

Corporate & Other Laws
Suggested Answer

Roll No.....

Maximum Marks - 100

Total No. of Questions - 7

Total No. of Printed Pages - 2

Time Allowed - 3 Hours

Marks

Attempt all questions.

1. Answer the following questions:

- a) ABC public Company decided to hold election for constituting a new Board of Directors of the company. The articles of association of the company is silent about the number of shares required to be held by a person for his appointment as director of the company. Mr. Prahalad having 90 shares of the company filed his candidacy for the appointment of director of the company. The election officer refused his application. How far the decision of the election officer is valid? Is there any exception in the concerned Law where share qualification is not required for being appointed in the post of director of the company? Answer with reference to the Companies Act, 2063. 10
- b) The board of directors of Gagan Aviation Ltd. decided to operate Aircraft Maintenance, Repair and Overhaul (MRO) Service in joint venture with London Aeronautics and to sell its 55% shares. The majority of the shareholders opposed this resolution and in the general meeting, with more than 2/3 majority, they disapprove the directors' action. Advise the directors about the validity of their action and the dealing with London Aeronautics. 5
- c) CEO of Himalaya Heights Pvt. Ltd. was dismissed as against the service contract. He filed a case for damages against the wrongful dismissal. Shortly thereafter, the company ceased trading; it paid of all its creditors and then transferred its remaining assets to Park View Ltd. When he obtained a judgment against the company, it had no assets and stood dissolved. Therefore, he charged against the Park View. Decide whether the transferee company is liable. 5
- d) Naini Musahar is appointed as director in Sarnath Community Agro Limited. After her appointment she is interested to know the duration of director in a company under the Companies Act. Explain the duration of director in a company referring Section 90 of the Companies Act, 2063. 5

Answer:

- a) Section 86 (2) the Companies Act, 2063 provides for the constitution of a board of directors in a public Company. Accordingly, every public company shall have a board of directors consisting of minimum three to maximum of eleven numbers of directors.

Section 88 of this Act, 2063 contains provision share qualification of directors. According to which if the articles of association of a company specify any number of shares required to be held by a person for his appointment as director of the company, the person who becomes director shall hold such number of shares. Failing to specify such number of shares to be held by any person, one hundred shares should be held by the person willing to become a director.

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On the basis of above provision the refusal of election officer is valid, as Mr. Prahalad doesn't hold one hundred shares.

However, the provisions of sections 86(3) and 87(2) of the Companies Act do not apply in this case. The section further states that this criteria is not applicable to the independent director appointed under section 86(3) and alternate director under section 87(2) of this Act.

- b) The division of powers between the board and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that, where powers had been vested in the board, the general meeting could not interfere with their exercise. Hence the directors were entitled to refuse to carry out a sale agreement adopted by ordinary resolution in general meeting.

Similarly, in **Shaw & Sons Ltd. v. Shaw [1935]2 K. B 113** in which a resolution of the general meeting disapproving the commencement of an action by the directors was held to be a nullity.

A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercise by directors; certain powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

In this case, the decision of the majority of board of directors of Gagan Aviation Ltd. to operate Aircraft Maintenance, Repair and Overhaul (MRO) Service in joint venture with London Aeronautics and to sell its 55% of shares cannot be invalid though the majority of shareholders opposed this resolution and in the general meeting, with more than 2/3 majority, they disapprove. It is because transacting the business deal or contract with the outsiders on behalf of the Company and at its best interest is the basic responsibility of the board of directors under section 103(2) of the Companies Act, 2063. Thus this section provides that it shall be the duty of every director to do such transaction within the ambit. Of jurisdiction specified in the memorandum of association of the company.

- c) Section 7 of the Companies Act, 2063 recognises that when a company is incorporated, it is treated as an autonomous and a separate legal person than of its member with perpetual succession. A company, as a separate legal person has full right to hold assets and run business in its name. Further it can sue and be sued and the member's property is not liable to meet the liabilities of the company.

The separate legal existence of a company cannot be used as a means to achieve some illegal or fraudulent purposes. The courts will refuse to uphold the separate existence of the company where it is formed to defeat or circumvent law, to defraud creditors or to avoid legal obligations. In such situations the corporate personality can be disregarded and its veil can be lifted and the natural person behind it can make liable. This case of the *doctrine of lifting the corporate veil* was accepted by the court in **Creasey v. Breachwood Motors Ltd. 1993 BCLC 480**.

