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Reference Material for Five Years

Bachelor of Law (Hons.)

Code : 035

Semester – VIII

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INTELLECTUAL PROPERTY RIGHTS (402)

UNIT-1: COPYRIGHT

Q.1 What is copyright? Why should copyright be protected ? What are the classes of works for which copyright protection is available in India ?

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work.

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.

Section 13 of the Copyright Act provides that copyright shall subsist throughout India in certain classes of works which are enumerated in the section. Copyright subsists throughout India in the following classes of works:

- Original literary, dramatic, musical and artistic works;
- Cinematograph films; and Sound recordings.

Literary Work

Not all literary works enjoy copyright protection. Section 2(o) of the Indian Copyright Act does not define the term 'literary work' as such but it includes computer programmes, tables and compilations including computer databases within the ambit of what is described as

literary work. Therefore, literary works are not limited to works of literature alone, but include all works expressed in print or writing (other than dramatic or musical works).

Also noteworthy is that the protection is not limited to words, but includes symbols and numerals. The scope of the subject matter protected as a literary work is enhanced by the fact that a work will be protected irrespective of the quality or style of the creation in question.

Points to ponder – Literary work has to have the following characteristics:

- It must be original and be fixed in some form.
- The word literature has to be understood in the same manner as it is understood in political and electioneering sense.
- Hence no literary merit is required.
- Therefore almost every kind of written material work would constitute literary work within the meaning of Section 13 (1).

Dramatic work

Section 2(h) of the Indian Copyright Act defines dramatic works to include any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise. [but does not include a cinematographic film.]

Simply put, a work of action, with or without words or music, which is capable of being performed before an audience is a dramatic work. Copyright subsists not only in the actual words of the work but in the dramatic incidents of the work as well.

The essence of a dramatic work is a story or a narrative. As a prerequisite in copyright law, for a piece of dramatic action to be protectable, a written description of the acts of the performer is essential. Therefore, a dance or pantomime by itself, sans the written description, is not capable of protection as a dramatic work.

Dramatic incidents of a show are protected as dramatic work. The work ought to have a story or a narrative for being afforded protection.

Musical Works

Section 2(p) of the Indian Copyright Act defines musical work to mean a work consisting of music and includes any graphic notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. The requirement of fixation in graphical notation within the definition of musical works has been done away with. The definition seeks to cover all forms of music irrespective of it being fixed. The definition of a musical work clarifies that it does not include words intended to be sung or spoken with the music or action intended to be performed with the music

Point to Ponder:

If a dramatic work may include music, then will the music be entitled to a separate copyright?

Answer: Yes, notwithstanding that the music also forms an integral part of the dramatic work, it shall be entitled to a separate copyright protection as a musical work

Artistic Works

Section 2(c) of the Indian Copyright Act defines artistic works to include A painting, a drawing (including a diagram, map, chart, or plan), an engraving or a photograph, whether or not any such work possesses any artistic quality.

A work of architecture.

Any other work of artistic craftsmanship.

To be protectable as an artistic work, the work ought to satisfy the prerequisite of 'originality' as defined in the Act. No artistic quality is required. Therefore anybody who can paint an original artwork can be entitled to copyright protection from the time the artwork has been created by him/her. Copyright law while attributing authorship to a painter does not delve into the subjective assessment of how good or poor an artwork is. That kind of assessment is left to be made by connoisseurs and dealers of art, and is understood to be outside the purview of copyright law.

Similarly works of architecture are protected as artistic work as long as they are originating from the author, i.e., the architect. Architectural drawings, diagrams, charts, maps, plans and even circuit diagrams are all protected as artistic works. However, one must take note that the building or structure which constitutes a work of architecture is built on the basis of a plan which enjoys a separate copyright apart from the copyright in the building itself.

Point to ponder:

(i) Is a straight line drawn with the help of a ruler a drawing, and therefore protectable as artistic work? Answer: In the case of *British Northrop v. Texteam Blackburn Ltd*, it was held that one should be a little slow to exclude drawings from copyrightability on the mere score of simplicity. Apart from the cases of barren and naked simplicity like a straight line, a simple work should be held to be copyrightable. A sculpture would be an example of a work of artistic craftsmanship. Copyright law affords protection to the work involving the art of carving, modeling, welding or otherwise producing figurative or abstract works of art in three dimensions as long as this work originates from the sculptor.

Point to ponder:

(i) Are sets of machine made replicas of the Taj Mahal sold as décor items capable of being protected as works of artistic craftsmanship?

Answer: No. Machine made replicas are not considered artistic craftsmanship.

Photographs: A photographic work includes any photo lithograph or any work produced by any process analogous to photography (but does not include any part of a cinematographic film). As is the case of all copyrightable subject matter, the photograph has to be original.

Point to ponder:

(i) Does a photograph of an already existing photograph enjoy copyright protection?

Answer: No. A photograph of an already existing photograph is not an original work. Therefore it will not be afforded copyright protection.

(ii) Is a painting based on scenery captured in a photograph an infringement of the copyright in the photograph?

Answer: No. However if the photograph itself is found to be not original, then a painting based on such photograph is not an infringement. For discussion on this point, one may refer to the case of *Bauman v Fussell*¹² where a photograph of bird fight was held to be not original and hence a painting based on it was not an infringement.

Cinematographic Works

Section 2(f) explains that any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films.

Points to ponder:

- (i) Does a remake of a foreign language film enjoy the same protection as the original version of the film?

Answer: A remake of a foreign language film is a derivative work and even when authorized to remake the film, in order for your remake to enjoy the same protection as the original version of the film, it must display some originality of its own.

- (ii) What if the original version of the film above is in public domain now, can you still remake it? And if you do, does your remake then enjoy a copyright protection as if it were an original?

Answer: if the original version of the film is in the public domain, anyone is free to remake it. However, in order for this remake to enjoy copyright protection it must contain sufficient new expression over and above that embodied in the older version. Originality is sine qua non of Copyright law.

- (iii) Is the e-tutorial accompanying this module a cinematographic film?

Answer: Yes. The e-tutorial is a visual recording on camera produced through a process from which a moving image of the tutor may be produced and includes a sound recording accompanying such visual recording. Therefore it is a cinematographic film.

Sound recording

Sound recording as a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. The sound recording should not infringe copyright in any other work. Example of a sound recording is a CD-ROM.

Point to ponder:

- (i) Does the audio recording of this e-tutorial qualify for separate copyright protection as a sound recording?

Answer: Yes, if the audio recording is fixed on a medium such as a phonogram or CD ROM.

- (ii) What if there is no separate audio recording but it forms part of the audio-visual as a whole, does it enjoy protection as a sound-recording as well?

Answer: Yes, the right of the sound recording is different from the subject matter recorded as they are subjects of independent subject-matters.

What is excluded from the subject matter requirement?

Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices are not copyrightable subject matter.

o However, written or recorded descriptions, explanations, or illustrations of such ideas are protectable under copyright law. Titles, names, short phrases, slogans and mere listings of ingredients or contents are not copyrightable subject matter.

o However, some titles and words might be protected under trademark law if their use is associated with a particular product or service.

Works that are not fixed in a tangible form of expression, such as an improvised speech or performance that is not written down or otherwise recorded are not copyrightable subject matter. Works consisting entirely of information that is commonly available and contains no originality (for example, standard calendars, standard measures and rulers, lists or tables compiled from public documents or other common sources) are not copyrightable subject matter.

Q.2 What are the treaties and conventions on copyright ?

Berne convention: The Berne Convention, adopted in 1886, deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them.

The Berne Convention deals with the protection of works and the rights of their authors. It is based on **three basic principles** and contains a series of provisions determining the **minimum protection** to be granted, as well as special provisions available to **developing countries** that want to make use of them.

(1) The **three basic principles** are the following:

(a) Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment")

(b) Protection must not be conditional upon compliance with any formality (principle of "automatic" protection)

(c) Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases .

(2) The **minimum standards** of protection relate to the works and rights to be protected, and to the duration of protection:

(a) As to works, protection must include "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression" (Article 2(1) of the Convention).

(b) Subject to certain allowed reservations, limitations or exceptions, the following are among the **rights** that must be recognized as exclusive rights of authorization:

- **the right to translate,**

- **the right to make adaptations and arrangements** of the work,
- **the right to perform in public** dramatic, dramatico-musical and musical works,
- **the right to recite** literary works in **public**,
- **the right to communicate to the public** the performance of such works,
- **the right to broadcast** (with the possibility that a Contracting State may provide for a mere right to equitable remuneration instead of a right of authorization),
- **the right to make reproductions** in any manner or form (with the possibility that a Contracting State may permit, in certain special cases, reproduction without authorization, provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author; and the possibility that a Contracting State may provide, in the case of sound recordings of musical works, for a right to equitable remuneration),
- **the right to use the work as a basis for an audiovisual work**, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work

The Convention also provides for "**moral rights**", that is, the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation.

(c) As to the **duration** of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author's death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his or her identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of the work

(3) The Berne Convention allows certain limitations and exceptions on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are commonly referred to

as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10*bis* (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11*bis*(3) (ephemeral recordings for broadcasting purposes).

It is to be noted that WTO Members, even those not party to the Berne Convention, must comply with the substantive law provisions of the Berne Convention, except that WTO Members not party to the Convention are not bound by the moral rights provisions of the Convention.

TRIPS:

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The three main features of the Agreement are:

Standards.: In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by

reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

Enforcement: The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

Dispute settlement: The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

Substantive provisions of TRIPS on Copyright:

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies and adds certain specific points.

Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. It confirms further, that the form in which a program is, whether in source or object code, does not affect the protection. The obligation to protect computer programs as literary works means e.g. that only those limitations that are applicable to literary works may be applied to computer

programs. It also confirms that the general term of protection of 50 years applies to computer programs. Possible shorter terms applicable to photographic works and works of applied art may not be applied.

Article 10.2 clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright. Databases are eligible for copyright protection provided that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are in, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11 provides that authors shall have in respect of at least computer programs and, in certain circumstances, of cinematographic works the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of

authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This is a horizontal provision that applies to all limitations and exceptions permitted under the provisions of the Berne Convention and the Appendix thereto as incorporated into the TRIPS Agreement. The application of these limitations is permitted also under the TRIPS Agreement, but the provision makes it clear that they must be applied in a manner that does not prejudice the legitimate interests of the right holder.

Substantive Provisions of TRIPS on Related rights:

The provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance.

In accordance with Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member,

which on 15 April 1994, i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

The term of protection is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organizations (Article 14.5).

Article 14.6 provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention

Geneva Convention: The Phonograms Convention, adopted in Geneva in October 1971, provides for the obligation of each Contracting State to protect a producer of phonograms who is a national of another Contracting State against the making of duplicates without that producer's consent, against the importation of such duplicates, where the making or importation is for the purpose of distribution to the public; and against the distribution of such duplicates to the public. WIPO is responsible, jointly with the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), for the administration of this Convention.

Rome Convention:

The Rome Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organizations.

(1) Performers (actors, singers, musicians, dancers and those who perform literary or artistic works) are protected against certain acts to which they have not consented, such as the broadcasting and communication to the public of a live performance; the fixation of the live performance; the reproduction of the fixation if the original fixation was made without the performer's consent or if the reproduction was made for purposes different from those for which consent was given.

(2) Producers of phonograms have the right to authorize or prohibit the direct or indirect reproduction of their phonograms. In the Rome Convention, "phonograms" means any exclusively aural fixation of sounds of a performance or of other sounds. Where a phonogram published for commercial purposes gives rise to secondary uses (such as broadcasting or communication to the public in any form), a single equitable remuneration must be paid by the user to the performers, to the producers of the phonograms, or to both. Contracting States are free, however, not to apply this rule or to limit its application.

(3) Broadcasting organizations have the right to authorize or prohibit certain acts, namely the rebroadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of such fixations; the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The Rome Convention allows for limitations and exceptions to the above-mentioned rights in national laws as regards private use, use of short excerpts in connection with reporting current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases where national law provides exceptions to copyright in literary and artistic works. Furthermore, once a performer has consented to the incorporation

of a performance in a visual or audiovisual fixation, the provisions on performers' rights have no further application.

As to duration, protection must last at least until the end of a 20-year period computed from the end of the year in which (a) the fixation was made, for phonograms and for performances incorporated therein; (b) the performance took place, for performances not incorporated in phonograms; (c) the broadcast took place. However, national laws increasingly provide for a 50-year term of protection, at least for phonograms and performances.

WCT :

The WIPO Copyright Treaty (WCT) is a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment. In addition to the rights recognized by the Berne Convention, they are granted certain economic rights. The Treaty also deals with two subject matters to be protected by copyright: (i) computer programs, whatever the mode or form of their expression; and (ii) compilations of data or other material ("databases").

WPPT:

The WIPO Performances and Phonograms Treaty (WPPT) deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds).

UCC:

Universal Copyright Convention, (1952), convention adopted at Geneva by an international conference convened under the auspices of UNESCO, which for several years had been consulting with copyright experts from various countries. The convention came into force in 1955.

Its main features are the following: (1) no signatory nation should accord its domestic authors more favourable copyright treatment than the authors of other signatory nations, though no minimum protection for either domestic or foreign authors is stipulated; (2) a formal copyright notice must appear in all copies of a work and consist of the symbol ©, the name of

the copyright owner, and the year of first publication; a signatory nation, however, might require further formalities, provided such formalities do not favour domestic over foreign works; (3) the minimum term of copyright in member nations must be the life of the author plus 25 years (except for photographic works and works of applied art, which have a 10-year term); (4) all adhering nations are required to grant an exclusive right of translation for a seven-year period, subject to a compulsory license under certain circumstances for the balance of the term of copyright.

The convention did not abrogate any other multilateral or bilateral conventions or arrangements between two or more member states. Where there are any differences, the provisions of the Universal Copyright Convention are to prevail except as regards the Berne Convention (*q.v.*), which takes priority over the UCC, and conventions or arrangements between two or more American republics.

Q.3 Can copyright be assigned and licensed ?

Assignment of Copyright

- It is a pecuniary opportunity for the first owner of copyright. The assignment must specify the amount of copyright [vide Section 19(3) of the Copyright Act]. The creator shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright, subject to certain conditions. [vide Section 18(1) proviso of The Copyright Act, 1957]
- In the case of an assignment of copyright in any future work, it shall take effect only when the work comes into existence. In this regard, “assignee” includes the legal representatives of the assignee, if he dies before the work comes into existence. [vide Section 18(1) proviso of the Copyright Act]
- The ownership may be assigned either wholly or only for a part of the work in question. [vide Section 18(1) of the Act]
- The Copyright Assignment must be in writing and signed by the assignor or by his duly authorized agent. [vide Section 19(1) of the Act]

- The duration of assignment must also be specified. The Delhi High Court recognized Section 19(5) and stated that if the assignment deed is silent about the duration, it shall be deemed to be 5 years from the date of assignment
- The agreement deed may specify the territorial extent of such assignment. If silent, it shall be presumed to extend within India. [vide Section 19(6) of the Act]
- The assignment shall be subject to revision, extension, or termination on terms mutually agreed upon by the parties. [vide Section 19(3) of the Act]
- Where the assignee fails to exercise his rights within one year from the date of assignment, the assignment in respect of such right shall be deemed to have lapsed, unless otherwise specified in the assignment deed. [vide Section 19(4) of the Act]
- If the assignment is in contrary to the terms and conditions of the rights already assigned to a copyright society to which the creator is a member, it shall be deemed void. [vide Section 19(8) of the Copyright Act]
- The creator is entitled to subsequent royalties in the course of future exploitation of a cinematographic film, which includes his work, other than by way of exhibitions in a cinema hall. For example, the creator will be entitled to subsequent royalties for satellite right, home video, internet rights, the etc. Similar clause has been added for the case of sound recording. [vide Section 19(9) and 19(10) of the Copyright Act]
- In the case of a manuscript, the copyright being a personal property of the owner can be transmitted by testamentary disposition. [vide Section 20 of the Act]
- The equitable assignment is just the agreement to assign
- The assignee has the rights of- translation, abridgment, adaptation, dramatic and filmmaking in the work.
- For relinquishment of work, the author has to give notice in prescribed form to the Registrar of Copyrights or by way of public notice. On its receipt, Registrar shall publish it in the Official Gazette. With 14 days of the publication, the Registrar shall post the notice on the official website of Copyright Office, so that such notice remains

in the public domain for not less than three years. Such right shall cease to exist from the date of the notice. [vide section 21 of the Copyright Act].

.Licensing of Copyright

The owner of copyright may grant a license to do any of the act in respect of which he has an exclusive right to do. The license can be classified into following categories:

Voluntary license (Section 30)

The author or the copyright owner has exclusive rights in his creative work and he alone has right to grant license with respect to such work. According to section 30 of the Copyright Act 1957, the owner of the copyright in a work may grant any interest in his copyright to any person by license in writing, which is to be signed by him or by his duly authorised agent. A license can be granted not only in existing work but also in respect of the future work, in this situation assignment shall come into force when such future work comes into existence. Where a licensee of the copyright in a future work dies before such work comes into existence, his legal representatives shall be entitled to the benefit of the license if there is no provision to contrary.

The mode of license is like an assignment deed, with necessary adaptations and modifications in section 19 (section 30A). Therefore, like an assignment, a license deed in relation to a work should comprise of following particulars:

- a. Duration of license
- b. The rights which have been licensed
- c. Territorial extent of the licensed
- d. The quantum of royalty payable
- e. Terms regarding revision
- f. Extension and termination

Voluntary licenses can be:

Exclusive - The term exclusive license has been defined in Section 2(j) as a license which confers on the licensee and persons authorized by him, to the exclusion of all other persons, any right comprised in the copyright work.

Non-exclusive – It does not confer right of exclusion. It is mere grant of an authority to do a particular thing which otherwise would have constituted an infringement. When owner grants an exclusive right, he denudes himself of all rights and retains no claim on the economic rights so transferred.

Co-exclusive – Here the licensor grants a license to more than one licensee but agrees that it will only grant licences to a limited group of other licensees.

Sole license – Where only the licensor and the licensee can use it to the exclusion of any other third party.

Implied license – Author impliedly allows or permits the use of his work. For example, he had knowledge that someone is using his work but he did not take any action.

Compulsory License

Being a member of Berne Convention, India has incorporated the provision of compulsory license in the Copyright Act, 1957. The Act provides for grant of compulsory license for Indian work in the public interest, in certain circumstances:

Works Withheld from Public

The Indian Copyright Act provides for the grant of compulsory licences in work which has been published or performed in public. It empowers the Appellate Board to direct the Registrar to grant license, if a complaint is made to it in writing under the Act, during the subsistence of copyright stating the necessary facts which are conditions precedent to its exercise of power, provided the owner has been approached in the first instance for the grant of license and it is only if he has refused to publish or allow the republication of the work and by the reason of such refusal the work is withheld from the public. In case where two or more persons have made a complaint, the licence shall be granted to the complainant who in the opinion of the Copyright Board would serve the interest of the general public. In *Super*

Cassette Industries Ltd v. Entertainment Network (India) Ltd, Mumbai⁵ the respondents who were running a radio FM channel under the brand name Radio Mirchi, made several attempts to obtain a license from Super Cassette Industries ltd (SCIL) to play its sound recordings but failed to get it. The Copyright Board ultimately issued them a compulsory license against which an appeal has been filed in the Delhi High Court. After contemplating over section 31, Court observed that in case compulsory license had to be granted to all, then there was no need of any enquiry as envisaged by section 31. The court also opined that once the copyright was in public, refusal has to be made on reasonable and valid ground. While making an order under section 31, the Board had to maintain a delicate balance between the private rights and the copyright vis-a vis- public interest. The case was sent back to the Copyright Board for fresh consideration.

Compulsory License in Unpublished or Published Work (Section 31-A)

According to this section, where the author is dead or unknown or cannot be traced , or the owner of the copyright in such work cannot be found, any person may apply to the Copyright Board for a licence to publish such work or translation thereof in any language.

Before making such an application, the applicant should publish his proposal in one issue of a daily newspaper in that language. The application to the copyright board should be in the prescribed form and accompanied by the prescribed fee and with the copy of advertisement issued.

The Copyright Board after making the certain prescribed enquires direct the Registrar of Copyright to grant license to the applicant to publish the work or its translation subject to the payment of royalty and other conditions.

Compulsory License for the Benefit of Disabled Persons (Section 31-B)

Any person working for the benefit of persons with disability on a profit basis or for business may apply in prescribed manner to the Appellate Board for a compulsory licence to publish any work in which copyright subsists for the benefit of such persons. However, where a compulsory licence has been issued, the Appellate Board may on a further application and after giving reasonable opportunity to the owners of the rights, extend the period of compulsory licence and allow the issue of more copies as it deems fit. ⁶

Statutory License for Cover Versions (Section 31-C)

Cover means a sound recording made in accordance with section 31C. Any person desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work with the consent or licence of the owner of the work, can do so.

