

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed : 3 hours

Maximum marks : 100

NOTE : Answer SIX questions including Question No. 1 which is **COMPULSORY**.

Question 1

Attempt any four of the following :

- (i) Define 'document'. Explain various kinds of deeds.*
- (ii) What are the important points that should be taken into consideration while drafting contracts ?*
- (iii) What are the pre-requisites of 'arbitration' ? Draft the specimen of an arbitration agreement to refer dispute to an arbitral tribunal.*
- (iv) Define the following :*
 - (a) Contract of guarantee*
 - (b) Hypothecation agreement*
 - (c) Lease*
 - (d) Licence*
 - (e) Mortgage.*
- (v) Draft a specimen of memorandum of mortgage by deposit of title deeds.*
(5 marks each)

Answer 1(i)

Document

Document as per Section 31(18) of General Clauses Act, 1894 means any matter expressed or described upon any substance by means of letters, figures or marks, or by the more than one of those means, intended to be used, or which way be used, for the purpose of recording that matter. As for instance, a writing is a document, words printed, lithographed or photographed are documents; a map or plan is a place or stone is a document. A caricature is a document. Thus, document is a paper or other material thing affording information, proof or evidence of anything.

Various kinds of Deeds

1. A good deed is one which conveys a good title, not one which is good merely in form.
2. A good and sufficient deed is marketable deed; one that will pass a good title to the land it purports to convey.
3. An inclusive deed is one which contains within the designated boundaries lands which are expected from the operation of the deed.
4. A latent deed is a deed kept for twenty years or more in man's escritoire or strong box.
5. A lawful deed is a deed conveying a good or lawful title.
6. A pretended deed is a deed apparently or prima facie valid.

7. A voluntary deed is one given without any “valuable consideration”,
8. A warranty deed is a deed containing a covenant of warranty.

Answer 1(ii)

Important points in regard to drafting of contracts

1. *Description of Parties to the Contract* : Parties to the contract should properly be defined by giving their names, status and address.
2. *Legal Nature of the Contract* : In the title or in the introductory part of the contract, the parties should clearly indicate the legal nature of the contract as to whether it is a sale/purchase contract or a contract for technical assistance, etc. so as to avoid any doubt as regards the nature of the contract and the legal position of the parties thereunder.
3. *Licences and Permits* : Provision in international trade contracts as to which party would be responsible for obtaining export/import licences and the effects of delay, refusal or withdrawal of a license by Government authority, etc.
4. *Taxes, Duties and Charges* : A provision regarding the responsibility for payment of taxes, duties and other charges, if any, may also be included in the contract. In international contracts, it is generally provided that the seller would be responsible for taxes, duties and charges levied in the country of export and the buyer with such charges levied in the country of import.
5. *Quality, Quantity and Inspection of Goods* : Quality of the goods is very important to the buyer in a sale-purchase contract and it is in this area that a number of disputes arise and, therefore, it is necessary to include a suitable provision relating to the description and inspection of the quality and quantity of the goods in the contract.
6. *Packing* : A proper stipulation regarding packaging of the goods according to the nature of the merchandise should be included in the contract.
7. *Shipment of the Goods* : It is desirable to stipulate precise particulars regarding the rights and duties of the parties towards shipment of the goods, i.e., the time, date and port of shipment, name of the ship and other ship particulars.
8. *Insurance* : A provision regarding insurance of the merchandise is also made in the contract.
9. *Documentation* : If the goods are of scientific or technical nature, a provision in the contract may be made as to whether the technical documentation supplied by the seller will become the property of the buyer or it has to be returned to the seller after a stipulated time.
10. *Guarantee* : A guarantee clause may be provided to make the seller responsible for the defects appearing in the goods during the period of the guarantee.
11. *Passing of the Property and Passing of the Risks* : It is very important to provide for the exact point of time when the title or the property in the goods and the risk will pass from the seller to the buyer.

12. *Amount, Mode and Currency of Payment* : Provision is to be made for the amount, mode and currency in which the price for the goods has to be paid.
13. *Force Majeure* : Another very important provision witnessed in modern commercial contracts relates to force majeure or excuses for non-performance. This provision defines as to what particular circumstances or events beyond the control of the seller would entitle him to delay or refuse the performance of the contract, without incurring liability for damages.
14. *Proper Law of Contract* : Provision stipulating the proper law of contract in international contracts.
15. *Settlement of Disputes and Arbitration* : Provision regarding settlement of disputes under the contract by arbitration or otherwise has to be stipulated. A suitable arbitration clause may be provided by the parties by mutual agreement.

Answer 1(iii)

Pre-requisites of Arbitration

Every arbitration must have the following three pre-requisites:

- (i) a dispute between parties to an agreement, requiring a settlement;
- (ii) its submission for a settlement to a third person; and
- (iii) a decision by such third person according to his own judgement based on the facts and circumstances of the dispute, which is binding on both the parties.

