# MIAQE BCL MARCH 2020
# SUGGESTED SOLUTION

## SECTION A

## QUESTION 1

a. The court will enforce a bargain between a plaintiff and the defendant as long as there is some consideration moving between them. Consideration is said to be sufficient if some consideration moves between the parties. The court will not examine such consideration to determine whether it is fair, equal or adequate. (***Phang Swee Kin v Beh I Hock***).

Thus, an agreement entered into by the free consent of the parties with some consideration is valid even though the promisor did not get a good bargain.

Illustration (f) to section 26 was applied by the court in Phang Swee Kin's case.
It reads as follows:

***A*** *agrees to sell a horse RM1,000 for RM10.* ***A****'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.*

(Ref: Chp 2: 1.3(c) Consideration)

(5 marks)

b. Three exceptions to section 28, CA.

i) Upon sale of a goodwill of a business;
The seller of the goodwill of a business may agree with the buyer not to carry on a similar business within specified local limits so long as the buyer carries on a similar business in that locality. The limits imposed must appear reasonable to the court, regard being had to the nature of the business.

ii) Upon dissolution of a partnership;
Partners may, upon or in anticipation of the dissolution of their partnership, agree to restrain all or some of the partners carrying on a similar business within specified local limits a stated in (i) above.

iii) During the partnership;
The partners of a partnership may agree that some or all of them will not carry on any other business other than that of the partnership during the continuance of the partnership. This restraint may be imposed to ensure that the partners focus their efforts on the business of the partnership.

(Ref: Chp 2; 4.4 Restraint of Trade)

(6 marks)

c. There are generally four ways under which a contract may be discharged. It may be discharged either by performance, by agreement, by breach or by frustration.

i) Discharge by performance.

The general rule is that a party to a contract must perform his obligations unless the performance of his obligation is waived by the other party. The performance of the contract binds even his representatives unless it was intended that the contract was to be performed by him personally (section 38).

The performance should be exact and precise. However, if deviation from the terms of the contract is immaterial and insignificant, the other party is not entitled to reject the performance.
The *de minimis* principle: ***Shipton, Anderson & Co v Well Brothers & Co*** (1912).
**Section 56**: Where time is of the essence, a contract not performed at the time fixed shall become voidable at the option of the innocent party.
**Section 47**: Where time is not of the essence, the contract must be performed within a reasonable time.
**Section 50**: A contract should be performed at a place fixed for its performance. If there is no fixed place for performance, the promisor is duty bound to request the promise for a reasonable place of performance.

ii) Discharge by agreement

**Sections 63 & 64**: Parties may agree to discharge the contract.
**Section 63**: Provides for the substitution of an existing contract with a new contract (a novation agreement).

> "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

**Section 64**: Provides that the promise may waive the performance of the promise that was made to him. He may also extend the time of performance.

> "Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit".

iii) Discharge by frustration.

A contract is said to be discharged by frustration if, after it is made, it becomes impossible or unlawful to perform.
**Section 57(1)**: An agreement to do an act which is impossible to perform is void.
**Section 57(2)**: A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

In the above situations, the contract is 'frustrated' and the parties are discharged from performing their obligations under the contract.
Circumstances under which a contract may be discharged by frustration:

- Total destruction of the subject matter which is essential to the performance of the contract;
- A supervening event defeating the purpose of the contract;
- Death or personal incapacity of the promisor;
- The performance of the contract becomes unlawful after the contract was made.

iv) Discharge by breach.

A contract is discharged by breach where one party fails or refuses to perform his obligations under the contract.
**Section 40**: When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Where the defaulting party fails or refuses to perform his obligations in its entirety, the innocent party may put an end to the contract.

However, if the innocent party has indicated that he wants the contract to be continued, he cannot put an end to the contract but he may claim compensation for the damage sustained by him as a result of the offending party's breach.

