

SUGGESTED ANSWERS

EXECUTIVE PROGRAMME

ECONOMIC AND COMMERCIAL LAWS (EP-ECL/2013)



**THE INSTITUTE OF
Company Secretaries of India**

IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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CONTENTS

<i>Sl.No.</i>		<i>Page</i>
	TEST PAPER 1/2013	
1.	Answer to Question No. 1	... 1
2.	Answer to Question No. 2	... 5
3.	Answer to Question No. 3	... 7
4.	Answer to Question No. 4	... 9
5.	Answer to Question No. 5	... 12
6.	Answer to Question No. 6	... 14
7.	Answer to Question No. 7	... 16
8.	Answer to Question No. 8	... 18
	TEST PAPER 2/2013	
9.	Answer to Question No. 1	... 20
10.	Answer to Question No. 2	... 23
11.	Answer to Question No. 3	... 24
12.	Answer to Question No. 4	... 27

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(ii)

13. Answer to Question No. 5	...	28
14. Answer to Question No. 6	...	30
15. Answer to Question No. 7	...	31
16. Answer to Question No. 8	...	32

TEST PAPER 3/2013

17. Answer to Question No. 1	...	34
18. Answer to Question No. 2	...	37
19. Answer to Question No. 3	...	39
20. Answer to Question No. 4	...	41
21. Answer to Question No. 5	...	42
22. Answer to Question No. 6	...	44
23. Answer to Question No. 7	...	45
24. Answer to Question No. 8	...	47

These answers have been written by competent persons and the Institute hopes that the **SUGGESTED ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model and not exhaustive answers and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

The Suggested Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

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EXECUTIVE PROGRAMME
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TEST PAPER 1/2013

Time allowed : 3 hours

Max. marks : 100

PART A (70 Marks)

*[Answer Question No.1 which is COMPULSORY and
ANY THREE of the rest from this part]*

Question No. 1

With reference to the relevant legal enactments, write short notes on the following :

- (i) Doctrine of Election*
- (ii) Importer-Exporter Code (IEC) number*
- (iii) Bid Rigging*
- (iv) Cartel*
- (v) Resale price maintenance* *(5 marks each)*

Answer to Question No. 1(i)

Doctrine of Election

Section 35 of the Transfer of Property Act deals with doctrine of election. Election may be defined as “the choosing between two rights where there is a clear intention that both were not intended to be enjoyed”. Election may be express or implied by conduct.

The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument. It is, therefore, a branch of a general rule that no one may approbate and reprobate [*Copper v. Copper* (1874) H.L. 53]. However, doctrine of election could not be applied to deprive a person of his statutory right to appear invoking extraordinary jurisdiction of the Supreme Court under Article 136 [*PR Deshpande v. MB Haribatti* (1995)(2) Scale 804 SC].

Illustration

A transfer to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election. You must elect either to take under the instrument,

in which case you will have to fulfil the condition and bear the burden imposed upon you or you must elect against the instrument, in which case neither the benefit nor the burden will come to you. The doctrine is based on the principle that "a donee shall not be allowed to approbate and reprobate and that if he approbates, he shall do all in his power to confirm the instrument which he approbates" (*Cavendish v. Decre 31 C.D. 466*).

Answer to Question No. 1(ii)

Importer-Exporter Code (IEC) number

The Foreign Trade Policy prohibits export or import by any person without an Import-Export Code (IEC) number unless specifically exempted. An IEC number is granted on application by competent authority in accordance with specified procedure.

An application for grant of IEC number is required to be made in the prescribed form alongwith specified documents, by the Registered/Head Office of the applicant to the Regional authority under whose jurisdiction, the Registered office in case of company and Head office in case of others, falls. In case of STP/ EHTP/ BTP units, the Regional Offices of the Director General Foreign Trade having jurisdiction over the district in which the Registered/ Head Office of the STP unit is located has been empowered to issue or amend the IECs. An IEC number allotted to an applicant remains valid for all its branches/divisions/ units/factories as indicated in the format of IEC.

Duplicate copy of IEC number

In case the IEC Number is lost or misplaced, the issuing authority may consider requests for grant of a duplicate copy of IEC number, if accompanied by an affidavit.

Surrender of IEC No

If an IEC holder does not wish to operate the allotted IEC number, the same may be surrendered by informing the issuing authority. On receipt of such intimation, the issuing authority immediately cancel the same and electronically transmit it to DGFT for onward transmission to the Customs and Regional Authorities.

IEC numbers exempted categories

The following categories of importers or exporters have been exempted from obtaining IEC number:

- (i) Importers covered by clause 3(1) [except sub-clauses (e) and (l)] and exporters covered by clause 3(2) [except sub-clauses (i) and (k)] of the Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993.
- (ii) Ministries/Departments of the Central or State Government.
- (iii) Persons importing or exporting goods for personal use not connected with trade or manufacture or agriculture.
- (iv) Persons importing/exporting goods from/to Nepal/Myanmar through Indo-Myanmar border areas provided the CIF value of a single consignment does not exceed Indian Rs. 25,000.

However, the exemption from obtaining Importer-Exporter Code (IEC) is not applicable for the export of Special Chemicals, Organisms, Materials, Equipments

and Technologies (SCOMET) except in the case of exports by Ministeries/ Departments of the Central/State Government.

- (vi) The Foreign Trade Policy allows the permanent IEC numbers to be used by the specified categories of importers/exporters.

Answer to Question No. 1(iii)

Bid Rigging

The explanation appended to the Section 3 of the Competition Act, 2002 defines the term 'bid rigging' as any agreement between enterprises or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

Bid rigging is anti-competitive

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

Some of the most commonly adopted ways in which collusive bidding or bid rigging may occur are:

- agreements to submit identical bids
- agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids)
- agreements not to bid against each other,
- agreements on common norms to calculate prices or terms of bids
- agreements to squeeze out outside bidders
- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis.

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending. Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

Answer to Question No. 1(iv)

Cartel

As per Section 2(c) of the Competition Act, 2002 Cartel includes an association of producers, sellers or distributors, traders or service providers who, by agreement amongst

themselves, limit control or attempt to control the production, distribution, sale or price of or, trade in goods or provision of services. The nature of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements. This is because such cartels do not adversely affect markets in India and are hence outside the purview of the Competition Act.

If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are:

- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion

Answer to Question No. 1(v)

Resale price maintenance

As per section 3(4) (e) of Competition Act, 2002 Resale Price Maintenance includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Section 3(4) of Competition Act, 2002 provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

- (a) tie-in agreement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance;

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

The agreements falling in Section 3(4) shall be judged by rule of reason and the onus lies on the prosecutor to prove its appreciable adverse effect on competition. The definition of all restrictive concepts covered under Section 3(4) is inclusive one. Any stipulation that the cement dealer should not sell below the stipulated price is a 'resale price maintenance' practice and is an anti competitive practice.

Question No. 2

- (a) *Discuss the condition for granting certificate of registration under the Foreign Contributions (Regulation) Act, 2010 ?*
- (b) *Briefly discuss the provisions of FEMA pertaining to Directorate of Enforcement.*
- (c) *With reference to the relevant provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder, advise Rakesh Kumar, an Indian citizen wants to hold qualification share in a company incorporated in USA. (5 marks each)*

Answer to Question No. 2(a)

Section 12(1) of Foreign Contribution (Regulation) Act, 2010 provides that an application by a person for grant of certificate or giving prior permission, shall be made to the Central Government in prescribed form and manner and alongwith prescribed fees.

Sub-section (4) of Section 12 provides following conditions for granting certificate of registration:

- (a) the person making an application for registration or grant of prior permission under sub-section (1),—
 - is not fictitious or benami;
 - has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
 - has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
 - has not been found guilty of diversion or mis-utilisation of its funds;
 - is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
 - is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;
 - has not contravened any of the provisions of this Act;
 - has not been prohibited from accepting foreign contribution;
- (b) the person making an application for registration under sub-section (1) has undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilised;

- (c) the person making an application for giving prior permission under sub-section (1) has prepared a reasonable project for the benefit of the society for which the foreign contribution is proposed to be utilised;
- (d) in case the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence pending against him;
- (e) in case the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him;
- (f) the acceptance of foreign contribution by the person referred to in sub-section (1) is not likely to affect prejudicially—
 - the sovereignty and integrity of India; or
 - the security, strategic, scientific or economic interest of the State; or
 - the public interest; or
 - freedom or fairness of election to any Legislature; or
 - friendly relation with any foreign State; or
 - harmony between religious, racial, social, linguistic, regional groups, castes or communities;
- (g) the acceptance of foreign contribution referred to in sub-section (1),—
 - shall not lead to incitement of an offence;
 - shall not endanger the life or physical safety of any person.

Answer to Question No. 2(b)

Section 36 of the Foreign Exchange Management Act, 1999 empowers the Central Government to establish a Directorate of Enforcement with a Director and other officers or class of Officers, for the purposes of the enforcement of the Act. The Central Government has also been empowered to authorise Director, Additional Director, Special Director or Deputy Director to appoint officers of enforcement below the rank of Assistant Director of Enforcement to exercise the powers and discharge the duties conferred or imposed on him under the Act.

The Central Government, may by order and with prescribed conditions and limitations, authorise any officers of customs or Central Excise or any police officer or officers of Central or State Government to exercise such powers and discharge such duties of the Director of Enforcement or any other officer of the Enforcement as stated in the order.