Specimen of an arbitration agreement to refer the dispute to an arbitral Tribunal

THIS AGREEMENT is made at..... this..... day of..... between Mr. X..... of..... residing at..... hereinafter referred to as the Party of the First Part and Mr. Y..... of..... residing at..... hereinafter referred to as the Party of the Second Part.

WHEREAS by an Agreement dated..... 2008 entered into between the parties hereto, the Party of the First Part entrusted the work of constructing a building on his plot of land situated at..... to the Party of the Second Part on the terms and conditions therein mentioned.

AND WHEREAS disputes have arisen between the parties hereto regarding the said contract and the parties could not mutually settle the matter

AND WHEREAS the said agreement provides that in the event of any dispute or difference arising between the parties the same shall be referred to arbitration if agreed upon and the Arbitration shall be governed by the provisions of the Arbitration & Conciliation Act, 1996.

AND WHEREAS the parties have agreed to refer all the disputes regarding the said contract to Mr..... Architect, as common Arbitrator and have proposed to enter into this Agreement for reference of the disputes to the sole arbitration of the said Mr.....

NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That the following points of dispute arising out of the said agreement dated... are hereby referred to the sole arbitration of the said Mr..... for his decision and award.

The points of dispute are:

- (a)
- (b)
- (c)
- (d)
- (e)
2. The said Arbitrator shall allow the parties to file their respective claims and contentions and to file documents relied upon by them within such reasonable time as the Arbitrator may direct.
3. The said Arbitrator shall give hearing to the parties either personally or through their respective Advocates but the Arbitrator will not be bound to take any oral evidence including cross examination of any party or person.
4. The said Arbitrator shall make his Award within a period of four months from the date of service of a copy of this agreement on him by any of the parties hereto provided that, the Arbitrator will have power to extend the said period from time to time with the consent of both the parties.
5. The Arbitrator will not make any interim award.
6. The award given by the Arbitrator will be binding on the parties hereto.
7. The Arbitrator will have full power to award or not to award payment of such costs of and incidental to this arbitration by one party to the other as he may think fit.
8. The Arbitration shall be governed by the provisions of the Arbitration & Conciliation Act, 1996.

IN WITNESS WHEREOF the parties herein under have set their hands the day and year hereinabove mentioned.

Signed by the within named

Signed by the within named

Mr. X in the presence of

Mr. Y..... in the presence of

Answer 1(iv)

- (a) **Contract of guarantee** : A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor"; and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written. (Section 126 of the Indian Contract Act, 1872)

- (b) **Hypothecation agreement** : Hypothecation is a form of transfer of property in goods. Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass. This form of transfer is not regulated in India by any statute. Neither the Transfer of Property Act, 1882, nor the Indian Contract Act, 1872, nor the Sale of Goods Act, 1930, recognize the non-possessory hypothecation of immovables, and the rights and remedies of the parties are regulated by the courts according to the general law of contract.

In hypothecation, there must be an intention of the parties to create a security on the property on which the money has been lent. If that intention can be established, equity gives effect to it.

- (c) **Lease** : A lease of immovable property is a transfer of a right to enjoy the property for a certain time in consideration for a price paid or promised. The price paid is called "rent".

- (d) **Licence** : Licence has been defined in Section 52 of the Indian Easements Act, 1882 as under:

"where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license".

- (e) **Mortgage** : A mortgage as per Section 58 of the Transfer of Property Act, 1882 is a transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, existing or future debt or the performance of an acknowledgement, which may give rise to pecuniary liabilities

The transferor in the case of a mortgage is called a 'mortgagor' and the transferee as 'mortgagee', the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument, if any, by which a transfer is effected is called a "mortgage deed".

Answer 1(v)

Memorandum of Mortgage by Deposit of Title Deeds

Memorandum that this..... day of..... 2009, 'AB' of, etc. (the mortgagor), as beneficial owner, has deposited with 'CD' of, etc. (the mortgagee), the original title deeds comprised in the Schedule A hereto, relating to the premises belonging to the said 'AB' and situate atetc., described in Schedule B with intent to create a charge thereon for securing repayment to the said 'CD' of the sum of Rs..... this day lent and advanced by the said 'CD' to the said 'AB' on demand with interest for the same from this date at the rate of Rs..... per cent per annum.

The said 'AB' do hereby undertake as and when required by the said 'CD' to execute and register at the costs of the said 'AB' a legal mortgage in such form and containing such covenants and provisions as he may reasonably require.

Dated this..... day of..... 2009.

*The Schedule A above referred to
Description of the Title Deeds deposited.
The Schedule B above referred to
Description of the Property.*

Signature of the Mortgagor.

