it and enter into a contract with a different party.

As Hai had already sold the car for 550 million dong, he was in breach of contract due to his failure to complete the transaction. It is possible that he could be liable to pay damages to Mai should she be unable to purchase a similar car for the same price elsewhere.

9 The question asked candidates to apply their knowledge of the law relating to share capital to a scenario in which an investor purchased shares from three companies.

(a) Linh, the investor, purchased shares worth 400 million dong from Company A but paid only 200 million dong for these. It is permissible to pay for shares on this basis, but in becoming a shareholder in Company A, Linh has committed herself to providing capital equivalent to the nominal value of the shares.

The purchase of shares in Company B differs to the extent that the company has stated that the shares were issued at a discount, implying that Linh would not be responsible for making any further capital contribution over and above the 200 million dong that she paid for them. It is therefore necessary to examine whether Linh could be called upon to pay a further 200 million dong, representing the full nominal value of the shares.

Article 87 of the Law on Enterprises states that the price at which shares are offered is decided by the board of management of a company. Generally, this price should not be lower than the market value at the time of offer.

The Law on Enterprises does not forbid the issuance of shares at a discount.

Article 84 of the Law on Enterprises provides that ordinary shareholders must pay in full for all shares for which they subscribe, and are liable for the debts and other property obligations of the company within the amount of capital they undertake to contribute to the company. This suggests that she will be liable for the unpaid element of the shares in Company A, and may be required by the liquidator of the company to discharge this obligation.

Although Linh purchased the shares in Company B at a discount, there is a risk to her that she may be treated as only having partly-paid up for the shares and be held liable for the difference between the amount she paid for the shares and the nominal value of the shares.

The liquidators of Company A and Company B may therefore decide to pursue Linh for the unpaid elements of her shares.

(b) Linh was prepared to pay double the nominal value of the shares in Company C. She has therefore purchased shares at a premium.

Again, the Law on Enterprises is permissive in respect of paying a premium for shares. If investors perceive that shares represent a good prospect for capital accumulation in the medium to long term, or attractive future dividend rates, they may be prepared to pay a higher price than the nominal value. When this occurs, it is usual for the company that issued the shares to record the premium received in a share premium account.

The share capital of an enterprise is generally regarded as permanent capital which cannot be drawn down at will by the shareholder, even if the shares were acquired at a price higher than the nominal value. Indeed, even if the company is prepared to repay capital to a shareholder, it may have to follow due process to reduce capital, except when the shares concerned are redeemable shares.

There are no provisions in the Law of Enterprises that enable Linh to demand repayment of the premium. The Charter of the company may make provision for this. However, this is unlikely, so her best prospect of recovering the funds is to sell the shares to a third party at the market price, and the success or otherwise of doing so will be dependent on market conditions and the perceived value that potential investors place on shares in Company C.

10 The question asked candidates to discuss the right of a member of a limited liability company to influence its lines of business, based on his view that he should have some control over how the assets that he had contributed to the business were used. It also asked candidates to discuss the potential consequences of the individual offering consultancy services to another company.

(a) The law relating to this part of the question is set out in Chapter III of the Law on Enterprises, which deals with limited liability companies comprising more than one member.

Article 39 sets out provisions in respect of capital contributions of members. Once a member has contributed capital to the enterprise, on formation or afterwards, that individual is issued with a capital contribution certificate, effectively confirming his or her stake in the business.

A limited liability company is a legal entity, having a personality and identity of its own, separate from those who manage it and those who own it. In this case, the owners and the managers are the same persons. While their actions determine the direction and destiny of the business, their relationship with the company is formed around the pecuniary interest they have in it through ownership of shares.

This separation has direct consequences for Trang's plans, as he has no right, without the consent of the members' council, to change the lines of business or insist on how the assets of the company are deployed, irrespective of whether he contributed the assets or not. To change the lines of business would necessitate an alteration to the Charter, and this would not be possible without the consent of the members' council.

The ownership of the assets contributed on formation of the company or subsequently is transferred when such contributions are made. This is underpinned by Article 29 of the Law on Enterprises, which states that the individual contributing assets must transfer them to the company. In doing so, Trang has no greater or lesser right than his colleagues to decide how the assets should be used. As in this case the assets were shops, these comprised real estate and would almost certainly have required changes to the particulars of registration.

Article 47 confirms that future development plans and strategy fall within the competence of the Members' Council. Therefore, in order to advance his plans for diversification, Trang would have to persuade his colleagues to expand the lines of business as set out in the Charter of the company and agree with him on how the shop space should be utilised.

(b) A limited liability company operates for the benefit of its members, so each member has an obligation to act in a manner that is not contrary to the best interests of the company. This principle is amplified in Article 56 of the Law on Enterprises.

In moving forward his plans to offer consultancy services to another company, Trang would contravene two principles established in Article 56.

Article 56(1(a)) states that any member of the Members' Council must exercise the delegated rights and perform the delegated duties honestly and diligently and to his or her best ability to assure the best lawful interests of the company and its owners. As Music Company has a stated desire to diversify into exactly the same line of business as Clothes Company, any collaboration by Trang with the former must be contrary to the best interests of the latter.