Section 37 of the Act empowers the Director of Enforcement and other officers not below the rank of an Assistant Director to take up for investigation the contravention referred to in Section 13 of the Act. In addition, the Central Government may also authorise any officer or class of officers in the Central Government, State Government, Reserve Bank of India, not below the rank of Under Secretary to Government of India, to investigate any contravention under Section 13 of the Act. The officers so appointed shall exercise the like powers which are conferred on income tax authorities under the Income Tax Act, 1961, subject to such conditions and limitations as laid down under that Act.

Answer to Question No. 2(c)

In terms of Regulation 24(1)(a) of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004 vide RBI Notification RBI/2011-12/474 A. P. (DIR Series) Circular No.97 dated March 28, 2012, A person resident in India being an individual may acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the post of a Director in the company provided that remittance shall be allowed to the extent prescribed as per the law of the host country where the company is located.

The limit of remittance for acquiring such qualification shares shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

In view of the above legal provision, Rakesh Kumar, an Indian citizen wants to hold qualification share in a company incorporated in USA.

Question No. 3

Distinguish between:

- (i) *'Intellectual property' and 'Industrial property'.*
- (ii) *'Contract of Service' and 'Contract for Service'.*
- (iii) *'Invention' and 'Inventive step' under the Patents Act, 1970. (5 marks each)*

Answer to Question No. 3(i)**'Intellectual property' and 'Industrial property'**

As the term intellectual property relates to the creations of human mind and human intellect, this property is called Intellectual property. In other words, intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property right does not vest in those copies but in the information reflected in those copies. Similar to property rights in movable and immovable property, intellectual property is also characterised by certain rights as well as limitations such as right to use and licence and also limited duration in the case of copy right and patents.

Usually intellectual property is divided into two branches, namely, industrial property and copyright. The Convention establishing World Intellectual Property Organisation, 1967 provides that the intellectual property shall include rights relating to:

- (i) literary, artistic and scientific works;
- (ii) performances of performing artists, phonograms and broadcasts;
- (iii) inventions in the field of human endeavour;
- (iv) scientific discoveries;
- (v) industrial designs;
- (vi) trademarks, service marks, commercial names and designations;

(vii) protection against unfair competition; and

all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Here, it may be clarified that rights relating to (i) and (ii) above constitute copyright, while (iii), (v) and (vi) constitute industrial property. However, scientific discoveries, as mentioned under (iv) above, belongs to neither of two branches of intellectual property, as scientific discoveries and inventions are not the same.

The expression 'Industrial Property' is sometimes misunderstood as relating to movable or immovable property used for industrial production. However, industrial property is a kind of intellectual property and relates to creation of human mind, e.g., inventions and industrial designs. Simply stated, inventions are new solutions to technological problems, and industrial designs are aesthetic creations determining the appearance of industrial products. In addition, industrial property includes trademarks, service marks, commercial names and designations, including indications of source and appellations of origin, and the protection against unfair competition.

The term 'Industrial Property' may not appear entirely logical in the sense that the inventions are only concerned with the industry. In other words, the inventions are exploited in industrial plants while the trademarks, service marks, trade names and service names are concerned with both the commerce as well as industry. Notwithstanding the lack of logic, this term has acquired a meaning which clearly covers inventions as well as other marks. The Paris Convention also recognised industrial property to cover patent, trademark, service mark, trade names, utility models, industrial designs, indication of source and appellations of origin and the repression of unfair competition.

Hence, industrial property right is a collective name for rights referring to the commercial or industrial activities of a person. These activities may include the activities of industrial or commercial interests. They may be called inventions, creations, new products, processes of manufacture, new designs or model and a distinctive mark for goods etc.

Answer to Question No. 3(ii)

'Contract of Service' and 'Contract for Service'

The Supreme Court in the case of *Indian Merchants Association v. V P Santha*, (CA No. 688 of 1993 decided on 13th November 1995) observed that a contract for service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion.

A contract of service on the other hand implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The Parliamentary draftsman was well aware of this well-accepted distinction between 'contract of service' and 'contract for services' and had deliberately chosen the expression 'contract of service' instead of the expression 'contract for service' in the exclusionary part of the definition of 'service', this being the reason being that an employer could not be regarded as a consumer in respect of the services

rendered by his employee in pursuance of contract of employment. By affixing the adjective 'personal' to the word 'service' the nature of the contracts which were excluded were not altered. The adjective only emphasised that what was sought to be excluded was personal service only.

The expression contract of personal service in the exclusionary part of Section 2(1)(o) of the Consumer Protection Act, 1986 must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service free from the ambit of the expression service.

Answer to Question No. 3(iii)

'Invention' and 'Inventive step' under the Patents Act, 1970.

As per Section 2(1)(j) of the Patents Act, 1970 invention means a new product or process involving an inventive step and capable of industrial application. Capable of industrial application in relation to an invention, means that the invention is capable of being made or used in an industry.

Under Section 2(1)(ja) of the Patents Act, 1970 inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

Any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art treated as new invention under Patent Act.

Question No. 4

(a) *What are the circumstances under which a registered trade mark is deemed to be infringed under the Trade Marks Act, 1999.* (8 marks)

(b) *Write a note on global initiatives in the prevention of money laundering.*

(7 marks)

Answer to Question No. 4(a)

Section 29 the Trade Marks Act, 1999 dealing with infringement of trade marks, explicitly enumerates the grounds which constitute infringement of a trademark. This section lays down that when a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement. This section clearly states that a registered trade mark is infringed, if

- (a) the mark is identical and is used in respect of similar goods or services; or
- (b) the mark is similar to the registered trade mark and there is an identity or similarity of the goods or services covered by the trade mark; or
- (c) the trade mark is identical and is used in relation to identical goods or services;

and that such use is likely to cause confusion on the part of the public or is likely to be

taken to have an association with the registered trade mark. Additionally in respect of cases falling in category (c) above, there will be a legal presumption of likelihood of confusion on the part of the public.

A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark.

A person has also been prohibited from adopting someone else's trade mark, as his trade name or name of his business concern or part of the name of his business concern dealing with goods or services in respect of which trade mark is registered. A person shall be deemed to have used a registered trade mark in circumstances which include affixing the mark to goods or packaging, offering or exposing the goods for sale or supply of services, importing or exporting the goods, the use of the mark as trade name or trade mark on business paper or in advertising. A person shall be deemed to have infringed a trade mark if he applies such registered trade mark knowing that application of such mark is not authorised by the proprietor or licensee.

Advertising of a trade mark to take unfair advantage of, or against the reputation of the trade mark also constitutes an infringement under Section 29(8) of the Act. Where the distinctive element of a registered trade mark consists of words, the spoken use of such words as well as visual representation for promoting the sale of goods or promotion of service would constitute infringement under Sub-section (9) of the Act.

Answer to Question No. 4(b)

Since money laundering is an international phenomenon, transnational co-operation is of critical importance in the fight against this menace. A number of initiatives have been taken to deal with the problem at international level. In this context, the United Nations or the Bank for International Settlements, took some initiatives in 1980s to address the problem of money laundering. However, with the creation of the Financial Action Task Force (FATF) in 1989, regional groupings, such as the European Union, Council of Europe, and organisation of American States also established anti-money laundering standards for their member countries.

The major international agreements addressing money laundering include the United Nations Convention against Illicit Trafficking in Drugs and Psychotropic Substances (the Vienna Convention) and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. The role of financial institutions in preventing and detecting money laundering has also been the subject of pronouncements by the Basle Committee on Banking Regulation Supervisory Practices, the European Union and the International Organization of Securities Commissions.

Vienna Convention

The first major initiative in the prevention of money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in December 1988 (popularly known as Vienna Convention). This convention laid the groundwork for efforts to combat money laundering by obliging the member states to

criminalize the laundering of money from drug trafficking. It promotes international cooperation in investigations and makes extradition between member states applicable to money laundering. The convention also establishes the principle that domestic bank secrecy provisions should not interfere with international criminal investigations.

Council of Europe Convention

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, 1990 establishes a common policy on money laundering. It sets out a common definition of money laundering and common measures for dealing with it. The Convention lays down the principles for international cooperation among the member states, which may also include states outside the Council of Europe. This convention came into force in September 1993. One of the purposes of the convention is to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of the proceeds of all types of criminality, particularly serious crimes, such as, drug offences, arms dealing, terrorist offences etc. and other offences which generate large profits.

European Union Money Laundering Directives

In response to the new opportunities for money laundering opened up by the liberalization of capital movements and cross-border financial services in the European Union, the Council of the European Communities in June, 1991 issued a directive on the Prevention of Use of the Financial System for the Purpose of Money Laundering. The directive requires member states to outlaw money laundering. The member states have been put under obligation to require financial institutions to establish and maintain internal systems to prevent laundering, to obtain the identification of customers with whom they enter into transaction of more than a particular amount and to keep proper records for at least five years. The financial institutions are also required to report suspicious transactions and ensure that such reporting does not result in liability for the institution or its employees.

Basle Committee's Statement of Principles

In December 1988 the Basle Committee on Banking Regulation Supervisory Practices issued a statement of principles to be complied by the international banks of member states. These principles include identifying customers, avoiding suspicious transactions, and cooperating with law enforcement agencies. The statement aims at encouraging the banking sector to adopt common position in order to ensure that banks are not used to hide or launder funds acquired through criminal activities.

The International Organization of Securities Commissions (IOSCO)

The International Organization of Securities Commissions (IOSCO) adopted, in October 1992, a resolution encouraging its members to take necessary steps to combat money laundering in securities and futures markets.

The Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational

measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a “policy-making body” which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

The FATF has developed a series of Recommendations that are recognised as the international standard for combating of money laundering and the financing of terrorism and proliferation of weapons of mass destruction. They form the basis for a co-ordinated response to these threats to the integrity of the financial system and help ensure a level playing field. First issued in 1990, the FATF Recommendations were revised in 1996, 2001, 2003 and in 2012 to ensure that they remain up to date and relevant, and they are intended to be of universal application.

