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# Answers

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- 1 The question asked candidates to explain the structure of the Government, and to explain its powers and duties.
- (a) The Government is the executive organ of the Vietnamese state. Matters relating to its structure, role and powers are set down in the Constitution. Article 109 states that it is the highest administrative state body.
- Article 110 sets out the structure of the Government, stating that it consists of the Prime Minister, Deputy Prime Ministers, Ministers and other members.
- The Prime Minister is accountable to the National Assembly, the Standing Committee and the President. The Deputy Prime Ministers assist the Prime Minister, and may be invited to replace him in his absence in directing the work of the Government.
- (b) Article 109 of the Constitution summarises the role of the Government: ‘The Government assumes the unified administration of the implementation of all political, economic, cultural, social, national defence, security and external activities of the State; ensures the effectiveness of the State apparatus from the centre down to the grass-roots level; ensures respect for and observance of the Constitution and the law; promotes the people’s rights as masters in national construction and defence, ensures the stabilisation and improvement of the material and cultural life of the people.’
- Article 112 expands on the duties and powers of the Government.
- The Government must lead ministries, other Government bodies and people’s committees, and must build and perfect the unified administrative system at all levels. It must direct and control the implementation of laws and create favourable conditions for people’s committees to discharge their duties. It must train, foster, employ and deploy state officials and employees.
- The Government has a dual role in relation to laws, in that it must ensure proper implementation of the Constitution and other laws, and submit draft laws, statutes and other bills to the National Assembly and to the Standing Committee.
- The economic role of the Government concerns developing the national economy by implementing economic policies and ensuring proper allocation of resources, including administration of the state budget. More broadly, it must develop culture, education, healthcare, science and technology.
- The Government must protect the rights of citizens and create favourable conditions for them to fulfil their obligations. It must take measures to protect property and the interests of the state and society, and to protect the environment.
- The Government must consolidate and strengthen the national defence, ensuring national security, social order and safety, including mobilisation in the case of national emergency.
- The Government’s administrative duties include the organisation of inventories and statistics, inspection and control of the work of the state, to combat bureaucracy and corruption, and to address the complaints of citizens.
- Internationally, the Government has a duty to negotiate and sign international treaties (except in cases where this right is reserved for the President under Article 103(10)), and protect the interests of the state and its citizens abroad.
- The Government must implement social, ethnic and religious policies.
- The Government must decide the modification of boundaries of administrative units below the level of provinces and cities under the central authority.
- The Government must coordinate with the Vietnam Fatherland Front and popular organisations in discharging its own duties and powers, and create favourable conditions for them to function effectively.
- 2 The question tested the candidates’ knowledge of methods of securing civil obligations.
- The methods of securing civil obligations are summarised in Article 318 of the Civil Code. Subsequent articles amplify the provisions relating to each.
- Pledge:**
- Articles 326–341 set down provisions relating to pledges.
- A pledge arises when a pledgor (usually an individual or entity who is seeking to borrow money) offers an asset under his ownership to a pledgee (usually a lender) as securing for performance of an obligation. A pledge must be entered into as a written contract, which may be a condition contained within the main contract, or as a separate collateral contract.
- If the pledgor fails to meet his obligations under the principal contract, the pledgee may sell the asset and has a priority right over the proceeds of sale.
- While the pledge contract is in force, both parties have rights and obligations as set out in articles 330–333. For example, the pledgee is responsible for the safe keeping of the object of pledge and may be liable for any damage.
- On proper fulfilment of the principal contract, the asset is returned to the pledgor.

**Mortgage:**

A mortgage involves a borrower (mortgagor) offering a property as security to a mortgagee (lender), while retaining ownership and possession of the property. Conceptually, it is very similar to a pledge. However, while many pledge contracts require the physical transfer of the asset to the pledgee, under a mortgage contract the mortgagor retains possession of the asset.

A mortgage contract must be in writing.