Question 2

- (a) Write short notes on any two of the following :
- (i) *Del credere agency*
 - (ii) *Usufructuary mortgage*
 - (iii) *Power of attorney and letter of authority.* (3 marks each)
- (b) Choose the most appropriate answer from the given options in respect of the following :
- (i) *A deed kept for twenty years or more in man's escritoire or strong box is called —*
 - (a) *Pretended deed*
 - (b) *Lawful deed*
 - (c) *Warranty deed*
 - (d) *Latent deed.*
 - (ii) *A 'guarantee' guaranteeing an employer against the misconduct of an employee or to answer for the debt or default of another is called —*
 - (a) *Performance guarantee*
 - (b) *Bank guarantee*
 - (c) *Counter guarantee*
 - (d) *Fidelity guarantee.*
 - (iii) *In English law, mortgage by deposit of title deed is called as —*
 - (a) *Usufructuary mortgage*
 - (b) *English mortgage*
 - (c) *Equitable mortgage*
 - (d) *Anomalous mortgage.*
 - (iv) *Power of attorney executed for the purpose of generally representing another person or for performing more than one act is called —*
 - (a) *General power of attorney*
 - (b) *Special power of attorney*
 - (c) *Particular power of attorney*
 - (d) *Revocable power of attorney.*
 - (v) *In case of a company, mortgage of the property should be duly authorised—*
 - (a) *By objects clause of the memorandum of association and approved by a resolution of the Board*

(b) *Only by objects clause of the memorandum of association*

(c) *Only by a resolution passed in the meeting of the Board*

(d) *By articles of association.* (1 mark each)

(c) *Mention the procedure to be followed for carrying through a compromise or arrangement under section 391 of the Companies Act, 1956.* (5 marks)

Answer 2(a)(i)

Del Credere Agency

There is a special type of agency, which combines agency with guarantee. This is known as del credere agency. A del credere agent is one who, for an extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer. By reason of his charging a del credere commission he assumes responsibility for the solvency and performance of the contract by the vendee and thus indemnifies his principal against loss. He, therefore, gives an additional security to the seller, but he does not shift the responsibility of payment from the buyer to the seller. A commission del credere is the premium or price given by the principal to the agent for guarantee, which presupposes a guarantee.

A *del credere* agent like any other agent, is to sell according to the instructions of his principal, to make such contracts as he is authorised to make for his principal and be bound, as soon as he receives the money, to hand it over to the principal. He is distinguished from other agents simply in this that he guarantees that those persons to whom he sells perform the contracts which he makes with them.

Answer 2(a)(ii)

Usufructuary Mortgage

In this mortgage, the mortgagor delivers possession of the mortgaged property to the mortgagee who retains the possession until the satisfaction of the debt. The mortgagee will take the usufruct in lieu of the interest or part payment of the principal or partly in payment of interest or partly in part payment of the principal. The mortgagor is not personally liable to pay the debt and the mortgagee is not entitled during the term of the mortgage to demand his mortgage money.

Answer 2(a)(iii)

Power of Attorney and Letter of Authority

Power of Attorney : Section 2(21) of the Indian Stamp Act, 1899 defines power of attorney as follows:

“Power of Attorney” includes any instrument (not chargeable with fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it”.

In terms of Section 1A of the Powers-of-Attorney Act, 1882 as amended by the Powers-of-Attorney (Amendment) Act, 1982, a power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney.

Letter of Authority : Letter of authority is nothing but a power of attorney. They are executed on plain paper and not on stamp paper. Letters of authority are usually issued for collecting some documents or papers, dividend interest etc. on behalf of another. By and large, the law relating to the powers of attorney will apply to letters of authority.

Answer 2(b)(i)

- (d) Latent deed

Answer 2(b)(ii)

- (d) Fidelity guarantee

Answer 2(b)(iii)

- (c) Equitable mortgage

Answer 2(b)(iv)

- (a) General Power of Attorney

Answer 2(b)(v)

- (a) By objects clause of the Memorandum of Association and approved by a resolution of the Board of Directors

Answer 2(c)

The following procedure shall be followed for carrying through a compromise or arrangement under Section 391 of the Act:

1. To prepare a scheme of compromise or arrangement with the concerned parties.
2. To apply to court by summons in Form No. 33 appended to the Companies (Court) Rules, 1959 for an order to convene a meeting of the creditors and or members or any class of them, supported by an affidavit in Form No. 34 of the Rules. The court may give such directions as it may think fit in respect of holding and conducting the meeting or meetings.
3. To hold the meeting or meetings and let the result be reported to the court. The court appoints a chairman for the meeting and where there are separate meetings, for each such separate meeting. The chairman of the meeting, or of each meeting, must report the result thereof to the court within the time fixed by the court, or where no time has been fixed within seven days after the conclusion of the meeting.
4. When the proposed compromise or arrangement is agreed to, with or without modification, as provided by Section 391(2) to apply to the court for confirmation of the compromise or arrangement. The petition must be made by the company (if the company is in liquidation; by its liquidator) within seven days of the filing of the report by the chairman. The petition shall be made in Form No. 40 of the said Rules.