The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

Question No. 5

- (a) *What are the factors that may be considered by Competition Commission of India for determining the relevant geographic market ?* (8 marks)
- (b) *Enumerate Doctrine of Lis Pendence.* (7 marks)

Answer to Question No. 5(a)

Section 2(s) of the Competition Act, 2002 Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas.

For determining the “Relevant Geographic Market”, the Commission shall have due regard to all or any of the following factors, namely;?

- regulatory trade barriers;
- local specification requirements;
- national procurement policies;
- adequate distribution facilities;
- transport costs;
- language;
- consumer preferences;
- need for secure, regular supplies or rapid after-sales service.

Answer to Question No. 5(b)

Lis means dispute, *Lis pendens* means a pending suit, action, petition or the like.

Section 52 of the Transfer of Property Act incorporates the doctrine of *Lis pendens*. It states that during the pendency of a suit in a Court of Law, property which is subject to litigation cannot be transferred. When we say that property cannot be transferred what we mean in this context is that property may be transferred but this transfer is subject to the rights that are created by a Court's decree. For example, A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

Section 52 lays down the Indian rule of *Lis pendens* being the legislative expression of the Maxim - "*ut lite pendente nihil innovetur*" 'During litigation nothing new should be introduced'.

Essential to constitute a Lis pendens

In order to constitute a *Lis pendens*, the following elements must be present:

1. There must be a suit or proceeding in a Court of competent jurisdiction.
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immoveable property is directly and specifically in question.
4. There must be transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must effect the rights of the other party that may ultimately accrue under the terms of the decree or order.

The rule is based on the *doctrine of expediency* i.e., the necessity for final adjudication. A plea of *lis pendens* will be allowed to be raised even though the point is not taken in the pleadings or raised as an issue.

When an application to sue in forma pauperis is admitted, the suit is pending from the time of presentation of the application to the Court but not if it is rejected.

A suit in foreign Court cannot operate as *lis pendens*. The doctrine of *lis pendens* does not apply to moveables. It is the essence of the rule that a right to immoveable property is directly and specifically in question in the suit. The doctrine is not applicable in favour of a third-party.

Effect

If the parties to the litigation, are completely prevented from transferring the property in litigation, it would cause unnecessary delay and hardship, as they would have to wait till the final disposal of the case. So, Section 53 creates a limitation over the transfer by making it subject to the result of the litigation. The effect of this doctrine is not to invalidate or avoid the transfer, or to prevent the vesting of title in the transfer, but to make it subject to the decision of the case, and the rule would operate even if the transferee pendente lite had no notice of the pending suit or proceeding at the time of the transfer.

PART B (30 marks)

(Answer ANY TWO questions from this part.)

Question No. 6

(a) *Write a note on regulatory framework for environmental protection in India.*
(8 marks)

(b) *'Seizure' and 'confiscation' under the Essential Commodities Act, 1955.*
(7 marks)

Answer to Question No. 6(a)

In India, as in other developing countries, the environmental problems are not confined to side effects of industrialisation but reflect the inadequacy of resources to provide infrastructural facilities to prevent industrial pollution. Other peculiar problems like population, illiteracy and unemployment obviously also pose questions regarding provisions of food, water, shelter and sanitation.

Though the Indian Penal Code, 1860 contains penal provisions for corrupting or fouling the water or spring or reservoir so as to make it less fit for the purpose for which it is ordinarily used as well as for vitiating the atmosphere so as to make it noxious to the health of any person etc. A number of other Central and State laws covering boilers, dangerous drugs, radiation, forests, etc. were enacted during the middle of the 20th century, however the legislative and administrative measures directed specifically at protection of the environment were introduced in the 1970s and 1980s.

The five-year plans and the Industrial Policies devoted attention to the orderly development of industries, conservation of forests, resources, urban and rural water supply and sanitation, health, and environment with considerable stress on development of industries in backward areas to ensure balanced regional development though no specific attention was paid to the control of pollution problems. However, the Industrial Policy Statement of 1980 laid emphasis on pollution control, and preservation of ecological balance. The locational policy adopted by the Government also had a beneficial impact on balancing regional development and reducing environment pollution in highly industrialised areas.

In 1972, the Department of Science and Technology set up a National Committee on Environmental Planning and Coordination to identify and investigate problems of preserving or improving the human environment and also to propose solutions for environmental problems. In 1977, by an amendment to the Constitution, Article 48A was introduced imposing a duty on the State to protect and improve the environment and safeguard the forests and wildlife of the country. Article 51A also, provides for the protection and improvement of the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

The Water (Prevention and Control of Pollution) Act was enacted in 1974 and the Air (Prevention and Control of Pollution) Act was passed by the Union of India in 1981, essentially to give effect to the decisions taken at the International Conference on Human Environment at Stockholm in 1972 declaring mans fundamental right to live in a pollution-free atmosphere and his responsibility to protect and improve the environment. In 1980,

a Committee was set up for reviewing and recommending legislative measures and administrative machinery for ensuring environmental protection and on its recommendations, the Department of Environment was set up which became a part of the Ministry of Environment and Forests in January, 1985. This Ministry was set up mainly to act as the focal point for planning, promotion and co-ordination of environment and forestry programmes. The issues of pollution control and environment protection assumed enormous importance after the 'Bhopal Gas Tragedy' in December, 1984 in which several people lost their lives or became permanently handicapped following the MIC gas leak in the Union Carbide Plant at Bhopal.

In 1986, the Government enacted the Environment Protection Act to provide for the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property. In 1991, Parliament enacted the Public Liability Insurance Act, for providing immediate relief to the persons affected by accidents occurring while handling any hazardous substance and for other incidental and connected matters. Central Government established National Green Tribunal under the National Green Tribunal Act, 2010 for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

Answer to Question No. 6(b)

The Essential Commodities Act envisages two independent proceedings against a person charged with contravention of the provisions of the Act. Under Section 6A, the Collector can confiscate the seized commodity and under Section 7, the contravention would be punishable. Confiscation of essential commodities is a sharp weapon which the Act has provided to the Central Government under Section 6A of the Act.

Section 6A provides that where any essential commodity is seized in pursuance of an order made under Section 3, a report of such seizure shall be made, without any unreasonable delay, to the collector of the district or the Presidency town in which such essential commodity is seized. The Collector at his discretion, may direct for the production of the seized commodity before him and if he is satisfied that there has been contravention of the order he may pass order for confiscation of (a) the essential commodity so seized, (b) any package, covering or receptacle in which such essential commodity is found, and (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity.

The Act uses the expressions 'confiscation' and 'seizure' in Section 6A and under this section a commodity which has been seized in pursuance of an order under Section 3 can be confiscated under the circumstances mentioned in Section 6A. Therefore, it is essential to know in brief the distinction between seizure and confiscation.

The expression 'seize' means to take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing. The person from whom anything is seized loses, from the moment of seizure, the right or power to control or regulate the use of that thing.

The dictionary meaning of the word 'seize' means to lay hold of suddenly or forcible,

to take hold of, to reach and grasp, to clutch'. It also means 'to take possession of or appropriate in order to subject to the force or operation of a warrant, order of Court or other legal processes. A reference to some provisions of the Codes of Criminal Procedure shows that the term seizure had been used therein in connection with the taking of actual physical possession of moveable property.

'Confiscation' according to Wharton's Law Lexicon, is condemnation and adjudication of property to the public treasury as of goods seized under the Customs Act. Confiscation, according to Strouds judicial Dictionary, must be an act done in some way on the part of the Government of the country where it takes place and in some way beneficial to that Government, though the proceeds may not strictly speaking be brought into its treasury. In *State of Kerala v. Mathai* (1961 K.L.T. 169) it was pointed out that confiscation is not to be considered part of the sentence for an offence but is only a mode by which Courts can dispose of property which comes before it in criminal trials.

That being the general distinction between confiscation and seizure, in the context of the Essential Commodities Act, it could be seen that an essential commodity which has been seized, could be confiscated. Therefore, confiscation is an action posterior to the seizure of the essential commodity. A commodity that has not been seized cannot be confiscated. Seizure itself does not imply confiscation. The seizure should have been made by virtue of an order passed under Section 3 of the Act. Clause (j) of Section 3 empowers the Government to make an order for seizure of any essential commodity if an order made by the Central Government controlling production, supply, distribution etc. of essential commodities has been or is about to be contravened. Therefore, any contravention or intended contravention of an order passed by the Government under the Act may lead to seizure, and under the circumstances mentioned in Section 6A such seized commodity could be confiscated.

Question No. 7

(a) Write short note on:

(i) Environment Clearance

(ii) Environmental Audit.

(4 marks each)

(b) What is the object of the law of Registration ?

(7 marks)

Answer to Question No. 7(a)(i)

Rule 5 of the Environment Protection Rules, 1986, read with Section 3(1) and Section 3(2) of the Environment Protection Act, 1986 empowers the Central Government to prohibit or restrict the location of industries and carrying on of processes and operations in different areas, after taking into consideration factors, such as standards for quality of environment in an area, the maximum allowable limits of concentration of environmental pollutants (including noise) for an area, the likely emission or discharge from the proposed industry, process or operation, the topographic and climatic features of an area, the net adverse environmental impact likely to be caused by the proposed industry process, or operation, the proximity of the proposed project to protected areas and human settlements, etc.