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In this case, therefore, the transferee company is liable to pay compensation to the plaintiff. In fact, the takeover of the company's assets had been carried out without regard to the separate entity of the company and the interests of its creditors, particularly the plaintiff and the purpose of the act of transferring the assets to the Park View Ltd. is to avoid its liabilities. As being created unjust result to the interest of the plaintiff. The transferee company cannot be treated as a separate legal person than its transferor company.

- d) Section 90 of the Companies Act, 2063 has defined the term of office of directors as follows:
- (1) The tenure of office of a director of a private company shall be as provided in its articles of association
 - (2) The tenure of office of a director of a public company shall be as specified in its articles of association, which shall not exceed four years.

It is also provided that:

- (1) A director appointed by the Government of Nepal or a corporate body shall hold office so long as the Government of Nepal or the appointing body desires.
- (2) A director appointed pursuant to Clauses (1) and (2) of the proviso to Section 87 shall hold office only until the holding of the annual general meeting.
- (3) The term of office of a director appointed to the office of any director which has fallen vacant before the expiry of his/her term of office shall be only the remainder of the tenure of office of that director whose office has so fallen vacant and in whose place one is appointed.
- (3) Notwithstanding anything contained in the prevailing law or articles of association, a person retired from the office of director on expiry of his/her tenure of office shall be eligible for reappointment to the office of director.

2. Answer the following questions:

- a) When Rastra Bank may cancel the license obtained by a licensed institution to carry on the financial transactions pursuant to Banks and Financial Institutions Act (BAFIA), 2063? Discuss. 5
- b) Nepal Rastra Bank being a bank of banks and also being a central Financial Advisor of the Government of Nepal, has therefore, been given special status by conferring it certain privileges and facilities. State those privileges and facilities conferred to Nepal Rastra Bank by Nepal Rastra Bank Act, 2058. 5
- c) Hill Development Bank Limited has appointed two public directors in its annual general meeting held on Baishak 2, 2072. However, these two public directors have not provided their particulars of disclosures as required by the Bank and Financial Institutions Act, 2063 till end of Baishak 2072 saying that they were unaware with the disclosure parts. Is it really required to disclose the particulars of directors as required by the Act? If so what are the matters to be disclosed by each director to the bank pursuant to this Act. 5

Answer:

- a) As a regulating body Rastra Bank shall have full authority to regulate and systematize the functions and activities of all licensed institutions (Banks and Financial Institutions). It is the bank of banks. Section 35 (2) of the Banks and Financial Institutions Act, 2063 has provided that Rastra Bank may cancel the license obtained by a licensed institution to carry on the financial transactions pursuant to this Act in any of the following circumstances.

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1. If the concerned licensed bank or financial institution requests for the cancellation of its license.
 2. If it fails to carry on the financial transactions within six months from the date of receipt of the license.
 3. If it stops carrying on the financial transactions since more than one month ago continuously.
 4. If it carries on the financial transactions in such a manner as to be contrary to the rights and interests of depositors.
 5. If it violates the conditions prescribed by Rastra Bank.
 6. If it fails to comply with the orders or directives issued by Rastra Bank.
 7. If it becomes insolvent.
 8. If the bank or financial institution is found to have obtained the license by submitting false details.
 9. If the licensed institution is merged with another bank or financial institution.
- b) Pursuant to section 8 of Nepal Rastra Bank Act, 2058, notwithstanding anything contained in the prevailing laws, Nepal Rastra Bank(NRB) shall be entitled to the following privileges and facilities:
- a. Exemption from all types of taxes, fees and charges on the incomes, capital transactions, land and houses, assets etc;
 - b. No requirement for the payment of registration fee for registration of the deeds of loan or refinance to be given by NRB;
 - c. No requirement of revenue stamps on any of the documents relating to NRB;
 - d. There would be no tax, fee, charge, duty on the export and import of bank notes coins, gold, silver and the paper, metal, chemicals, and other materials to be used for printing bank notes and minting coins.
- c) Yes, it is mandatorily required to disclose the particulars by the newly appointed Directors under Section 22 of the Banks and Financial Institutions Act, 2063 as it has defined the requirement of disclosure as follows:
- (1) Every director shall, no later than seven days after assuming the office of director, disclose in writing to the bank or financial institution the following matters:
 - (a) If he or she or any of his or her family members has entered into or going to enter into any kind of contract with the concerned bank or financial institution, details thereof;
 - (b) If he or she has any kind of interest in the appointment of the chief executive, managing director, secretary, auditor and general manager, details thereof;
 - (c) Particulars of such shares or debentures in the concerned bank or financial institution or in its holding or subsidiary company as subscribed by him or her or by his or her family;
 - (d) If he or she is a director of any company, details thereof;
 - (e) If any member of his or her family is working as an officer of the bank or financial institution, details thereof;
 - (f) Such other details prescribed by Rastra Bank as required to be disclosed by the director to the Board.
 - (2) In making disclosure pursuant to Sub-section (1) above, a copy of the written agreement, if any, concluded between the directors or his or her family member

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shall be submitted, and failing such agreement, substantial and necessary matters concerning the transaction or financial interest or involvement shall be set out.