The person making the cover version is required to give prior notice to the owner of the copyright in such works and to the Registrar of Copyright at least 15 days in advance of making the cover version. Advance copies of all covers with which the sound recording is to be sold to be provided or royalties to be paid in advance. One royalty in respect of such sound recordings shall be paid for a minimum of fifty thousand copies of each work during each year. The Delhi High Court in *Star India Pvt Ltd v. Piyush Aggarwal*⁷, stated that sound recording included a subsequent original sound recording made from the musical and literary work and which was called a version recording i.e. a sound recording made after a first sound recording was made by use of the musical work and literary work.

Statutory Licensing for Broadcasting of Literary and Musical Work and Sound Recording (Section 31-D)

Any broadcasting organization, desirous of communicating published work to the public by way of broadcast (by way of television broadcast or radio) or a performance of any published musical/ lyrical work and sound recording, can do so by giving prior notice of this intention to the owners. The notice must specify the duration and territorial coverage of the broadcast. Corresponding royalties are required to be paid to the owner of copyrighted work. Rates of television broadcasting are different from the rate fixed with respect to radio broadcasting. At the time of fixing the rate of royalty the Copyright Board may ask the broadcasting organisation to deposit some amount of money in advance to the owner.

License to Produce and Publish Translation of Literary or Dramatic Work in any Language (Section 32)

Section 32 of the Copyright Act provides that after expiry of a period of seven years from the first publication of a literary or dramatic work, any person may apply to the Copyright Board for a license to produce and publish a translation of work. Where the work is not Indian work, any person may apply to the Board for a license to produce and publish a translation in

printed or analogous form of reproduction of a literary or dramatic work in any language in general use in India after a period of three years from the first publication of such work, if such translation is required for the purpose of teaching, scholarship or research. But where translation is in a language not in general use in any developed country, such application may be made after the period of one year from such publication.

License to Reproduce and Publish Works for Certain Purposes (Section 32-A)

According to this section, any person may apply to the Copyright Board for a license to reproduce and publish any literary, scientific or artistic work after the expiration of the relevant period from the date of first publication of an edition of such work, if the copies of such edition are not made available in India, or such copies have not been put on sale in India for a period of six months to the general public or in connection with systematically instructional activities at a price reasonably related to that normally charged in India for comparable works by the owner of the right of reproduction or by any person authorised by him in this behalf.

The period prescribed are:

- Seven years for work related to fiction, poetry, drama, music or art
- Three years for works related to natural science, physical science mathematics or technology
- Five years for any other work

Q.4 What do you understand by Authorship and Ownership of Copyright?

Owner of a copyrighted work

As a general rule, the author of a work is the first owner of copyright in a work. For an original literary, musical, dramatic and artistic work, it is the person who created or composed such work and for a sound recording and cinematograph film, it is the producer of such a work. In case of a photograph, it is the photographer. For computer-generated works, the author (ie, first owner of copyright) is the person who causes the work to be created.

The exceptions to this rule are covered in section 17 of the Copyright Act, as summarised below:

- In the case of literary, dramatic or artistic works made by the author in the course of his or her employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship for the purpose of publication in the newspaper, magazine or periodical, then the proprietor of the publication shall be the first owner of the work for the purposes of its publication in a newspaper, magazine or similar periodical. In all other respects, the author is the first owner.
- In the case of a work that is a photograph, painting, portrait, engraving or cinematograph film that has been created at the instance of any person for valuable consideration, then such person is the first owner of the copyright in the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film.
- In the case of *Indian Heritage Society & Anr v Meher Malhotra & Anr* [CS(OS)No. 2717 of 2011], the Delhi High Court granted a permanent injunction in favour of the plaintiff who was not the photographer, but was held to be the first owner of copyright in the photographs. This was because it was at the plaintiff's instance that the photographs were taken for a valuable consideration paid to the photographer.
- In the case of a work created by an author in the course of his or her employment under a contract of service or apprenticeship, then the employer is the first owner of the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film as has been clarified by the 2012 amendments to the Copyright Act.
- In the case of any address or speech delivered, the person making the address or delivering the speech, or the person on whose behalf he or she does so, is the first owner of the work.
- In the case of a government work, the government is the first owner of the work.
- In the case of a work made or first published by a public undertaking, the public undertaking will be the first owner of the work.
- In the case of works created by international organisations, the international organisation would be the first owner of the work.

Q.5 What are the available to the copyright owner. What does Copyright Infringement mean and what are the remedies available to the copyright owner in case of infringement of copyright?

Rights of a Copyright Owner

A copyright owner is entitled to the following economic rights(S.14)-

- Produce their work in public
- Publish their work
- Perform their work in public
- Translate their work
- Make any cinematograph film or a record of their work
- Broadcast their work
- Make an adaptation of their work
- Make copies of their work and distribute them
- Make derivatives of their work
- Prevent others from making unauthorized use of copyrighted work

A copyright owner is also entitled to the following moral rights (S.57)

- Right of paternity: refers to a right of an author to claim authorship of work and a right to prevent all others from claiming authorship of his work
- Right of integrity: integrity empowers the author to prevent distortion, mutilation or other alterations of his work, or any other action in relation to said work, which would be prejudicial to his honour or reputation

Meaning of Copyright Infringement

Use of any copyrighted work without the permission of the owner amounts to copyright infringement. Infringement occurs when a person intentionally or unintentionally copies/uses the work of another without credit. Infringement is usually classified into two categories- primary infringement and secondary infringement.

Primary infringement is the actual act of copying, while secondary infringement includes unauthorised dealings like selling the pirated books, importing, etc. In the case of secondary

infringement, knowledge of infringement is present with the infringer while in the case of primary infringement, knowledge may or may not be present.

When does Copyright infringement occur?

In India, copyright infringement occurs when-

1. Copies of copyrighted work are made for sale/hire without permission or authority, like in the case of online piracy
2. A copyrighted work is performed in a public place
3. Infringing copies are distributed for the purpose of trade and personal gains
4. Public exhibition of infringing copies by way of trade prejudicial to the owner
5. Infringing copies are imported from another country into India

Acts Not Constituting Infringement [S. 52(1)]

The Copyright Act provides certain exceptions to infringement. The object of these provisions is to enable the encouragement of private study and research and promotion of education. They provide defenses in an action for infringement. The exceptions come under the following categories:

- reproduction for use in judicial proceedings and for use of members of the legislature,
- publication of short passages, restricted reproduction or performance for educational purposes,
- making of records under license from Copyright Board on payment of royalty,
- playing of records or performance by a club or society for the benefit of the members of religious institutions,
- reproduction of an article on current economic, political, social or religious matters in newspapers, magazines etc,
- reproduction of a few copies for use in libraries or for research or private study,
- matters published in official gazettes including Act of Parliament (subject to certain conditions) or its translation,
- making of a drawing, engraving or photograph of an architectural work of art, or a sculpture kept in a public place,

- use of artistic work in a cinematography film,
- use of an artistic work (author not the owner of copyright) by the author of any mould, cast, sketch, plan, model, etc., made by him for the work,
- making of an object in three dimension of an artistic work in two dimensions subject to certain condition, and
- Reconstruction of a building in accordance with architectural drawings.
- Fair dealing without commercial benefits.[S.52(1)(a)]

Actions against Copyright Infringement

The key requirements for taking an action against copyright infringement include:

1. Proof of ownership of copyright
2. Substantial similarity between the original and the infringed copy
3. Copying amounts to improper appropriation

The first thing to do is to send a legal notice for copyright infringement to the person or entity guilty of copyright violation. In the case of online copyright infringement, a takedown notice may be sent to the person or company involved. A copyright owner can take several actions against copyright infringement under the civil and criminal laws

Remedies for Copyright Infringement

Civil remedy– The civil actions against copyright infringement are given under Section 55 of the Copyright Act, 1957. Under a civil action against copyright infringement, the court can grant the following reliefs:

The copyright owner is entitled to remedies by way of injunctions, damages and accounts against the Infringer.

Criminal Remedy– Copyright infringement is a criminal offence under Section 63 of the Copyright Act which envisages that any person who knowingly infringes or abets the infringement of the copyright in a work shall be punishable with imprisonment for a term which shall not be less than six months but which may extended to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.

UNIT-II : TRADEMARK

Q.1 What is Trademark. What are the types of Trademark?

What is a Trademark?

A “**Trade mark**” [TM] is defined under Section 2(zb) of the Indian Trademarks Act, 1999 as *“mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include a shape of goods, their packaging, and combination of colors.”*

Simply put, a trademark may include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any such combinations. (Section 2(m)). The only qualification for a trademark being its capacity to *distinguish the goods or services of one person from that of another*.

In order to understand the requirements for choosing a proper trademark for your business, you may refer to our previous blog post [that cannot be registered](#).

What are the types of Trademarks?

A trademark may be divided into the following categories:

1. **Word marks:** Word marks may be words letters or numerals. A word mark gives the proprietor a right only in the word, letter or numerical. No right is sought with respect to the representation of the mark.
2. **Device marks:** Where the trademark lies in the unique representation of a word, letter or numerical, it is called as a device mark.
3. **Service Marks:** A service mark is nothing but a mark that distinguishes the services of one person from that of another. Service marks do not represent goods, but the services offered by a person/ company.

They are used in a service business where actual goods under the mark are not traded. It is a mechanism available to protect marks used in the service industry. Thus businesses providing services like computer hardware and software assembly and maintenance, restaurant and hotel services, courier and transport, beauty and health care, advertising, publishing, educational and the like are now in a position to protect their names and marks from being misused by others. As service marks, the substantive and procedural rules governing the service marks are fundamentally the same.

4. **Collective Marks:** Marks being used by a group of companies can now be protected by the group collectively. Collective marks are used to inform the public about a particular feature of the product for which the collective mark is used. The owner of such marks may be an association or public institution or cooperative. Collective marks are also used to promote particular products which have certain characteristics specific to the producer in a given region.



ISO 9001:2015 & 14001:2015



5. **Certification Marks:** Certification marks are used to define standards. They assure the consumers that the product meets certain prescribed standards. The presence of a certification mark on a product indicates that the product has successfully gone through a standard test specified. It assures the consumer that the manufacturers have gone through an audit process to ensure the quality of the product. For example, Toys, Electrical goods, etc. have such marking that indicates the safety and the quality of the product.

The difference between the certification mark and the collective mark is that the collective mark is used by a particular enterprise or members of the association while a certification mark may be used by anybody who meets the defined standards.





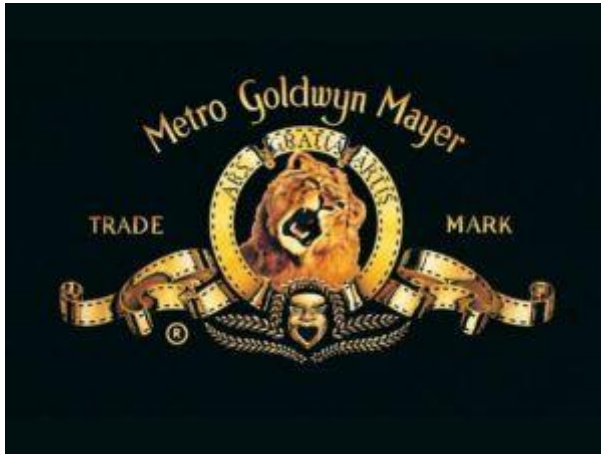
6. **Well-known marks:** When a mark is easily recognized among a large percentage of the population it achieves the trademark status of a well-known mark. Well-known marks enjoy greater protection. Persons will not be able to register or use marks, which are imitations of well-known trademarks. In order to be well-known, a trademark needs to be known/recognized by a relevant section of people. These people include actual or potential customers, people involved in the distribution and business service dealing with the goods/services. Now you can declare your mark as well known marks and learn more details [here](#).

7. **Unconventional Trademarks:** A **non-conventional trademark**, also known as a **nontraditional trademark**, is any new type of trademark which does not belong to a pre-existing, conventional category of trade mark, and which is often difficult to register, but which may nevertheless fulfill the essential trademark function of uniquely identifying the commercial origin of products or services.

Unconventional trademarks include the following categories::

Colour Trademark: If a particular color has become a distinctive feature indicating the goods of a particular trader it can be registered as a trademark. For example, Red Wine.

Sound Marks: Signs which are perceived by hearing and which is distinguishable by their distinctive and exclusive sound can be registered as sound marks. For example, the MGM's roar of a lion.



Russian Trademark Registration 251933

Shape Marks: When the shape of goods, packaging has some distinctive feature it can be registered.





Smell Marks: When the smell is distinctive and cannot be mistaken for an associated product it can be registered as a smell mark. For example, Perfumes

Q. 2 What are the grounds for refusal of registration of a trade mark ?

Registration of a trade mark can be refused on the following grounds:

Absolute Grounds

Section 9(1) to (3) of the Trade Marks Act lists the absolute grounds for refusal of registration.

Section 9(1) prohibits the registration of those trade marks-

- (a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;
- (b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or services; or
- (c) which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practice of the trade. However, a trade mark shall not be refused registration, if the mark has in fact acquired a distinctive character

as a result of the use made of it or is a well known trade mark before the date of application for registration.

The basis of Section 9(1) is that a trader should not obtain a statutory monopoly through registration in a word which another trader might legitimately wish to use. A competitor should of course be entitled to make bonafide use of the word, to describe his goods or the place of manufacture. If a word, however, through use has become clearly associated in public mind with the goods/service of a particular trader, then it could not be legitimately used as a trade mark by a competitor. For this purpose the onus is on the applicant to show by cogent evidence that the trade mark, by reason of use has acquired distinctiveness in relation to his goods or services.

If a trade mark is devoid of distinctive character, the same can not be registered. In *Ambalal Sarbhai Enterprises Limited v. Tata Oil Mills Company Limited* 1988 OTC 73 Bom, it was held that the word PROMIX was distinctive. The Court held that even though there are many trade marks in the register with the prefix PRO which is common to the trade, the applicants have particularly coined the word PROMIX and the same was not known earlier. Applicants are the proprietors of a series of trade marks having prefixed PRO as a leading distinguishing feature. Their trade mark is distinctive and so can be registered under the Act.

Length of user is a material factor to acquire distinctiveness in a trade mark (*Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*, AIR 1962 Ker 156). This view was affirmed in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories*, AIR 1965 SC 980. The Apex Court held that the length of user would, of course, be a material factor for the mark to become distinctive.

In *Mahendra & Mahendra Paper Mills Ltd. v. Mahindra & Mahendra Ltd.*, AIR 2002 SC 117, the Supreme Court observed

"...the name has acquired a distinctiveness and a secondary meaning in the business or trade circles. People have come associate the name "Mahindra" with a certain standard of goods and services. Any attempt by another person to use the name in business and trade circles is likely to and in probability will create an impression of a connection with the plaintiffs' group of companies. Such user may also affect the plaintiff prejudicially in its business and trading activities."

Section 9(2) states that a mark shall not be registered as a trade mark if —

- (a) it is of such nature as to deceive the public or cause confusion;
- (b) it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;
- (c) it comprises or contains scandalous or obscene matter;
- (d) its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950.

Under Section 9(2), if the confusion arises from any factor whatsoever, even without involvement of any other mark or there being no similarity with any other mark, the registration may still be refused if the impugned mark is of such nature that it will cause confusion. For a successful opposition the opponent has to establish by proper evidence that its mark had acquired reputation by use and the mark of the applicant if registered is likely to cause confusion (*Anglo-French Drug Co. v. Brihans Laboratories*, 1995 IPLR 7).

The medical preparations sold at the prescription by doctors and supplied by qualified pharmacists have been considered a special case for determining deceptive similarity. The test was not of the ordinary customers but whether the pharmacists or doctors would be confused. Therefore, in the field of drugs and chemicals, the names with small variations are allowed. In *Burrough Wellcome v. Uni Sole Pvt. Ltd.*, 1999 PTC 188, the Bombay High Court has applied the test of person of ordinary intelligence as against doctors and pharmacists. The Court took the judicial notice of the fact that various medicines which are required by law to be sold per prescription, in actual practice they are sold without such prescription in spite of the mandate of the law.

Section 9(3) prohibits registration of a mark, if it consists exclusively of shape of goods which results from the nature of the goods themselves or which is necessary to obtain a technical result or which gives substantial value to the goods. It is, however, explained that the nature of goods or services in relation to which the trade mark is used or proposed to be used shall not be a ground for refusal of registration.

Section 9(3) is intended to prevent permanent monopolies being created under the Trade Marks Act, by reason of trade marks constituted by the shape of goods giving the proprietor a

permanent and substantial advantage over his potential competitors. It is considered that will create unacceptable distortions in the market.

In order to avoid an objection, a mark constituted by a shape must be sufficiently different from a shape which is - (a) characteristic of the product; (b) the norm or customary in the sector concerned. In other words, the shape should not be descriptive and must stand out from the crowd, and in the case of new product development must not be a shape likely to be taken for the product concerned.

The fact that functional claim has been previously made in a patent application will be prima facie evidence that those aspects of the shape covered by the patent claim are necessary to achieve a technical result. This will attract objection under section 9(3)(b). The test is whether there are any significant aspects of the shape or its arrangement which are not only attributable to the achievement of a technical result.

The shape of an ornamental lamp, for example would appear to add substantial value to the goods by making it attractive. This would attract objection under section 9(3)(c) and also 9(3)(a).

Relative Grounds

Section 11 of the Trade Marks Act stipulates that where there exists a likelihood of confusion on the part of the public because of the identity with an earlier trade mark or similarity of goods or services, the trade mark shall not be registered. The registration of a mark which is merely reproduction or imitation of a well-known mark is also prohibited. Sub-section (3) prohibits the registration of a trade mark if or to the extent that, its use in India will be prevented by law of passing off or under the law of copyright unless the proprietor of the earlier trade mark consents to such registration.

The term “earlier trade mark” as per the Explanation appended to this Section means a registered trade mark or an international registration or a convention application which has a date of application earlier than the trade mark in question, or a trade mark, which on the date of application for registration or on the date of priority claimed was entitled to protection as a well known trade mark.

The proprietor of earlier trade mark is entitled to oppose the registration of a trade mark and prove it. In the opposition proceeding the Registrar shall protect a well-known trade mark against identical or similar trade marks and take into consideration the bad faith of either the applicant or the opponent affecting the rights relating to the trade mark. Further, the section also lays down the factors which the Registrar is required to take into account while determining the status of a well-known trade mark. The Section also lays down the facts to be considered by the Registrar in determining whether a trade mark is known or recognised in a relevant section of the public.

What is a well known trade mark, the Delhi High Court held in *Tata Sons Ltd. v. Mr. Md. Jawed & Anron* (March, 2011) held that a well known trade mark is a mark which is widely known to the relevant section of the general public and enjoys a comparatively high reputation amongst them. Further, the Court observed that the owner of a well known trade mark may (i) seek cancellation or (ii) prevent registration of a trade mark which is same or similar to the well known mark irrespective of whether the impugned mark is in relation to identical or similar goods or services or in relation to other categories of goods or services. He may also prevent others from incorporating the well known trade mark as a part of their corporate name/business name. Even if a well known trade mark is not registered in India, its owner may avail these rights in respect of the trade mark registered/used or sought to be registered/used in India, provided that the well known mark is otherwise known to or recognized by the relevant section of public in India. The Trade Marks Act, 1999 accords a statutory protection to well known marks, irrespective of whether they are Indian marks or foreign marks. The existence of actual confusion or a risk of confusion is, however, necessary for the protection of a well known trade mark, as a result of infringement.

O.3 How a Trademark is Registered?

The application must be finalized in the office of the Trademarks Registry within whose territorial limits the principal place of business in India, of the applicant is located. After application for registration of a trademark is complete the same is sent for examination.

Examination of Trade Mark application will cover examination as to compliance with–

1. Filing requirements governed by procedure prescribed under the Trade Marks Act and Trade Marks Rules

2. Substantive requirements for registrability of the mark

In particular, the official assigned examination duties will scrutinize the application as to-

1. whether the application has been filed in the manner as prescribed in the Trade Marks Rules 2002
2. whether any same/similar mark in respect of same/similar goods/services is there on record
3. whether the trademark applied for registration can be accepted for registration under the Trade Marks Act 1999
4. whether any restriction, condition or limitation is required to be imposed.