(Ref: Chp 2: 6.0 Discharge of contract)

(9 marks)
(Total: 20 marks)

**QUESTION 2**

a. **Section 4 (1)**: A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

i) Transfer of property. The seller must agree to transfer the property in the goods to the buyer
Section 19(1): Property is transferred from the seller to the buyer at the time it is intended by the parties to be transferred.

ii) Goods. The sale must involve 'goods' as defined in the SOGA.
**Section 2**: All moveable property with exception of actionable claims and money are goods.
However, money that has acquired a curio value will be taken as goods (see *Moss v Hancock*)
Land and things attached to land are not goods but growing crops and things attached to or things forming part of the land are goods if they are 'agreed to be severed before sale or under the contract of sale'.

iii) Price.
**Section 2**: Price is defined as the money consideration for the sale of goods.
The sale must be for a price in money terms. A barter transaction is not considered as a sale of goods even though the subject matter of transaction has monetary value.

(Ref: Chp 3: 1.1: Definition of a 'contract of sale' under the SOGA, 1957)

(6 marks)

b. Sales of Goods Act, 1957:
Goods which must be manufactured or acquired by the seller; e.g. a contract to buy a made-to-measure suit which the seller must then make.
**Section 2**, Sales of Goods Act, specifically defines 'future goods'.
Future goods may also sometimes be classified as 'unascertained goods' when it has yet to be separated and set aside for the buyer (an unidentified part from a specific whole); e.g. 100 litres of oil from a larger quantity stored in a particular place.
(Ref: Chp 3: 1.2: Classification of goods by the SOGA, 1957)

(4 marks)

c. Duties of a principal towards his agent is provided for in sections 170-178 of the Contracts Act, 1950.

i) Remuneration
The principal is to pay the agent his remuneration and for the expense incurred.
**Section 172**: The principal is to pay the agent his remuneration when the agent has completed his act, unless the agency contract stipulates otherwise.
**Section 173**: The agent is not entitled to remuneration in respect of that part of business which he has misconducted.

**Sections 170 & 174**: The principal is liable to pay the agent for any advances made or expenses properly incurred by him in carrying out the principal's instructions.
**Section 170 & 172**: The agent may retain moneys out of the sums received on the principal's account to settle the payments due from the principal to him.

ii) Indemnity for lawful act
**Section 175**: The principal is to indemnify the agent against the consequences of all lawful acts done by the agent in the exercise of the authority conferred upon him by the principal.
**Section 176**: The principal is to indemnify the agent against the consequence of an act authorised by the principal even though the act causes an injury to the rights of third persons provided that the agent acts in good faith. If the agent is compelled to pay damages to the third person, he may seek an indemnity from the principal.

iii) Compensation for injury
**Section 178**: If the agent suffers injury as a result of the principal's neglect or want of skill, the principal must compensate the agent for his injury.
**Illustration to section 178**:

> ***A*** employs ***B*** as a bricklayer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up and ***B*** is in consequence, hurt. ***A*** must make compensation to ***B***.

(Ref: Chp 4: 3.2: Duties of a principal to his agent)

(10 marks)
(Total: 20 marks)

**QUESTION 3**

a. i. Minimum number of partners is two whilst the maximum is twenty.
ii. Each partner is liable for the debts of the firm and his liability is not limited. Section11 Partnership Act, 1961: every partner is jointly liable with the other partners for all debts and obligations of the firm incurred while he is a partner;
iii. A partnership is not a legal entity by itself. It merely comprises of two or more persons carrying on business with a view of profit.

(Ref: Chp 5: 1.0: Definition and Essentials of a Partnership)

(4 marks)

b. **Section 22(1):** All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Although vans were registered under personal names, it was the clear intention of the partners that the vans were meant for the firm's business. Therefore, the van should rightfully be returned to the firm. In this case, Abu's son is claiming under his estate and may rightfully claim thereof. Therefore, John must return the van to the partnership.
Case: **Gian Singh v. Devraj Nahar & Anor**:
(Ref: Chp 5: 3.2: Statutory Rules)

(6 marks)

**c.** The issue in this case is whether a duty of care is owed by the external auditors to Park Hung Bhd. and John Lanja.

As a general rule, an external auditor of a company, in auditing the accounts under the **Companies Act, 1965**, owes no duty of care to members of the public at large who may have relied on the audited accounts to increase their shareholding in the company, to lend money to the company or buy shares in the company. Further, an external auditor owes no duty of care to individual shareholders in the company.