(3) The information provided by a director pursuant to Subsection (1) above, shall be forwarded to Rastra Bank within seven days; and upon receipt of such information, Rastra Bank shall record the same in a separate register maintained for this purpose.

3. Answer the following questions:

- a) Enumerate the circumstances on which a chairperson and a member may be removed from office under the Securities Act, 2063. 5
- b) What are the matters to be disclosed by stock exchange to Nepal Securities Board? 5

Answer:

a) Section 12 of the Securities Act, 2063 provides different circumstances where Nepal Government may remove chairperson and a member of Nepal Securities Board. These circumstances are as follows:

- (a) If one is disqualified to be a Chairperson and a member, as the case may be, pursuant to Section 11,
- (b) If one commits any act contrary to the interest of investors in securities or any act that may cause loss or damage to the development of capital market,
- (c) If one suffers from lack of competence to implement, or cause to be implemented, such functions required to be performed by the Board to attain the objectives of the Board pursuant to this Act or the Rules framed under this Act,
- (d) If one has been held disqualified to carry on any occupation or business by the reason of misconduct and his or her certificate has been revoked or he or she has thus been restricted to carry on a business,
- (e) If one remains absent from three consecutive meetings of the Board without giving a notice.

b) Section 46 of the Securities Act, 2063 has explained the matter that is to be disclosed by a stock exchange immediately when it comes to its knowledge as follows:

- (a) Where it appears that any of its members has committed any financial irregularity or the economic status of such a member appears to be suspicious from any activities of such a member,
- (b) Where it appears that any of its members has failed to fulfill such obligation as required to be fulfilled by such a member under laws or is not capable of performing such obligation,
- (c) Where it appears that any of its members has failed to observe financial Rules and Bye-laws or is not capable of observing such Rules and Bye-laws,
- (d) Such other information as may be prescribed.

4. Answer the following questions:

- a) How a dispute between a foreign investor and a concerned industry can be resolved under Foreign Investment and Technology Transfer Act, 2049? Explain. 5
- b) Makalu Enterprise, an industry established in the year 2064 is being operated in loss till date. Mr. Dil Juharchan, a promoter of the industry thinks that if the industry is declared sick industry and more facilities would be obtained and the

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industry would be exempted tax on the raw materials to be imported from China.
Answer the following questions on the basis of existing laws of Nepal.

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- i) Can such industry be declared as a sick industry?
- ii) Whether the contention of Mr. Dil Juharchan regarding exemption of tax is tenable?

Answer:

- a) Section 7 of Foreign Investment and Technology Transfer Act, 1992 has provided the way of solving dispute between a foreign investor and a concerned industry. According to it, if any dispute arises between a foreign investor or the concerned industry, the concerned parties shall be required to settle the dispute by mutual consultations in the presence of Department of Industry. If the dispute could not be settled through mutual consultation, it shall be settled by an arbitration in accordance with the prevailing Arbitration Rules of UNCITRAL. Moreover, the place of arbitration shall be held in Kathmandu and the Nepalese laws shall be applicable in the arbitration.
- b) Section 25A of the Industrial Enterprises Act, 2049 mentions the provision regarding the sick industry. According to it 1) if any industry is being operated in loss for a consecutive period of five years and its production level is twenty percent or less than twenty percent of the total production capacity, the Government of Nepal may, if it deems necessary, declare such industry a sick industry by notification published in Nepal Gazette.
2) No duty, fee and tax of any kind shall be levied on the machinery imported by any industry as referred to in sub section (1) above for the extension and diversification of such industry .
On the basis of above legal provision of law the answer can be mentioned as follows:
 - i) No, Makalu Enterprise cannot be declared as sick industry because we don't know the production capacity and current production level of it. As Makalu Enterprise has been running in loss for more than 5 years, however, without having proper knowledge of its production capacity and current production this industry cannot be declared as sick industry.
 - ii) Similarly, the answer again is 'no', because exemption shall be obtained only in case of import of machinery not in import of raw materials.