The Examiner (includes a Senior Examiner) doing the examination work will give a consolidated 'Examination Report' mentioning the objections (if any) as to the acceptance of application for registration; or as the case may be, forward a proposal to accept the application with or without any restriction, condition or limitation on the use of trademark. A computer generated 'Search Report' short listing conflicting marks on record will be attached with the Examination Report. The examiner will mention all existing deficiencies in the application and will raise all applicable objections to the acceptance of application for registration of trademark. The applicant (it includes the applicant's authorized agent) is required to respond to the Examiner's objection(s) within a period of one month from the date of receipt of Examination Report. The reply to the Examination Report together with evidence of use of the trademark in India and other documents attached with the reply will be duly considered. In case the objections cannot be waived an opportunity of a Hearing will be given to the applicant. The application will thereafter be accepted with or without any restriction, condition or limitation on the use of trademark; or as the case may be, it will be refused for registration. The decision as to acceptance or refusal of the application will be communicated to the applicant. The accepted application will thereafter be advertised in the Trade Mark Journal

2.3 Acceptance & Advertisement

Where an application is Advertised before Acceptance and there is no opposition, it is a necessary statutory requirement that the application should be accepted on the file by the Registrar or an authorized officer before the mark is allowed to be registered. **Section 20** of the Trade Marks Act 1999 states that- When an application for registration of a trade mark has been accepted whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted together with the conditions or limitations, if any, subject to which it has been accepted, to be advertised in the prescribed manner: Proviso to section 20 enables the Registrar to cause an application for registration of trade mark to be Advertised Before Acceptance if it relates to a trade mark to which subsection (1) of section 9 and sub-sections (1) and (2) of section 11 apply. Such a course can also be adopted by the Registrar in any other case where it appears to him to be expedient “by reason of any exceptional circumstances so to do”.

It is felt that this provision should not be routinely used by the Examiner to advertise trade marks even in cases where there is strong objection to the registration of the mark under section 9 or 11. After advertisement if there is no opposition the mark may generally proceed to registration. Thus, the provision for **Advertisement Before Acceptance**, as the law itself enacts, should be invoked in “exceptional circumstances” . Where the Examiner finds strong evidence of bonafide commercial adoption and use of the mark, the Examiner or the Hearing Officer may “Accept” the application and order the mark to be advertised “as accepted”. A cross notice may be issued to the registered proprietor or the prior applicant in suitable cases or when there is request on form TM-58. This will enable him to oppose the registration, if he chooses to do so.

Section 19 enables the Registrar to withdraw acceptance of an application in error

or in circumstances that the trade mark should not be registered or should be registered

subject to conditions or limitations

2.4 Opposition

The individual application are vital, it is to be noted that ‘Precedents’ are of great value, though not decisive.

A Notice of Opposition to the registration of a trade mark must be given within three months from the date of advertisement or re-advertisement of the application in the Trade Marks Journal or within such further period not exceeding one month in the aggregate as the Registrar, on application made to him on Form TM-44 may allow [(See Rule 47(6)].

Section 11(3) provides as follows:

A trade mark shall not be registered if, or to the extent that, its use in India is liable to be prevented by virtue of any law in particular the law of passing off protecting an unregistered trade mark used in the course of trade; or by virtue of law of copyright. Objection under section 11(3) call for evidence of facts from which it could be properly concluded that normal and fair use of the trade mark for the purpose of distinguishing the goods/services of the applicant from those of others was liable to be prevented at the date of application for registration of the later mark by enforcement of rights in a passing of action or under copyright law.

Section 91 of the Trade Marks Act, provides for an appeal against an order or decision of the Registrar to the Intellectual Property Appellate Board (IPAB). In some cases, parties may also invoke the writ jurisdiction of High Courts. It is obvious, therefore, that whenever the Registrar or any officer acting for him passes an order as a tribunal under the Act it should be a reasoned and a speaking order.[See Rule 40 of Trade Marks Rules, 2002].

In this reference, the principle laid down by the Supreme Court, “The Court insists upon disclosure of reasons in support of the order on two grounds – one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject its case were erroneous; the other, that the obligation to record reasons operates as a deterrent

against possible arbitrary actions by the executive authority invested with judicial power” (Travancore Rayon v. Union of India AIR 1971 SC 862, at p.866)

2.5 Procedural formalities

The examination of trade marks for acceptability under the Trade Marks Act

1999 must be by reference to the provisions of that Act and Rules structured there under taking into account the recognized practice of the Registry and the law as laid down or approved by the Intellectual Property Appellate Board (IPAB) and by Courts in India which is binding on the Registrar.

India accepted the International Convention for Protection of Intellectual Property and TRIPS Agreement, the administration of the Act will need to be in harmony with international practice. Accordingly, European Trade Mark Reports (ETMRs), Fleet Street Reports (FSRs) the US Trade Marks Reports will continue to be followed by India. The Registry in India broadly matches up with the practice existing in the U.K.

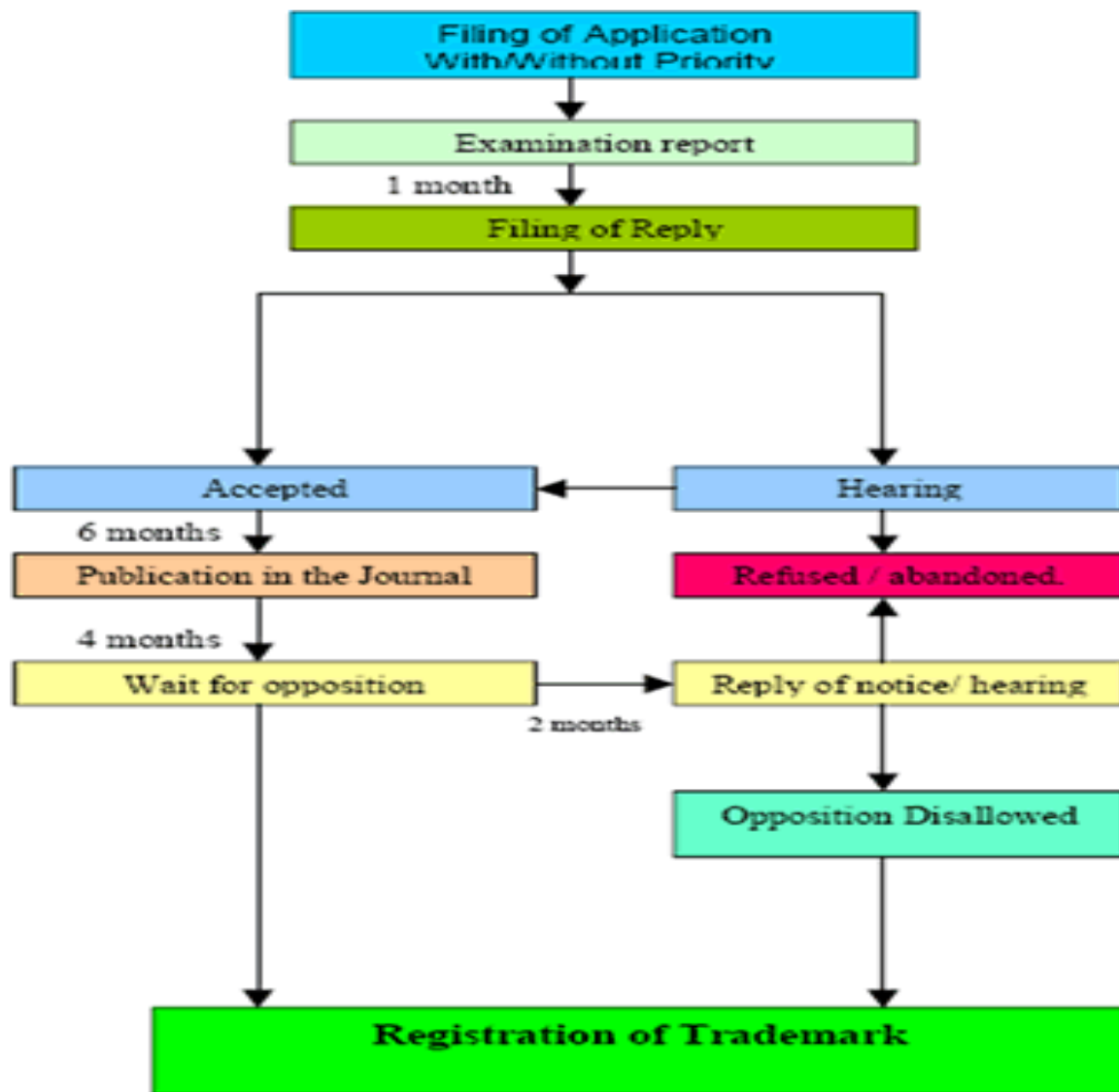
An Application for registration of registered user will be filed by the registered proprietor and proposed user jointly on form TM-28 along with the prescribed fees together with the following documents.

1. Agreement in writing between the registered proprietor and proposed user or duly authenticated copy thereof with respect to the permitted use of the trade mark. It is to be noted that in terms of sub-rule (4) of Rule 80 no application will be entertained unless the same has been filed within 6 months from the date of agreement.

2. Document and correspondence, if any mentioned in the agreement or

authenticated copies thereof

3. An affidavit of the registered proprietor or by some person authorized, testifying to the genuineness of the documents accompanying the application.



Section 50(1)(d) empowers the Registrar to cancel the registration of a registered user of his own motion or on an application of any person on the ground that any stipulation in the agreement regarding the quality of goods/services is either not being enforced or not being complied with. Section 47 provides two alternative grounds for removal of mark on ground of non-use. Correction or amendment similar to those envisaged by section 58(1) in respect of registered trade mark is contemplated under sub-section (2) in respect of the registered users. Such as, a) any error in the name, address or description of the registered proprietor of a trade mark, or any other entry relating to the trade mark; b) any change in the name, address or description of the person who is registered as proprietor; c) cancellation of the entry of a trade mark; d)

striking out of any goods or classes of goods or services in respect of which the mark is registered. Rule 91 prescribes the procedure for the purpose. Section 59(1) expressly prohibits any addition or alteration in a manner substantially affecting the identity of the registered trade mark. Section 25(4) provides for restoration of removed trade mark to the register and its renewal upto one year after the expiration of the last registration. In such cases, the request has to be made on form TM-13 along with prescribed fees plus the applicable renewal fees otherwise sub-section (3) of section 25 enables the registered proprietor to get the registration renewed for a period of 10 years, on an application made in the prescribed form (TM-10) and payment of prescribed fee and surcharge within six months from the expiration of last registration.

Q.4 “Internet domain names are also entitle to protection as ‘Trademark’. Comment.?”

The Internet Domain Names have now become much more than mere representing the websites of different companies on the Internet. Today, in this age of well-developed information technology and worldwide businesses through Internet, these domain names have attained the status of being business identifiers and promoters. Since the commercial activities on the Internet are to go on increasing day by day, the importance and usefulness of domain names too, are to be enhanced for the purposes of greater publicity, popularity, and profitability of businesses in all economic sectors. According to Bill Gates, the founder of Microsoft, "Domains have and will continue to go up in value faster than any other commodity ever known to man". Broadly, the functions of domain names are now quite similar to the functions of a trademark or service mark, for these purposes. Ours this very informative web-article offers rich and hugely beneficial and securing information regarding the registration and protection of the domain names as trademarks, with a view to help and serve people, companies, and professions pertaining to diverse occupational and economic fields.

Functions of A Domain Name and A Trademark

A Domain Name is a quite user-friendly form of an Internet Protocol (IP) address; the technical IP address of this being invisible to the viewers. Addresses to the Internet Web Servers are assigned and managed through the Domain Name System (DNS), the globally

distributed internet database administered by ICANN. An example of a domain name is "inta.org". The name portion of a domain name [here, inta] is called as the Second-Level Name, and this unique and scintillating name is to be created or selected by the domain name applicant. The end portion of a domain name [here, .org] is termed as the Top-Level Domain (TLD); and is further classified into the categories of the Generic Top-Level Domains (gTLDs) and the Country-Code Top-Level Domains (ccTLDs). Some of the most common and popular categories of the top-level domains are **.com**; **.org**; **.gov**; **.net**; **.in**; etc.

Generally, a domain name performs the same functions online, which a trademark serves in the offline business dealings and transactions. While the trademark is striking graphic signifier of your product or company, the domain name is magnificent navigator to your company on the internet, and the virtual image of your business. Duly registered and protected trademark and domain name can offer the following main benefits: ---

- A trademark or service mark promotes and protects your brand name, while a registered and protected domain name provides you protection against any unauthorized use of your domain name by any person or entity.
- Trademark supports the face value of your business or profession, while a domain name increases access value of your business from any remote place of the world over.
- A trademark (or service mark) makes your any product (or service) prominent in the concerned marketplace, while a domain name can also function to deliver your product or service to your customers worldwide.

Thus, a well-protected domain name is certainly immensely helpful for security, worldwide prominence, and profitability of a business, quite like an internationally protected trademark or service mark. Hence, proper registration and protection of both the trademark and domain name are advisable and imperative.

Can Internet Domain Names be Registered and Protected As Trademarks or Service Marks?

Yes, domain names can also be registered and protected as trademarks or service marks at the national and international levels, provided that the domain names do satisfy all conditions to be duly registered and protected like the trademark and service marks.

Any unique internet domain name which is capable of identifying and distinguishing goods or services of a company from that of other companies, and can also act as a reliable source identifier for the concerned goods or services on the internet, may be registered and thus protected as trademark, if it satisfies all other rules and requirements for registration which are commonly applicable to the trademarks and service marks. Again, for proper registration of a domain name as a trademark or service mark, this must be unambiguously unique from all other domains names and well-known trademarks on the internet, so that it does not mislead, confuse, or deceive customers of other companies engaged in the same or different fields, or violate public order or morality. Such cases may give rise to instances of trademark infringement litigation. Exclusive information about registration and protection of domain names as trademarks in India and abroad is provided in the sections below.

In this connection, the following judgment of the Honorable Supreme Courts of India is worth mentioning, which was extended in the case of **Satyam Infoway Ltd. Vs Sifynet Solutions Pvt. Ltd.** [Where the matter for consideration before this Apex Court of India was whether Internet Domain Names are recognizable as other Intellectual Properties such as Trademarks]: --- "The original role of a domain name was no doubt to provide an address for computers on the internet. But the internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication but also identifies the specific internet site, and distinguishes specific businesses or services of different companies. Consequently a domain name as an address must, of necessity, be peculiar and unique and where a domain name is used in connection with a business, the value of maintaining an exclusive identity becomes critical. "As more and more commercial enterprises trade or advertise their presence on the web, domain names have become more and more valuable and the potential for dispute is high."

Trademark Protection Vs. Domain Name Protection

Trademarks or service marks are provided recognition and protection in only those national and international jurisdictions, where these are properly registered; these may not attain trademark protection worldwide. The domain names as trademarks or service marks are registered and protected at the entire global level supremely by only one organization which is ICANN [Internet Corporation for Assigned Names and Numbers], along with the national and international protection under the directly concerned national Trademark Law and diverse International Trademark Treaties of the world. Any national or international trademark law is not fully capable of protecting a domain name in countries of the world over. To meet this vital objective, the ICANN with support of the WIPO (World Intellectual Property Organization) prescribed the following two strong and strict measures --- a rigorous and censorious system of registration of domain names with accredited registrars [by ICANN]; and an efficient and efficacious dispute resolution policy, named as the Uniform Domain Name Disputes Resolution Policy (UDNDR Policy).

For a dispute resolution under the UDNDR Policy of October 1999, a person or entity may formally complain before the competent administration-dispute-resolution services providers [listed by ICANN under Rule 4(a)], that:

1. Any specified domain name is very strikingly or confusingly similar to a previously registered domain name or trademark of the complainant
2. Any accused domain name has been registered, and is blatantly being used in bad faith
3. There exists any certain case of trademark infringement against the complainant

Today, the domain name registrars duly authorized by the ICANN, operate a dispute resolution procedure under the UDNDR Policy, for the purposes of providing efficient and rigorous remedy against bad faith and abusive registration of domain names which violate the trademark rights of the complainants.

Protection of Domain Names in India

The protection of domain names in India has been deeply felt and approved by the law courts of the country, like the protection enjoyed by the trademarks or service marks; provided that the proposed domain name fulfils all requirements to be properly registered under the Indian

trademark law. Any person or business or professional entity may obtain protection to his/her/its newly created domain name in entire India under the Trade Marks Act of 1999 and the Trade Marks Rules of 2002, and all amendments made in these so far. For the purpose of worldwide protection of registered domain names, the concerned people or entity has to follow the above-mentioned system or procedure. Here, it may be reiterated that a well-protected domain name will offer to the registrant all those legitimate rights and authorities which are commonly availed by the owners of registered trademarks or services marks in India. The rights to take rigorous and drastic actions against any infringement cases connected with the registered and protected domain name within the Indian jurisdictions, are essentially covered by these rights granted to the registrant of domain name by any regional Trademarks Office of India.

In this connection, the opinion and judgment of the law courts of India, essentially including the Apex Court, are expressed explicitly during the handling of many domain-name related law cases, particularly the cases of **Satyam Infoway Ltd. Vs Sifynet Solutions Pvt. Ltd;** and the **Tata Sons Ltd. Vs Manukosuri and Others.**

Q.5 Difference Between Infringement and Passing off of Trademark?

Infringement of Trademark:

Any person who trespasses the rights conferred by registration of a trademark infringes the registered trademark for example by adopting identical or deceptively similar trademark. In case a trademark is not registered then the trademark can be protected under passing off. The idea used for infringement is the same used for passing off but the two differ in two fundamental aspects; passing off is concerned with only one method of passing off, namely use of a trademark; once a mark is shown to offend, the user of it cannot escape by showing that he has adopted the name outside the area where the proprietor of the actual mark has attained distinction. The present Act of 1999 now gives recognition to certain concepts like dilution of trademark, erosion of distinctive character of trademark and damage to reputation. These were not covered under

the previous Act of 1958. The concept of dilution has been dealt with in the I module under the “concepts” subtopic.

Essentials:

When the rights conferred upon registration are trespassed, amounts to infringement. An infringement should constitute the following essentials (a) the infringing mark must be either identical with or deceptively similar to the registered trade mark; (b) the goods or services in respect of which it is used must be specifically covered by the registrar.

It was held in Parker Knoll that the marks have to be very similar marks have so as to “nearly resemble” the registered mark and “likely” to deceive or cause confusion among consumers. It is not a necessity that it should be intended to deceive or intended to cause confusion. It is the probable effect on ordinary people that have to be taken into consideration for determining deception or confusion.

The question of similarity between two trademarks and the likelihood of deception or confusion arising from their use is not to be decided in vacuo but to be determined always in the background of the surrounding circumstances. The following factors are taken into consideration:

- The nature of the marks, i.e. whether they are words, coined or descriptive or non-descriptive, surname or geographical name, devices, letters or numerals or a combination of two or more of the above,
- The degree of resemblance between the marks and essential features, i.e. similarity in phonetic, visual and in idea,
- The nature of the goods in respect of which they are used or likely to be used as trademarks,

- The similarity in the nature, character and purpose of the goods of the rival traders,
- The class of purchasers who are likely to buy the goods bearing the marks, their level of education and intelligence, and the degree of care they are likely to exercise in purchasing the goods,
- The mode of purchase of the goods or of placing orders for the goods,
- Any other surrounding circumstances.

To determine infringement the following factors are taken into consideration:

- If the mark nearly resembles the plaintiff's registered trademark so as to cause confusion or deceive the general public.
- Once it is found that the defendant has used the trademark nothing said or done by the defendant can make available the trademark to the defendant since the infringement consists in using the trademark, as trademark is indicative of the origin.
- Even if the trademark is descriptive and not registrable and the defendant too uses a name that is descriptive but confusingly similar to the previous trademark, the defendant cannot use it as a defence to a claim for infringement action. Thus plaintiffs are not deprived of statutory provision of the fact that the defendants may be using a descriptive work "as a trademark".
- The proprietor does not necessarily have to establish instances of actual confusion or deception arising from the defendant's use of the mark.
- Whether certain trademark causes confusion is a question of fact and degree in each case. The court has to take into account all the relevant circumstances in the comparison of the marks. The risk of deception must be real and not fanciful. The factors that are taken into consideration are the degree of

similarity of the two marks in sight and sound, looking not just at the registered mark as a whole but also at its essential or distinguishing features or the essential idea behind it the whole range of potential customers for the goods protected by the registered mark and not just customers for the goods of the particular type marketed by the defendant's goods, the manner in which the purchasers of the goods are normally made. All circumstances of the trades must be considered.

The question of resemblance and the likelihood of deception are considered by reference to the whole mark and by the distinguishing essential feature. Intention is not essential to determine infringement but it does help further in determination of infringement. It has also been held that any mark has to be sufficiently big to be seen by the eye. For example unauthorised printing of labels is held to be infringement of the registered trademark, use of plaintiff's mark on reconditioned goods also may constitute infringement even if it is made clear that the goods are not original but only reconditioned, import or possession of the spuriously marked goods for personal consumption but not for trading purposes, may not constitute infringement. Import of such goods for sale in India is an infringement in the country of origin. Even the use of a registered trademark as part of the trading style of another dealing in the same kind of goods is held to be infringement of the mark under section 29(3) of the 1999 Act.