In **Caparo Industries PLC v Dickman & Ors**, the respondent, relying on the accounts of a public company that was audited by the appellant, bought shares in the company. It was subsequently discovered that the audited accounts were inaccurate. The audited accounts showed a profit of £1 million when the company actually made a loss of £400,000. The company was in fact in a bad financial situation. As a result of the respondent's reliance on the audited accounts, they suffered loss. They brought an action against the appellant, alleging that the accounts of the company audited by the appellant were inaccurate and misleading and that the auditors were negligent in auditing the accounts.

The **House of Lords** held that the auditors did not owe a duty of care to the respondents. The purpose of the audited accounts prepared by the auditors was to enable the shareholders as a body to exercise informed control of the company and not to enable the individual shareholders to buy more shares in the company with a view to profit. The auditors' statutory duty in auditing the accounts was owed to the body of the shareholders as a whole and not to individual shareholders or the public at large.

In the present situation, Park Hung Bhd and John Lanja are alleging that the auditors had been negligent in conducting the audits and that the negligence had caused them loss. Applying the law in Caparo Industries to the given facts, the auditors may be advised that they owed Park Hung Bhd and John Lanja no duty of care.

(Ref: Chp6: 2.0 Duty of Care, 2.2 Post *Hedley Byrne v Heller & Partners*)

(10 marks)
(Total: 20 marks)

**SECTION B**

**QUESTION 4**

a. 1. Members of the company
The persons whose names appear in the company's register of members from time to time shall be the members of the company (Section 18(2)) and together with such other persons who may become members from time to time.

2. "Body Corporate" & Separate Legal Entity (Section 20(a))
Once the company is duly registered, the law shall regard the company to be of a body corporate. The persons whose names appear in the company's register of members from time to time shall be the members of the company and together they shall be a body corporate. Cases: Salomon v. A. Salomon Co. Ltd (1897); Lee v Lee's Air farming Ltd

3. Ability to sue and be sued (Section 21(1)(a))
As the company is a separate legal entity, it can sue and be sued in its own name. It can sue in respect of rights that it has, and if it has liabilities, others may sue against it. The members of the company generally cannot take any legal action on

behalf of the company. Only the company itself can enforce its rights. This is called the 'proper plaintiff' rule and it was established in the case of: Foss v Harbottle (1843)

4. Ability to own land (Section 21(1)(b))
   A company can own property in its name. Although the members have shares in the company, the property is held or owned by the company.Case: Macaura v Northern Assurance Co Ltd.

5. Perpetual succession (Section 20(b))
   The company is immortal. It will continue to live until it is properly wound up or struck off the register. Even if all the member dies, the business still exists.Case: Re Noel Tedman Pty Ltd

6. Do any act to enter into transactions
   Under section 21(1)(c) a company can do any act which it may do to enter into transactions.

   (Chp 7 ; 3.0)

(6 marks)

b. An exempt private company is defined in section 2(1) as a private company limited by shares with not more than 20 members/shareholders. All the members are natural persons (individuals) and none of them holds the shares in the company on behalf of any corporation. (A corporation is defined in section 3 to mean a local company or a foreign company or a local limited liability partnership or a foreign limited liability partnership.)

An exempt private company enjoys certain benefits which is not given to other companies. It is allowed to lend money or give financial assistance to directors and persons connected to directors and it is exempted from filing audited financial statements and reports to the Registrar of Companies.

If a private company fulfils the above definition of exempt company, it has the option of filing an exempt certificate to the Registrar instead of the full audited financial statements. The exempt certificate provides information that -

- The company is and has at all relevant times been an exempt private company;
- A duly audited financial statements and reports required under the CA 2016 has been circulated to its members; and
- As at the date to which the financial statements has been made up, the company appeared to have been able to meet its liabilities as and when the liabilities fall due.

(5 marks)

(Chp :7 ; 2.2)

c. i. A company may amend its constitution by passing a special resolution, or by court order. UNLESS restricted by the company's constitution. (Section 36 Companies Act 2016)

The issue in this case is whether the proposed change that majority shareholders shall have the power to compulsory purchase the shares of the minority is effective.