5. Answer the following questions:

- a) Mention the provisions regarding the contingent contract under the Contract Act, 2056. 5
- b) CA Damannath Pahadi was elected as Councilor among the CA Members of ICAN; however his tenure of Councilor has ceased due to certain reason. Under what circumstances, the Councilor ceases to hold office? 5
- c) State the circumstances where a ban may be imposed on insurance business by the Insurance Board pursuant to the Insurance Act, 2049. 5

Answer:

- a) Provisions regarding the contingent contract under section 12 of Contract Act, 2056 are as follows:
 - i) In case a contract has been concluded to perform or not to perform any work if any event happens in the future, the contract shall not create any liability until such event happens.

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- ii) In case a contract has been concluded subject to the condition that it shall be deemed to have been concluded in case a person performs any specified work in the future, no liability shall be deemed to have emerged from that contract if such person does anything in such a manner as not to perform that work or acts in such a manner that the work cannot be performed.
 - iii) In case a contract has been concluded to perform or not to perform any work if any uncertain event doesn't happen in the future, liability under that contract shall emerge only after the happening of that event becomes impossible.
 - iv) In case a contract has been concluded with a provision to perform or not to perform any work if any event happens within a specified period in the future, the contract shall be deemed to have become invalid after the happening of that event becomes impossible within the specified period or after the expiring of that period.
 - v) In case a contract has been concluded with a provision to perform or not to perform any work if any event does not happen within a specified period in the future, liability under such contract shall emerge if that event doesnot happen within that period or if it becomes certain that the event will not happen within that period.
- b) Section 8 of Nepal Chartered Accountants Act, 2053 has explained various circumstances where Councilor ceases to hold office as follows:
- (1) A councilor shall cease to hold his or her office in any of the following circumstances:
 - (a) If the councilor ceases to be a member of ICAN, provided that, this provision shall not be applicable to the nominated councilor;
 - (b) If resignation tendered by the councilor from his or her office is accepted by the Council of ICAN;
 - (c) If the councilor absents himself or herself from three consecutive meetings of the Council without giving a notice with reason to the Council;
 - (d) If the term of office of the Councilor expires;
 - (e) If it is proved that the Councilor has not abided by the conduct referred to in Section 34 of this Act;
 - (f) If the councilor dies.
 - (2) While tendering resignation pursuant to Clause (b) of Subsection (1) of this section, the president shall tender it to the vice-president and the other councilors, to the president.
- c) Pursuant to Section 12A(1) of the Insurance Act, 2049, the Insurance Board may impose a ban entirely or partially on any type of business being operated by the Insurer under the Insurance Business in any of the following cases:
- 1. If the directives provided by the Insurance Board from time to time regarding the procedures to be followed by the Insurer during the operation of the Insurance Business has been violated.
 - 2. If the Insurer provides loan to any corporate body in which any of its Directors or his/her family is working as a Managing Agent or partner or

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- provides guarantee or security of any kind for any loan provided to him/her by others by violating section 14 of this Act.
3. If the Insurer does not provide information to the Board to be provided pursuant to section 15 of this Act.
 4. If the Insurer does not maintain the accounts and record to be maintained pursuant to section 19 of this Act.
 5. If the insurer does not maintain separate accounts and records to be maintained separately pursuant to section 20 of this Act.
 6. If the Insurer does not maintain the fund to be maintained by it pursuant to section 21 or bears liability of one Insurance Business from the fund maintained for another business.
 7. If the Insurer does not maintain the compulsory reserve fund to be maintained by it pursuant to section 22 of this Act.
 8. If the Insurer accepts the insurance risk without receiving the insurance premium pursuant to section 27 of this Act.
 9. If the Insurer does not re-insure pursuant to section 28 of this Act.
6. Answer the following questions:
- a) Raju Sai opened M/S Makawanpur Butcher Shop in Hetauda Industrial Estate with an initial labour strength of nine. Later Raju shifted his shop to the main market and left the industrial estate, but he fired Silu Nani, one of his staff, without any reason from his shop on the day when he shifted to the main market leaving the Industrial Estate without following the provisions of Labour Act, 2048 and the regulations as his shop is out of the purview of this Act. Later Silu Nani challenged the decision of Raju Sai and sued to Labour Office to reinstate her in Makawanpur Butcher Shop. Discuss whether Silu Nani's challenge is correct considering the provisions of Labour Act, 2048. 5
 - b) Under what conditions Bonus is received? What restrictions are imposed to receive Bonus? Answer in the light of Bonus Act, 2030. 5
 - c) Under what circumstances negotiable Instruments deem to be dishonored? Answer it in the light of Negotiable Instruments Act, 2034. 5