In exercise of the powers under Sections 3(1) and 3(2)(v) of the Act and Rule 5, the

Ministry of Environment and Forests has issued notifications restricting location of any industry, mining operations, cutting of trees, grazing by cattle in certain areas, construction of any clusters of dwelling units, farm houses, roads etc. and electrification in the Aravalli range . Any person wishing to undertake any of these operations in the said area is required to submit an application in the prescribed form along with an Environment Impact Assessment and an Environmental Management Plan. It has also been notified that the setting up of any new industrial project or the expansion or modernisation of any existing industry shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central or any State Government, as the case may be. Clearance would be so accorded only on the basis of an Environmental Impact Assessment of the project and the necessary Environmental Management Plan for the prevention, elimination or mitigation of the adverse impacts, right from the inception stage of the project.

Answer to Question No. 7(a)(ii)

Environmental Audit

Rule 14 of the Environment Protection Rules, 1986 provides for the submission of environmental audit report. Accordingly, every person carrying on an industry, operation or process requiring consent under Section 25 of the Water (Prevention and Control of Pollution) Act or Section 23 of the Air (Prevention and Control of Pollution) Act or both or authorisation under the Hazardous Wastes (Management and Handling) Rules, 1989 is required to submit an environmental audit report in Form V for the financial year ending on 31st March every year on or before the 15th of May, to the concerned State Pollution Control Board.

Answer to Question No. 7(b)

The Registration Act, 1908 is the law relating to registration of documents. The object and purpose of the Act among other things is to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud.

Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document. Document whose registration is compulsory are instruments of gift of immovable property; other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property; leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent and non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

Question No. 8

- (a) *Define the micro, small and medium enterprise under the Micro, Small and Medium Enterprises Development Act. (8 marks)*

- (b) *What are the essential commodities under the Essential Commodities Act, 1955?*
(7 marks)

Answer to Question No. 8(a)

Medium Enterprise

The term Medium Enterprise has been defined under Section 2(g) of the Act as to mean an enterprise classified as such under sub-clause (iii) of clause (a) or sub-clause (iii) of clause (b) of Sub-section (1) of Section 7. Section 7 deals with the classification of enterprises.

Micro Enterprise

Micro Enterprise under Section 2(h) has been defined to mean an enterprise classified as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of Sub-section (1) of Section 7.

Small Enterprise

Small Enterprise under Section 2(m) of the Act means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of Sub-section (1) of Section 7.

Section 7(1) empowers the Central Government to classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

- (a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the IDRA as—
- (i) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;
 - (ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or
 - (iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;
- (b) in the case of the enterprises engaged in providing or rendering of services, as—
- (i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;
 - (ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or
 - (iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

It has been clarified that the cost of pollution control, research and development, industrial safety devices and such other items as may be specified shall not be included in calculating the investment in plant and machinery.

MANUFACTURING SECTOR

ENTERPRISES	INVESTMENT IN PLANT & MACHINERY
MICRO ENTERPRISES	DOES NOT EXCEED TWENTY FIVE LAKH RUPEES
SMALL ENTERPRISES	MORE THAN TWENTY FIVE LAKH RUPEES BUT DOES NOT EXCEED FIVE CRORE RUPEES
MEDIUM ENTERPRISES	MORE THAN FIVE CRORE RUPEES BUT DOES NOT EXCEED TEN CRORE RUPEES

SERVICE SECTOR

ENTERPRISES	INVESTMENT IN EQUIPMENTS
MICRO ENTERPRISES	DOES NOT EXCEED TEN LAKH RUPEES
SMALL ENTERPRISES	MORE THAN TEN LAKH RUPEES BUT DOES NOT EXCEED TWO CRORE RUPEES
MEDIUM ENTERPRISES	MORE THAN TWO CRORE RUPEES BUT DOES NOT EXCEED FIVE CORE RUPEES

Answer to Question No. 8(b)

Essential commodities declared under the Essential Commodities Act, 1955 are as follows :

- (1) drugs: The explanation clarifies that for the purposes of this Schedule, "drugs" has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940;
 - (2) fertilizer, whether inorganic, organic or mixed;
 - (3) foodstuffs, including edible oilseeds and oils;
 - (4) hank yarn made wholly from cotton;
 - (5) petroleum and petroleum products;
 - (6) raw jute and jute textiles;
 - (7) (i) seeds of food-crops and seeds of fruits and vegetables;
(ii) seeds of cattle fodder; and
(iii) jute seeds.
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TEST PAPER 2/2013

Time allowed : 3 hours

Max. marks : 100

PART A (70 marks)

[Answer Question No.1 which is COMPULSORY and ANY THREE of the rest from this part]

Question No. 1

With reference to the relevant legal enactments, write short notes on the following:

- (i) Market Access Initiative under Foreign Trade Policy*
- (ii) Special Economic Zones*
- (iii) Competition advocacy*
- (iv) Term of patents*

Answer to Question No. 1(i)

Market Access Initiative under Foreign Trade Policy

Market Access Initiative (MAI) means Market Access Initiative Scheme notified by Department of Commerce.

MAI scheme Under Foreign Trade Policy, financial assistance is provided for export promotion activities on focus country, focus product basis. Financial assistance is available for Export Promotion Councils (EPCs), Industry and Trade Associations (ITAs), Agencies of State Government, Indian Commercial Missions (ICMs) abroad and other national level institutions/eligible entities as may be notified.

A whole range of activities can be funded under MAI scheme. These include, amongst others,

- Market studies/surveys,
- Setting up of showroom / warehouse,
- Participation in international trade fairs,
- Displays in International departmental stores,
- Publicity campaigns,
- Brand promotion,

- Reimbursement of registration charges for pharmaceuticals and expenses for carrying out clinical trials etc., in fulfillment of statutory requirements in the buyer country,
- Testing charges for engineering products abroad,
- Assistance for contesting Anti Dumping litigations etc.

Each of these export promotion activities can receive financial assistance from Government ranging from 25% to 100% of total cost depending upon activity and implementing agency.

Answer to Question No. 1(ii)

Special Economic Zones

Special Economic Zones (SEZ) are growth engines that can boost manufacturing, augment exports and generate employment. The SEZs require special fiscal and regulatory regime in order to impart a hassle free operational regime encompassing the state of the art infrastructure and support services.

Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs. Goods and services going into the SEZ area from Domestic Tariff Area (DTA) treated as exports and goods coming from the SEZ area into DTA treated as if these are being imported. SEZ units may be set up for manufacture of goods and rendering of services.

The Government of India had announced a Special Economic Zone scheme in April, 2000 with a view to provide an internationally competitive environment for exports. To instil confidence in investors and signal the Government's commitment to a stable SEZ policy regime and with a view to impart stability to the SEZ regime thereby generating greater economic activity and employment through the establishment of SEZs, the Special Economic Zones Act, 2005, was passed by Parliament in 2005.

SEZ Act, provides for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.

As per section 2 (za) of the Special Economic Zones Act, 2005, Special Economic Zone means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone.

Answer to Question No. 1(iii)

Competition Advocacy

Competition Advocacy under Competition law aims at creating, expanding and strengthening awareness of competition in the market. Section 49 of the Competition Act, 2002 mandates the Competition Commission of India (CCI) to undertake advocacy for promoting competition.

Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. In

this context, Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within sixty days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central Government/State Government in formulating such a policy. The Commission is also empowered to take suitable measures for the

- promotion of competition advocacy;
- creating awareness about the competition; and
- imparting training about competition issues.

The creating awareness about benefits of competition and imparting training in competition issues is expected to generate conducive environment to promote and foster competition, which is sine-qua non for accelerating economic growth.

The CCI has taken up competition advocacy efforts simultaneously with the Central Government and State governments, besides undertaking advocacy with the other stakeholders such as the business chambers, consumer activists/associations, academic institutions and statutory bodies of professionals such as lawyers, chartered accountants, cost accountants and company secretaries.

Answer to Question No. 1(iv)

Term of patents

Section 53 of Patents Act, 1970 provides that the term of every patent granted after the commencement of the Patents (Amendment) Act, 2002 and the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement, shall be twenty years from the date of filing of application for the patent.

Explanation to Section 53(1) clarifies that the term of patent in case of international applications filed under the Paris Convention Treaty (PCT) designating India, shall be twenty years from the international filing date accorded under the Patent Cooperation Treaty.

A patent shall cease to have effect on the expiration of the period prescribed for the payment of any renewal fee, if that fee is not paid within the prescribed period or within such extended period as may be prescribed. Further on cessation of the patent right due to non-payment of renewal fee or on expiry of the term of patent, the subject matter covered by the said patent shall not be entitled to any protection.

Answer to Question No. 1(v)

Foreign Securities

The term Foreign Security has been defined under section 2(o) of the FEMA, 1999 to mean any security, in the form of shares, stocks, bonds, debentures or any other

instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency but where redemption or any form of return such as interest or dividend is payable in Indian currency.

Transfer or issue of a foreign security is a capital account transaction within the meaning of Section 6(3)(a) of the Foreign Exchange Management Act. The Reserve Bank of India has made Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2000 for regulation, acquisition and transfer of a foreign security by a person resident in India i.e. investment by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

Question No. 2

- (a) *'The Competition Act does not prohibit the dominance but the abuse of dominant position' Comment. (8 marks)*
- (b) *Discuss briefly the basic rights of consumer under Consumer Protection Act, 1986. (7 marks)*

Answer to Question No. 2(a)

The Competition Act, 2002 defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to:

- operate independently of the competitive forces prevailing in the relevant market;
- or
- affect its competitors or consumers or the relevant market in its favour.

Dominance is not considered bad *per se* but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner. The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Such practices shall constitute abuse only when adopted by an enterprise enjoying dominant position in the relevant market in India.