In Amritdhara Pharmacy the question of phonetic similarity was elaborately discussed. It was alleged by the plaintiff that the two words Amritdhara and Lakshmandhara were phonetically so similar so as to cause confusion among consumers and hence Lakshmandhara should not be allowed registration. The names were adopted as tradenames for the same type of medicines. The plaintiff stated that this was a clear case of passing off because they were being used for the same type of medicines due to phonetic similarity for an average Indian consumer and an ultimate purchaser. The Court stated that the words 'Amrit' and 'dhara' were common words in the Hindi language and the

combined word 'Amritdhara' meant 'current of nectar' or the 'flow of nectar'; the two words 'Lakshman' and 'dhara' were also well-known common words and combined together they meant 'current or flow of Lakshman'. The Court also held that it is not right to take a part of the word and compare it with a part of the other word; one word must be considered as a whole and compared with the other word as whole. It also stated that it is a dangerous method to adopt to divide the word up and seek to distinguish a portion of it from a portion of the other word.' It took into consideration the ordinary Indian Villager or townsman who perhaps might know Lakshman, the story of the Ramayana being familiar to him; but doubted if would apply it in cases as the present one. They would go more by the similarity of the two names in the context of the widely known medicinal preparation which he wants for his ailments.

The Court then held that both the words are overall and phonetically similar.

The test of infringement was laid down elaborately in Durga Dutt's case, as follows:

1. The onus would be on the plaintiff,
2. Where the two marks are identical, no further question to establish that there is infringement arises,
3. Where the two marks are not identical the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trademark as is likely to deceive or cause confusion in relation to goods in respect of which it is registered,
4. The court has to compare the two marks; the degree of resemblance. The purpose of the comparison is for determining whether the essential features of the plaintiff's trademark are to be found used by the defendant. The

base is to find out if the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff.

The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the court based on evidence led before it as regards the usage of the trade.

Passing Off:

In case of infringement of unregistered trademark the passing off can be used a common law remedy of torts. The plaintiff has to prove that his goods or services have a reputation and goodwill in the market. The basis of passing off is false representation. In an action of passing off it is not necessary that there should be absolute identity between the articles of the plaintiff and the defendant. The basis for an action is deception and false representation. There has to be direct false representation, adoption of trademark which is the same or colourable imitation of the trademark of the rival traders, adoption of an essential part of the rival trader's name, copying the get-up or colour scheme of the label used by the trader, imitating the design or shape of the goods and adopting the word or name by which the rival trader's goods or business is known in the market.

The concept now has changed from protecting the manufacturer's goodwill and reputation to the concept of protecting the manufacturer's monetary benefit and to bar unfair reaping by others of what has been sowed by the manufacturer. The ultimate concept remains same that is to protect the consumers from the ultimate confusion while buying the goods, services etc. In the early nineteenth century tort as a remedy was available for name, trademark or product or business but now it is inclusive of television, radio programme, and other non-trading activities like professional associations, business of looking after children, organizing exhibitions, beauty contests, so on and so forth.

In the English case of Erven Warnink, which is also known as the Advocat case, the essential characteristics which must be present in order to create a valid cause of action for passing off are:

1. misrepresentation,
2. that is made by a person in the course of trade,
3. to prospective customers of his or ultimate consumers of goods or services,

4. supplied by him which is calculated to injure the business or good-will of another trader, and
5. which causes actual damage to a business or goodwill of the trader by whom the action is brought.

General Principles:

a) Misrepresentation

No one is entitled to represent his goods or business as being the goods or business of another whether such representation is made by the use of any mark, name, sign, or symbol device or other means. It is therefore an actionable wrong to pass off by whatever means that result is achieved.

Where the ultimate purchasers get confused from the overall getup of the unregistered mark, it is sufficient to claim for passing off though a prerequisite is to have goodwill in an unregistered trademark. It is an invasion of the proprietary rights vested in the plaintiff. The misrepresentation should also have deceived or is likely to deceive and that the plaintiff is likely to suffer damage by such deception. Mere confusion that does not lead to sale is not sufficient.” This is a condition precedent to success in an action for passing off where the alleged representation consists of the use of a name in connection with the goods, that the name should have become distinctive of the plaintiff’s goods.

b) Representation that defendant’s goods or business is connected with the goods or business of plaintiffs

In certain circumstances passing off action lies when there is a representation there is a connection or association with the goods or business of the plaintiff. The association or connection must be sufficiently close to affect the goodwill of the injured party. The test is: would consumers believe or at any rate would some of them believe that it is associated with the same source of manufacture as the plaintiff’s product.

The principle of passing off unlike the case in early nineteenth century now encompasses other descriptive material such as slogans or visual images, radio, television or trademark of a product or a business. A plaintiff does not have to be in direct competition with the defendant

to suffer injury. The passing off action has also been applied to professional associations, business of looking after children, organizing exhibitions and beauty contests.

Passing off is a wrongful invasion of a right of property vested in the plaintiff, but the property which is protected by an action for passing off is not the plaintiff's proprietary right in the name or get-up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misrepresentation.

Essential elements of passing off

There are three elements of the tort of passing off which are as follows:

(1)Reputation (2) deception (3) damage.

These are sometimes called the “classical trinity”.

Once a misrepresentation is established it is reasonable to infer that customers of the goods bought them on that misrepresentation unless there is evidence to the contrary.

In the recent case of *Reckitt & Colman* it was stated that according to the law of passing off no man could pass off his goods as those of another. It may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. Firstly goodwill has to be established or reputation attached to the foods or services which he supplies in the mind of the purchasing public by association with the identifying “get-up” (whether it consists simply of a brand name or a trade description, or the individual features of labeling or packaging) under which his particular goods or services are offered to the public, such that the get up is recognized by the public as distinctive specifically of the plaintiffs goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public leading or likely to lead the public into believing that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware

of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, so long as they are identified with a particular source which is in fact the plaintiffs. Thirdly, he must demonstrate that he suffers or that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff. There are two necessary elements, first a misrepresentation, express or implied but not necessary fraudulent and second a consequent likelihood of damage to the plaintiff's goodwill. Misrepresentation may be express or implied. The cases on implied misrepresentation is more common than express misrepresentation. It is however very difficult to classify all the possible ways in which a man may make the false representation relied on.

Difference Between Infringement And Passing Off

An action for Trademark infringement is a statutory right, conferred on the registered proprietor of a registered Trademark for the vindication of the exclusive right to its use in relation to those goods. Passing off is a common law remedy, an action for deceit that is passing off by a person of his own goods as those of another. In the case of infringement what needs to be proved is that the plaintiff was the first to adopt and use the mark and the mark is registered. In a passing off action the use of a mark for a sufficient long time so as to be known to the public is one of the conditions precedent to the filing of such action. The use by the defendant of the Trademark of the plaintiff is not essential in an action for passing off but is the sine qua non in the case of an action for infringement.

In infringement action the issue is whether the defendant is using a Trademark which is the same, or which is a colourable imitation of the plaintiffs registered mark. Whereas in the passing off goods, the important thing is whether the defendant is selling goods so marked as to be designed or calculated to mislead the purchasers that they are goods of the plaintiffs.

Passing off action is based solely on deception. In an infringement action the plaintiff must make out that the use of the defendant mark is likely to deceive but where the similarity between two marks is so close and the court reaches the conclusion that there is an imitation no further evidence is required to establish that the plaintiff's rights are violated. If the essential features of the trade mark of a plaintiff have been adopted by the defendant, the fact that the get-up, packaging, other writing or marks on the goods show marked differences or indicate clearly a trade origin different from that of the registered proprietor of the mark is

immaterial.

In an infringement, the defendant must use the offending mark on the same goods for which the plaintiff's mark is registered. In passing off, the defendant's goods need not be same it may be allied or even different. In an infringement action, an injunction can be issued against using the TM. In a passing off action the defendant is prevented not only from using the TM but is also stopped from using it in such a way to pass off his goods as that of another. In an infringement case the main issue that the court is concerned with is what the defendant is doing and not with what it might do.

The statutory recognition and protection of well known TMs and tests for their determination have also been inserted so as to protect the interests of persons who have adopted and used the mark in bonafide manner. The new law defines well-known TMs in relation to any goods or services, a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such TM in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first mentioned goods and services.

The jurisdiction of district court to entertain suits for infringement and passing off has been made same as for infringement of copyright thus enabling a plaintiff to file the suit in the district court within whose jurisdiction he resides or carries on business. There has also been substantial enhancement of punishments for offences relating to trade marks and false description.

UNIT-III : PATENTS

Q.1 What are the Patentable and Non- Patentable Inventions?

Section 2(1)(j) "invention" means a new product or process involving an inventive step and capable of industrial application;

Section 2(1)(ja) "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

Section 2(1)(ac) "capable of industrial application", in relation to an invention, means that the invention is capable of being made or used in an industry;

Section 2(1)(l) "new invention" means 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;

Patentability requirements of an invention

- Newness or novelty
- Inventive step or non-obviousness requirement
- Capable of Industrial application

Newness or novelty requirement

Sections 2(1)(l) and 2(1)(j) of the Patents Act highlight the difference between a new invention and an invention. A 'new invention' is defined as:

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.

An invention is said to be novel if all elements of a claim of the invention are not anticipated by a single prior art which is published, or used or known to public.

Refer our section on "working with patent agent or attorney" on patent drafting for understanding importance of claim and the role they play in patent.

inventive step or non obviousness

Now let's talk about inventive step, also known as non obviousness test for your innovative idea.

An inventive step is said to be present in your invention when it has a technical advance as compared to the existing knowledge (that is state of the art of your field of invention) or it has

economic significance or your invention has both such that it makes your invention non-obvious to a person skilled in the art.

So, we need to identify feature of our invention that is either technically advance or it is economically significant or both, when it is compared to state of the art or existing knowledge such that our invention becomes non-obvious to a person skilled in the art.

Technical advance means some feature of the invention is having advancement which is technical in nature as compared to the existing knowledge.

A person skilled in the art is a person who has average skills from your domain. For example if your invention is related to mechanical device the person skilled in the art would be from mechanical background. If there are multiple technologies used in the invention then a person skilled in the art is assumed to have all the knowledge (that is available and known to public) from the technologies involved. This is to assess the inventiveness of the invention.

The idea here is our invention should not be obvious to a person skilled in the art (that is an average person from a background of field of invention).

In other words, considering the state of the art (things already known to public) and assuming the person skilled in the art does not have any knowledge about our invention, if that person skilled in the art was asked to solve the problem (that our invention solves), then the our invention should not come as a natural suggestion by that person skilled in the art. Which ultimately means invention should not be obvious. This is in essence known as non obviousness test.

And one of the way to qualify for the non obviousness test of patentability is mentioning and proving to examiner that our invention is solving a the long standing problem in the industry. Pointing out that the problem existed for long time and there was a need to solve the problem, also mentioning existing prior arts and patent references who tried before but could not solve up to certain extent (stating problems with the prior arts in the background of the invention while drafting patent) and since the problem has not solved till now it ultimately means the solution to the problem that is our invention was Not obvious.

Now, this is not your job as an inventor to do all this, in fact this is responsibility of a patent agent or patent attorney working on your invention. an experienced patent professional

would be asking you for required details and technicality of your invention and using such information while drafting patent application for your invention which gives a very good chance for your patent application to stand through examination stage till the grant of patent.

Industrial application or utility

Section 2(1)(ac) capable of industrial application", in relation to an invention, means that the invention is capable of being made or used in an industry;

Industrial application means invention is capable of being made or used in any kind of industry. This is also known as usefulness, a patented invention should be able to be produced on a large scale that is it could be created, used and repeated.

Now if you observe the word in definition is Capable of industrial application, which means it need not be mass produced right now, but has capability of industrial application in future. In general this patentability requirement of usefulness or industrial application is not much of a problem to prove.

Non- Patentable Inventions:

Section 3:

Section 3 (a): Frivolous inventions

Section 3 (b): Inventions which are contrary to Law or Morality or injurious to public health

Section 3 (c): Mere discovery of a scientific principle or formulation of an abstract theory.

Section 3 (d): The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant is not an invention.

Section 3(d) provides an explanatory clause to make it more clear which reads as follows:

(Explanation- For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy)

The complete specification must clearly and categorically bring out in the description, as to how the subject matter differs significantly in properties with regard to efficacy from the known substance. .

In a recent landmark decision (Novartis AG Vs. Union of India, W.P. No. 24760/06), the Madras High Court held that efficacy means therapeutic efficacy. It was held that going by the meaning for the word efficacy and therapeutic what the patent applicant is expected to show is, how effective the new discovery made would be in healing a disease or having a good effect on the body. In other words, as the Court further clarified, the patent applicant is definitely aware as to what is the therapeutic effect of the drug for which he had already got a patent and what is the difference between the therapeutic effect of the patented drug and the drug in respect of which patent is asked for.

Section 3 (e): A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance is not an invention.

A mere aggregation of features must be distinguished from a combination invention. The existence of a combination invention requires that the relationship between the features or groups of features be one of functional reciprocity or that they show a combinative effect beyond the sum of their individual effects. The features should be functionally linked together which is the actual characteristic of a combination invention.

An admixture resulting in synergistic properties is not considered as mere admixture, e.g., a soap, detergent, lubricant and polymer composition etc, and hence may be considered to be patentable.

Section 3 (f): Mere arrangement or re-arrangement of known devices

The Manual of Patent Practice & Procedure says that in order to be patentable, an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an inventive step. To be patentable, the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before.

Section 3 (h): Method of agriculture or horticulture

Section 3 (i): Any process for the medicinal, surgical, curative, prophylactic diagnostic therapeutic or othertreatment of human being or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products is not patentable

a) Medicinal methods: As for example a process of administering medicines orally, or through injectables, or topically or through a dermal patch.

(b) Surgical methods: As for example a stitch-free incision for cataract removal.

(c) Curative methods: As for example a method of cleaning plaque from teeth.

(d) Prophylactic methods: As for example a method of vaccination.

(e) Diagnostic methods: Diagnosis is the identification of the nature of a medical illness, usually by investigating its history and symptoms and by applying tests.

Therapeutic methods: The term —therapy includes prevention as well as treatment or cure of disease. Therefore, the process relating to therapy may be considered as a method of treatment and as such not patentable.

Further examples of subject matters excluded under this provision are: any operation on the body, which requires the skill and knowledge of a surgeon and includes treatments such as cosmetic treatment, the termination of pregnancy,castration, sterilization, artificial insemination, embryo transplants, treatments for experimental and research purposes and the removal of organs, skin or bone marrow from a living donor, any therapy or diagnosis

practiced on the human or animal body and further includes methods of abortion, induction of labour, control of estrus or menstrual regulation.

Application of substances to the body for purely cosmetic purposes is not therapy.

Patent may however be obtained for surgical, therapeutic or diagnostic instrument or apparatus. Also the manufacture of prostheses or artificial limbs and taking measurements thereof on the human body are patentable.

Section 3 (j): Plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals are not inventions.

The subject matters excluded under this provision are:

- (a) plants in whole or in part
- (b) animals in whole or in part
- (c) seeds
- (d) varieties and species of plants and animals
- (e) essentially biological process(es) for production or propagation of plants and animals.

Microorganisms, other than the ones discovered from the nature, may be patentable. For instance, genetically modified microorganisms may be patentable subject to other requirements of Patentability.

Plant varieties are provided protection in India under the provisions of the Protection of Plant Varieties and Farmers Rights Act, 2002.

Section 3 (k): A mathematical or business method or a computer programme per se or algorithms are not inventions and hence not patentable.

Software per se not patentable. Technical applicability of the software claimed as a process or method claim, is required to be defined in relation with the particular hardware components.

Computer Implemented Inventions can be patented if:

They have technical character and solve a technical problem.

They are new.

They involve an inventive technical contribution to the prior art.

The method claims should clearly define the steps involved in carrying out the invention. It should have a technical character.

The claims should incorporate the details regarding the mode of the implementation of the invention via hardware or software, for better clarity.

The claim orienting towards a process/method should contain a hardware or machine limitation.

Business Methods claimed in any form are not patentable subject matter. The term Business Methods involves whole gamut of activities in a commercial or industrial enterprise relating to transaction of goods or services. With the development of technology, business activities have grown tremendously through e-commerce and related B2B and B2C business transactions. The claims are at times drafted not directly as business methods but apparently with some technical features such as internet, networks, satellites, telecommunications etc. This exclusion applies to all business methods and, therefore, if in substance the claims relate to business methods, even with the help of technology, they are not considered to be a patentable subject matter.

Algorithms in all forms including but not limited to, a set of rules or procedures or any sequence of steps or any method expressed by way of a finite list of defined instructions, whether for solving a problem or otherwise, and whether employing a logical, arithmetical or computational method, recursive or otherwise, are excluded from patentability.

Patent applications, with computer programme as a subject matter, are first examined with respect to (b), (c) and (d) above. If the subject matter of an application does not fall under these categories, then, the subject matter is examined with a view to decide whether it is a computer programme per se.

If the claimed subject matter in a patent application is only a computer programme, it is considered as a computer programme per se and hence not patentable. Claims directed at computer programme products are computer programmes per se stored in a computer readable medium and as such are not allowable. Even if the claims, inter alia, contain a subject matter which is not a computer programme, it is examined whether such subject matter is sufficiently disclosed in the specification and forms an essential part of the invention.

If the subject matter of a patent application is not found excluded under the foregoing provisions, it shall be examined with respect to other criteria of patentability.

Section 3 (l): A literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions is not patentable.

Section 3 (m): A mere scheme or rule or method of performing mental act or method of playing game is not patentable.

Section 3 (n): A presentation of information is not patentable.

Section 3 (o) Topography of integrated circuits is not patentable.

Section 3 (p) An invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components is not patentable.

Section 4: deals with inventions relating to atomic energy, that are also not patentable and that fall within sub-section (1) of section 20 of the Atomic Energy Act, 1962.

Q.2 How Patent is Registered in India?

Step 1: Write down the invention (idea or concept) with as much details as possible

Collect all the information about your invention such as:

- Area of invention
- Description of the invention what it does
- How does it work

- Advantages of the invention

Ideally, if you have worked on the invention during research and development phase you should have something call lab record duly signed with date by you and respective authority.

Step 2: include drawings, diagrams or sketches explaining working of invention

The drawings and diagrams should be designed so as to explain the working of the invention in better way with visual illustrations. They play an important role in patent application.

Step 3: check whether the invention is patentable subject matter

All inventions may not be patentable, as per Indian patent act there are certain inventions that are not patentable explained in detail in([inventions not patentable](#))

Step 4a: Patentability search

The next step would be finding out whether your invention meets all patentability criteria as per Indian patent act? That is,

- Novelty
- Non-obviousness
- Industrial application
- Enabling

The detailed explanation for patentability criteria is given here ([what are patentability criteria's](#)). The patentability opinion is provided by the patent professionals up on conducting extensive search and forming patentability report.

Step 4b: Decide whether to go ahead with patent

The patentability report and opinion helps you decide whether to go ahead with the patent or not, chances are what you thought as novel might already been patented or know to public in some form of information. Hence this reports saves lots of time, efforts and cost of the inventor by helping him decide whether to go ahead with the patent filing process or not.

Step 5: Draft (write) patent application

In case you are at very early stage in the research and development for your invention, then you can go for **provisional application**. It gives following benefits:

- Secures filing date
- 12 months of time to file complete specification
- Low cost

After filing provisional application, you secure the filing date which is very crucial in patent world. You get 12 months of time to come up with the complete specification, up on expiry of 12 months your patent application will be abandoned.

When you complete the required documents and your research work is at level where you can have prototype and experimental results to prove your inventive step you can file complete specification with patent application.

Filing the provisional specification is the optional step, if you are at the stage where you have complete information about your invention then you can directly go for complete specification.

Step 6: Publication of the application

Up on filing the complete specification along with application for patent, the application is published after 18 months of first filing.

An early publication request can be made along with prescribed fees if you do not wish to wait till the expiry of 18 months from the date of filing for publishing your patent application.

Generally the patent application is published within a month from request for early publication.

Step 7: Request for examination

The patent application is examined only after receiving request for examination that is RFE. Up on receiving this request the controller gives your patent application to a patent examiner who examines the patent application with different patentability criteria like:

- Patentable subject matter
- Novelty

- Non-obviousness
- Inventive step
- Industrial application
- Enabling

The examiner creates a first examination report of the patent application upon reviewing it for above terms. This is called patent prosecution. Everything happening to patent application before grant of patent is generally called as patent prosecution.

The first examination report submitted to controller by examiner generally contains prior arts (existing documents before the date of filing) which are similar to the claimed invention, and same is reported to patent applicant.