Mortgages are considered most suitable for raising funds by offering real estate as collateral, though the Civil Code does not impose any restriction in this respect. Article 342 alludes to the use of both movable and immovable property.

In common with pledge, there are exhaustive provisions in the Civil Code in relation to mortgages, contained in Articles 342–357. These include the rights and obligations of the parties (Articles 348–351).

Mortgages of land are subject to further provisions set out in Articles 715–721 of the Civil Code.

**Performance bond:**

Article 358 defines a performance bond.

A performance bond requires the deposit of an asset to secure an obligation. The asset may be money, precious metal, gemstones, or other valuable objects. The asset thus deposited is referred to as performance bond property.

Performance bonds must be executed in written form.

The bond may be used to ensure that an individual fulfils a promise to enter into a contract, or to perform the contract. Upon the contract being entered into or performed, the property is returned to the party that delivered it, or deducted from the obligation to pay money.

Performance bonds may be used to support a tender for a large capital project, and several banks offer a service in this respect. Some financial institutions refer to them as ‘bid and performance bonds’.

If the party that delivered the bond refuses to discharge his obligation, the performance bond property belongs to the recipient. Conversely, if the recipient of the performance bond property fails to discharge his obligation, the property must be returned or an equivalent sum paid, unless otherwise agreed between the parties.

**Security deposit:**

Article 359 of the Civil Code defines a security deposit as a sum of money, precious metals, gemstones, or other valuable objects delivered by a lessee of movable property to the lessor for a period of time as security for the return of the leased property.

Once the leased property is returned or on expiry of the lease, the lessee may reclaim the security deposit property, net of any rent deductible.

Security deposits in respect of leased accommodation have increased in popularity in recent years. The security deposit may be set out in a pre-tenancy agreement.

**Escrow deposit:**

Article 360 defines an escrow deposit as a sum of money, precious metals, gemstones or other valuable papers deposited by an obligor into an escrow account at a bank as security for the performance of an obligation. If the obligor fails to discharge his obligation, the obligee is entitled to claim against this deposit, net of any bank charges incurred.

**Guarantee:**

A guarantee is defined in Article 361 as an obligation undertaken by a third party to fulfil the obligation of another, if the latter fails to perform obligations under the principal contract. This form of security therefore entails the creation of two contracts. The guarantee contract is a collateral contract underpinning a principal contract.

The guarantee contract must be in writing, either as a part of the principal contract or as a separate contract. Under certain circumstances, the guarantee must be notarised.

Article 365 permits an obligation to be supported by joint guarantors.

**Fidelity guarantee:**

Article 372 defines a fidelity guarantee as a commitment that may be entered into by socio-political organisations at grass roots level to enable poor individuals and households to borrow from banks or other credit institutions for the purposes of production, business or provision of services.

**Note: Candidates were only required to describe FIVE methods of securing obligations.**

**3** The question asked candidates to describe the main characteristics of a limited liability company, and to describe any four differences between a limited liability company and a shareholding company.

**(a)** The characteristics of a limited liability company are contained within Chapter III of the Law on Enterprises.

Article 38 states that a limited liability company is an enterprise that may be set up by between 1 and 50 members, where the liabilities of the members will be limited to the capital contribution that they make, or agree to contribute, to the company. The members may be individuals or organisations.

The capital of the company is made up of the contributions of the members, which must be made in full and on time. The shares in capital contributions may only be assigned subject to the provisions of Articles 43–45 of the Law on Enterprises. These include a pre-emption right of other members to the shares in contribution to be alienated.

In common with other types of enterprise, a limited liability company must have a charter, the content of which is prescribed in Article 22.

The body responsible for management and administration of the company is the Members' Council (Article 46). This body is made up of all members of the company. Companies with two or more members must elect a chairman and a director or general director. One of these persons must be the legal representative of the company. The chairman may serve concurrently as the director or general director. If the company has more than eleven members it must appoint an Inspection Committee. Provisions relating to the composition, rights and duties of the Members' Council are set down in Article 47. Obligations of members are set down in Article 56.