Where a compromise or arrangement is proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies, or for the amalgamation of any two or more companies, the petition must pray

for appropriate orders and directions under Section 394 for facilitating the reconstruction or amalgamation of the company or companies.

The application under Section 391 is normally made by the company but any creditor or member also may make the application. It would, therefore, seem that a scheme could be started even if the company did not wish it, but the court will, it seems, refuse to convene the meetings if the company, either through its Board or simple majority of its members in a general meeting, has not approved the proposed scheme. This would be an exercise of the court's discretion and not a limit on its powers.

Before an application is made by a company under Section 391, it is usual for the Chairman of the Board of the company which is to be reconstructed or where an amalgamation between two or more companies is proposed, for the Chairman of the Board of each of these companies, to send a circular letter to the members of the company or companies and when the creditors are affected, to them also, explaining the scheme of reconstruction or amalgamation, as the case may be, and the reasons which prompted the preparation of the scheme. The circular letter should specify how the scheme will affect the shareholdings of the members, and when applicable, the claims of the creditors, including debenture holders.

Question 3

(a) *Distinguish between the following :*

(i) *'Conveyance' and 'contract'.*

(ii) *'Instrument' and 'deed'.*

(iii) *'Partnership' and 'trust'.* (4 marks each)

(b) *Write a short note on 'retirement and expulsion of partners'.* (4 marks)

Answer 3(a)(i)

Conveyance and Contract

1. Contract remains to be performed and its specific performance may be sought but conveyance passes on the title of property to another person. Conveyance does not create any right of any action but at the same time it alters the ownership of existing right.
2. Contracts are governed by provisions of the Indian Contract Act, 1872 whereas the cases of transfer of immovable property are governed by the Transfer of Property Act, 1882.
3. A contract to mortgage or sale would not amount to actual transfer of interest in the property but the deed of mortgage or sale would operate as conveyance of such interest. In other words, once the document transferring immovable property has been completed and registered as required by law, the transaction becomes conveyance. Any such transaction would be governed under the provisions of the Transfer of Property Act, 1882.

Answer 3(a)(ii)**Instrument and Deed**

Instrument : The word “instrument” includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

Deed : Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability.

A deed may be defined as a formal writing of a non-testamentary character, which purports and operates to create, declare, confirm, assign, limit or extinguish some right, title or interest. Deeds are in writing, signed sealed and delivered. Deeds are instruments, but all instruments are not deeds.

Answer 3(a)(iii)**Partnership and Trust**

Partnership : Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits.

Partnership is defined in Section 4 of the Indian Partnership Act, 1932 as the relation between persons who have agreed to share profits of business carried on by all or any one of them acting for all.

Trust : A trust is defined under Section 3 of the Indian Trusts Act, 1882 as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner.

Answer 3(b)**Retirement and Expulsion of Partners**

Sections 32 and 33 of the Partnership Act, 1932 make provisions for retirement and expulsion of partners.

A partner may retire from a firm with the consent of all the other partners. If the terms of the agreement so provide, a partner may retire by notice to the other partners. In a partnership at will also, a partner can retire by giving notice in writing to all the other partners of his intention to retire. A partner can be expelled from a firm by a majority of the partners where such a power is conferred by the agreement between the partners and the power is exercised in good faith.

Question 4

(a) *State, with reasons in brief, whether the following statements are correct or incorrect:*

(i) *Drafting is first thinking and second composing.*

(ii) *If a document is not properly stamped, it is rendered inadmissible in evidence.*

(iii) *Testimonium is the clause in the first part of the deed. (2 marks each)*

(b) *“Practising of good professional etiquettes is necessary for professional success in the emerging business scenario.” Discuss. (4 marks)*

(c) *Bharat requests Ajay to sell and deliver to him goods on credit. Ajay agrees to do so, provided Chandan guarantees the payment of the price of the goods. Is this a sufficient consideration for Chandan’s promise and is this arrangement a valid contract of guarantee ? Discuss. (6 marks)*

Answer 4(a)(i)

Correct : The process of drafting operates in two planes: the conceptual and the verbal. Besides seeking the right words, the draftsman seeks the right concepts. Drafting, therefore, is first thinking and second composing.

Answer 4(a)(ii)

Correct : The draft of document is required to be approved by the parties. The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per the Indian Stamp Act. If a document is not properly stamped, it is rendered inadmissible in evidence nor it will be registered with the Registrar of Assurances.

Answer 4(a)(iii)

Incorrect : Testimonium is the clause in the last part of the deed. Testimonium signifies that the parties to the document have signed the deed. This clause marks the close of the deed and is an essential part of the deed.

Answer 4b)

Etiquette is the fine art of behaving in front of others. It is a set of practices and forms which are followed in a wide variety of situations. Many people consider it to be a branch of decorum, or general social behavior. Each society has its own distinct etiquette, and various cultures within a society also have their own rules and social norms.