Step 8: respond to objections

Pre Grant Opposition:

Section 25(1) of the Patent (Amendment) Act 2005 provides provisions for pre grant opposition of Patent. Under this provision any person or any third party or Government may challenge the application of grant of patent and inform to the controller of Patents for opposition, in writing against the grant of a patent after the application for a patent has been published but before the grant of a patent a patent. Pre-grant opposition acts as a defensive shield to confirm the validity of the patent applications before patents are granted to them. Furthermore pre grant opposition proceeds as a business approach, where opponents take it as a golden opportunity for opposing the unlawful protective rights.

Pre-grant opposition can be made on the grounds listed under section 25(1)(a) to (k) of the Patent Amendment Act, 2005:

- Wrongfully obtaining the invention
- anticipation by prior publication
- anticipation by prior date, Prior claiming in India
- Prior public knowledge or public use in India
- Obviousness and lack of inventive step
- non patentable subject matter

- insufficiency of description of the invention
- non-disclosure of information as per the requirement or providing materially false information by an applicant
- Patent application not filed within 12 months of filing the first application in a convention country
- nondisclosure/ wrong mention of source of biological material
- Invention anticipated with regard to traditional knowledge of any community, anywhere in the world.

Post Grant Opposition:

Post grant opposition may be filed at any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of the patent. Under this provision any person interested may give notice of opposition to the Controller in the prescribed manner on any of the grounds mentioned in section 25 of the Patent (Amendment) Act 2005. Section 2(1)(t) of Indian patent act defines "person interested" as including a person engaged in, or in promoting, research in the same filed as that to which the invention relates. In addition, interested person may also include any organization that has a manufacturing or trading/ financial interest in the goods related to the patented product.

Similar to the pre-grant opposition, a post-grant opposition may be filed on a number of grounds as specified under section 25(2) of the Act. It is notable that many of the grounds are similar to the grounds required for filing pre-grant opposition.

Majority of patent applicants will receive some type of objections based on examination report. The best thing to do it analyse the examination report with patent professional (patent agent) and creating a response to the objections raised in the examination report.

This is a chance for an inventor to communicate his novelty over prior arts found in the examination report. The inventor and patent agent create and send a response to the examination that tries to prove to controller that his invention is indeed patentable and satisfies all patentability criteria's.

Step 9: clearing all objections

This communication between controller and patent applicant is to ensure that all objections raised in the patent application are resolved. (if not the patent will not be granted) and the inventor has his fair chance to prove his point and establish novelty and inventive step over existing prior arts.

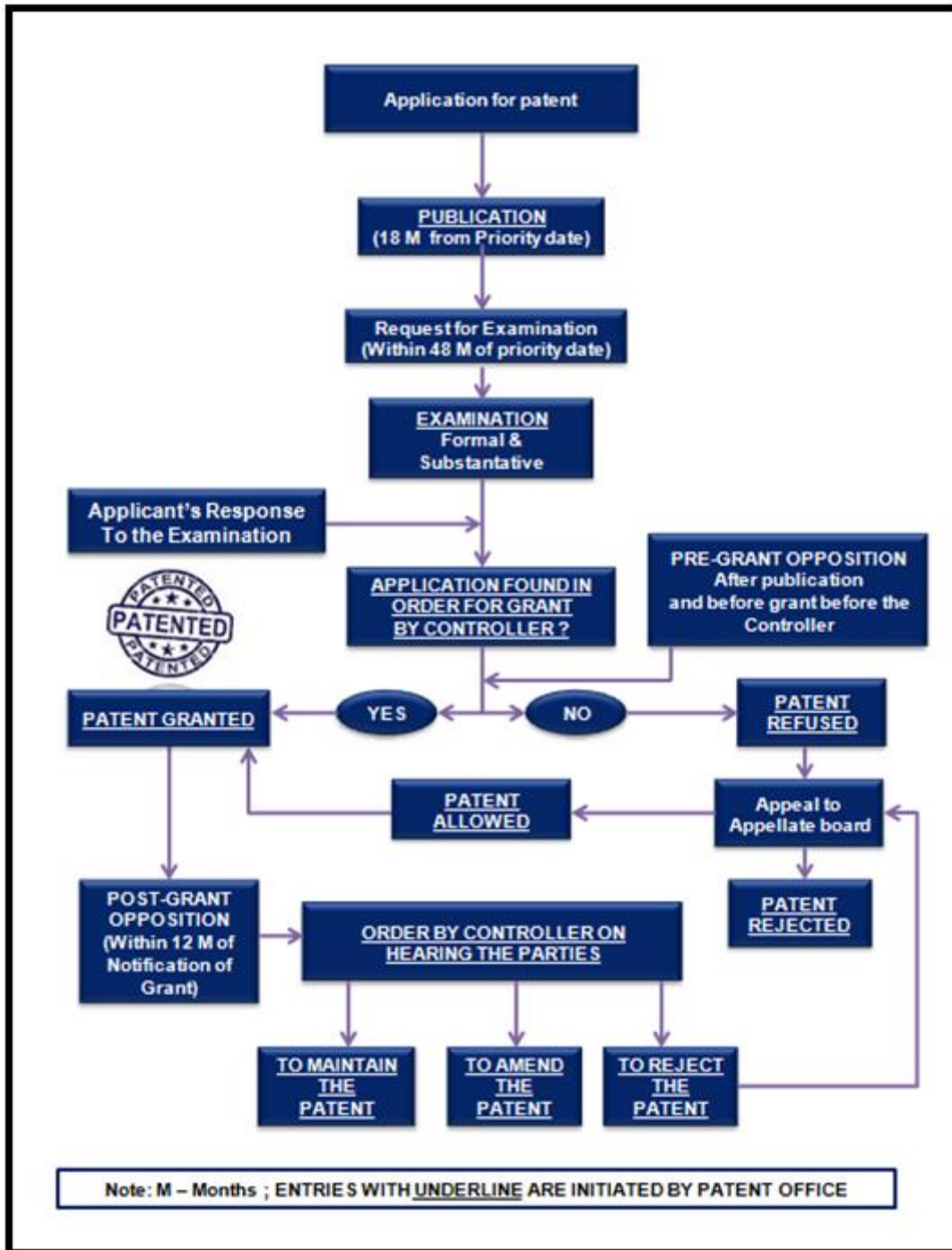
Up on finding the patent application in order of grant, it is grant to the patent applicant as early as possible.

Step 10: Grant of patent

The application would be placed in order for grant once it is found to be meeting all patentability requirements. The grant of patent is notified in the patent journal which is published time to time.



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Q.3 What are the International treaties and conventions on Patent ?

TRIPS:

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The three main features of the Agreement are:

Standards.: In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

Enforcement: The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it

contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

Dispute settlement: The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

Substantive provisions of TRIPS on Patents

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced (Article 27.1).

There are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to ordre public or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of ordre public or morality (Article 27.2).

The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)).

The third is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective sui generis system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement (Article 27.3(b)).

The exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained directly by the

process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts (Article 28).

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (Article 30).

The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date (Article 33).

Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application (Article 29.1).

If the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating a likelihood that the protected process was used are met (Article 34).

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions are mainly contained in Article 31. These include the obligation, as a general rule, to grant such licences only if an unsuccessful attempt has been made to acquire a voluntary licence on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the licence; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions are relaxed where compulsory licences are employed to remedy practices that have been established as anticompetitive by a legal process. These conditions should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced

The Paris Convention applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models (a kind of "small-scale patent" provided for by the laws of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications (indications of source and appellations of origin) and the repression of unfair competition.

The substantive provisions of the Convention fall into three main categories: national treatment, right of priority, common rules.

(1) Under the provisions on **national treatment**, the Convention provides that, as regards the protection of industrial property, each Contracting State must grant the **same** protection to nationals of other Contracting States that it grants to its own nationals. Nationals of non-Contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a Contracting State.

(2) The Convention provides for the **right of priority** in the case of patents (and utility models where they exist), marks and industrial designs. This right means that, on the basis of a regular first application filed **in one** of the Contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection **in any of the other** Contracting States. These subsequent applications will be regarded as if they had been filed on the same day as the first application. In other words, they will have priority (hence the expression "right of priority") over applications filed by others during the said period of time for the same invention, utility model, mark or industrial design. Moreover, these subsequent applications, being based on the first application, will not be affected by any event that takes place in the interval, such as the publication of an invention or the sale of articles bearing a mark or incorporating an industrial design. One of the great practical advantages of this provision is that applicants seeking protection in several countries are not required to present all of their applications at the same time but have 6 or 12 months to decide in which countries they wish to seek protection, and to organize with due care the steps necessary for securing protection.

(3) The Convention lays down a few **common rules for patents** that all Contracting States must follow. The most important are:

(a) **Patents.** Patents granted in different Contracting States for the same invention are **independent of each other**: the granting of a patent in one Contracting State does not oblige other Contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any Contracting State on the ground that it has been refused or annulled or has terminated in any other Contracting State.

The inventor has **the right to be named** as such in the patent.

The grant of a patent may not be refused, and a patent may not be invalidated, on the ground that the sale of the patented product, or of a product obtained by means of the patented process, is subject to restrictions or limitations resulting from the domestic law.

Each Contracting State that takes legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exclusive rights conferred by a patent may do so only under **certain conditions**. A compulsory license (a license not granted by the owner of the patent but by a public authority of the State concerned), based on failure to work or insufficient working of the patented invention, may only be granted pursuant to a request filed after three years from the grant of the patent or four years from the filing date of the patent application, and it must be refused if the patentee gives legitimate reasons to justify this inaction. Furthermore, forfeiture of a patent may not be provided for, except in cases where the grant of a compulsory license would not have been sufficient to prevent the abuse. In the latter case, proceedings for forfeiture of a patent may be instituted, but only after the expiration of two years from the grant of the first compulsory licence.

Patent Law Treaty (PLT)

The Patent Law Treaty (PLT) was adopted in 2000 with the aim of harmonizing and streamlining formal procedures with respect to national and regional patent applications and patents and making such procedures more user friendly. With the significant exception of filing date requirements, the PLT provides the maximum sets of requirements the office of a Contracting Party may apply.

Budapest treaty:

Adopted in 1977, the Budapest Treaty concerns a specific topic in the international patent process: microorganisms.

All states party to the Treaty are obliged to recognize microorganisms deposited as a part of the patent procedure, irrespective of where the depository authority is located.

In practice this means that the requirement to submit microorganisms to each and every national authority in which patent protection is sought no longer exists.

Patent Cooperation Treaty:(PCT)

The **Patent Cooperation Treaty (PCT)** is an international patent law treaty, concluded in 1970. It provides a unified procedure for filing patent applications to protect inventions in each of its contracting states. A patent application filed under the PCT is called an **international application**, or **PCT application**.

It makes possible to seek patent protection for an invention simultaneously in a large number of countries for filing a single **international patent application** instead of filing several separate national or regional patent applications. The granting of patents remains under the control of the national or regional patent offices in what is called the 'national phase'.

A single filing of a PCT application is made with a Receiving Office (International Bureau of WIPO) in one language. It then results in a search performed by an International Searching Authority (ISA), accompanied by a written opinion regarding the patentability of the invention, which is the subject of the application. It is optionally followed by a **preliminary examination**, performed by an International Preliminary Examining Authority (IPEA). Finally, the relevant national or regional authorities administer matters related to the examination of application (if provided by national law) and issuance of patent.

A PCT application does not itself result in the grant of a patent, since there is no such thing as an "international patent", and the grant of patent is a prerogative of each national or regional authority. In other words, a PCT application, which establishes a filing date in all contracting states, must be followed up with the step of entering into national or regional phases to

proceed towards grant of one or more patents. The PCT procedure essentially leads to a standard national or regional patent application, which may be granted or rejected according to applicable law, in each jurisdiction in which a patent is desired.

Q.4 What is compulsory licence? Discuss the cases in which compulsory licences may be granted.?

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What are ‘compulsory licenses’ under the Patents Act?

In simple terms, compulsory licenses are authorizations given to a third-party by the Government to make, use or sell a particular product or use a particular process which has been patented, without the need of the permission of the patent



owner.

The provisions regarding compulsory licenses are given in the Indian Patents Act, 1970 and in the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement at the International level. Although this works against the patent holder, generally compulsory licenses are only considered in certain cases of national emergency, and health crisis. There are certain pre-requisite conditions which need to be fulfilled if the Government wants to grant a compulsory license in favor of someone.

Under Indian Patents Act, 1970 the provisions of ‘compulsory license’ are specifically given under Chapter XVI, and the conditions which need to be fulfilled are given in Sections 84-92 of the said Act.

Section 84

At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory license on patent on any of the following grounds, namely:—

(a) That the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India.

As per Section 84, any person who is interested or already the holder of the license under the Patent can make a request to the Controller for grant of compulsory license on expiry of the three years, when the above conditions are fulfilled.

Procedure for processing compulsory licence application

On filing the application for grant of a compulsory licence along with the relevant facts and evidence, the controller will analyse the *prima facie* case made by the applicant against the patentee. After considering such factors as the nature of the invention, the applicant's ability to work the invention and whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and, if such efforts have not been successful within a reasonable period (ie, six months from the date of application), the controller will decide whether to grant or reject the compulsory licence.

In case the controller is not satisfied with the applicant's request, a notice will be issued to the applicant regarding rejection of the grant of a compulsory licence. In this scenario, the applicant may request a hearing with the controller, within one month from the date of such notice of rejection. The controller will thereafter decide the fate of the application based on the hearing discussion held with the applicant.

Opposition to the grant of a compulsory licence

When the controller is satisfied, on consideration of an application under Section 84, that a *prima facie* case has been made out for the making of an order, the applicant will be directed to serve copies of the application to the patentee and any other person appearing from the register (eg, a licensee mentioned in the register). The application made by the applicant is thereafter published in the *Official Journal*.

The patentee or any other person desiring to oppose the application for the grant of a compulsory licence may, within the prescribed time (two months from the date of publishing the application in the *Official Journal*), file a notice of opposition via Form 14, along with the prescribed fee. The opposition statement should contain statements pertaining to the grounds on which the grant of the compulsory licence is opposed. When such a notice is served, the controller will notify the applicant and give both the applicant and opponent an opportunity to be heard before deciding the case.

Termination of compulsory licence

On an application (via Form 21) along with evidence, made by the patentee or any other person deriving title or interest in the patent, the compulsory licence granted under Section 84 may be terminated by the controller when the circumstances considered for grant of the compulsory licence cease to exist. The applicant is thereafter required to serve a copy of the application and evidence to the holder of the compulsory licence and to inform the controller of the date on which the service was made effective.

The holder of the compulsory licence may file his or her objection along with evidence to the application for termination, within one month from the date of the controller's receipt of the application (and evidence). A copy of the objection and evidence is also required to be served to the applicant by the licence holder.

Thereafter, the controller will appoint a hearing for analysing the facts and issuing a verdict. If the controller decides to terminate the compulsory licence, an order setting out terms and conditions (if any) of such termination will be served to both the parties.

India's first case of granting compulsory license– India's first case of granting compulsory license was granted by the Patent office in 2012 to an Indian Company called Natco Pharma for the generic production of Bayer Corporation's Nexavar. All the 3 conditions of Sec 84 was fulfilled that the reasonable requirements of the public were not fulfilled, and that it was not available at an affordable price and that the patented invention was not worked around in



India.

This medicine is used for treating Liver and Kidney Cancer, and one month's worth of dosage costs around Rs 2.8 Lakh. Natco Pharma offered to sell it around for Rd 9000 making this potentially lifesaving drug easily accessible to all parts of the society and not just the rich people. The Government took this decision for the general public benefit. However, it was heavily criticized by the Pharmaceutical Companies as they felt the license should not have been given.

However, Natco Pharma is paying the royalties to Bayer at a rate of 6% of all sales on a quarterly basis in accordance with the guidelines set by the United Nations Development Programme (UNDP)

In January 2013, the Health Ministry of India recommended three anti-cancer drugs trastuzumab, ixabepilone, and dasatinib for compulsory licenses. This will allow the Government to sell these drugs at a significantly lower price and will also allow the people who cannot afford the drugs originally, access to these drugs.

BDR Pharmaceuticals International Pvt Ltd v Bristol-Myers Squibb Co

In *BDR Pharmaceuticals* the controller rejected BDR's application for a compulsory licence (4 March 2013) for the Bristol-Myers Squibb cancer drug SPRYCEL. The controller rejected the compulsory licence application made by BDR by stating that BDR had failed to make

a *prima facie* case for the grant of the compulsory licence. The controller observed that BDR had made no credible attempt to procure a licence from the patent holder and the applicant had also not acquired the ability to work the invention to public advantage. Thus, the request for grant of the compulsory licence was refused.

Lee Pharma v AstraZeneca AB

In the most recent case of compulsory licensing in India, Lee Pharma, a Hyderabad-based Indian pharma company, filed an application for a compulsory licence (29 June 2015) for the patent covering AstraZeneca's diabetes management drug Saxagliptin. In order to make a *prima facie* case, Lee Pharma declared that request for a licence with the patent owner was not responded to within a reasonable period. The grounds alleged by Lee Pharma were that:

- the patentee failed to meet the reasonable requirements of the public;
- the patented invention is unavailable to the public at a reasonably affordable price; and
- the patented invention is not used in India.

However, all three grounds as well as the compulsory application were rejected. The application was rejected on the basis that Lee Pharma failed to demonstrate the reasonable requirement of the public and further failed to demonstrate the comparative requirement of Saxagliptin in relation to other drugs in the market. Further, the controller held that all the related drugs available in the market were in the same price range and the allegation that Saxagliptin alone was being sold at an unaffordable price was not justified. The controller also stated that Lee Pharma failed to demonstrate the exact number of patients that were unable to obtain the drug due to its non-availability

However compulsory licenses may also be granted, when –

1. Section 92 A- For exports, under exceptional circumstances.
2. Section 92A- In case of national emergency, extreme urgency of public non-commercial use by notification of the Central Government
3. Section 92 A (1) – To a country which has insufficient or no manufacturing power in the pharmaceutical sector to address public health.

Global Perspective on Compulsory Licensing- This phenomenon of compulsory licensing is a hugely debated issue. Many developing countries are giving importance to the compulsory licensing because of the unavailability and unaffordability of the medicines, and they are continuously granting more and more compulsory licenses. The developed countries of Europe, USA are opposing this view as it would make innovation difficult for the pharmaceutical companies

Q.5 What do you mean by infringement of Patent? Which acts do not constitute infringement? Discuss various reliefs available against it.?

Rights of Patentee

A Patent confers the exclusive right on the Patentee to make, distribute or sell the invention in India. This exclusive right is for 20 years. After 20 years, that invention becomes a public Domain. An infringement would be when any of three rights is violated. A Patentee may assign/ license all or some of these rights. The exercise of the rights so transferred in favors of the assignee or the licensee by the assignor or the licensor would not amount to infringement of the Patents.

In the case of product Patents, rights of the Patentees are infringed by any one who makes or supplies that substance commercially. In the case of a process Patent, the use of such a method or process in India by anyone other than the Patentee amounts to infringement. Whether the act of a person other than the Patentee amounts to infringement or not would depend upon.

- i) The extent of the monopoly right conferred by the Patent which is interpreted from the specification and claims contained in the application of the claims would not amount to infringement.
- ii) Whether he is infringing any of the monopoly rights in the patentee to make, or sell the invention.

Infringement of Patents

Patent infringement means the violation of the exclusive rights of the patent holder. As discussed earlier, patent rights are the exclusive rights granted by the Government to an inventor over his invention for a limited period of time. In other words, if any person exercises the exclusive rights of the patent holder without the patent owner's authorization then that person is liable for patent infringement. Sections 104-114 of the Patents Act, 1970 provide guidelines relating to patent infringement.

Unlike the Design law, the Patents law does not specify as to what would constitute infringement of a patented product or process. However, the following acts when committed without the consent of the patentee shall amount to infringement:

- (i) making, using, offering for sale, selling, importing the patented product;
- (ii) using the patented process, or using, offering for sale, selling or importing the product directly obtained by that process

Types of Infringement

There are two kinds of infringement :

- **Direct Infringement**

Direct patent infringement is the most obvious and the most common form of patent infringement. Basically, direct patent infringement occurs when a product that is substantially close to a patented product or invention is marketed, sold, or used commercially without permission from the owner of the patented product or invention.

- **Indirect Infringement**

Indirect patent infringement suggests that there was some amount of deceit or accidental patent infringement in the incident. For instance, A holds a patent for a device and B manufactures a device which is substantially similar to the A's device. B is supplied with a product from another person C to facilitate manufacturing of the B's device. If the device so manufactured by B infringes upon A's patent, then the person C indirectly infringes A's

patent. Further, if such a product is knowingly sold or supplied, it may lead to “contributory infringement”. In the above example, if the person C knowingly supplies the product to B then the infringement is construed as contributory infringement

Doctrine of Equivalents And Doctrine of Colourable Variation

Patent infringement generally falls into two categories: literal infringement and infringement under the doctrine of equivalents. The term "literal infringement" means that each and every element recited in a claim has identical correspondence in the allegedly infringing device or process.