The Members' Council may meet as often as deemed necessary, but must meet at least once annually. The meeting is the supreme decision taking body of the company, and may pass resolutions by way of attendance of members or by written opinions.

Article 61 states that profits may only be distributed out of profits generated by the company, and then only if tax and other obligations are paid in full. A company must not make a distribution if by doing so this will compromise its ability to meet its financial obligations.

Section II of Chapter III specifically relates to sole member limited liability companies. The sole member may be an individual or an organisation.

Article 66 imposes restrictions on withdrawals of capital. This may be done by assignment to other individuals or organisations, but if withdrawal is made in any other way, the member is jointly liable for the debts and other obligations of the company.

Article 67 requires the appointment of one or more authorised representatives if the sole member is an organisation. If there are two or more authorised representatives, they will comprise the Members' Council.

Article 71 requires the company to appoint up to three inspectors who must be independent, qualified and experienced.

Under Article 76 a sole member company may increase but not decrease its capital.

**(b) The law relating to shareholding companies is set out in Chapter IV of the Law on Enterprises.**

Shareholding companies have many similarities to limited liability companies, including separate legal personality and the limited liability of their members. The main differences are as follows.

**Members:**

A shareholding company must have a minimum of three shareholders. There is no maximum number of shareholders.

**Share capital:**

The capital of a shareholding company is made up of shares, which in turn may comprise several classes. All shareholding companies must have ordinary shares, but in addition they may issue preference shares. In turn, these may be voting preference shares, dividend preference shares, redeemable preference shares, or other types of share as laid down in the charter of the company.

**Loan capital:**

Under Article 88, a shareholding company may issue bonds, which are a form of long-term capital raised from those prepared to lend to the company.

**Reducing capital and redemption of shares:**

The provisions in relation to reducing capital and redeeming shares are generally more complex for shareholding companies than those applicable to limited liability companies (Articles 90–92).

**Management and administration:**

While the management and administration of a limited liability company is entirely within the hands of all those who have contributed capital, a shareholding company usually has some degree of separation between shareholders and management. The shareholding company must appoint a board of management made up of 3–11 members. This effectively creates an agency relationship through which the board acts on behalf of the shareholders.

The Law on Enterprises also reserves some matters that fall within the exclusive competence of the general meeting of shareholders as set out in Article 96(2).

**Disclosure and transparency:**

Shareholding companies are subject to greater scrutiny than limited liability companies, and have an obligation to make public disclosures on their activities (Articles 118, 128 and 129).

**Note: Candidates were only required to describe FOUR differences between limited liability companies and shareholding companies.**

**4** The question tested the candidates' knowledge of the provisions of the Law on Enterprises in respect of ordinary shares issued to the founding shareholders of a newly-formed shareholding company, and asked candidates to discuss the extent to which a company can guarantee the dividends to be paid to shareholders.

**(a)** The law relating to this answer is set out in Article 84 of the Law on Enterprises.

When a shareholding company is formed, the founding shareholders must subscribe for a minimum of 20% of the ordinary shares offered for sale. The shares must be fully paid up within 90 days of the date of issuance of the business registration certificate to the company by the state registration body. The company must also notify the state registration body of the contribution of share capital.

The notice to the registration body must set out the following information:

Name, address of head office, number and date of the business registration certificate and the registered location of the business.

The total number of ordinary shares offered for sale and the number of shares taken up by founding shareholders.

Where the shareholder is an individual, the name, permanent address, nationality and number of his people's identity card, passport or other identification document.

Where the shareholder is a legal entity, the name, permanent address, nationality and the number of the decision on establishment, or the number of the business registration.

For each shareholder, the number of shares to be subscribed, the number of shares already subscribed and the types of assets (if any) contributed as consideration for the shares.

The total number and value of shares already paid for by the founding shareholders.

Full name and signature of the legal representative of the company.

The legal representative is responsible for any damage to the company and to third parties arising from late notification or untruthful, inaccurate or incomplete notification.