There is an important principle at common law that alterations "must be made for the benefit of the company as a whole." Case law has indicated that a shareholder who is prejudiced by the alteration may apply to court to cancel the alteration is not made for the benefit of the company as a whole.

The board of directors and Sim (who between them control 80 per cent of the company's shares) had alter the company's constitution that provides the majority with the power to expel a member and compulsorily purchase that member's shares. Whilst they have the requisite number of votes to alter Horizon constitution in this way, there are further limitations upon the majority's ability to alter the articles, notably the alteration must be 'bona fide for the benefit of the company as a whole' (Allen v Gold Reefs of West Africa Ltd [1900]).

The facts stated that Mel is one of the minority shareholders in Horizon, and she will be compelled to sell her shares to the majority shareholders. Case law has indicated further, that the constitution should not be altered to oppress or discriminate the minority or to take away their rights or their property or the property of the company and will not be permitted by the court.. Thus resolution which compels the minority to sell their shares to the majority will generally be void. (See : Brown v British Abrasive Wheell Co (1919))

(6 marks)

ii. Section 28 Companies Act 2016 provides that a company may alter its name by passing a special resolution. Hence, if majority required for a special resolution can be achieved the name of a company can be altered. It should also be noted that the majority's right to alter the name of a company will not be restricted by a clause in the constitution as such clause will conflict with a statutory right of the members stipulated under section 28. Mel will therefore be unsuccessful if she challenges the validity of the alteration.

(3 marks)
(Total: 20 marks)

(Ref : Chp 8 ; 3.3)

**QUESTION 5**

a. Share capital refers to the capital that is raised by a company through the issue of shares. A company's share capital comprises the number of shares issued by it to investors either on or after incorporation. Those investors then become the shareholders in the company.

(2 marks)

b. Under the Companies Act 2016, a company may now reduce its share capital by any of the following methods unless provided otherwise in its constitution: 1) Court Confirmation Procedure in accordance with section 116; OR 2)a special resolution supported by a solvency statement in accordance with section 117 ("Solvency Statement Procedure").

The Companies Act 2016 envisages, amongst others, the following ways for a company to reduce its capital: 1) by extinguishing or reducing the liability on any of its shares in respect of share capital not paid up; 2) by cancelling any paid up share capital not represented by available assets; 3) by paying back to its members / shareholders any paid up share capital which is in excess of the needs of the company. (The three methods set out above are not exhaustive and not mutually exclusive.)

(4 marks)

(Chp : 9 ; 6.4)

c. i. The Rights of Tata as a Preference Shareholder

1. Under Section 90(4) Companies Act 2016; constitution shall set out the rights of the shareholders with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting and priority of payment of capital and dividend in relation to other shares or other classes of preference shares.

2. Unlike ordinary shareholders, preference shareholders (Tata) have rights to fixed dividend and this must be stated in Constitution. If the company's financial position is not good in a particular year and no dividend is declared, the right of preference shareholder may still be in better position if the rights is cumulative – dividends will be carried forward and paid in subsequent years where company make profits.

3. In addition to the benefits mentioned under section 90(4) Companies Act 2016, the constitution may expressly state other rights that may be given to preference shareholders in three situations : 1) A priority over ordinary shareholders regarding return of their capital in a winding up; 2) A right to participate in surplus profits; and 3) A right to participate in surplus assets in a winding up (that is, the assets available after every debt and liability of the company is settled and the capital of both the ordinary and preference shareholders are returned.

(6 marks)

ii. The holders of preference shares enjoy special rights. They may be attempts to vary those rights. Companies Act 2016 allows the rights attached to the preference shares to be modified or varied. Whether the rights can be varied depends on whether they are incorporated in the company's constitution. If the company's (Dualcomm) constitution has provided the procedure for the variation of class rights, then the procedure is to be followed (section 91(1)(a)).