However, even if there is no literal infringement, a claim may be infringed under the doctrine of equivalents if some other element of the accused device or process performs substantially the same function, insubstantially the same way, to achieve substantially the same result. The doctrine of equivalents is a legal rule in most of the world's patent systems that allows a Court to hold a party liable for patent infringement even though the infringing device or process does not fall within the literal scope of a patent claim, but nevertheless is equivalent to the claimed invention.

This "expansion" of claim coverage permitted by the doctrine of equivalents, however, is not unbounded. Instead, the scope of coverage which is afforded the patent owner is limited by (i) the doctrine of "prosecution history estoppel" and (ii) the prior art.

An infringement analysis determines whether a claim in a patent literally "reads on" an accused infringer's device or process, or covers the allegedly infringing device under the doctrine of equivalents.

Burden of Proof

The traditional rule of burden of proof is adhered to with respect to patented product and accordingly in case of alleged infringement of a patented product the ‘onus of proof’ rests on the plaintiff. However, TRIPS-prompted amendment inserted by way of Section 104 (A) has ‘reversed burden of proof’ in case of infringement of patented process. Under the current law, the court can at its discretion shift the burden of proof on the defendant, in respect of process patent if either of the following two conditions is met:

(a) the subject matter of the patent is a process for obtaining a new product; or

(b) there is substantial likelihood that an identical product is made by the process and plaintiff has made reasonable efforts to determine the process actually used but has failed. [Section 104 (A)]

While considering whether a party has discharged the burden imposed upon him under Section 104(A), the court shall not require him to disclose any manufacturing or commercial secrets, if it appears to the court that it would be

What can amount to Infringement?

- i) The colorable imitation of an invention.
- ii) Immaterial variation in the invention.
- iii) Mechanical equivalents.
- iv) Taking essential features of the Invention.

All the above acts often overlap each other when an infringement of a Patent or process occurs.

Infringement by mechanical equivalents would occur when he uses mere substitutes for those features so as to get the same result for the same purpose as obtained by the Patentee.

Where a suit is to be instituted?[Sec. 104]

A suit for infringement shall not be instituted in any court inferior to a District court having jurisdiction to try the suit. In appropriate cases where the High Court has original jurisdiction to try the suit shall be instituted in the High Court. When an action for infringement has been instituted in a District court and the defendants make a counter claim for revocation of the Patents the suit is transferred to the High Court for decision because High Court has the jurisdiction to try cases of revocation. The procedure followed in conducting a suit for infringement is governed by the provisions of code of civil procedure.

When a Suit can be instituted:

A suit for infringement can be instituted only after the patent has been sealed when a specification has been accepted and published i.e. during the period when opposition has been called and is being decided, the applicants cannot institute a suit for infringement, but damages sustained due to the infringement committed during the period, i.e. between the date of publication of acceptance of complete specification and the date of damages but not suit for infringement.

When the term of the Patent has expired and infringement occurred during the term of the Patent, a suit can be instituted during the term or even after the expiry of the term. In the case of patent had lapsed and was subsequently restored, committed between the date on which Patent ceased to have effect and the date of publication of application for restoration.

When a patent was obtained wrongfully by a person and later granted to the true and first inventor, no suit for infringement can be instituted for any infringement occurring before the period of such grant to the true and first inventor. The person who institutes a suit, is not obliged to give a notice to the infringer before instituting a suit, court will issue a notice.

Who is entitled to Sue:

Only a person who has a right in the Patent can institute a suit for infringement. The following persons are entitled to sue: –

- i) Patentee
- ii) The exclusive licensee, if license is registered.
- iii) A compulsory licensee, when
- iv) Assignee.

Remedies/Reliefs provided:

1. Administrative remedy: The patent owner can reach the collector of customs and prohibit the entry of these goods into the Indian market. The patent owner must provide the name of the exporter, consignee, port of entry, name of the ship etc. details.

2. Civil remedies:

3. Injunctions: When there is a *prima facie* case and/or balance of convenience is in the favor of the plaintiff; Interim injunction is granted. Whereas after the complete trial permanent injunctions are granted.

4. Damages or accounts of profits is granted if it is established that on the date of the infringement; the defendant was aware of the prior existence of the patent.

The court may also order **delivery up** of the infringing goods. This is mentioned in order XXXIX rule 7 of the Civil Procedure Code. As per the provisions mentioned under this relief, a commissioner appointed by the court visits the defendant's premises and take the inventory of the infringing articles that are present in the defendant's premises. These orders are usually passed without sending notice to the infringer.

Groundless threats for Infringement proceedings:

There may be a certain situation where a person is aggrieved by baseless threats of patent infringement. Such a person may seek for the following reliefs:

- 1) Injunction against such threats;
- 2) Ask for damages if any sustained;
- 3) A declaration to the effect that the threats are unjustified.

In India as the awareness regarding IP protection is increasing, people are becoming more and more conscious about the ways to secure their patents. A concerned and well-informed strategy towards securing ones Intellectual property is always the best approach.

Criminal Remedies:

Indian Patent Act, 1970 also considers falsification of entries in register, claiming patent rights in an unauthorized way etc. to be punishable criminal offences. Such penalties are mentioned under Chapter XX of the Indian Patents Act, 1970.

Exceptions and Limitation of Patent Rights

Exhaustion of Patent Rights and Parallel Importation[Sec. 107 A(b)]

Compulsory License[Sec. 84 to 92]

Experimental or Research Use[Sec.47]

Use of Inventions for purposes of Government and Acquisition of Inventions by Central Government[Sec. 100]

Acts for Obtaining Regulatory Approval from Authorities[Sec. 107 A(a)]

Use of Patented Invention on Foreign Vessels [Sec. 49]

UNIT 4: DESIGNS

Q.1 What is the significance of a design? What are its essential features as per Designs Act, 2000?

JUSTIFICATION FOR PROTECTING DESIGNS

Industrial designs are a unique combination of invention, creativity and design. It is the blending of these elements that makes an industrial design exciting and new. Argument in

favour of Industrial design protection is being advanced is that a strong design protection will lead to increased innovation and creativity by providing designers with an economic incentive to develop better or higher quality products.

ESSENTIAL FEATURES

Section 2(d) in the Designs Act, 2000

“design” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957);

The Act also provides that a ‘design’ may be registered in respect of an article. An ‘article’ means any article of manufacture and includes any part of an article if that part is made and sold separately.

Thus in order to be registrable under the Act, the following criteria has to be satisfied. They are:

- (1) ‘Features of shape, configuration, pattern, or ornament or composition of lines or colour’,
- (2) Which are ‘applied’,
- (3) To an ‘article’,

Which in the finished article ‘appeal to and are judged solely by the eye’,

Applied To An Article

Designs are not registered in the abstract. They are registered as features, which are applied to an article. The essence of design law is that a design consists of visual features, which are applicable to an article. To be applicable to an article means that the design must be distinct from the article to which it is applied, so that, even without the design, the article would retain its essential character.

The subject matter which is protected by the design system is the application of the design to an article. At the outset, two characteristics of the design law could be identified. The **first** is that it is concerned with the 'visual aspects' of the articles. This has an important impact on the types of subject matter protected as registered designs. For example, the visual dimension of designs operates to exclude function from the scope of protection. The **second** feature is that it concerns designs applied to 'articles' The fact that protection is given only to design which is applied to articles means that garden design, urban planning, and architectural design have been excluded from the scope of design protection. Similarly, If you make a painting of 'Monalisa' on a sheet then it only a pure artistic work. But if you apply 'Monalisa' Painting made by you on the T- shirt then it is considered as an Industrial design.

An Article

“Article” means any article of manufacture and any substance, artificial, or partly artificial and partly natural and includes any part of an article capable of being made and sold separately.

Features of Shape, Configuration, Pattern, or Ornament or Composition of Lines or Colour

It is generally accepted that “shape” and “configuration” refer primarily to the three dimensional aspects of an article, such as the shape in which a chair or vase is made. “Pattern” and “ornamentation” refer primarily to two dimensional aspects, namely things that are added to or placed on the surface of an article, such as the pattern applied to wallpaper or carpet, colour and texture may also be embraced by the concept of pattern or ornamentation. A composition of lines or colours could be a design.

The word 'shape' indicates the external form of the article. The word 'configuration' refers to the arrangement by which the shape of a composite article is arrived at. It is also accepted

that shape and configuration are often produced by a single process of manufacture. In contrast, pattern and ornamentation are normally applied to articles as a form of decoration after they have been manufactured, such as textile pattern or a fabric design

Made and Sold Separately

If a design is applied to part of an article, the part must be for an article which is ‘made and sold separately’

The parts such as body panels, the bonnet lid, the lid, the wind screen and door panels have no reality as articles of commerce apart from their forming part of a complete vehicle. Since these spare parts were intended to be used as replacement parts, it was held that they were not made and sold separately. As such, they were not parts in relation to which designs could be registered. On the other hand, objects such as wing mirrors, wheels, seats, and steering wheels were stated to be possible to substitute articles with different designs, and were held to be by their nature susceptible of being made and sold separately.

EXCLUDED SUBJECT- MATTER

All designs will not qualify for protection. Section 2(d) of the Designs Act, 2000 excludes from the meaning of design:

1. Method or Principle of Construction.

Section 2(d) of the Designs Act, provides that for the purposes of the Act ‘design’ does not include any “mode or principle of construction”. The exclusion ensures that protection is only granted to the appearance of articles rather than to the methods or principles of construction by which the article is manufactured..

2. Features dictated solely by function.

A particular shape is dictated solely by function if its relevant features are brought about by, or attributable only to, the function which the article in that shape is to perform, even if the same function could be performed by an article of different shape.

This exclusion also draws the line between design law which protects the appearance of objects and the patent law which is concerned with the functional aspects of objects

3. A mechanical device.

To be a design a particular form must possess some features beyond those necessary to enable the article to fulfill its particular purpose

4. A trademark, or property mark or artistic work.

Section 2(d) of the Designs Act excludes any trade mark as defined in the Trade and Merchandise Marks Act, 1958 or property mark as defined in Section 479 of the Indian Penal Code 1860 or any artistic work, as defined in the Copyright Act, 1957. (If you make a painting of 'Monalisa' on a sheet then it only a pure artistic work protected under Copyright Act not under designs Act. But if you apply 'Monalisa' Painting made by you on the T- shirt then it is considered as an Industrial design which is protected under Designs Act.)

5. Immoral designs or designs contrary to public order.

Section 5(1) of the Designs Act 2000 excludes designs, which are contrary to public order or morality

Q. 2 Discuss the mode and manner of registration of design under designs Act, 2000.?

REQUIREMENTS FOR REGISTRATION OF DESIGNS

Design Must Be Applied To Articles.

A Design is something which is applied to an article and not the article itself. A design must be incorporated in the article itself as in the case of a shape or configuration which is three-dimensional, e.g., shape of a bottle or flower vase or the case of design which is two dimensional, e.g., design on a bed sheet, wallpaper which serves the purpose of decoration. An article to which the design is to be applied must be something which is to be delivered to the purchaser as a finished article.

Appeal To The Eye.

The design must be capable of being applied to an article in such a way that the article to which it is applied will appeal to and judged solely by the eye. The particular shape, configuration, pattern or ornamentation must have a visual appeal. Feature to be registered must “appeal to the eye” and be “judged by the eye. In *Amp v. Utilux*, (1972), it was held that

- (a) to have eye appeal, the features must be externally visible.
- (b) The feature must appeal to the customer’s eye.
- (c) The eye appeal need be neither artistic nor aesthetic, provided that some appeal is created by distinctiveness of shape, pattern, or ornamentation calculated to influence the consumer’s choice.

The shape adopted in *Amp v. Utilux* found no “eye appeal”, because the part (electrical connector which was an internal component of a washing machine) although visibly distinctive was entirely functional and would not affect the consumer’s choice. A different approach was taken in the case, *Interlego v. Tyco*, (1988), where the toy brick’s shape, though functional, did have a visual appeal which would affect the buyer’s choice.

Novelty Or Originality.

A design can be registered only when it is new or original and not previously published in India. A design would be registrable if the pattern though already known is applied to new article. For example, the shape of an apple if applied to school bag would be registrable. It was held in *Pilot Pen Co. v. Gujarat Ind. P. Ltd*, that registration could not be deemed to be effective unless the design, which sought to be protected, was new and original and not of a pre-existing common type. Also if it comprises or contains scandalous or obscene matter, shall not be registered under the Act. In *Rotela Auto Components (P) Ltd. and Anr. v. Jaspal Singh*, it was held that, the test for novelty and originality is dependent on determining the type of mental activity involved in conceiving the design in question. If the design is a mere

trade variation of a previous design then the designer could be said to have kept an existing design in view and made some changes. There should be some original mental application involved when conceiving a new design. The novelty or originality of a particular part of the article may be sufficient to impart the character of novelty and originality to the whole. A combination of previously known designs can be registered if the visual impact of the combination as a whole is new.

No Prior Publication

A design can be registered only when it is not previously published in India. In the case of *Wimco Ltd. v. Meena Match Industries*, the Court held that publication means the opposite of being kept secret. The disclosure even to one person is sufficient to constitute publication. The design cannot be registered under Design Act if it is not significantly distinguishable from known designs or combination of known designs. To constitute publication a design must be available to the public and it has been ceased to be a secret. For e.g.: -the display of a design on a saree in a fashion show is a publication of that design.

WHO CAN APPLY FOR REGISTRATION OF A DESIGN?

As per Section 5 of Design Act, 2000, any person who claims to be the proprietor of any new or original design can apply for the registration of the design. A foreigner can also apply for the registration of the design. However, the convention followed is that if a country does not offer the identical registration right to Indian citizen for their designs in their country, its citizen would not be eligible to apply for registration of design in India. In the *Vredenburgs Registered Designs* case, it was held that if there are two persons each of whom has produced a similar design and communicated the fact of such authorship to the other, neither of them alone is the proprietor of a new or original design. There is joint authorship of the design.

PROCEDURE FOR REGISTRATION

The application under Section 5 shall be accompanied by four copies of representation of the design and the application shall state the class in which the design is to be registered. In India, we follow Locarno Classification for registration of design comprising 32 classes,

numbered 1 to 31 and an additional Class 99 to include articles not falling under the aforesaid 31 classes. Briefly the procedure is as follows:

Submission of application

The proprietor of the design shall submit the application for registration in the patent office. The application shall be in the prescribed form and shall be accompanied by the prescribed fees. According to section 5(1), the controller may on application made by any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order and morality, register the design under the Act. The application is to be accompanied by the prescribed fee and in prescribed Form and in prescribed manner. The application shall state the class in which the design is to be registered.

Acceptance /Refusal

Before registration the Controller shall refer the application to an examiner appointed under this Act, to determine whether the design is capable of registration under this Act. The Controller shall consider the report of the examiner and if satisfied that the design complies with all requirements for registration under this Act shall register it. The Controller may if he thinks fit refuse to register the design. The aggrieved by such refusal may appeal to the High Court .The Controller may refuse to register a design, the use of which would be contrary to public order or morality.

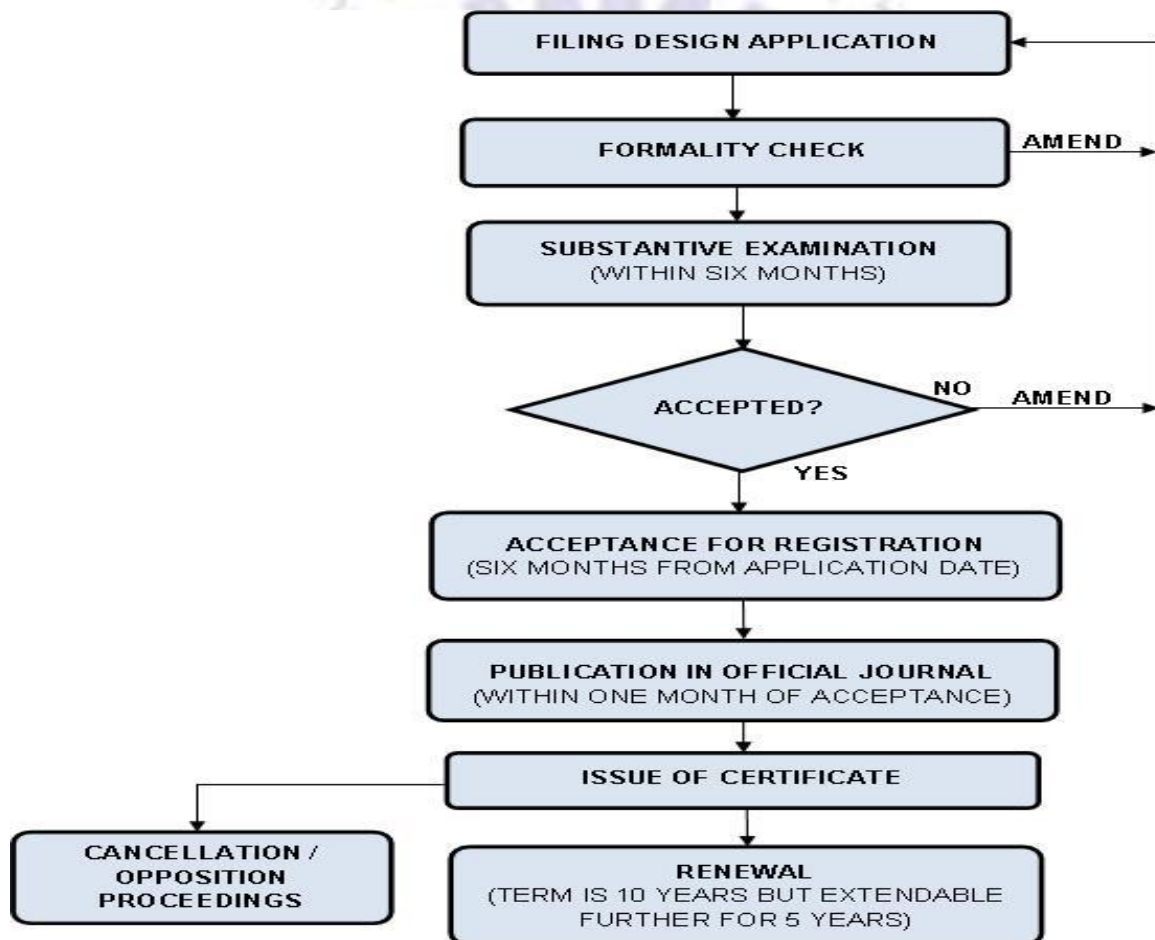
Objection/Removal of Objection/Appeal to Central Government

If on consideration of the application any objections appear to the Controller, a statement of these objections shall be sent to the applicant or his agent. The applicant has to remove the objection within one month of communication of the objections to him failing which the application shall be deemed to have been withdrawn. He may also apply to the Controller for being heard on the matter. When the Controller refuses the application after the submission, he may directly appeal to the Central Government whose decision is final.

Decision of Central Government: The decision of the Central Government on the registrability of the design is final.

Registration of the design

As soon as the design is registered the Controller shall direct the publication of the particulars of the design and thereafter it becomes open to public inspection. As per section 10, a book called Register of designs shall be kept in the patent office. The register shall contain particulars such as the names and addresses of the proprietors of registered designs, notifications of assignments and other prescribed particulars. On the completion of the above procedure, the Controller shall grant a certificate of registration to the proprietor of the design.



Section 19: Cancellation of a registered Design

If a registered design is :

- Previously registered in India
- Published in India or other Countries prior to the date of registration.
- Not a new or original Design
- Not a registerable design under this Act.
- Not a Design under Section 2(d) of this act.

NAAC ACCREDITED

Q.3 What are Various the International Conventions and Treaties on Designs?

TRIPS:

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The three main features of the Agreement are:

Standards.: In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions

are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

Enforcement: The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

Dispute settlement: The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures

Substantive Provisions of TRIPS on Industrial designs:

Article 25.1 of the TRIPS Agreement obliges Members to provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

Article 25.2 contains a special provision aimed at taking into account the short life cycle and sheer number of new designs in the textile sector: requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through industrial design law or through copyright law.

Article 26.1 requires Members to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing

articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

Article 26.2 allows Members to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

The duration of protection available shall amount to at least 10 years (Article 26.3). The wording “amount to” allows the term to be divided into, for example, two periods of five years.

Hague Agreement

The Hague Agreement allows applicants to register an industrial design by filing a single application with the International Bureau of WIPO, enabling design owners to protect their designs with minimum formalities in multiple countries or regions. The Hague Agreement also simplifies the management of an industrial design registration, since it is possible to record subsequent changes and to renew the international registration through a single procedural step.