If a founding shareholder fails to pay for the shares in full, the unpaid shares are allotted by all other founding shareholders taking up the allotment on a pro rata basis, by other founding shareholders taking up the allotment, or a third party taking up the allotment. In all of these cases, the founding shareholder who failed to contribute ceases to be a shareholder in the company.

The founding shareholders are jointly liable for debts and property obligations up to the value of any unpaid shares.

Where the founding shareholders do not subscribe in full for all of the founding shares, the unpaid shares must be offered for sale and allotted within three years of the date of the business registration certificate.

Within three years from issuance of the business registration certificate, ordinary shares held by founding shareholders may be assigned to other founding shareholders. They may also be allocated to persons who are not founding shareholders, subject to approval by the general meeting of shareholders. Those who wish to assign shares may not vote on this matter as they are interested parties. If assignment is approved, the assignee becomes a founding shareholder.

Founding shares may be transferred freely after the three year statutory period.

**(b)** Payments of dividends are subject to the provisions of Article 93 of the Law on Enterprises.

No shareholder, irrespective of the class of share held, has an absolute guarantee that a dividend will be paid to them. Dividends may only be paid out of profits, and only after the company has discharged its tax liabilities and other obligations (including previous losses). In addition, the company must be certain that it will be capable of satisfying debts and other obligations once a dividend has been paid.

If the company is profitable, preference shareholders usually enjoy a greater prospect of receiving dividends, consistent with provisions contained in the charter. Unlike ordinary shareholders, whose dividend is dependent on the recommendation of the board of management, the dividend payable to preference shareholders may be fixed. However, any payments due to bondholders have priority, which may reduce the amount available for distribution to the shareholders.

**5** Candidates were asked to explain the provisions of the Law on Enterprises relating to business lines and business conditions, the limitations that apply to these, and the prohibitions that apply to participation in enterprises.

**(a)** The legal provisions relating to lines of business and business conditions are set down in Article 7 of the Law on Enterprises. This Article applies to all types of incorporated entity, irrespective of its corporate form.

The provisions of Article 7 are permissive in nature, permitting enterprises to conduct any lines of business which are not prohibited by law. This does not mean, however, that an entity may do as it chooses. Some specified lines of business are subject to restrictions stipulated in the law on investment and other legislation, so if the enterprise wishes to participate in these activities it must satisfy the statutory conditions that apply.

Legal entities may not participate in business activities which affect national security or inflict harm. These include activities which may adversely affect national defence, security, social order and safety, historical, cultural and ethical traditions, fine customs and traditions of Vietnam and the people's health, or deteriorating natural resources or destroying the environment.

The government publishes a list of prohibited lines of business. Under Article 7(4), the government may review and reassess business conditions. It can impose new conditions, and modify or remove existing conditions.

A 'business condition' is a requirement which the legal entity must satisfy or perform when conducting a particular line of business.

Business conditions include the requirement to hold a business licence, certificate of satisfaction of conditions for business, practicing certificate, certificate of professional indemnity insurance, requirement for legal capital or other requirements.

Under Article 7(5), individuals and bodies who are subordinate to government, including ministries, people's councils and people's committees, may not be permitted to stipulate business conditions.

- (b) Any individual or entity who wishes to participate in the formation of a business must have active legal capacity. Those who have not yet reached the age of full capacity (18 years of age), and those whose capacity is restricted or lost, such as mentally incapacitated persons and some persons whose affairs are governed by insolvency law, cannot set up a new entity.

The categories of person who do not have the right to establish or manage enterprises are laid down in Article 13(2):

State bodies and military personnel cannot use State assets to make profits for their own bodies or units.

State officials and employees, in accordance with the law on State officials and employees.

Officers, non-commissioned officers, career servicemen, national defence workers in bodies and units of the army.

Officers, career non-commissioned officers in bodies and units of the police.