Answer:

- a) Labour Act, 2048 has defined the term enterprise under its Section 2(b). Each enterprise should follow the provisions of Labour Act and regulations.
An enterprise includes any factory, company, organization, association, firm, or group thereof, established under the prevailing laws for the purpose of operating any industry, profession or service, where ten or more workers or employees are engaged. This expression also includes:
(1) Tea estates, established under the law for commercial purpose;
(2) Enterprise operating within the industrial districts established by Government of Nepal where less than ten workers or employees are engaged.

In the above case, Section 2(b) of this Act is applicable on the day when the shop was in the Government established Industrial Estate. Hetauda is also a government established industrial estate and irrespective of the number of staff/employees. Makawanpur Butcher Shop should follow the labour law. The owner could not fire Silu Nani on the same day of his shifting from Industrial Estate to the main market.

Therefore, Silu Nani's challenge is correct considering the provisions of this Act.

b) Section 6 of Bonus Act 2030 mentions the following provisions regarding the eligibility to receive bonus:

- i) An employee who has worked for half of a period to be worked in a fiscal year, shall be entitled to obtain bonus under this Act. Provided that, no employee shall be entitled to obtain bonus who has worked caually or in a shift basis.
- ii) For the purpose of sub-section (i) above, the following periods shall also be computed as a period where an employee has worked:
 - a. a period kept on reserve under any contract or under section 11 of the Labour Act, 2048.
 - b. A period under which an employee is on any leave with salary
 - c. A period of disablement caused by accident arising in course of business of the enterprise.

Restriction to receive bonus:

Section 8 of the Bonus Act, 2030 states that notwithstanding anything contained in section 6 above, an employee shall not be entitled to obtain bonus under this Act, if he/she is punished or dismissed from service for committing any act as follows:

- i) Theft of the property of the enterprise or any damage to such property.
- ii) Illegal strike or abetment to other for such strike,
- iii) Riots or breaching of discipline.

Provided that, this section shall not be deemed to be prejudiced to obtain in the case of the bonus for a period before committing such a punishable act.

c) In pursuance to the grounds specified by sections 64, 65 and 66 of the Negotiable Instruments Act, 2034, negotiable instruments shall be deemed to be dishonoured on the following grounds:

Section 64: (1) A bill of Exchange shall be demed to be dishonoured by non-acceptance when the Drawee, or one of several Drawees not being partners, makes default in acceptance upon being duly required to accept the bill.

(2) If agreed to accept the bill with conditions or the Drawee is incompetent to contract, the Bill of Exchange shall be deemed to be dishonoured.

Section 65: A Promissory Note, Bill of Exchange or Cheque shall be deemed to be dishonored by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

Section 66: When a Bill of Exchange is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice to all other parties related to such instrument and if any party among them has not been noticed, such party shall not be liable to that instrument.

7. Write short notes on the followings:

(2×5=10)

- a) Fund of the Insurance Board
- b) Objectives of ICAN

Answer:

- a) The Insurance Act, 2049 has provided provisions for the fund of Board. Pursuant to section 34 (1), the Board shall have a separate fund of its own and the following amounts shall consist in the fund so created: -
- i) The amount received from the Government of Nepal.
 - ii) The amount received from any foreign government or international organization or association.
 - iii) The amount received as name registration and renewed fees etc. from the Insurer, Insurance Agent or Surveyor.
 - iv) The amount received from service charge.
 - v) The amount received from any other sources.

All the expenses to be incurred on behalf of the Board shall be borne from the account credited to the Fund of the Board as per the section 34A of this Act.

- b) Section 5 of Nepal Chartered Accountant Act, 2053 states the objectives of ICAN which are as follows:
- i) To play the role of regulatory body to encourage the members to carry on accounting profession being within the extent of the code of conduct in order to consolidate and develop accounting profession as a cause for economic development of the nations.
 - ii) To enhance social recognition and faith in accounting profession by raising awareness of the general public towards the importance of accounting profession and the economic and social responsibility of professional accountants.
 - iii) To develop, protect and promote the accounting profession by enabling professional accountants understand their responsibility towards the importance of accounting profession and accountancy.
 - iv) To develop mechanism of registration, evaluation and examination of accounting professionals in consonance with international norms and practices so as to make the accounting profession respectable and reliable.