An international application may be governed by the 1999 Act, the 1960 Act or both, depending on the Contracting Party with which the applicant has the connection described above (hereafter referred to as "Contracting Party of origin").

International design applications may be filed with the International Bureau of WIPO, either directly or through the industrial property office of the Contracting Party of origin if the law of that Contracting Party so permits or requires. In practice, however, virtually all international applications are filed directly with the International Bureau, and the majority are filed using the electronic filing interface on WIPO's website.

International applications may include up to 100 designs, provided they all belong to the same class of the International Classification for Industrial Designs (Locarno Classification). Applicants may choose to file an application in English, French or Spanish. International

applications must contain one or several reproductions of the industrial design(s) and must designate at least one Contracting Party.

International registrations are published in the *International Designs Bulletin*, issued weekly online. Depending on the Contracting Parties designated, applicants may request that the publication be deferred by a period not exceeding 30 months from the date of the international registration or, if priority is claimed, from the priority date.

Each Contracting Party designated by the applicant may refuse protection within 6 months, or possibly 12 months under the 1999 Act, from the date of publication of the international registration. Refusal of protection can only be based on requirements of the domestic law other than the formalities and administrative acts to be accomplished under the domestic law by the office of the Contracting Party that refuses protection.

If no refusal is notified by a given designated Contracting Party within the prescribed time limit (or if such refusal has subsequently been withdrawn), the international registration has effect as a grant of protection in that Contracting Party, under the law of that Contracting Party.

The term of protection is five years, renewable for at least one five-year period under the 1960 Act, or two such periods under the 1999 Act. If the legislation of a Contracting Party provides for a longer term of protection, protection of the same duration shall, on the basis of the international registration and its renewals, be granted in that Contracting Party to designs that have been the subject of an international registration. To facilitate access to the Hague system for design creators from least developed countries (LDCs), the fees for an international application are, in their case, reduced to 10 per cent of the prescribed amounts.

Paris Convention:

The Paris Convention applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models (a kind of "small-scale patent" provided for by the laws of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications (indications of source and appellations of origin) and the repression of unfair competition.

The substantive provisions of the Convention fall into three main categories: national treatment, right of priority, common rules.

(1) Under the provisions on **national treatment**, the Convention provides that, as regards the protection of industrial property, each Contracting State must grant the **same** protection to nationals of other Contracting States that it grants to its own nationals. Nationals of non-Contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a Contracting State.

(2) The Convention provides for the **right of priority** in the case of patents (and utility models where they exist), marks and industrial designs. This right means that, on the basis of a regular first application filed **in one** of the Contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection **in any of the other** Contracting States. These subsequent applications will be regarded as if they had been filed on the same day as the first application. In other words, they will have priority (hence the expression "right of priority") over applications filed by others during the said period of time for the same invention, utility model, mark or industrial design. Moreover, these subsequent applications, being based on the first application, will not be affected by any event that takes place in the interval, such as the publication of an invention or the sale of articles bearing a mark or incorporating an industrial design. One of the great practical advantages of this provision is that applicants seeking protection in several countries are not required to present all of their applications at the same time but have 6 or 12 months to decide in which countries they wish to seek protection, and to organize with due care the steps necessary for securing protection.

Locarno Agreement:

The Locarno Agreement, concluded at Locarno in 1968 and amended in 1979, establishes a classification for industrial designs (the Locarno Classification).

The competent offices of the Contracting States must indicate in official documents and in any publication they issue in respect of the deposit or registration of industrial designs the

numbers of the classes and subclasses of the Classification to which the goods incorporating the designs belong.

The Locarno Agreement created a Union, which has an Assembly. Every State that is a member of the Union is a member of the Assembly. Among the most important tasks of the Assembly is the adoption of the biennial program and budget of the Union.

The Agreement also set up a Committee of Experts in which all members of the Union are represented. The main task of the Committee is the periodical revision of the Classification.

The Agreement is open to States party to the Paris Convention for the Protection of Industrial Property (1883). Instruments of ratification or accession must be deposited with the Director General of WIPO.

Q.4 Explain the Overlapping of Design and Copyright ?

One of most controversial provisions of the Copyright Act, 1957, states that copyright in any design that could be registered under the Designs Act, 2000, but has not been so registered will cease when any article to which the design has been applied has been reproduced more than 50 times by an industrial process.

The judgment of a division bench of Delhi High Court in *Microfibres Inc v Girdhar & Co & Anr* (2009) provided much needed clarity with respect to the conflict between original artistic work as defined under the Copyright Act and design as defined in the Designs Act. It was held that copyright would exist in the original work of art and the author or copyright holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work.

For example, a famous painting will continue to enjoy the protection available to an artistic work under the Copyright Act. A design created from such a painting for the purpose of industrial application on an article may also be entitled design protection in terms of the provisions of the Designs Act. If the design is registered under the Designs Act, the design would lose its copyright protection under the Copyright Act but the original painting would retain this protection. If the design is registrable under the Designs Act but has not been

registered, the design would continue to enjoy copyright protection until the threshold limit of its application on an article by an industrial process 50 times is reached. Once that limit is crossed, it would lose its copyright protection under the Copyright Act.

It was further held that the original artistic work on which the industrially produced designed article is based would continue to fall within the meaning of artistic work as defined under section 2(c) of the Copyright Act and would be entitled to the full period of copyright protection as evident from the definition of “design” under section 2(d) of the Designs Act. The court held that the legislative intent was to grant greater protection to original, purely artistic works such as paintings, sculptures, etc., and lesser protection to design activity which is commercial in nature. The protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure art. Thus, the creator or copyright holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work.

Using this rationale, Delhi High Court in *Ritika Private Limited v Biba Apparels Private Limited* (2016) held that because of the language of section 15(2) of the Copyright Act, no copyright can subsist in a drawing, sketch or design used for the creation of dresses, once more than 50 dresses have been produced. The court considered the observation in the Microfibres case that the legislature intended to give a lesser period of copyright protection when a design is created which is applied for commercial purposes. The court observed that an interpretation to give protection under the Copyright Act although the drawing, sketch or design is to be registered under the Designs Act would result in the Designs Act being redundant, and that every design originates with an intermediate product such as engraving, mould or diagram, based on the artistic work.

In the case of *Holland Company LP and Ors v SP Industries* (2017), Delhi High Court interpreted the relevant sections of the Designs Act and the Copyright Act and held that where a design of an article is prepared for industrial production of an article, it is a design and registrable under the Designs Act, and under section 14(c) of the Copyright Act, the author of such a design can claim copyright. Since such a design is registrable under Designs Act, if the design has been used for production of articles by an industrial process more than

50 times by the copyright owner or by any other person with the owner's permission, the copyright in the design ceases.

Considering the above judgments, it has become settled that if original drawings made solely for the industrial production of an article meet the criteria of a design, they can be protected by registration under the Designs Act, but even if such registration is not sought, the author continues to enjoy rights over the drawings if the article made from such drawings is produced by an industrial process no more than 50 times.

Q.5 What do you mean by piracy of copyright in design? What rights are available to the proprietor of design?

Piracy Of A Registered Design[Sec. 22(1)]

Infringement of a copyright in design is termed as "Piracy of a registered Design". It is not lawful for any person during the existence of copyright to do the following acts without the consent or license of the registered proprietor of the design. Section 22 of the Designs Act, 2000, lays down that the following acts amount to piracy:

- (1) To publish or to have it published or expose for sale any article of the class in question on which either the design or any fraudulent or obvious imitation has been applied.
- (2) To either apply or cause to apply the design that is registered to any class of goods covered by the registration, the design or any imitation of it.
- (3) To import for the purpose of sale any article belonging to the class in which the design has been registered and to which the design or a fraudulent or obvious imitation thereof has been applied.

In fact any unauthorized application of the registered design or a fraudulent or obvious imitation thereof to any article covered by the registration for trade purpose or the import of such articles for sale is a piracy or infringement of the copyright in the design.

Meaning Of Fraudulent Or Obvious Imitation

A distinction is made between fraudulent and obvious imitation. The crux of both is that there is imitation. Thus even in the case of fraudulent imitation the design applied must be an imitation of the registered design. In a fraud the imitation has been made with the intention to deceive another person with the knowledge that what is being done is a violation of the other person's right. There must be an exact imitation of the registered design. In *Western Engineering Company v. Paul Engineering Co*, it was held that features of shape, configuration, pattern etc, of the two designs must be same for determining whether there was infringement or not. The sameness in feature shall be determined by the eye. The design need not be identical on all points and differ on no points

To have a basic understanding about the piracy of a design, it is better to have a conjoined reading of Sections 22 and 11 of the Designs Act. While Section 11 authorizes a registered proprietor to have copyright in the design, Section 22 safeguards such right of the proprietor.

The piracy of a design may happen only as per the following circumstances:

- 1) It is committed during the existence of copyright in any design.
- 2) The design is applied or imitated without the consent of the registered proprietor.
- 3) It is for the purpose of sale, and not for private or personal use.
- 4) The articles must be in the same class in which the design is registered

Remedies against Infringement of designs[Sec. 22(2)]

The design statute in India though does not carry any separate provision on criminal remedies, provides criminal actions for the infringement of designs. The civil and criminal remedies are clubbed together in the case of designs.

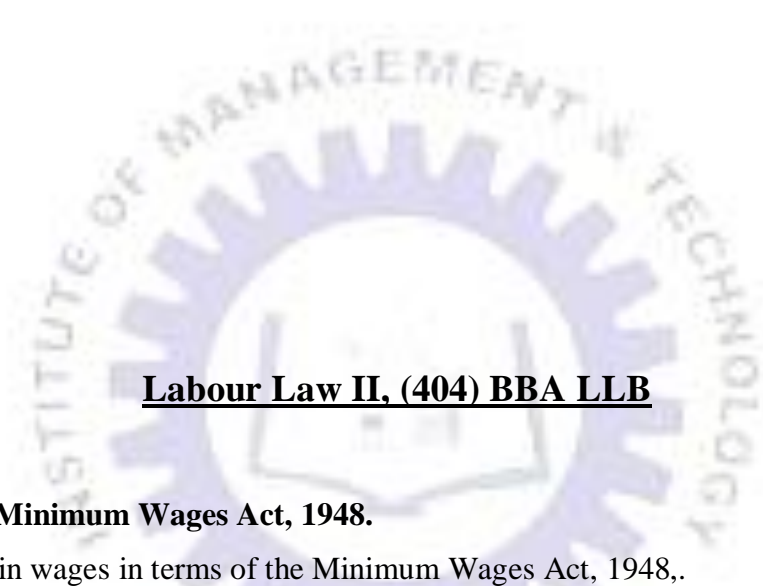
According to the Designs Act, 2000 it shall not be lawful for any person for the purpose of sale to apply or cause to be applied to any article in any class of articles in which the design is registered the design or any fraudulent or obvious imitation except with the licence or written consent of the registered proprietor or to do anything with a view to enable the design to be so applied, or to import for the purposes of sale without the consent of the registered proprietor any article belonging to the class in which the design has been registered and having applied to it the design or any fraudulent or obvious imitation, or knowing that the design or any fraudulent or obvious imitation has been applied to any article in any class of articles in which the design is registered without the consent of the registered proprietor to publish or expose or cause to be published or exposed for sale that article.

Any person contravening the above provisions shall be liable to pay to the registered proprietor of the design a sum not exceeding twenty-five thousand rupees recoverable as a contract debt. The total sum recoverable in respect of any one design shall not exceed fifty thousand rupees. Any proceeding for relief under this provision shall be instituted in any court below the court of District Judge.

The designs provisions in India thus, does not contain an exhaustive detail of the criminal remedies as is provided under the other aspects of intellectual property rights like patents, copyrights and trademarks.

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Labour Law II, (404) BBA LLB

Unit I. The Minimum Wages Act, 1948.

Q No. 1. Explain wages in terms of the Minimum Wages Act, 1948,.

Ans:

Wage;

Section 2(h) "wages" means all remuneration capable of being expressed in terms of money which would if the terms of the contract of employment express or implied were fulfilled be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance but does not include,

The value of –

(a) Any house accommodation supply of light water medical attendance or

(b) Any other amenity or any service excluded by general or special order of the appropriate government;

(ii) Any contribution paid by the employer to any person fund or provident fund or under any scheme of social insurance;

(iii) Any traveling allowance or the value of any traveling concession;

(iv) Any sum paid to the person employed to defray special expenses entailed on him by the

nature of his employment; or

(v) Any gratuity payable on discharge.

Q No .2. What is the classification of wages, explain essential ingredient of the Wages, as per the Minimum Wages Act, 1948.

Ans;

Classification of Wages:

The Supreme Court has classified “Wages” into three categories. They are:

1. The Living Wage (highest standard of wage)
2. The Fair Wage (between living and minimum wage)
3. The Minimum Wage.(it is the lowest standard of wage)

Essential Ingredient of wages;

1. Wage should be by way of remuneration
2. It should be capable of being expressed in terms of money value
3. It should be payable to a person employed in respect of his employment or of work done in such employment.
4. It should be payable to a employee by his employer
5. It should be payable if the terms of employment, express or implied, are fulfilled.
6. It includes a house rent allowance.
7. It does not include house accommodation, supply of light, water, medical attendance, traveling allowance, contribution of employer towards provident fund, gratuity , any scheme of social insurance etc.

Q No 3. Explain the concept of fixation minimum wages as per the Minimum Wages Act, 1948.

Ans:

The term ‘Minimum Wage Fixation’ implies the fixation of the rate or rates of minimum wages by a process or by invoking the authority of the State. Minimum wage consists of a basic wage and an allowance linked to the cost of living index and is to be paid in cash, though payment of wages fully in kind or partly in kind may be allowed in certain cases.

The statutory minimum wage has the force of law and it becomes obligatory on the part of the employers not to pay below the prescribed minimum wage to its employees. The obligation of the employer to pay the said wage is absolute.

The process helps the employees in getting fair and reasonable wages more particularly in the unorganised sector and eliminates exploitation of labour to a large extent. This ensures rapid growth and equitable distribution of the national income thereby ensuring sound development of the national economy.

It has been the constant endeavour of the Government to ensure minimum rates of wages to the workers in the sweated industries and which has been sought to be achieved through the fixation of minimum wages, which is to be the only solution to this problem.

Q No. 4. Explain the object of the Minimum Wages Act, 1948.

Ans;

In a labour surplus economy like India wages couldn't be left to be determined entirely by forces of demand and supply as it would lead to the fixation of wages at a very low level resulting in exploitation of less privileged class. Keeping this in view, the Government of India enacted the Minimum Wages Act, 1948. The purpose of the Act is to provide that no employer shall pay to workers in certain categories of employments wages at a rate less than the minimum wage prescribed by notification under the Act. In fact the sole purpose of this act is to prevent exploitation of sweetened and unorganised labour, working in a competitive market.

The Minimum Wages Act, 1948, provides for fixation / periodic revision of minimum wages in employments where the labour is vulnerable to exploitation. Under the Act, the appropriate Government, both Central and State can fix / revise the minimum wages in such scheduled employments falling in their respective jurisdiction.

Q No. 5. Explain the main provision of the Minimum Wages Act, 1948.

Ans.

Main provisions under the Minimum Wages Act;

A. Fixing of minimum rates of wages, Section 3

1. The appropriate Government may fix the minimum rates of wages payable to employees employed in an employment specified in Part – I or Part – II of the

Schedule and in an employment subsequently added to the Schedule. The Government may review the minimum rates of wages and revise the minimum rates at intervals not exceeding five years.

2. The appropriate Government may refrain from fixing minimum wages in respect of any scheduled employment in which there are in the whole State less than one thousand employees engaged in such employment.
3. The appropriate Government may fix separate minimum rates of wages for time rate and for piece rate. Different wage rates may be fixed for different scheduled employments, different classes of work in the same scheduled employment, for adults, adolescents, children and apprentices and for different localities and for any one or more of the wage periods, viz., by the hour or by the day or by the month or by such larger wage period as may be prescribed.

B. Minimum rate of wages (Section 4)

Any minimum rate of wages fixed or revised may consist of

- (a) A basic rate of wages and a special allowance ; or
- (b) A basic rate of wages with or without cost of living allowance and the cash value of concessions in respect of supplies of essential commodities at concessional rates; or
- (c) An all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of concessions, if any.

C. Procedure for fixing and revising minimum wages (section 5)

The appropriate Government is required to appoint an Advisory Board for advising it, generally in the matter of fixing and revising minimum rates of wages.

The Central Government appoints a Central Advisory Board for the purpose of advising the Central and State Governments in the matters of the fixation and revision of minimum rates of wages as well as for coordinating the work of Advisory Boards.

The Central Advisory Board consists of persons to be nominated by the Central Government representing employers and employees in the scheduled employments, in equal number and independent persons not exceeding one third of its total number of members. One of such independent persons is to be appointed the Chairman of the Board by the Central Government.

D Wages in kind (section 11)

Minimum wages payable under this Act are to be paid in cash. However, the payment of minimum wages can be made wholly or partly in kind, by notifying in the official Gazette, where it is customary to pay wages either wholly or partly in kind.

Unit 2. The Payment of Wages Act, 1936.

Qo, 1. Explain Responsibility of payment of wages as per the Payment of wages Act, 1936.

Ans.

Responsibility for payment of wages.--(1) Every employer shall be responsible for the payment of all wages required to be paid under this Act to persons employed by him and in case of persons employed,--

(a) In factories, if a person has been named as the manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948);

(b) In industrial or other establishments, if there is a person responsible to the employer for the supervision and control of the industrial or other establishments;

(c) Upon railways (other than in factories), if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned;

(d) in the case of contractor, a person designated by such contractor who is directly under his charge; and

(e) In any other case, a person designated by the employer as a person responsible for complying with the provisions of the Act,

The person so named, the person responsible to the employer, the person so nominated or the person so designated, as the case may be, shall be responsible for such payment.

(2) Notwithstanding anything contained in sub-section (1), it shall be the responsibility of the employer to make payment of all wages required to be made under this Act in case the contractor or the person designated by the employer fails to make such payment.

Q No. 2. Explain the permissible Deductions which may be made from wages of an employee.

Ans;

The wages of an employed person shall be paid to him without deductions of any kind except those authorised by or under this Act. As per Section 7(2) , these are as follows;

- (a) Fines;
- (b) Deductions for absence from duty;
- (c) Deductions for damage to or loss of goods expressly entrusted to the employed person for custody, or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default;
- (d) Deductions for house-accommodation supplied by the employer or by Government or any housing board set up under any law for the time being in force.
- (e) Deductions for such amenities and services supplied by the employer as the [appropriate Government] [or any officer specified by it in this behalf] may, by general or special order, authorise;
- (f) Deductions for recovery of advances of whatever nature (including advances for travelling allowance or conveyance allowance), and the interest due in respect thereof, or for adjustment of over-payments of wages;
- (ff) Dductions for recovery of loans made from any fund constituted for the welfare of labour in accordance with the rules approved by ¹⁰[appropriate Government], and the interest due in respect thereof;
- (fff) Deductions for recovery of loans granted for house-building
- (g) Deductions of income-tax payable by the employed person;
- (h) Deductions required to be made by order of a Court or other authority competent to make such order;
- (i) Deductions for subscriptions to, and for repayment of advances from any provident fund to which the Provident Funds Act, 1925 (19 of 1925),
- (j) Deductions for payments to co-operative societies

(k) Deductions, made with the written authorisation of the person employed for payment of any premium on his life insurance policy to the Life Insurance Corporation of India established under the Life Insurance

(kk) Deductions made, with the written authorisation of the employed person, for the payment of his contribution to any fund constituted by the employer or a trade union registered under the Trade Union Act, 1926 (16 of 1926), for the welfare of the employed persons or the members of their families,

(kkk) Deductions made, with the written authorisation of the employed person, for payment of the fees payable by him for the membership of any trade union registered under the Trade Unions Act, 1926 (16 of 1926);]

(l) Deductions for payment of insurance premia on Fidelity Guarantee Bonds;

(m) Deductions for recovery of losses sustained by a railway administration on account of acceptance by the employed person of counterfeit or base coins or mutilated or forged currency notes;

(n) Deductions for recovery of losses sustained by a railway administration on account of the failure of the employed person to invoice, to bill, to collect or to account for the appropriate charges due to that administration whether in respect of fares, freight, demurrage,

(o) Deductions for recovery of losses sustained by a railway administration on account of any rebates or refunds incorrectly granted by the employed person where such loss is directly attributable to his neglect or default;]

(p) Deductions, made with the written authorisation of the employed person, for contribution to the Prime Ministers National Relief Fund or to such other Fund as the Central Government may, by notification in the Official Gazette, specify;]

(q) Deductions for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.]