Management personnel and professional management personnel in enterprises whose capital is wholly owned by the State, with the exception of those appointed to be authorised representatives to manage the State's share of capital in other enterprises.

Persons serving prison sentences and those prohibited by a court from conducting business.

Certain persons affected by the Law on Bankruptcy.

- 6 The question asked candidates to define insolvency, and to describe the role of the parties involved in the insolvency process.

- (a) In accounting terms, insolvency refers to a situation in which the total liabilities of an entity exceed its total assets. In such cases, the entity has negative net worth and is therefore *de facto* insolvent.

The Law on Bankruptcy does not offer a specific definition of insolvency, but the term is generally taken to mean that the entity is incapable of meeting its financial obligations within a reasonable time of the obligations falling due. An entity can therefore be insolvent even if its total liabilities does not exceed its total assets, such as when it is chronically illiquid, or if it becomes clear that there is little or no prospect of a receivable being paid.

- (b) The parties involved in the insolvency process are the petitioner for bankruptcy, the court, the creditors, the committee for management and liquidation of assets and the company itself.

**The petitioner:**

Chapter II of the Law on Bankruptcy sets out matters relating to the petition for bankruptcy. A petition may be filed by the creditors, the employees, the entity itself, the shareholders of a company and the partners in a partnership.

In all of these cases it is necessary to present the petition to the court with the information set down in the relevant articles in Chapter II. These differ depending on the party bringing the petition, but broadly set out the parties to the proposed action, the due debts and the grounds for the request.

**The court:**

The Provincial People's Courts deal with corporate bankruptcies, except in the case of cooperatives, where cases are heard by the District People's Courts.

The duty of the court is to supervise and conduct the bankruptcy procedure. If criminal activity in connection with the entity is detected during the course of the bankruptcy process, the judge must refer the matter to the People's Procuracy.

The judge (or council of three judges in the provincial courts) must decide within 30 days of the petition whether the bankruptcy process is to be set in motion, and if this is the case issues a decision to establish a committee for management and liquidation of assets.

**Creditors:**

While the creditors may instigate the bankruptcy procedure, the granting of an order by the court effectively ringfences the bankrupt company from their claims for the time being. However, Article 9 of the Law on Bankruptcy states that there must be a representative of the creditors on the committee for management and liquidation of assets. It is through this individual that creditors' interests may be put forward.

### **Committee for management and liquidation of assets:**

The committee is accountable to the court. It comprises an enforcement officer, who acts as head of the committee, an officer of the court, a representative of the creditors, a legal representative of the insolvent company, and at the discretion of the judge, a representative of the employees or trade union.

The roles of the committee are set out in Article 10(1) of the Law on Bankruptcy. These include preparing a statement of the company's financial affairs, supervision and inspection of the use of assets, proposing where necessary emergency measures to preserve the assets, preparing lists of receivables and payables, and dealing with the liquidation of assets in order to minimise the creditors' losses. The committee also has an enforcement role, in that it is responsible for carrying out any instructions issued by the judge while the bankruptcy proceedings continue their course.

Chapter IV of the Law on Bankruptcy sets down requirements for the preservation of assets.

### **The insolvent company:**

Article 30 provides for the continuance of business activity once the bankruptcy order has been issued, subject to supervision and inspection by the judge and the committee for management and liquidation of assets. The court is empowered to appoint an external manager if it is of the opinion that the incumbent management lacks the ability to operate the company, or if it is felt that the company's position will deteriorate by failing to take such action.

Article 31 places limitations on the actions of the company once the bankruptcy order has been granted.

The company is responsible for providing the committee with the information necessary to carry out their work. Article 31 prohibits the concealment of any assets.

## **7** Candidates were asked to explain the role, rights and duties of the Inspection Committee of a shareholding company.

Articles 121 *et seq* of the Law on Enterprises stipulate that a shareholding company must appoint an Inspection Committee.

Although the Inspection Committee has a duty to report to the general meeting of shareholders, its work is mainly internally focused, in monitoring and supervising the management of the company. It also provides management support from an independent position, and can contribute to greater efficiency in internal systems and controls.