In today’s world of business, professionals need to know how to conduct themselves within the corporate world. One of the best ways to do so is to practice good professional etiquette. Practicing good professional etiquette is necessary for professional success in the emerging business scenario which is constantly changing and making the market place more competitive and contestable. Corporates look for those candidates who possess manners, a professional look and demeanor, and the ability to converse appropriately with business colleagues and clients. Though academic knowledge and skills of a professional may be spectacular, but not knowing proper etiquette required to be successful in the professional career could be a roadblock preventing him to achieve success in the professional life and business relationships. Good professional etiquette indicates to potential employers that the person they are hiring is a mature, responsible adult who can aptly represent their company.

Answer 4(c)

This is a sufficient consideration for Chandan’s promise and this arrangement is a valid contract of guarantee.

Section 127 of the Indian Contract Act, 1872 defines consideration for guarantee as “Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee”.

Question 5

(a) *Explain in detail the general principles of drafting and conveyancing and other writings.* (12 marks)

(b) *Write a short note on ‘covenants and undertakings’.* (4 marks)

Answer 5(a)

Drafting of legal documents is a skilled job. A draftsman, in the first instance, must ascertain the names, description and addresses of the parties to the instrument. He must obtain particulars about all necessary matters which are required to form part of the instrument. He must also note down with provision any particular directions or stipulations which are to be kept in view and to be incorporated in the instrument. The duty of a draftsman is to express the intention of the parties clearly and concisely in technical language. With this end in view, he should first form a clear idea of what these intentions are.

When the draftsman has digested the facts, he should next consider as to whether those intentions can be given effect to without offending against any provision of law. A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided. As for instance, in cases where a deed to be executed by a limited company, it is necessary to go into the question as to whether the company has got power or authority under its memorandum to enter into the transaction. A limited company can do only that much which it is authorised by its memorandum. Further, a company being a legal entity, must necessarily act through its authorised agents. A deed, therefore, should be executed by a person duly authorised by the directors by their resolution or by their power of attorney.

It is also to be ensured that the format of documents adopted adheres to the customs and conventions in vogue in the business community or in the ordinary course of legal transactions. For any change in the form of such document, use of juridical and technical language should invariably be followed. The statements of negatives should generally be avoided. The order of the draft should be strictly logical. Legal language should be, to the utmost possible extent, precise and accurate. The draft must be readily intelligible to laymen.

Document should be supported by the schedules, enclosures or annexures in case any reference to such material has been made in that.

Answer 5(b)**Covenants and Undertakings**

The term covenant has been defined as an agreement under seal, whereby parties stipulate for the truth of certain facts. In Whasten's Law Lexicon, a covenant has been

explained as an agreement or consideration or promise by the parties, by deed in writing, signed, sealed and delivered, by which either of the parties, pledged himself to the other than something is either done or shall be done for stipulating the truth of certain facts. Covenant clause includes undertakings also. Usually, covenant is stated first. In some instances the covenants and undertakings are mixed, i.e. can not be separated in that case, they are joint together, words put for this as “The Parties aforesaid hereto hereby mutually agree with each other as follows:” Such covenants may be expressed or implied.

Question 6

Attempt any four of the following :

- (i) *What is meant by ‘pre-incorporation contracts’ ? Can a company ratify a contract entered into by the promoters on its behalf before its incorporation ? Explain with reasons. (4 marks)*
- (ii) *Mention important guidelines which are required to be followed while entering into a foreign collaboration agreement. (4 marks)*
- (iii) *Draft an affidavit of creditor in proof of his debt in proceeding for the liquidation of a company. (4 marks)*
- (iv) *Define the following :*
 - (a) *Appeal*
 - (b) *Affidavit*
 - (c) *Articles of Association*
 - (d) *Rejoinder. (1 mark each)*
- (v) *What is ‘compounding of offences’ ? How does compounding of offences take place under the Code of Criminal Procedure, 1973 ? (4 marks)*

Answer 6(i)

Pre-incorporation contracts

The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre-incorporation contracts.

The promoters generally enter into such contracts as agents for the company about to be formed. The legal position is that since presence of two consenting parties is necessary for a contract, and the company before incorporation is a non-entity, the promoters cannot act as agents for the company, which has yet to come into existence. As such, the company is not liable for the acts of the promoters done before its incorporation.

Similarly, the company, after incorporation, cannot enforce any contract made before its incorporation, which means the company cannot sue the other party to the contract if the other party fails to carry out the contract. Promoters remain personally liable on the contract.

A company also cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit

of the contract purporting to have been made on its behalf before it came into existence, as ratification by the company when formed is legally impossible. The doctrine of ratification applies only if an agent contracts for a principal who is in existence and who is competent to contract at the time of the contract by the agent. Where a contract is made on behalf of principal known to both parties to be non-existent, the contract is deemed to have been entered into personally by the actual maker, i.e. the agent. The company may, if it desires, enter into a new contract, after its incorporation, with the other party which is known as novation of promoter's contracts;; and if it makes a fresh contract in terms of the preliminary contract, the liability of the promoters comes to an end and if it does not make a fresh contract within a limited, period of time, either of the parties may rescind the contract.