Section 4 (2) of the Act specifies the following practices by a dominant enterprise or group of enterprises as abuses:

- directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;
- directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) of goods or service;
- limiting or restricting production of goods or provision of services or market;
- limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
- denying market access in any manner;
- making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

- using its dominant position in one relevant market to enter into, or protect, other relevant market.

Answer to Question No. 2(b)

The basic rights of consumers under Consumer Protection Act that are sought to be promoted and protected are:

- the right to be protected against marketing of goods and services which are hazardous to life and property;
- the right to be informed about the quality, quantity, potency, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;
- the right to be assured, wherever possible, access to variety of goods and services at competitive prices;
- the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
- the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and right to consumer education.

Above rights are based on the basic rights of consumers as defined by the International Organisation of Consumers (IOCU) viz., the Rights to Safety, to Information, of Choice, to be Heard, to Redressal, to Consumer Education, to Healthy Environment and to Basic Needs.

Question No. 3

- (a) *Discuss the provisions relating to establishment of branch office in India by a person resident outside India.* (7 marks)
- (b) *List out the sectors/activities where FDI is allowed.* (8 marks)

Answer to Question No. 3(a)

Establishment of Branch in India is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Foreign Exchange Management (Establishment in India of branch or office or other place of business) Regulations, 2000 as amended from time to time.

A body corporate incorporated outside India (including a firm or other association of individuals), desirous of opening a Branch Office (BO) in India have to obtain permission from the Reserve Bank under provisions of FEMA 1999. The applications from such entities considered by Reserve Bank under two routes:

- *Reserve Bank Route* : where principal business of the foreign entity falls under sectors where 100 per cent Foreign Direct Investment (FDI) is permissible under the automatic route.
- *Government Route* : Where principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category and those from Non-Government Organisations / Non - Profit Organisations / Government Bodies /

Departments are considered by the Reserve Bank in consultation with the Ministry of Finance, Government of India.

The following additional criteria are also considered by the Reserve Bank while sanctioning Liaison/Branch Offices of foreign entities:

- *Track Record for Branch Office* : a profit making track record during the immediately preceding five financial years in the home country.
- *Net Worth* [total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name] for Branch Office: not less than USD 100,000 or its equivalent.

Permissible Activities for Branch Office

Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the Reserve Bank. Such Branch Offices are permitted to represent the parent / group companies and undertake the following activities in India:

- Export / Import of goods.
- Rendering professional or consultancy services.
- Carrying out research work, in areas in which the parent company is engaged.
- Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
- Representing the parent company in India and acting as buying / selling agent in India.
- Rendering services in information technology and development of software in India.
- Rendering technical support to the products supplied by parent/group companies.
- Foreign airline / shipping company.

Normally, the Branch Office should be engaged in the activity in which the parent company is engaged.

Branch Office in Special Economic Zones (SEZs)

Reserve Bank has given general permission to foreign companies for establishing branch/unit in Special Economic Zones (SEZs) to undertake manufacturing and service activities. The general permission is subject to the following conditions:

- such units are functioning in those sectors where 100 per cent FDI is permitted;
- such units comply with part XI of the Companies Act, 1956 (Section 592 to 602);
- such units function on a stand-alone basis.

In the event of winding-up of business and for remittance of winding-up proceeds,

the branch shall approach an AD Category – I bank with the documents as mentioned under "Closure of Liaison / Branch Office" except the copy of the letter granting approval by the Reserve Bank.

Answer to Question No. 3(b)

FDI is allowed in the following sectors/activities:

- Animal Husbandry
- Floriculture
- Pisciculture
- Aquaculture
- Development of seeds
- Vegetable and Mushrooms
- Tea plantation
- Mining
- Manufacture of items reserved for production in Micro and Small Enterprises (MSEs)
- Defence
- Electric Generation, Transmission, Distribution and Trading
- Civil Aviation Sector
- Asset Reconstruction Companies
- Banking – Private Sector
- Banking – Public Sector
- Terrestrial Broadcasting
- Cable network
- DTH
- HITS
- Setting up hardware facilities such as up-linking, HUB
- Commodity Exchange
- Development of Townships, Housing, Built-up infrastructure and Construction-development projects
- Credit Information Companies (CIC)
- Industrial Parks both setting up and in established Industrial Parks
- Insurance
- Infrastructure Company in the Securities Market
- Non-Banking Finance Companies (NBFC)
- Petroleum Refining by PSU
- Print Media
- Security Agencies in Private Sector

- Satellites – Establishment and operation
- Telecommunication
- Cash and Carry Trading Wholesale Trading/Wholesale Trading
- E-Commerce Activities
- Trading of items sourced from MSE Sector

Question No. 4

- (a) *Distinguishes between Mortgage and Charges.* (8 marks)
- (b) *Discuss the procedure to be followed for arbitral proceedings by an arbitral tribunal under the Arbitration and Conciliation Act, 1996.* (7 marks)

Answer to Question No. 4(a)

Distinction between a charge and mortgage are as under :

- A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.
- A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties.
- A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
- In certain types of mortgage (viz., mortgage by conditional sale and anomalous mortgage) the mortgagor can foreclose the mortgaged property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.
- From the very nature of it, a charge as a general rule, cannot be enforced against a transferee for consideration without notice. But in a mortgage, the transferee of mortgaged property from the mortgagor, can only acquire the remaining interest of the mortgagor, and is therefore, only bound by the mortgage.
- In a charge created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the charge-holder is against the property only. In a mortgage, there can be security as well as personal liability. In fact, the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage.

Answer to Question No. 4(b)

Sections 23 to 27 of the Arbitration and Conciliation Act, 1996 lay down the procedure to be followed in arbitration proceedings. The procedure involves:

- *Statements of claim and defence* : The claimant has to submit his claim, consisting of facts supporting the claim, points at issue and the relief or remedy sought - within the period agreed by the parties, or determined by the arbitral tribunal. Likewise, the respondent has to state the defence in respect of the

claims of the claimant. Parties are required to attach to these statements, all relevant documents. They may also add references to the documents or evidence which they will submit later on. Parties may amend or supplement these statements during the proceedings, unless otherwise agreed by the parties or the arbitral tribunal considers it inappropriate to allow the amendment or supplement, due to delay in making it.

- *Hearings and written proceedings* : It is open to parties to agree for holding oral hearings for presentation of evidence and for oral arguments or, alternatively, for conducting proceedings on the basis of documents (such as affidavits). In absence of any such agreement, a decision in this regard may be taken by the arbitral tribunal. Even if the arbitral tribunal decides to-conduct arbitration on the basis of documents only, it shall grant an oral hearing at the appropriate stage, on request by a party, unless such oral hearings are barred by agreement by the parties. The arbitral tribunal shall give adequate advance notice to the parties of any hearing or of any meeting of the tribunal for inspection of documents, goods or property. All documents received and any expert report or document in evidence must be communicated to the parties.
- *Default of a party* : It is open to the parties to agree to what constitutes a default in the proceedings. In the absence of any such agreement, certain situations as stipulated under the Act are regarded as defaults, leading to certain consequences.
- *Expert appointment by arbitral tribunal* : The arbitral tribunal may appoint one or more experts to report to it, on specific issues to be determined by the arbitral tribunal. The tribunal may require the parties to give to the expert(s), relevant information or to produce or give access to any relevant documents, goods or other property for the experts' inspection. The experts' reports shall be communicated to the parties, by the arbitral tribunal.
- *Court assistance in taking evidence* : The tribunal, or a party, with the approval of the tribunal, may apply to a court for assistance in taking evidence. Such an application shall specify all details as specified in Section 27(2). The court may then order that the evidence be provided direct to the tribunal. The court may issue the same processes (summons, or commissions), as in suits before it. Persons failing to attend, or making a default, during the conduct of the proceedings, shall be subject to the same punishments and penalties by the orders of the court, as for like offences in suits tried by the court.
- *Decision* : The decision of the tribunal as per Section 29 of the Act is generally by a majority of all its members.

Question No. 5

- (a) Explain the term 'conveyance' under the Indian Stamp Act, 1899. (8 marks)
- (b) Briefly explain Quasi-Contract under the Indian Contract Act, 1872. (7 marks)

Answer to Question No. 5(a)

As per Section 2(10) of the Indian Stamp Act, 1899 the term "conveyance" includes

a conveyance on sale and every instrument by which property (whether movable or immovable) is transferred inter vivos (during lifetime.) and which is not otherwise specifically provided for by Schedule, It does not include a will. Thus, all transfers of property whether movable or immovable, on sale (which are not otherwise specially provided for by the Schedule), are chargeable as conveyances.

Under Section 2(14) of the Indian Stamp Act, 1899, 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.

Thus, conveyance is an act of conveyancing or transferring any property whether movable or immovable from one person to another permitted by customs, conventions and law within the legal structure of the country.

Technically speaking, conveyancing is the art of drafting of deeds and documents whereby land or interest in land i.e. immovable property, is transferred by one person to another; but the drafting of commercial and other documents is also commonly understood to be included in the expression.

Mitra's legal and commercial dictionary defines "conveyance" as the action of conveyancing, a means or way of conveyancing, an instrument by which title to property is transferred, a means of transport, vehicle.

Answer to Question No. 5(b)

A valid contract must contain certain essential elements, such as offer and acceptance, capacity to contract, consideration and free consent. But sometimes the law implies a promise imposing obligations on one party and conferring right in favour of the other even when there is no offer, no acceptance, no consensus ad idem, and in fact, there is neither agreement nor promise. Such cases are not contracts in the strict sense, but the Court recognises them as relations resembling those of contracts and enforces them as if they were contracts, hence the term quasi- contracts (i.e., resembling a contract).