The committee is an independent oversight body working within the company to supervise the board of management, the director or general director in the performance of their duties, and to report to the general meeting of shareholders on matters within its remit. Specific rights and duties are set out in Article 123.

The committee must inspect the reasonableness, legality, truthfulness and prudence in the management of the company, the accountancy work that underpins the financial statements of the company and the preparation of these statements. In carrying out its duties, it must review the books of accounts and other relevant documents and submit reports on its findings.

Under Article 79(2), shareholders with at least 10% of the shares in the company may require the committee to carry out an inspection. This must be carried out within seven working days, and a report submitted within 15 days of the end of the inspection.

The committee monitors the operations and systems of the company, and is empowered to make recommendations to the board of management on improvements.

If during the course of its work the committee finds that members of the board of management are in breach of their obligations, the committee can serve notice of this on the board of management and require that the breach be addressed.

Should it be considered appropriate, the committee may commission an independent consultant to carry out its duties.

The charter of the company may stipulate additional duties of the committee.

## **8** The question tested the candidates' knowledge of the law relating to breach of contract.

- (a)** The scenario stated that Thuy, the owner of a property, entered into a contract for a fence and gate to be built by Binh to protect her property, but the work carried out was not to her satisfaction.

Binh informed Thuy that he could not carry out further work due to an injury incurred on the next job. This may appear to be a case of *force majeure*, as the injury would not have been contemplated by either party to the contract. However, Binh should not be absolved of responsibility for not performing the contract to the satisfaction of Thuy.

Article 412 of the Civil Code states that an obligation must be completed in compliance with the proper subject matter, quality, quantity, type, time-limit, method and 'other matters'.

Article 304 states that where a civil obligation involves performance of an act and that act is not performed, the injured party has a right to demand that it be performed. As Binh's injury precludes him from doing so, Thuy may rely on the same Article, which goes on to state that the performance of the obligation may be assigned to another person. Binh could be required to pay additional reasonable expenses incurred.

In engaging a new contractor to complete the work to her satisfaction, Thuy could claim for costs over and above the original projected cost of erecting the fence and gate, including the cost of removal of the inadequate structure.

An alternative outcome is that Thuy and Binh could agree to a delay in performance of the original obligation (Article 287) if Binh's injury is of a temporary nature.

- (b) Thuy entered into a contract with Cam to landscape her garden, but half way through the task Cam withdrew, claiming he was physically exhausted. Engaging the services of a new contractor meant that Thuy had to pay an additional 3 million dong for the work to be completed.

Unless such circumstances were envisaged in the contract, Thuy could rely on the provisions of law described above and claim for monetary compensation representing the difference in cost to her.

Thuy may be entitled not to pay anything at all to Cam, as performance of the obligation should be in full. However, if the work carried out by Cam had been of an acceptable standard, his part performance of the contract may be accepted by Thuy, perhaps on condition that any monies due be reduced to take account of the extra payment necessary to complete the work.

The ability on Cam's part to rely on *force majeure* would be dependent on whether the nature of his exhaustion was due to an unforeseen medical condition. Arguing that he was merely 'tired' would probably not absolve him of responsibility, as landscape gardening is known to be physical work.

In both cases, the outcome to Thuy should be that she should be put into a position that is no better or worse than that which would have arisen had the obligations been performed properly.

- 9 The question asked candidates to discuss the legal implications of five recommendations made by the head of human resources of a company in seeking to reduce costs and increase the flexibility of the workforce.

**Introduction of rolling one year contracts:**

Lan proposed the introduction of one year contracts for newly-appointed departmental managers, to be rolled over only if they achieved their targets.

Article 22 of the Labour Code defines the types of labour contract that may be created: indefinite term, definite term and seasonal or specific job contracts. Lan's recommendation is therefore to create flexibility by making departmental managers subject to definite term labour contracts.