The pre-incorporation agreements entered into by the promoters acting on behalf of the intended company with third party cannot always be avoided for various reasons. These agreements affect the operations of the incorporated company.

Answer 6(ii)

Guidelines for entering into Foreign Collaboration Agreements

These guidelines cover the following aspects of foreign collaboration agreements:

1. *Investment* : Where in a foreign collaboration agreement, equity participation is involved, the value of the shares to be acquired should be brought in cash.
2. *Lump sum payment* : The amount agreed to be paid by an Indian party to a foreign collaborator for technology transfer should be paid in three instalments as follows:
 - (i) one-third to be paid after the agreement has been approved by the Central Government;
 - (ii) one-third on transfer of the technical documents; and
 - (iii) one-third on the commencement of commercial production.
3. *Royalty* : Royalty payable to a foreign collaborator has to be calculated on the basis of net ex-factory selling price of the product less excise duties and cost of imported components. The normal rate of royalty may be three per cent to five per cent. This rate will depend upon the nature and extent of the technology involved.
4. *Duration of agreement* : The period is approved by the Government usually for five years from the date of the agreement in the first instance or five years from the date of commencement of commercial production; the total period, however, not exceeding eight years from the date of the agreement.
5. *Renewal or extension of agreement* : The Central Government may consider an application for renewal of a foreign collaboration agreement or for extension of its period on merit.
6. *Sub-licensing* : An agreement shall not normally impose any restriction on the sub-licensing of the technical know-how to other Indian parties. Sub-licensing is, however, subject to the Central Government's approval.
8. *Exports* : No foreign collaboration agreement shall be allowed to contain any restriction on the free export to all countries, except in a case where the foreign

collaborator has licensing arrangements in which case the countries concerned shall be specified.

9. *Procurement of capital goods etc.* : There should be no restriction on procurement of capital goods, components, spares, raw materials etc. by the Indian party.
10. *Training* : Provision shall be made in the agreement for adequate facilities for training of Indian technicians for research and development.
11. *Exploitation of Indian patents* : Where any item of manufacture is patented in India, the payment of royalty or lump sum to the foreign collaborator should make provision for compensation for use of such patent until its expiry.
12. *Brand Name* : There should be no insistence on the use of foreign brand names on products for sale in India. There can, however, be no objection for use of foreign brand name on products to be exported to other countries.
13. *Indian Laws* : All collaboration agreements shall be subject to Indian laws.
14. *Approval of Central Government* : Every foreign collaboration agreement shall be approved by the Central Government.

While drafting a collaboration agreement, care should be taken that it is in strict compliance with the guidelines as detailed above. Every collaboration agreement must contain one or more clause to the effect: "The agreement shall be subject to Indian laws. The agreement shall be subject to the approval of the Government of India".

Answer 6(iii)

Affidavit of creditor in proof of his debt in proceeding for the liquidation of a company

IN THE (HIGH) COURT OF.....

The matter of the Indian Companies Act, 1956.

And

The matter of the liquidation of..... Company Limited.

I, AB, aged..... years, son of Shri..... resident of....., do hereby on oath (or on solemn affirmation) state as follows:

1. That the abovenamed company was on the..... day of..... 2009, the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of Rupees..... (Rs.....) only in account of (describe briefly the nature of the debt).
2. That in proof of the aforesaid debt I attach hereto the documents marked A, B and C.
3. That I have not, nor have any person or persons by my order or to my knowledge or belief for my use, received the aforesaid sum of Rupees..... or any part thereof, or any security or satisfaction for the same or any part thereof except the sum or security (state the exact amount of security).

4. That this my affidavit is true, that it conceals nothing and no part of it is false.

Sd/-

AB

Dated..... 2009

Deponent

Verification

I, the abovenamed deponent, verify that the contents of paragraphs 1 to 4 of this affidavit are true to my personal knowledge.

Sd/-

AB

Dated..... 2009

I, s/o..... r/o..... declare,
from a perusal of the papers produced by the deponent before me that I am satisfied that
he is Shri AB

Sd/-.....

Solemnly affirmed before me on this.....day of..... 2009
of..... (time) by the deponent.

Sd/-.....