A quasi-contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract at all. It is an obligation which the law creates, in the absence of any agreement, when any person is in the possession of one persons money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which in justice and fairness belongs to another. It is the duty and not an agreement or intention which defines it. A very simple illustration is money paid under mistake. Equity demands that such money must be paid back.

The following types of quasi-contracts have been dealt within the Indian Contract Act—

- Necessaries supplied to person incapable of contracting or to anyone whom he is illegally bound to support - Section 68.
- Suit for money had and received - Section 69 and 72.
- Quantum Meruit

- Obligations of a finder of goods - Section 71.
- Obligation of person enjoying benefit of a non-gratuitous act - Section 70

PART B (30 marks)

(Answer ANY TWO questions from this part.)

Question No. 6

- (a) Discuss briefly the concept of sustainable development. (8 marks)
- (b) *Mens rea* under the Essential Commodities Act, 1955. (7 marks)

Answer to Question No. 6(a)

Universe is one of the rarest gift that the nature has given to the human being. Even after prolonged experiments the scientist could not establish, that human can survive in any other planet except earth. Therefore humanity must live within the carrying capacity of the earth. It is essential for the people who live now to use the resources of earth sustainably and prudently so that they do not deny certain benefits to future generations. Modern states use the natural resources of the earth recklessly. This will result that the Earth will not be able to support everyone unless there is less waste and extravagance. We should, therefore have, a new approach to future, that is, to secure a widespread and deeply held commitment for sustainable living. We have to integrate conservation and development, conservation to keep our actions within the earths capacity and development to enable the people everywhere to enjoy long, healthy and fulfilling lives.

The concept of 'sustainable development was first highlighted at the United Nations Conference on the Human Environment held at Stockholm in June, 1972. Since then, various countries such as Japan, US, France, Germany, etc. besides India, have enacted legislative measures for protection of the environment introducing strict penal measures for damages caused due to hazardous substances, etc. Various international conferences have been held on the subject of environmental planning etc. the recent one being the 'The United Nations Conference on Environment and Development popularly known as the Earth Summit held at Rio De Janeiro in Brazil in June, 1992 which aimed at focusing the attention of the world on problems of our environment and look for ways in which these can be avoided in future. India too has been an active participant at these conferences.

Sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs. Seen as the guiding principle for long-term global development, sustainable development consists of three pillars: economic development, social development and environmental protection.

Answer to Question No. 6(b)

In *Nathulal v. State of Madhya Pradesh* (AIR 1966 S.C. 43) it was held by the Supreme Court that *mens rea* or guilty mind is an ingredient of the offence punishable under Section 7 of the Essential Commodities Act, 1955 i.e., an intentional contravention of an order made under Section 3, is an essential ingredient of an offence under Section 7. In other words, if the dealer did believe bona fide that he could store the foodgrains for instance, without infringing any order under Section 3, there could be no contravention under Section 7.

It was observed by the Supreme Court that *mens rea* is an essential ingredient of any criminal offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the Statute would otherwise be defeated. The nature of *mens rea* that would be implied in a Statute creating an offence depends on the object of the Act and the provisions thereof.

In *Hariprasad Rao v. State* (AIR 1951 SC 264), it was observed by the Supreme Court that unless a Statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, an accused cannot be found guilty of an offence against the criminal law unless he has got a guilty mind. Therefore, *mens rea* is an essential ingredient of an offence under Section 7 of the Act.

Question No. 7

(a) *What is industrial licence? Under what circumstances an Industrial licence is required under Industries (Development and Regulation) Act, 1951. (8 marks)*

(b) *Briefly explain memorandum of Micro, Small and Medium Enterprise. (7 marks)*

Answer to Question No. 7(a)

An Industrial licence is a written permission from the Government to an industrial undertaking to manufacture specified articles, listed in the First Schedule of the Act and includes particulars of industrial undertaking, its location, articles to be manufactured, the capacity on the basis of maximum utilisation of plant and machinery etc. The licence is subject to a validity period within which the licensed capacity of the undertaking should be established.

Licensing of New Undertaking

Under Section 11 of the Industries (Development and Regulation) Act, 1951, no person or authority other than Central Government, shall establish any new industrial undertaking without a licence from the Central Government. The licence may contain such conditions including in particular, the location and size of the undertaking as the Central Government may deem fit. In case any State Government wants to establish any new industrial undertaking, previous permission of the Central Government would be required.

A licence or permission under Section 11(1) may contain certain conditions as to the location of the undertaking and the minimum standards in respect of size to be provided therein as the Central Government may impose.

Licence for Producing or Manufacturing New Articles

The owner of an industrial undertaking (other than Central Government) registered under Section 10, or licensed under Section 11, shall not produce or manufacture any new article unless: (a) in the case of an industrial undertaking registered under Section 10, he has obtained a licence for producing or manufacturing such new articles, and (b) in the case of an undertaking licensed under Section 11, he has had the existing licence amended in the prescribed manner.

Licence for Carrying on Business after the Revocation of Certificate of Registration

Under Section 10A, the certificate of registration granted by the Central Government

can be revoked under certain circumstances. Section 13(1)(b) provides that after such revocation, the owner shall not carry on the business unless a licence or permission for this purpose has been obtained from the Government

Licence for Change in Location

Under Section 13(1)(e) the owner of an industrial undertaking (other than Central Government) cannot change the location of the whole or any part of a registered industrial undertaking without the Central Government's permission/licence.

Licence for Effecting Substantial Expansion

Under Section 13(1)(d), the owner of an industrial undertaking (other than Central Government) cannot effect any substantial expansion of an industrial undertaking registered or in respect of which a licence or permission has been issued, without a licence from the Central Government. Accordingly, a licence is required for effecting any substantial expansion in any undertaking registered/ licensed under the Act.

Answer to Question No. 7(b)

Section 8 of the Micro, Small and Medium Enterprises Act, 2006 provides that any person who intends to establish a micro or small enterprise, may, at his discretion, or a medium enterprise engaged in providing or rendering of services may, at his discretion; or a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the IDRA, is required to file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government or the Central Government .

However, a person who has established before the commencement of the Act a small scale industry and obtained a registration certificate, may, at his discretion; and an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to IDRA having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and has filed an Industrial Entrepreneur's Memorandum is required to file the memorandum with the specified authority within one hundred and eighty days from the commencement of the Act.

Question No. 8

- (a) *State the documents which are required to be compulsorily registered under the Registration Act, 1908. (8 marks)*
- (b) *Discuss the remedies available to a person who has been refused to register a document by Sub-Registrar. Can registration of documents be refused on the ground of under – valuation for stamp duty ? (7 marks)*

Answer to Question No. 8(a)

According to Section 17 of the Registration Act, 1908, documents whose registration is compulsory are the following:

- Instruments of gift of immovable property
- Other non-testamentary instruments (other than instruments of gift of immovable

property) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property situated in a district in which this Act is in force.

- Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest.
- Lease of immovable property is compulsory registrable, if it is from year to year; or if it is for a term exceeding one year; or if it reserves a yearly rent.
- Non-testamentary instruments transferring or assigning any decree or order of a Court or any award in order to create interests.
- The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001

Answer to Question No. 8(b)

According to Section 72(1) of the Registration Act, 1908, an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate. It presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of denial of execution.

Section 72(2) of the Registration Act, 1908 provides that if the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in Sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration.

Registration cannot be refused on the ground of undervaluation for stamp or any other extraneous reason. (*Mulla (1998), page 308*)

TEST PAPER 3/2013

Time allowed : 3 hours

Max. marks : 100

PART A (70 marks)

[Answer Question No.1 which is COMPULSORY and ANY THREE of the rest from this part]

Question No. 1

With reference to the relevant legal enactments, write short notes on the following:

- (i) Current Account transactions.
- (ii) Contract of Indemnity
- (iii) Money Laundering
- (iv) Alternative Dispute Resolution
- (v) Geographical Indication.

(5 marks)

Answer to Question No. 1(i)

The term current account transaction has been defined under Section 2(j) of the Foreign Exchange Management Act, 1999 to mean a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes :

- Payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business;
- Payments due as interest on loan and as net income from investments;
- Remittances for living expenses of parents, spouse and children residing abroad; and
- Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Under the Act freedom has been granted for selling and drawing of foreign exchange to or from an authorized person for undertaking current account transactions. However, the Central Government has been vested with powers in consultation with Reserve Bank to impose reasonable restrictions on current account transactions. The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000 dealing with various aspects of current account transactions.

Answer to Question No. 1(ii)

Contract of Indemnity

Section 124 of the Indian Contract Act, 1872 a contract of indemnity is a contract by

which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. For example, A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of 300 rupees. This is a contract of indemnity. The contract of indemnity may be express or implied. The latter may be inferred from the circumstances of a particular case, e.g., an act done by A at the request of B. If A incurs any expenses, he can recover the same from B.

The person who promises to indemnify or make good the loss is called the indemnifier and the person whose loss is made good is called the indemnified or the indemnity holder. A contract of insurance is an example of a contract of indemnity according to English Law. In consideration of premium, the insurer promises to make good the loss suffered by the assured on account of the destruction by fire of his property insured against fire.

Under the Indian Contract Act, the contract of indemnity is restricted to such cases only where the loss promised to be reimbursed, is caused by the conduct of the promisor or of any other person. The loss caused by events or accidents which do not depend on the conduct of any person, it seems, cannot be sought to be reimbursed under a contract of indemnity.

Under Section 125, the promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as if it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit; and
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Answer to Question No. 1(iii)

Money Laundering

Money laundering is the processing of criminal proceeds to disguise its illegal origin. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.