This proposal is unlawful, as Article 22(2) states that a definite term labour contract can only be rolled over once. If it falls due for renewal again, and the parties wish to continue with the contract, it must be renewed as an indefinite term labour contract.

**Oral contracts and temporary employees:**

Lan has proposed that all new domestic and cleaning staff, as well as temporary employees engaged during the busy two month tourist season, should be offered oral contracts.

Temporary staff engaged on a seasonal basis can be offered oral contracts under Article 16(2) of the Labour Code. However, this is no longer permitted for domestic and cleaning staff, unless they too are engaged on a temporary basis and for a period not exceeding three months.

It should be noted that Lan's proposal to engage domestic and cleaning staff under oral contracts would have been acceptable prior to the most recent revision of the Labour Code.

**Redundancies:**

Lan has recommended that the managers of the hotels should be made redundant and given the opportunity to apply for new positions, incorporating most of their existing duties but orientated more towards selling accommodation and with less focus on administration.

Articles 121 *et seq* of the Law on Enterprises stipulate that a shareholding company must appoint an Inspection Committee. Redundancy (or retrenchment) refers to dismissal of employees due to a job no longer existing, or a job radically changing due to restructuring, changes in technology or economic reasons. This is governed by Article 44 of the Labour Code.

Lan's underlying motive is to reduce labour costs, so it would not be possible to regard her proposed action as a *bona fide* retrenchment. In order to make the managers redundant in a legitimate manner, she would have to establish that it is part of a fundamental restructuring of the workforce, has been brought about by technology, or has to be done for economic reasons. Given that the existing managers would be retaining many of their existing duties, making them redundant would be of questionable legality, as well as arguably unethical.

The case for redundancies would be more compelling if the decision was made as a result of certain fundamental changes, such as the introduction of a centralised administration software package. However, in very general terms, redundancy is most often associated with downsizing the workforce or replacing old jobs with new ones.

If RRR Company agreed to go ahead with Lan's recommendation, it would have to serve 30 days notice of its intentions and would be obliged to enter into discussions with the collective labour body.

It is highly unlikely that Lan's recommendation could be implemented without violating the provisions of Article 44.



**Probationary employees:**

Lan has recommended that the contracts of all probationary employees should be terminated, and they should be offered new contracts at a lower wage.

Probationary workers generally have fewer rights than other employees. However, the Labour Code sets down provisions relevant to Lan's recommendation. Under Article 29(1), if the employee's work satisfies the standards demanded by the employer, the latter must sign a labour contract. Further, although both parties have a right to terminate the contract during the probationary period, Article 29(2) qualifies this by specifying 'if the employee's probationary work does not satisfy the requirements agreed by the two parties'.

It is unlikely that RRR Company could dismiss all probationary employees at the same time, as they would all have to be failing to fulfil the expectations of the employer simultaneously. As such, this action would be seen as an excuse or pretext.

- 10** The question asked candidates to discuss the legal implications of a member of a board of management having involvement in a company owned by his wife and children.

Article 119 of the Law on Enterprises requires members of the board of management to be loyal to the interests of the company and its shareholders, and to perform their duties in their best interests. It also states that they must notify the company, in a full, accurate and timely manner, of any interests that they or related persons have in other enterprises.

Article 118 stipulates that members of the board of management carrying out work on behalf of themselves must report that work to the board of management, and may only carry out that work if the majority of the board of management agree to this.

Setting up MMM Company under the ownership of Tuan's wife and children may have been a facade constructed to enable Tuan to generate additional income without having direct involvement in the management and administration of the company. In doing so, there could be intent to benefit from MMM Company having a separate legal personality to its owners. At face value, Tuan is neither a shareholder nor a member of the members' council of the company, so he could argue that the company is nothing to do with him. However, the fact that he has represented his wife at meetings with clients suggests he has had some direct involvement in the business, and this would create a conflict of interest.

The scenario suggests that although the board of management is aware of the business run by Tuan's family, it has not been fully discussed. This would appear to be at odds with the 'full, timely and accurate' disclosure provision.