(Oath Commissioner)

Answer 6(iv)

- (a) *Appeal* : Any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an "appeal".
- (b) *Affidavit* : A statement or declaration on oath by the deponent is called Affidavit. The consequences of a false affidavit are serious. Therefore, great care is required in drafting it.
- (c) *Articles of Association* : Articles of Association is another equally important document for incorporation of a limited company. Articles are rules and regulations for management of internal affairs of the company. It constitute a contract between the company and its members and members inter se. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum. Section 36 of the Companies Act, 1956 emphasises its importance as to its contractual force. Articles should be in conformity with the provisions of Memorandum and the Companies Act.
- (d) *Rejoinder* : A written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent, is termed as a rejoinder or replication. Such statements are subsequent pleadings as contemplated in Order 8, Rule 9 of the Civil Procedure Code. Under Rule 9, leave of the court is essential before any party can present a further pleading after the written statement has been filed.

Answer 6(v)**Compounding of offences**

'Compounding' means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement, and the complainant agrees not to prosecute the accused. The accused and the complainant then make a joint application to the Court that the parties have come to terms and the case may not be proceeded with.

Compounding saves the parties from the hassle of spending a lot of money, time and energy in lengthy legal proceedings. In a country like India where there are thousands of cases pending in the court 'compounding' is a good way of settling disputes or matters.

Compounding of Offences under the Code of Criminal Procedure : Section 320 of the Criminal Procedure Code, 1973 permits compounding of various offences under Indian Penal Code. Such compounding can be done either before or after institution of prosecution. It may be pointed out here that a crime is essentially a wrong done to society; therefore a compromise between the accused (wrong-door) and the individual victim should not be enough to absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences [see the table given in Section 320(1)] and some others as compoundable only with the permission of the court [see the table given in Section 320(1)]. After payment of such composition amount, prosecution will not be launched, or if it was launched, it will be withdrawn.

Question 7

- (a) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
- (i) *Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to a _____.*
 - (ii) *The present day system of pleadings in our country is based on the provisions of the _____ supplemented from time to time by rules in that behalf by the High Courts of the States.*
 - (iii) *_____ is an application by any party to an appellate court asking it to set aside or revise a decision of a subordinate court.*
 - (iv) *_____ compels courts to act within their jurisdiction when a tribunal acts without or in excess of jurisdiction or in violation of the rules or law.*
 - (v) *In compounding of offences, _____ make a joint application to the court that the parties have come to terms and the case may not be proceeded with. (1 mark each)*
- (b) *State the general guidelines of drafting notices under the Companies Act, 1956. (5 marks)*
- (c) *What is meant by a 'consent order' ? What remedies are available with the*

Securities and Exchange Board of India if the consent order is violated by a party ?
(6 marks)

Answer 7(a)

- (i) Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to a **specialist**.
- (ii) The present day system of pleadings in our country is based on the provisions of the **Civil Procedure Code, 1908** supplemented from time to time by rules in that behalf by the High Courts of the States.
- (iii) **An appeal** is an application by any party to an appellate court asking it to set aside or revise a decision of a subordinate court.
- (iv) **Writ of prohibition** compels courts to act within their jurisdiction when a tribunal acts without or in excess of jurisdiction or in violation of the rules or law.
- (v) In compounding of offences, **the accused and the complainant** make a joint application to the court that the parties have come to terms and the case may not be proceeded with.

Answer 7(b)

General Guidelines for Drafting of Notices

1. Where the form of notice is prescribed by statutory rules or forms, it has necessarily to adhere to what is prescribed.
2. One has to study, the nature of the notice, the circumstances which warrant their issue or service. The language of the notice depends upon whether it is addressed generally or it is meant to an individual or a class or a Government official.
3. Notice shall be dated, signed by authorised person, mention date, place time and nature of meeting [Section 172(1)].
4. One of the important contents of the notice is to state the business to be transacted at the meeting. Either it be separately enclosed or incorporated in the notice itself [Section 172(1)].
5. Another important feature of the notice is that, it should relate to the event either taken place or which is likely to take place, the time within which any particular compliance is required to be made either by person receiving the notice, or otherwise, the authority issuing the notice and the person(s) for whom it is meant.
6. Explanatory statement (Section 173) requirement shall be complied with as regards to special business to be transacted at the meeting. It should contain material facts, such as the nature of interest, extent of shareholdings etc. of directors/manager as required as per Section 173(2).
7. If the meeting is to accord approval to a document, the explanatory statement must also state the time and place where that document can be inspected [Section 173(3)].

8. Where the resolution is to be passed 'as a special resolution', the intention to propose the resolution as such must also be stated in the notice [Section 189(2)(a)].
9. In the case of companies having share capital, the notice should also state with reasonable prominence that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of himself and the proxy need not be a member [Section 176(2)]. This must appear in the body of the notice before the signature of the authorised person.
10. If the notice is published in a newspaper mainly to satisfy the requirement of giving a deemed notice to those members who have no registered address in India, and who have not supplied any address within India for the giving of notices to him, the statement of material facts need not be annexed to the notice, but it should be mentioned in the notice that the statement has been forwarded individually to the members [proviso to sub-section (2) of Section 172].
11. Notice should be clear, concise and to the point which any reader can make out quickly. Use of bold letters for key aspects is ideal.
12. One has to comply with Section 190 about special notice, proper serving of notice, duty to give notice in time, and provision of statutory length of notice etc.
13. Notice if required may warrant, the receiver to act upon, and it should mention the consequences in case of failure to act.