If the constitution (of Dualcomm) does not prescribe the procedure, then the company (Dualcomm) may do so with the consent of the holders of the shares in that class (section 91(1)(b)). The consent of the holders may be obtained as follows: First the approval may be by way of written consent representing not less than 75% of the total voting rights of the holders of shares of that class. Second, the approval may be given by passing a special resolution of the holders of shares of that class. Thus, the proposed change by Dualcomm Bhd is permitted under the Companies Act 2016 relying on the above stated contentions.

(5 marks)

(Chp : 9 ; 3.2)

iii. Section 93 of the Companies Act 2016 stipulated that dissatisfied shareholder can challenged the validity of the variation to have the variation or abrogation of their rights cancelled. In such case, any shareholder representing not less than 10% of shares of that class can challenge the variation. The challenge can be made even if those challenging the variation have originally voted in favour of the variation. Application to the court must be made within 30 days (1 month) from the date on which the variation is made. On the application being made, the court may disallow the variation if it is satisfied that the variation would unfairly prejudiced the class shareholders and if not, the court will confirm the variation.

(3 marks)
(Total :20 marks)

(Chp : 9 ; 3.2)

**QUESTION 6**

a. A director stands a fiduciary position to his company. He must act honestly and in the best interest of his company. He must use his rights and powers for the benefit of the company and not for other purpose.

Section 213 of the Companies Act 2016 provides that directors must at all times exercise their powers for a proper purpose and in good faith in the best interest of the company; and exercise reasonable care, skill and diligence in the discharge of the duties of his office.

He must not make personal profit from his position or put himself in a position where his duties as a fiduciary and his personal interest come into conflict.

The director shall not make improper use of any information acquired by virtue of his position to gain directly or indirectly an advantage for himself or for any other person or to cause detriment to the company.

Further under Section 214 of the Companies Act also provides that a director who makes a business judgment is deemed to meet the requirements of his duty as a director if he:

- makes the business judgment for a proper purpose and in good faith;
- does not have a material personal interest in the subject matter of the business judgment;
- is informed about the subject matter of the business judgment to the extent that he reasonably believes to be appropriate under the circumstances;
- reasonably believes that the business judgment is in the best interest of the company

(7 marks)

(Chp : 11 ; 5.2)

b. i. Qualifications

Each secretary must be a

1) Natural person
2) 18 years of age
3) Citizen OR a permanent resident of Malaysia
4) Principal / main place of residence is Malaysia OR ordinarily resides in Malaysia
5) Licensed by the Registrar of Companies OR a member of a professional body prescribed by the Minister in the Fourth Schedule of the CA 2016, including :

- ✓ Malaysian Institute of Accountants (MIA)
- ✓ Malaysian Association of the Institute of Chartered Secretaries and Administrators (MAICSA)
- ✓ Malaysian Association of Company Secretaries (MACS)
- ✓ Malaysian Institute of Certified Public Accountants (MICPA)
- ✓ Malaysian Bar
- ✓ Sabah Law Association
- ✓ Advocates' Association of Sarawak

Under s.241 CA 2016, a person (who is a member of the above prescribed bodies OR licensed by the ROC) is still unqualified to be appointed as a company secretary until he has obtained a practicing certificate from the ROC.

The ROC may revoke the practicing certificate of a person who has failed to act honestly or fail to use reasonable diligence in discharging his duties as a company secretary (see: s.238 CA 2016).

(4 marks)

ii. Disqualifications
S. 238 CA 2016 state that the person who has the following characteristics is disqualified to act as company secretary, BUT may continue to do so with the Court's approval :

1) He is undischarged bankrupt (i.e. a bankrupt)

2) He is convicted of an offence which relates to any of the followings :
   - in connection with the promotion, formation or management of corporation
   - involving bribery, fraud or dishonesty
   - breach of fiduciary duty as a director – fail to exercise reasonable skill care and diligence
   - breach of fiduciary duty as a nominee director
   - improper use of company's property, information, position, corporate opportunity
   - having conflict of interest with the company
   - substantial value transaction involving directors/substantial shareholder
   - company's failure to keep proper accounts
   - wrongful trading

3) He ceases to be a member of the body prescribed by the Minister; or ceases to be a holder of valid license issued by ROC
4) He ceases to have a practicing certificate issued by the ROC.