Most significantly for Tuan, Article 118(4) states that all of the income from the work carried out by members of the board of management for themselves shall belong to the company. Therefore, if Tuan's expertise has been used to benefit MMM Company, then JJJ Company could claim this income.

In relation to sub-contracting work to MMM Company, it would be important for JJJ Company to take account of the provisions of Article 120 of the Law on Enterprises, which requires that related party transactions be approved by the board of management or the general meeting of shareholders. In this instance, sub-contracting smaller contracts suggests that approval by the board of management may suffice, but as a related person Tuan should not be permitted to vote on this matter.

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

**June 2014 Marking Scheme**

<p><b>1 (a)</b> Prime minister is head of Government Deputy prime ministers/other ministers</p> <p><b>(b)</b> Per power/duty of the Government</p>	<p>1 mark 1 mark (2 marks)</p> <p>1 mark, maximum 8 marks (8 marks) <b>(Total 10 marks)</b></p>
<p><b>2</b> Pledge Mortgage Performance bond Security deposit Escrow deposit Guarantee Fidelity guarantee</p>	<p>Up to 2 marks Up to 2 marks Up to 2 marks Up to 2 marks Up to 2 marks Up to 2 marks Up to 2 marks <b>(Total 10 marks)</b></p>
<p><b>3 (a)</b> Per characteristic of limited liability company</p> <p><b>(b)</b> Membership/shareholding Share capital Loan capital Management and administration Transparency</p>	<p>1 mark, maximum 6 marks (6 marks)</p> <p>1 mark 1 mark 1 mark 1 mark 1 mark (4 marks) <b>(Total 10 marks)</b></p>
<p><b>4 (a)</b> Founders' subscription Paid-up requirement Documentation and registration details Unpaid shares Assignment of shares</p> <p><b>(b)</b> Statutory limits to dividends Specific provisions on preference shares Conclusion that guarantee cannot be given</p>	<p>1 mark 1 mark Up to 2 marks 1 mark 1 mark (6 marks)</p> <p>Up to 2 marks 1 mark 1 mark (4 marks) <b>(Total 10 marks)</b></p>
<p><b>5 (a)</b> Explanation of lines of business Explanation of conditions/limitations</p> <p><b>(b)</b> Prohibited persons, per relevant point</p>	<p>Up to 2 marks Up to 3 marks (5 marks)</p> <p>1 mark, maximum 5 marks (5 marks) <b>(Total 10 marks)</b></p>
<p><b>6 (a)</b> Definition of insolvency</p> <p><b>(b)</b> Role of petitioners Role of the court Role of committee for management/liquidation Role of the creditors Role of the company</p>	<p>Up to 2 marks (2 marks)</p> <p>Up to 2 marks Up to 2 marks Up to 2 marks 1 mark 1 mark (8 marks) <b>(Total 10 marks)</b></p>

- 7 General description of role  
Per right/duty  
Up to 3 marks  
1 mark, maximum 7 marks  
**(Total 10 marks)**
- 8 (a) Law relating to breach  
Application to scenario  
Up to 3 marks  
Up to 2 marks  
(5 marks)
- (b) Law relating to breach  
Application to scenario  
Up to 3 marks  
Up to 2 marks  
(5 marks)  
**(Total 10 marks)**
- 9 Restrictions on definite term contracts  
Restrictions on oral contracts for domestic staff  
Oral contracts permitted for temporary staff  
Discussion of redundancy  
Discussion of probationary employment  
Up to 2 marks  
Up to 2 marks  
Up to 2 marks  
Up to 2 marks  
Up to 2 marks  
**(Total 10 marks)**
- 10 Law relating to duties of board of management  
Related persons  
Consequences of conflict of interest  
Discussion of sub-contracting services  
Up to 4 marks  
Up to 2 marks  
Up to 2 marks  
Up to 2 marks  
**(Total 10 marks)**