Process of Money Laundering

The process of money laundering can be classified into three stages, namely, placement, layering and integration.

In the initial or placement stage of money laundering, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into less

conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments that are later collected and deposited into accounts at another location.

After the funds are entered into the financial system, the layering takes place. In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments, or the launderer might simply wire the funds through a series of accounts at various banks across the globe.

After successful processing of criminal profits through the first two phases of the money laundering process, the launderer moves them to integration. In this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

The possible social, economic and political effects of money laundering, if left unchecked or dealt with ineffectively, are serious. Through the process of money laundering, organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. Thus, the economic and political influence of criminal organisations can weaken the social fabric, ethical standards and ultimately the democratic institutions of society.

Answer to Question No. 1(iv)

Alternative Dispute Resolution

There is a growing awareness that courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The Alternative Dispute Resolution (ADR) processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

At present, ADR services are offered in India in very rudimentary form. There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India. These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities.

The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world. The ICADR is a Society registered under Societies Registration Act, 1860; it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes.

Almost all disputes including commercial, civil, labour and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability, professional liability, real estate, securities, contract interpretation and performance and insurance coverage.

Answer to Question No. 1(v)**Geographical Indication**

As per Section 2(e) of the Geographical Indications of Goods (Registration & Protection) Act, 1999, Geographical indication in relation to goods means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

It may be noted that any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be. Goods mean any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff.

Geographical Indications covered under Articles 22 to 24 of the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which was part of the Agreements concluding the Uruguay Round of GATT negotiations. India, as a member of the World Trade Organization (WTO), enacted the Geographical Indications of Goods (Registration & Protection) Act, 1999. This Act seeks to provide for the registration and better protection of geographical indications relating to goods in India. Examples of Indian Geographical Indications are Darjeeling Tea, Kanchipuram Silk Saree, Alphanso Mango, Nagpur Orange, Kolhapuri Chappal etc

Question No. 2

- (a) *Discuss the provisions relating to Regulation of Combinations under Competition Act, 2002. (8 marks)*
- (b) *Discuss with help of decided cases the deficiency in services in terms of provisions of Consumer Protection Act. (7 marks)*

Answer to Question No. 2(a)

Combination means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Competition Act, 2002. The thresholds are specified in Section 5 the Act in terms of assets or turnover in India and outside India.

Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void. Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form, prescribed and submit the form together with

the fee prescribed by regulations. Such intimation should be submitted within 30 days of?

- (a) approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;
- (b) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

Section 6 (2A) envisages that no combination shall come into effect until 210 days have passed from the day of notice or the Commission has passed orders, whichever is earlier.

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with provisions of Sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under Section 6(2) is correct and whether the combination has, or is likely to have, an appreciable adverse effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

It may be noted that Regulations 28 (6) The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 having due regard to the provisions contained in sub-section (11) of section 31 of the Act, the Commission shall endeavour to pass an order or issue direction in accordance with sub-section (1) or sub-section (2) or sub-section (7) of section 31 of the Act within one hundred and eighty days of filing of the notice under sub-section (2) of section 6 of the Act.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. This exemption appears to have been provided in the Act to facilitate raising of funds by an enterprise in the course of its normal business. Under Section 6(5), the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement, within seven days from the date of such acquisition or entering into such agreement, as the case may be.

It may be noted that under the law, the combinations are only regulated whereas anti-competitive agreements and abuse of dominance are prohibited. CCI examine as to whether or not combination is or is likely to have an appreciable adverse effect on competition. The Competition Act with many innovative concepts coupled with power to impose fine is likely to let in harsh glare of sunlight to disinfect pernicious anti-competitive practices.

Answer to Question No. 2(b)

As per Section 2(1)(g) of the Consumer Protection Act, 1986 Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of

performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service .

Failure to maintain the quality of performance required by the law or failure to provide services as per warranties given, by the provider of the service would amount to 'deficiency'.

In *Divisional Manager, LIC of India v. Bhavanam Srinivas Reddy*, the National Commission observed that default or negligence in regard to settlement of an insurance claim (on allegation of suppression of material facts, in this particular case) would constitute a deficiency in service on the part of the insurance company and it will be perfectly open for the aggrieved consumer to approach the Redressal Forums to seek appropriate relief.

In *N. Prabhakaran v. General Manager, Southern Railway, Madras CPJ* the National Commission held that failure of the Railways to provide cushioned seats in the first class compartments as per specifications laid down by the Railway Board and to check unauthorised persons from entering and occupying first class compartments was held to be 'deficiency' in service.

Question No. 3

- (a) *Discuss in detail the provisions of Copyright Act in respect moral right of performer.* (8 marks)
- (b) *"Without consideration a contract is void." Discuss. Briefly state the exception to the rule.* (7 marks)

Answer to Question No. 3(a)

The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned. The moral rights are independent of the author's copyright and remains with him even after assignment of the copyright.

Section 57 of Copyright Act, 1957 deals with Author's special rights. It states that Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim authorship of the work; and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. The right conferred upon an author of a work may be exercised by the legal representatives of the author.

Answer to Question No. 3(b)

Consideration is one of the essential elements of a valid contract. The requirement of consideration stems from the policy of extending the arm of the law to the enforcement of mutual promises of parties. A mere promise is not enforceable at law.

Section 2(d) of the Indian Contract Act, 1872 defines consideration as follows:

“When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise”. The fundamental principle that consideration is essential in every contract is laid down by the definition.

Rule governing consideration:

- (a) Every simple contract must be supported by valuable consideration otherwise it is formally void subject to some exceptions.
- (b) Consideration may be an act of abstinence or promise.
- (c) There must be mutuality i.e., each party must do or agree to do something. A gratuitous promise as in the case of subscription for charity, is not enforceable. For example, where A promises to subscribe Rs. 5,000 for the repair of a temple, and then refuses to pay, no action can be taken against him.
- (d) Consideration must be real, and not vague, indefinite, or illusory, e.g., a son's promise to “stop being a nuisance” to his father, being vague, is no consideration.
- (e) Although consideration must have some value, it need not be adequate i.e., a full return for the promise. Section 25 (Exp. II) clearly provides that “an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate”. It is upon the parties to fix their own prices. For example, where A voluntarily agreed to sell his motor car for Rs. 50000/- to B, it became a valid contract despite the inadequacy of the consideration.
- (f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime. If the consideration is unlawful, the agreement is void.
- (g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration. For example, if a seaman deserts his ship so breaking his contract of service and is induced to return to his duty by the promise for extra wages, he cannot later sue for the extra wages since he has only done what he had already contracted for: *Stilk v. Myrick* (1809).

When Consideration not Necessary:

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian Contract Act lays down certain exceptions which make a promise without consideration valid and binding. Thus, an agreement without consideration is valid:

1. If it is expressed in writing and registered and is made out of natural love and affection between parties standing in a near relation to each other; or
2. If it is made to compensate a person who has already done something voluntarily for the promisor, or done something which the promisor was legally compellable

to do; or

3. If it is a promise in writing and signed by the person to be charged therewith, or by his agent, to pay a debt barred by the law of limitation.
4. Besides, according to Section 185 of the Indian Contract Act, consideration is not required to create an agency.
5. In the case of gift actually made, no consideration is necessary. There need not be nearness of relation and even if it is, there need not be any natural love and affection between them.

The requirements in the above exceptions are noteworthy. The first one requires written and registered promise. The second may be oral or in writing and the third must be in writing.

Question No. 4

- (a) *List any ten instruments which are chargeable with duty under the Indian Stamp Act, 1899.* (8 marks)
- (b) *Discuss briefly the compounding of offences under Foreign Exchange Management Act, 1999.* (7 marks)

Answer to Question No. 4(a)

- Administration Bond
- Bill of Exchange
- Bond
- Debenture
- Indemnity-bond
- Mortgage-deed
- Promissory-note
- Security Bond or Mortgage-deed
- Settlement
- Certificate of Sale
- Lease
- An instrument of Partition

Answer to Question No. 4(b)

Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. It is a voluntary process in which an individual or a corporate seeks compounding of an admitted contravention.

The provisions of Section 15 of FEMA, 1999 permit compounding of contraventions and empower the Compounding Authority to compound any contravention as defined under Section 13 of the Act on an application made by the person committing such

contravention. In terms of Rule 4 of the Foreign Exchange (Compounding Proceedings) Rules, 2000, the powers to compound the contraventions have been prescribed for compounding authorities with regard to the sum involved in such contravention and no contravention shall be compounded unless the amount involved in the contravention is quantifiable.

In terms of Section 13(1) of FEMA 1999, if any person contravenes any provision of FEMA, 1999, or any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where the amount is quantifiable or up to Rupees Two lakh, where the amount is not quantifiable and where the contravention is a continuing one, further penalty which may extend to Rupees Five thousand for every day after the first day during which the contravention continues.

The Government of India has, in consultation with the Reserve Bank placed the responsibility of administering compounding of contraventions with the Reserve Bank, except contraventions under Section 3(a) of FEMA, 1999. Accordingly, Foreign Exchange (Compounding Proceedings) Rules, 2000 have been framed by the Government of India empowering the Reserve Bank to compound contraventions under FEMA, 1999 with a view to provide comfort to individuals and corporate community by minimizing transaction costs, while taking severe view of Willful, malafide and fraudulent transactions are, however, viewed seriously, which will not be compounded by the Reserve Bank.

Compounding Powers

The compounding powers of the Reserve Bank and the Directorate of Enforcement (DoE), respectively, are as under:

- Reserve Bank has been empowered to compound the contraventions of all the Sections of FEMA, 1999, except clause (a) of Section 3 of the Act, *ibid*.
- Directorate of Enforcement would exercise powers of compounding under clause (a) of Section 3 of FEMA, 1999 (dealing essentially with Hawala transactions).