(4 marks)

iii. Applying the law to the given facts, Stan does not automatically qualify to be a company secretary. His master's degree in public administration is not one of the recognised qualifications under Companies Act 2016. Thus he may only become a company secretary if he obtains the necessary licence from the Registrar.

(2 marks)

(Chp : 12 ; 1.0 and 2.1)

c. Under Companies Act 2016, Only private companies can pass such written resolutions. The voting percentage required to pass a written resolution depends on the type of resolution required to pass the "subject matter" of resolution as specified in the Companies Act 2016. The effective date of the resolution is the date on which the required majority of eligible members have signified their consent. A written shareholders resolution cannot be used to remove a director or an auditor.

(3 marks)
(Total: 20 marks)

(Chp : 14 ; 4.6)

**QUESTION 7**

a. A creditor may petition to wind up its debtor on the ground that the debtor is unable to pay its debts.

Firstly, According to section 466(1) a company will be deemed to be unable to pay its debts when The creditor is owed a sum exceeding the amount prescribe by the Minister. Currently the amount is RM10,000. The creditor or his agent has served a notice of demand on the company at its registered office requiring the company to pay within 21 days after the service of the demand.

If the company failed to pay, the creditor may file the petition to wind up the company within 6 months from the expiry of the said notice. (section 466(2). This limb applies even where the creditor has not obtained judgment.

Secondly, the creditor has obtained judgement against the company. Though the creditor has executed the judgement, the execution did not meet sufficient proceeds to satisfy the judgement sum.

Thirdly, the court is satisfied that the company is unable to pay its debts after taking into account the company's contingent and prospective liabilities. In other words, the company's liabilities are more than its assets.
The difference between the first circumstance and the third circumstance is that the former refers to cash flow insolvency and the latter refers to balance sheet insolvency.

(6 marks)

(Chp : 16 ; 3.3)

b. Difference between members voluntary winding up and creditors winding up petition:-
There are generally two types of winding up, (i) compulsory winding up or winding up by the court and (ii) voluntary winding up. Voluntary winding up may be further divided into members' voluntary winding up and creditors' voluntary winding up. A members' voluntary winding up is only possible if the company is solvent.

Members' voluntary winding up is commenced by a resolution of the members. In a members' voluntary winding up petition - directors have to make a declaration of solvency. Members are responsible for appointing the liquidator.

If company is insolvent or subsequent to a members voluntary winding up petition, the liquidator appointed by the members forms the opinion that the debts of the company will not be paid in full, it will then proceed as a creditor's winding up petition. The liquidator may then summon a meeting of creditors and lay before them a statement of assets and liabilities of the company in accordance with Companies Act 2016. The creditors have the option to replace the liquidator with their own nominee.

(5 marks)

(Chp : 16 ; 3.7)

c. Differences
A liquidator has numerous statutory powers. A receiver's powers are primarily derived from the debenture under which he is appointed or from the court. A receiver is personally liable on the contracts which he makes for the company. A liquidator has no such liability. However, either office holder, if he fails to perform his duties properly may be called to account in various ways.

Appointment
The receiver is a representative of secured creditors appointed by them (or by the court on their behalf) to enforce the security, e.g. take control of the company and raise monies from assets to pay the secured debt. Once the debt is paid, the Receiver vacates office and the directors resume office.

The liquidator is appointed by court (compulsory liquidator) or by members (member's voluntary liquidation) or by members and creditors (creditors voluntary liquidation). His task is to take control of all the company's assets with a view to their realisation and the payment of all debts of the company and distribution of any surplus to members. At the end of liquidation the company is usually dissolved.

(6 marks)

(Chp : 16 ; 4.0)

d. Corporate governance basically refers to the ideal way in which a company should be governed. There are several key concepts that are relevant to good practices on corporate governance. These qualities are also found to be prevalent in companies with good corporate governance. These key concepts in corporate governance are transparency, independence, accountability and responsibility, and fairness.

(3 marks)
(Total: 20 marks)

(Chp : 15 ; 1.0)

**END OF SOLUTION**