Article 56(1(b)) states that every member must be loyal to the interests of the company and the company owner; not use information, know-how or business opportunities of the company; not abuse his or her position and power nor use assets of the company for the personal benefit of himself or herself or others. In pursuing his arrangement with Music Company, Trang would certainly be benefiting through the receipt of consultancy fees, but would also be acting in a disloyal manner.

In violating these legal requirements, Trang exposes himself to possible removal from the company, as the other owners would regard his actions as contrary to their interests as well as those of the company. Arguably, they could pass a resolution to repay his capital contribution, provided the financial position of the company enabled them to do so (Article 60).

Article 42(5) stipulates that members bear personal responsibility for business or other transactions that are not in the best interests of the company. Therefore, if it can be established that Trang's consultancy work for Music Company inflicted damage on Clothes Company, he could be required to compensate Clothes Company.

Fundamentals Level – Skills Module, Paper F4 (VNM)
Corporate and Business Law (Vietnam) **June 2013 Marking Scheme**

1	**(a)**	Meaning of civil legal capacity	1 mark
		Capacity from birth until death	1 mark
		Provisions relating to ages 6–18 years	Up to 2 marks
		Removal of legal capacity	Up to 2 marks
			(6 marks)
	(b)	Legal entities have capacity in own right	1 mark
		Capacity exists from formation to dissolution	1 mark
		Acts carried out through representatives	1 mark
		Not absolute, must act within lines of business	1 mark
			(4 marks)
			(Total 10 marks)
2	**(a)**	Definition and nature of breach	1 mark
		Performance through delivery	1 mark
		Late performance	1 mark
		Damages	Up to 2 marks
		Requirement to cease actions that breach contract	1 mark
			(6 marks)
	(b)	Counterparty willing to forgive breach	1 mark
		Force majeure	1 mark
		Breach is fault of counterparty	1 mark
		Performance would contravene law/morals	1 mark
			(4 marks)
			(Total 10 marks)
3	**(a)**	Probation period	1 mark
		Expiry of labour agreement	1 mark
		Failure to perform work	1 mark
		Employee disciplined	1 mark
		Prolonged absence	1 mark
		Redundancy	1 mark
			(6 marks)
	(b)	Disciplinary hearing	1 mark
		Convene up to three times	1 mark
		Parties attending hearing	1 mark
		Alternative outcomes of hearing	1 mark
			(4 marks)
			(Total 10 marks)
4	Each difference between shareholding company and partnership		Up to 2 marks
			(Total 10 marks)
5	**(a)**	Nature of a share	1 mark
		Nature of a loan	1 mark
		Membership	1 mark
		Attendance at meetings	1 mark
		Voting	1 mark
		Information	1 mark
			(6 marks)
	(b)	Interest	1 mark
		Repayment of capital	1 mark
		Covenants in contract	1 mark
		Rights on bankruptcy	1 mark
			(4 marks)
			(Total 10 marks)

6	**(a)**	Types of meeting – AGM and *ad hoc*	1 mark
		Production of agenda, documents, opinions	Up to 2 marks
		Time limits	1 mark
		Failure to call meetings	1 mark
			(4 marks)
	(b)	List of members	1 mark
		Register of shareholders	1 mark
		Agenda and invitations	Up to 2 marks
		Voting cards	1 mark
		Reconvening meetings	1 mark
			(6 marks)
			(Total 10 marks)
7	**(a)**	Creditors	Up to 2 marks
		Employees	Up to 2 marks
		Insolvent company	Up to 2 marks
		Owners/shareholders	Up to 2 marks
			(7 marks)
	(b)	Per ground for rejecting petition	1 mark
			(3 marks)
			(Total 10 marks)
8	**(a)**	Analysis of scenario	Up to 2 marks
		Principles relating to withdrawal	Up to 2 marks
		Conclusion	1 mark
			(5 marks)
	(b)	Analysis of scenario	Up to 2 marks
		Principles relating to counter-offer	1 mark
		Principles relating to irrevocable offer	1 mark
		Conclusion	1 mark
			(5 marks)
			(Total 10 marks)
9	**(a)**	Partly-paid shares	Up to 2 marks
		Discounted shares	Up to 2 marks
		Conclusion	Up to 2 marks
			(6 marks)
	(b)	Shares purchased at premium	Up to 2 marks
		Implications for investor	Up to 2 marks
		Conclusion and alternatives for investor	1 mark
			(4 marks)
			(Total 10 marks)
10	**(a)**	Transfer of assets on formation	Up to 2 marks
		Constraints of Charter/product lines	1 mark
		Implications of separate personality	Up to 2 marks
		Conclusion	1 mark
			(5 marks)
	(b)	Best interests, loyalty, conflict	Up to 3 marks
		Consequences	1 mark
		Conclusion	1 mark
			(5 marks)
			(Total 10 marks)