The point is that if any essential feature is left out, serious legal consequences may ensue, which one has to avert. Sending a second notice, in place of an incorrect or illegal one adds to the cost.

Answer 7(c)

Consent Order

Consent Order means an order settling administrative or civil proceedings between the regulator and a person (party) who may prima facie be found to have violated securities laws. Here, Administrative/Civil enforcement actions include issuing directions, suspension or cancellation of certificate of registration, imposition of monetary penalty, pursuing suits and appeals in Courts and Securities Appellate Tribunal (SAT). It may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved. A Consent Order may or may not include a determination that a violation has occurred.

Consent Order provides flexibility of wider array of enforcement and remedial actions which will achieve the twin goals of an appropriate sanction, remedy and deterrence without resorting to litigation, lengthy proceedings and consequent delays.

Remedies available with SEBI in case of violation: Violation of consent order by a party (i.e. failure to obey) would invite appropriate action, including for violating SEBI orders, besides revival of the pending action. In this context, any proceeding which had been kept in abeyance pending the consent process will begin from such stage at which it was suspended.

Question 8

- (a) *Explain the guidelines for professional dress of Company Secretaries. (6 marks)*
- (b) *Why is art of advocacy important ? What are the important factors which Company Secretaries should keep in mind while making written pleadings ? (10 marks)*

Answer 8(a)**Guidelines for Professional Dress of Company Secretaries**

In professional life it is important to look presentable because personal appearance counts. How you look can be a major factor in how you are perceived by others. Getting dressed for work is to project a professional and competent image. It has been observed that the professionals who do not take the time to maintain a professional appearance or those who have never learned how to dress properly for their chosen field of work, are not being taken seriously by co-workers and present the image of not being able to perform satisfactorily on the job.

To enhance the visibility and brand building of the profession and ensuring uniformity, the Council of the Institute of Company Secretaries of India has prescribed the following guidelines for professional dress for members while appearing before judicial/quasi-judicial bodies and tribunals:

- (a) The professional dress for male members will be Navy Blue suit and white shirt with a tie (preferably of the ICSI) or navy blue buttoned-up coat over a pant or a navy blue safari suit.
- (b) The professional dress for female members will be saree or any other dress of a sober colour with a Navy Blue jacket.
- (c) Members in employment may wear the dress/uniform as specified by the employer for all employees or if allowed the aforesaid professional dress.
- (d) Practising Company Secretaries appearing before any tribunal or quasi-judicial body should adhere to dress code if any prescribed for appearing before such tribunal or quasi-judicial body or if allowed the aforesaid professional dress.

It may be pointed out that any person whether a lawyer, pleader or authorized representative representing a litigant before any court of law or a tribunal or any other authority discharging the functions of a court/a quasi judicial authority, should comport himself in a manner befitting his status as an officer of the court, a privileged member of the community and a gentleman.

Answer 8(b)**Art of Advocacy**

Company Secretaries act as an authorized representative before various tribunals/quasi judicial bodies. It is necessary for them to learn art of advocacy or court craft for effective delivery of results to their clients when they act as an authorized representative before any tribunal or quasi judicial body.

For winning a case, art of advocacy is important which in essence means to convince the judge and others that my position in the case is the proper interpretation. Advocacy/ court craft is learned when we enter the practising side of the profession. The aim of advocacy is to make judge prefer your version of the truth.

Apart from the legal side of the profession, advocacy is often useful and sometimes vital, in client interviewing, in negotiation and in meetings, client seminars and public lectures. It is a valuable and lifelong skill worth mastering.

Technical and legal knowledge about the area in which Company Secretaries are acting is essential. Better their knowledge, the better their advocacy skills and the greater their impact. Good advocacy or negotiating skills will not compensate for lack of appropriate knowledge.

Points to be kept in mind while drafting written pleadings

Pleadings could be both written and oral. Mastering both the kinds of pleadings is a must for effective delivery of results to the clients. Some of the important factors which may be borne in mind while making written pleadings are as under:

- Quote relevant provisions in the petition and excerpts of observations made by the Courts relevant to the point;
- Draft prayers for interim relief in such a manner which though appears to be innocuous but satisfy your requirements;
- Do not suppress facts;
- Highlight material facts, legal provisions and Court decisions, if any;
- State important points at the outset together with reference to relevant provisions/ judgements.

If you are opponent

- File your reply to the petition at the earliest opportunity;
- Take all possible preliminary contentions together with reference to relevant law point and judgements;
- Submit your reply to each paragraph of the petition.

If you are for the petitioner

- File your rejoinder upon receiving the reply at the earliest opportunity;
 - Meet clearly with the specific points raised by the opponent in the reply affidavit.
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