For effective implementation of compounding process under FEMA, 1999, the Government of India has framed the procedure for compounding of contraventions. Once a contravention has been compounded by the Compounding Authority, no proceeding or further proceeding will be initiated or continued, as the case may be, against the contravener.

Question No. 5

- (a) *States the grounds for setting aside of an arbitral award under the Arbitration and Conciliation Act, 1996.* (8 marks)
- (b) *Discuss briefly the salient features of Special Economic Zones Act, 2005.* (7 marks)

Answer to Question No. 5(a)

Section 34 (2)(a) of the Arbitration and Conciliation Act, 1996 stipulates that an arbitral award may be set aside by the Court on the following grounds:

- incapacity of a party;

- invalidity of the arbitration agreement;
- party applying was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- award not in accordance with the terms of submission to arbitration in regard to the dispute;
- arbitral tribunal not properly constituted or the arbitral procedure was not in accordance with the agreement of the parties;
- subject matter of the dispute not capable of settlement by arbitration under the law for the time being in force;
- award being in conflict with 'the public policy of India'.

Section 2(e) of the Act, specifically provides that "Court" means the principal Civil Court of original jurisdiction in a district, including High Court and excludes any Civil Court of grade inferior to such principal Civil Court or any Court of small causes.

Section 34(3) of the Act prescribes the time limit for making an application for setting aside an arbitral award. The application cannot be made after three months have elapsed from the date on which the party making that application had received the arbitral award or if a request had been made under Section 33 from the date on which that request had been disposed of by the arbitral tribunal. It is further provided that the period of three months could be extended to a maximum of 30 days by the Court but not thereafter if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period.

Answer to Question No. 5(b)

The salient features of the Special Economic Zones Act, 2005 are as under:—

- matters relating to establishment of Special Economic Zone and for setting up of units therein, including requirements, obligations and entitlements;
- matters relating to requirements for setting up of off-shore banking units and units in International Financial Service Center in Special Economic Zone, including fiscal regime governing the operation of such units;
- the fiscal regime for developers of Special Economic Zones and units set up therein;
- single window clearance mechanism at the Zone level;
- establishment of an Authority for each Special Economic Zone set up by the Central Government to impart greater administrative autonomy; and
- designation of special courts and single enforcement agency to ensure speedy trial and investigation of notified offences committed in Special Economic Zones.

PART B (30 marks)

[Answer ANY TWO questions from this part.]

Question No. 6

- (a) *Discuss the power of the Central Government under Essential Commodities Act, 1955. (8 marks)*
- (b) *What is Pre-packed Commodity? State the provision regarding Pre-packed Commodity under Legal Metrology Act, 2009. (7 marks)*

Answer to Question No. 6(a)

Section 3 of the Essential Commodities Act, 1955 empowers of Central Government to control production, supply and distribution etc., of essential commodities.

Central Government having been vested with power under Section 3(1) can issue order in the following circumstances providing for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein:

- when it is necessary or expedient for maintaining or increasing supplies of any essential commodity;
- for securing the equitable distribution and availability of essential commodities at fair price; or
- for securing any essential commodity for the defence of India or the efficient conduct of military operations.

Section 3(3) vests powers in Central Government to deal with the pricing of the essential commodities particularly when the commodities are being sold to Central/State Government in compliance of order under clause (f) of Sub-section (2) of Section 3.

Section 3(3A)(i) is in the nature of an emergency provision and can be resorted to meet a situation arising at a particular locality. It empowers the Central Government to direct the price at which the foodstuffs in any locality will be sold to general public.

Section 3(3B) empowers Central Government fix the procurement price shall be paid for food grains, edible oil and oilseeds. Further, under section 3 (3C) the Central Government may determine different prices for different areas from time to time or for different factories or for different kinds of sugar.

Answer to Question No. 6(b)

Section 2 (l) of the Legal Metrology Act, 2009 define "pre-packaged commodity" as to mean a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity.

Section 18 of the Act states that no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed. Any advertisement mentioning

the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.

Question No. 7

- (a) *Discuss briefly the restriction on new outlets and new discharges under the Water (Prevention and Control of Pollution) Act, 1974.* (7 marks)
- (b) *List out the heads under which compensation for damages under National Green Tribunal Act, 2010 may be claimed.* (8 marks)

Answer to Question No. 7(a)

Section 25 of the Act which places certain restrictions on new outlets and new discharges is an important one. This section making it obligatory on the part of a person to obtain the consent of the Board for establishing or taking any steps to establish any industry, operation or process which is likely to cause pollution of water and also empowering the Boards to limit their consents for suitable period so as to enable them to monitor observance of the prescribed conditions.

Section 25 provides that without the previous consent of the State Pollution Control Board no person is authorized to:

- (i) establish or take any steps to establish any industry, operation or process or any treatment and disposal system or any extension or addition thereto which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land;
- (ii) bring into use any new or altered outlet for discharge of sewage; or
- (iii) begin to make any new discharge of sewage or trade effluent.

The application for consent should be made in the specified form and manner accompanied by the prescribed fee. When an application for consent is received the State Board make such enquiry as it may deem fit. The procedure for making such enquiry is specified in the Rules framed by the State Government. While granting consent for establishment of any industry, operation etc. or for bringing into use any new or altered outlet, the Board may impose conditions as to the point of discharge of sewage or trade effluent.

In the case of consent for new discharge, it may impose conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made. Such consent would be valid only for such period as may be specified in the order. The conditions imposed by the Board are binding on the person establishing or taking steps to establish any industry, operation or process or treatment and disposal system or extension or addition thereto or using the new or altered outlet or discharging the effluent from the land or premises.

Where without the consent of the Board any of the aforesaid acts like establishment of industry, operation, bringing into use outlet or effecting discharge of effluents etc. are done by any person, the Board may serve on the person concerned a notice imposing,

such conditions as it might have imposed on an application for its consent in respect of such establishment outlet or discharge.

Section 27 empowers a State Board to grant or refuse to grant its consent for the establishment of any industry, operation or process or treatment and disposal system or extension or addition thereto or to the bringing into use of a new or altered outlet, unless the industry, operation or process or treatment and disposal system or extension/addition thereto or the outlet is so established as to comply with the conditions imposed by the Board, in order to enable it to exercise its right to take samples of the effluent.

Answer to Question No. 7(b)

The Schedule II to the National Green Tribunal Act, 2010 lists out the following heads under which compensation for damages may be claimed:

- Death;
- Permanent, temporary, total or partial disability or other injury or sickness;
- Loss of wages due to total or partial disability or permanent or temporary disability;
- Medical expenses incurred for treatment of injuries or sickness;
- Damage to private property;
- Expenses incurred by the Government or any local authority in providing relief, aid and rehabilitation to the affected persons;
- Expenses incurred by Government for any administrative or legal action or to cope with any harm or damage, including compensation for environmental degradation and restoration of the quality of environment;
- Loss to Government or local authority arising out of, or connected with, the activity causing any damage;
- Claims on account of any harm, damage or destruction to the fauna including milch and draught animals and aquatic fauna;
- Claims on account of any harm, damage or destruction to flora including aquatic flora, crops, vegetables, trees and orchards;
- Claim including cost of restoration on account of any harm or damage to environment including pollution of soil, air, water, land and eco-system;
- Loss and destruction of any property other than private property;
- Loss of business or employment or both;

Any other claim arising out of or connected with, any activity of handling of hazardous substance.

Question No. 8

- (a) *Discusses the status of a Society registered under Society Registration Act, 1860.* (7 marks)
- (b) *Write short notes on:*
- (i) *Extinction of Trust*
 - (ii) *Revocation of Trust* (4 marks each)

Answer to Question No. 8(a)

Society registered under the Societies Registration Act, 1860 is a legalized institution of non-commercial nature for promotion of numerous charitable activities like education, art, religion, culture, music, social welfare, sports etc. Associations, clubs or societies are formed to help these purposes as they work on non-profit basis.

In the case of *Board of Trustees v. State of Delhi* AIR 1962 SC 458, Supreme Court held that a registered society is a legal entity but it is not a body corporate. It is separate from its members. It can own properties. It is capable of suing or being sued. The position of a society is comparable with an incorporated company under the Companies Act 1956. The main Act has been continuing to be applicable in all the States with some amendments made by almost all the States in operation, administration and management of societies within the respective States.

The Societies Registration Act, 1860 envisaged the incorporation, management and dissolution of societies incorporated under the said Act.

Answer to Question No. 8(b)(i)**Extinction of Trust**

Section 77 of the Indian Trust Act, 1882 deals with Trust how extinguished. It states that a Trust is extinguished:

- When its purpose is completely fulfilled; or
- When its purpose becomes unlawful; or
- When the fulfillment of its purpose becomes impossible by destruction of the trust property or otherwise; or
- When the trust being revocable, is expressly revoked.

Answer to Question No. 8(b)(ii)**Revocation of Trust**

Section 78 of the Indian Trust Act, 1882 provides that if a trust is created by a Will, it may be revoked by the revocation of the Will. A trust which has been created otherwise, by an instrument other than a Will or orally, can be revoked only:

- with the consent of all the beneficiaries competent to contract;
- by the exercise of power of revocation expressly reserved by the author of the trust (in cases of trusts declared orally or by non-testamentary instruments); or
- where the trust is created for the payment of debts of the author of the trust, and has not been communicated to the creditors, at the pleasure of the author of the trust.

A trust is generally irrevocable unless a power of revocation is expressly reserved.