(q) deductions to recover from a person re-employed after the termination of his former employment any amount paid to him from a provident fund or as a gratuity on such termination:

Q No. 3. Explain fixation of wage period, in term of the Payment of Wages Act, 1936.

Ans.

Fixation of wage-periods.

(1) Every person responsible for the payment of wages under section 3 shall fix periods (in this Act referred to as wage-periods) in respect of which such wages shall be payable.

(2) No wage-period shall exceed one month.

The wages of every person employed upon or in

(a) Any railway, factory or ¹[industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before expiry of the seventh day,

(b) Any other railway, factory or ¹[industrial or other establishment], shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable:

Q No. 4. Explain Time of payment of wage, as per the provision of the Payment of Wages Act, 1936.

Ans.

Time of payment of wages.

(1) The wages of every person employed upon or in

(a) Any railway, factory or [industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before expiry of the seventh day,

(b) Any other railway, factory or industrial or other establishment shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable:

Provided that in the case of persons employed on a dock, wharf or jetty or in a mine, the balance of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid before the expiry of the seventh day from the day of such completion.

(2) Where the employment of any person is terminated by or on behalf of the employer, the wages, earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated:

Provided that where the employment of any person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or other recognised holiday, the wages earned by him shall be paid before the expiry of the second day from the day on which his employment is so terminated.

(3) Appropriate Government may, by general or special order, exempt, to such extent and subject to such conditions as may be specified in the order, the person responsible for the payment of wages to persons employed upon any railway.

Provided that in the case of persons employed as daily-rated workers as aforesaid, no such order shall be made except in consultation with the Central Government.

(4) Save as otherwise provided in sub-section (2), all payments] of wages shall be made on a working day.

Q No. 5. Explain Deductions from the wages of an employee due for absence from duty of an employee.

Ans;

The provision for deduction for absence of duty are provided in Sec 9 of the Payment of Wages Act, these are as follows;

(1) Deductions may be made under clause (b) of sub-section (2) of section 7 only on account of the absence of an employed person from the place or places where, by the terms of his employment, he is required to work, such absence being for the whole or any part of the period during which he is so required to work.

(2) The amount of such deduction shall in no case bear to the wages payable to the employed person in respect of the wage-period for which the deduction is made a large proportion than the period for which he was absent bears to the total period, within such wage-period, during which by the terms of his employment, he was required to work:

Provided that, subject to any rules made in this behalf by ¹[appropriate Government], if ten or more employed persons acting in concert absent themselves without due notice (that is to say without giving the notice which is required under the terms of their contracts of employment) and without reasonable cause, such deduction from any such person may include such amount not exceeding his wages for eight days as may by any such terms be due to the employer in lieu of due notice.

UNIT 3. The Factories Act, 1948

Q No. 1. Define 'Manufacturing process' in terms of the Factories Act, 1948.

Ans:

The manufacturing process is defined in Sec 2 (k) of the Factories Act , 1948. As

Sec 2(k) "manufacturing process" means any process for--

- (i) Making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or
- (ii) Pumping oil, water, sewage or any other substance; or]
- (iii) Generating, transforming or transmitting power; or
- (iv) Composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or
- (v) Constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
- (vi) Preserving or storing any article in cold storage.

Q. No. 2. Define Occupier in terms of the Factories Act, 1948.

Ans;

The Occupier is defied in Sec 2 (n) of the Factorie Act 1948. As

Sec 2 (n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory

Provided that--

- (i) In the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;
- (ii) In the case of a company, any one of the directors shall be deemed to be the occupier;
- (iii) In the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the Stale Government or the local authority, as the case may be, shall be deemed to be the occupier:

Q No. 3. Explain provision of Approval Licensing and Registration of the factories in terms of the Factories Act, 1948.

Ans;

Approval, licensing and registration of factories.

(1) The Factories Act, 1948 , Sec 6, provides provision regarding Approval, licensing and registration of factories. , As per the provisions

The State Government may make rules--

(a) Requiring, for the purposes of this Act, the submission of plans of any class or description of factories to the Chief Inspector or the State Government;

[(aa)] Requiring, the previous permission in writing of the State Government or the Chief Inspector to be obtained for the site on which the factory is to be situated and for the construction or extension of any factory or class or description of factories;

(b) Requiring for the purpose of considering applications for such permission the submission of plans and specifications;

(c) Prescribing the nature of such plans and specifications and by whom they shall be certified;

(d) Requiring the registration and licensing of factories or any class or description of factories, and prescribing the fees payable for such registration and licensing and for the renewal of licences;

(e) Requiring that no licence shall be granted or renewed unless the notice specified in section 7 has been given.

(2) If on an application for permission referred to in [clause (aa)] of sub-section (1) accompanied by the plans and specifications required by the rules made under clause (b) of that sub-section, sent to the State Government or Chief Inspector by registered post, no order is communicated to the applicant within three months from the date on which it is so sent, the permission applied for in the said application shall be deemed to have been granted.

(3) Where a State Government or a Chief Inspector refuses to grant permission to the site, construction or extension of a factory or to the registration and licensing of a factory, the applicant may within thirty days of the date of such refusal appeal to the Central Government if the decision appealed from was of the State Government and to the State Government in any other case.

Q No. 4. Explain General Duties of the Occupier in terms of the Factories Act, 1948.

Ans;

General duties of the occupier are provided under Sec 7 A of the Act.

Sec 7A. General duties of the occupier.-

(1) Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

(2) Without prejudice to the generality of the provisions of sub-section (1), the matters to which such duty extends, shall include--

(a) the provision and maintenance of plant and systems of work in the factory that are safe and without risks to health;

(b) the arrangements in the factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provisions of such information, instruction, training and supervision as are necessary to ensure the health and safety of all workers at work;

(d) the maintenance of all places of work in the factory in a condition that is safe and without risks to health and the provision and maintenance of such means of access to, and egress from, such places as are safe and without such risks;

(e) the provision, maintenance or monitoring of such working environment in the factory for the workers that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, every occupier shall prepare, and, as often as may be appropriate, revise, a written statement of his general policy with respect to the health and safety of the workers at work and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed.]

Q No. 5. Explain provision regarding Canteen as welfare measures for the workers in terms of the Factories Act, 1948.

Ans;

The Provision in respect of Canteens are provided in sec 46 of the Act. The provisions are as follows ,

- (1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.
- (2) Without prejudice to the generality of the foregoing power, such rules may provide for--
- (a) the date by which such canteen shall be provided;
 - (b) the standards in respect of construction, accommodation, furniture and other equipment of the canteen;
 - (c) the foodstuffs to be served therein and the charges which may be made therefor;
 - (d) the constitution of a managing committee for the canteen and representation of the workers in the management of the canteen;
 - (dd) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer;
 - (e) the delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the power to make rules under clause (c).

UNIT 4. The Workmen Compensation Act, 1923.

Q No. 1. Explain Partial Disablement as defined in the Workmen Compensation Act 1923.

Ans;

Partial Disablement has been defined in Sec 2 (g) of the Workmen Compensation Act 1923, as follows,

Sec 2(g) "Partial Disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a [employee] in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time:

Provided that every injury specified [in Part II of Schedule I] shall be deemed to result in permanent partial disablement;

Q No. 2. Define “ Employee” as defined in the Workmen Compensation Act 1923.

Ans;

“Employee” is defined under Sec 2(dd) in the Workmen Compensation Act 1923. As follows, Sec 2(dd) "employee" means a person, who is--

- (i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II; or
- (ii) (a) a master, seaman or other member of the crew of a ship,
(b) a captain or other member of the crew of an aircraft,
(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,
(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India; or
- (iii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of them.

Q No.3. Explain circumstances under which employer is not liable to pay compensation under the Workmen Compensation Act 1923.

Ans;

Employer's non liability for compensation-

(1) If personal injury is caused to a employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Act

Provided, that the employer shall not be so liable--

- (a) in respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding ³[three] days;
- (b) in respect of any ⁴[injury, not resulting in death ⁵[or permanent total disablement], caused by], an accident which is directly attributable to--
- (i) the employee having been at the time thereof under the influence of drink or drugs, or
- (ii) the wilful disobedience of the ²[employee] to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employee's, or
- (iii) the wilful removal or disregard by the ²[employee] of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employees.

Q No. 4. Explain provision in respect of the review of half- monthly payments as compensation under the workmen compensation Act, 1923.

Ans.

The provision in respect of the review of half- monthly payments as compensation under the workmen compensation Act, 1923, is provided in Sec 6 of the Act;

Sec 6, Review of compensation. -

1. .Any half-monthly payment payable under this Act, either under an agreement between the parties or under the order of a Commissioner, may be reviewed by the Commissioner, on the application either of the employer or of the employee accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the employee or, subject to rules made under this Act, on application made without such certificate.

(2) Any half-monthly payment may, on review under this section, subject to the provisions of this Act, be continued, increased, decreased or ended, or if the accident is found to have resulted in permanent disablement, be converted to the lump sum to which the employee is entitled less any amount which he has already received by way of half-monthly payments.

Q No. 5. Explain provisions of penalty in default of payment of compensation under the Workmen Compensation Act, 1923.

Ans ;

The provisions of penalty in default of payment of compensation under the Workmen Compensation Act, 1923, is provided under Sec 4 A of the act , as follows,

Compensation to be paid when due in case of non payment of compensation the following provision shall be applicable as penalty for the default.-

Sec 4A-

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the¹[employee], as the case may be, without prejudice to the right of the¹[employee] to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall--

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher, rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

(3A) The interest and the penalty payable under sub-section (3) shall be paid to the¹[employee] or his dependant, as the case may be.

INTERPRETATION OF STATUTE -406

1 WHAT ARE PRIMARY RULES ?

The principles of interpretation have been enunciated in various slokas. The one such shlok is:

Upkramop sanhard abhyaso upp urwatta falam Arthwadopatti ch lingam tat parya nirnaye'.

This means that when one has to draw the conclusion from a writing he has to read it from beginning till end, as without doing it, it is difficult to understand the purpose. If there is any repetition or emphasis its meaning must be understood. If there is any curiosity or a curious problem tackled it should be noticed and the result thereof must be understood. If there is any

innovation a something new it should be taken note of. Then one must notice the result of such innovation. Then it is necessary to find out what the author intends to convey and in what context.

To arrive at the intention of the legislature, English courts have laid down several rules for themselves. The Judicial Committee of the Privy Council, when it was the highest court of appeal for India, applied these rules for interpreting Indian Statutes. After Independence, the Supreme Court has approved most of these rules as proper rules for the interpretation of the various Acts of the Central and State Legislatures. But interpretation of statutes has today become a very complicated and technical subject. Judges feeling themselves bound by precedents, have been following rules developed in a different age and clime, and 'grafting' exceptions whenever they found a particular rule inconvenient. The result is a whole set of rules, illogical and by no means easy or simple in their application. But every student of law must know these

rules, because, when he becomes an advocate and has to advise his client, he must find out the law correctly, and this he can do only if he reads the particular provision of law which he has to interpret, in the manner in which it should be read and understood.

In the past, lawyers and courts were concerned with what may be called the Indian Common Law. The problems of the personal laws of Hindus and Muslims arose more out of a conflict of ideas. But nowadays, almost all our rights and liabilities are the subject matter of statutes and problems that now arise have their source in meaning of words. It is only by giving the correct meaning to the words of a provision in a statute that a lawyer can say what the law is.

2 EXPLAIN IN DETAIL LITERAL RULE ?

In interpreting or construing a statute, the obvious method would be to start with the literal interpretation. The first rule of statutory interpretation is - what is the literal meaning of a word? Literal meaning is the ordinary, plain meaning we give to words. So the first rule that judges have laid down is that the words of an enactment are to be given their literal meaning and if such meaning is clear and unambiguous, effect should be given to a provision of a statute whatever may be the consequences.

It has been held that if the meaning of the language employed by the legislature is clear on the face of the statute or the rules, hardship and inconvenience cannot alter the meaning of the language.

In the speech on Second Reading of the Charter Bill, 1833, Lord Macaulay said "A code is perhaps the only blessing which absolute governments are better fitted to confer on a nation than popular governments. It should be so drafted as to be fully intelligible to the average educated person. Doubtful points in interpretation should be disposed of by the legislature issuing successive editions of the code."

It is the elementary that the primary duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention.

A statute must be constructed in a manner which carries out the intention of the legislature. The 'intention of the legislature must be gathered from the words of the statute itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be obtained by it.¹ When the language of the law admits of no ambiguity and is very clear, it is not open to the courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law.

If the terms are plain and unambiguous, we cannot have resort to the position of law in England or in other countries when the statute was enacted by the legislature.

If the provisions of a statute are clear and unequivocal on their face, there is no need to resort to legislative history of the Act. If the words of a statute are clear, precise and unambiguous, they should be expounded in their natural and ordinary sense, specially when such exposition is not inconsistent with that sense and does not lean to manifest injustice.

When the language of a statute is unambiguous, in interpreting the provisions thereof, it is not necessary to look into the legislative intent of the Act. ² No single argument has more weight in statutory interpretation than the plain meaning of the words.

In the case of Prakash v. State of Haryana [(2004) 1 SCC 339J plain reading of S. 361 of Indian Penal Code 1860 the minor's consent was found to be wholly immaterial. Neither did the section require that the taking of the minor should be by force or fraud. The plain text of the section only accords significance to the consent of the guardian.

It is an elementary principle of the construction of statutes that the words have to be read in their literal sense. To ascertain the literal meaning, it is equally necessary, first to ascertain the juxtaposition in which the rule is placed; secondly, the purpose for which it is enacted; thirdly, the object which it is required to subserve; and fourthly the authority by which the rule is framed.

In construing a statutory provision literal rule of construction is first and foremost rule of construction. We have to see at the very outset is what that provision says. If the provision is unambiguous, and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes³.

The other rules of construction of statute are called into aid only when the legislative intention is not clear. When the language of a statute is plain and unambiguous, that is to say, admits of but one meaning, there is no occasion for construction. The task of interpretation can hardly be said to arise in such a case.

The most common rule of statutory interpretation is the rule that a statute, clear and unambiguous, need not and cannot be interpreted by a court, and only those statutes which are ambiguous or of doubtful meaning, are subject to the process of statutory interpretation.⁴

It is not allowable to interpret what has no need of interpretation.⁵

Absolute sententia expositio non indiget - Plain words need no exposition.

Where the words of the statute are clear enough, it is not for the courts to travel beyond the permissible limit under the doctrine of implementing legislative intention.⁶

Where the language of law is clear, there is no room for speculation and the court is under an obligation to administer the law *literatim ad verbatim*.

There are certain principles decided by courts in different cases in the matter of literal rule of interpret,

- 1) Ordinary and natural meaning to be adhered to in the first instance.
- 2) Necessity for interpretation does not arise where language is plain.
- 3) If language is plain consequences to be disregarded.
- 4) Ordinary and natural meaning not to be controlled by supposed intention.
- 5) Courts not to make an assumption of intention before construction.
- 6) Words to be given their natural meaning, even if not in consonance with legislative intent.
- 7) Ordinary and natural meaning not to be controlled by intention of legislature.
- 8) Ordinary and natural meaning not to be controlled by spirit of legislation.
- 9) Ordinary and natural meaning not to be controlled by considerations of public policy.
- 10) Ordinary and natural meaning not to be controlled by equitable construction.
- 11) Ordinary and natural meaning not to be affected by supposed anomalies.
- 12) Ordinary and natural meaning not to be affected by considerations of hardship, Insolvencies etc. For applying the literal rule courts should not introduce legal fictions. As in case of *State of Karnataka V. Vishwabharti House Building Co-operative Society*⁷, the Supreme Court was required to consider the meaning of S.25 of the Consumer Protection Act 1986. The section provided that the orders made by District Forum/State commission or National Commission will be deemed to be a decree or order made by civil court in a suit. The purpose of the legal fiction was to enable execution of orders passed by the forum or commission. It was only in the event of its inability to execute its orders that the commission or forum should approach the civil court for execution of its orders. To hold that all orders of the commission or forum had to be executed by the civil court would violate the plain meaning of the section.

Though the courts are bound in certain situations of the statutory language, yet it is not unoften that courts are equally constrained to read down the plain language of a section or give it a restricted meaning when contrary approach may be clearly opposed to the object and scheme of the Act or may lead to an absurd, illogical or unconstitutional result.

Therefore there are certain exceptions or departure from the literal rule or plain meaning rule. There are certain circumstances in which it is necessary to go for departure from the literal rule.

- a) Language of statutes is not always that of a rigid grammarian. It is not necessary to try sections of a statute upon the rules of grammar.
- b) Frequent disagreement of Judges as to whether meaning is plain or not. Paton in Jurisprudence says: Judges frequently disagree as to whether a section is plain or not, and even where it is agreed that the meaning is plain, each may differ from the other as to what that plain meaning is. Intention must be gathered from the statute itself.⁸

Maxwell in Interpretation of statutes on cases in which departure from plain meaning permitted says : "General words admit of indefinite extension, or restriction, according to the subject to which they relate and the scope and object in contemplation. It is open to the court, in cases where there is a manifest contradiction of the apparent purpose of the enactment or where the literal construction is likely to lead to a result not intended by the legislature, to modify the meaning of the words, if necessary even by departing from the rules of grammar or by giving an unusual meaning to particular words."

Courts can modify language of statute in order that the section makes good sense and does not lead to absurdity or manifest injustice.⁹

- c) Grammatical and ordinary sense of words not followed where words technical : The terms 'dismissal' and 'removal in rank' in Art 311 of the constitution are all technical expressions employed in the article, and it is not right to interpret them in the popular or grammatical sense.¹⁰

d) Plain meaning subject to context: According to Black the comprehensive meaning to the context is "when we speak of the context it is not meant merely that different words or clauses in the same sentence must be compared with each other, or successive sentences be read together. But in a wider sense, one section of statute may stand as context to another, whether it immediately proceeds or follows it or is more widely separated from it, provided it bears upon the same general subject matter.¹¹

Courts have held that alternative shades of meanings may be chosen when there is absurdity or inconvenience. This has led to the rule that it is not the literal meaning that should be taken, but that the meaning to be chosen depends upon the context. For example, in *State of M.P. v. Azad Sharat Finance Co*:¹²

A truck belonging to the respondent was used to carry contraband opium, but without the respondent's ledge. Under Sec.11 of the Opium Act, 1878, as modified by the opium (Madhya Bharat Amendment) 1955 the truck was ordered to be confiscated as the words used in the amended section are 'shall e confiscated, whereas, the words used in the main Act are 'shall be liable to be confiscated'. On appeal to the High Court held that the section conferred a discretion on the Magistrate and that in the particular circumstances of the case the truck should not have been confiscated. On appeal to the Supreme Court, it was held :

“The the High Court was right in reading the section as permissive and not obligatory. It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'shall' occurs and other circumstances. In the present case could be unjust to confiscate the truck as the respondent had no knowledge of the commission of the offence. It is well recognized that if a statute leads to absurdity, hardship or injustice, presumably not indented, a construction may be put upon it which modifies the meaning of the words, or even that structure of the sentence.”

Therefore, context prevails and one must choose a meaning of words according to the context. Read the whole Act and choose those meanings for words which fit the context. And

fitting the context would mean (1) avoiding absurdity or inconvenience, (2) avoiding conflict with other sections of the Act.

The ordinary grammatical sense of the words is to be adhered to unless that would lead to an absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid such absurdity, repugnance or inconsistency, but no further.¹³

Apparently, the rule solves all problems and that is why it has been called the Golden rule and the method of approach is described as the modifying method of interpretation.

3 EXPLAIN IN DETAIL WHAT IS GOLDEN RULE OF INTERPRETATION?

For interpreting a statute in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further.¹⁴

Lord Wensleydale called it the 'Golden Rule' and adopted it in *Grey v. Pearson* and thereafter it is usually known as Lord Wensleydale's Golden Rule. It is a very useful rule in the construction of a statute to refer to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid inconvenience, but no further. Now let us see how golden the Golden Rule is.

In *State of Punjab v. Quaiser Jehon Begum*¹⁵ an application under Sec. 18 of the Land Acquisition Act, 1947, for reference to the civil court was made by the respondent within 6 months of her knowledge of award regarding compensation, but beyond 6 months from the date of the award. The section requires that the application should be made not beyond 'six months from the date of the award: On the question whether the application was in time, the Supreme Court held:

“A literal and mechanical construction of the words would not be appropriate and the knowledge of the party affected by the award, either actual or constructive, being on essential requirement of fair play and natural

justice, the expression used must mean the date when the award is either communicated to the party or is known to him either actually or constructively”.

In *Municipal Board v. State Transport Authority, Rajasthan*¹⁶ the State Transport Authority under Sec. 64A of the Motor Vehicles Act, 1939, set aside an order of the Regional Transport Authority, changing the location of a bus-stand, on an application filed beyond 30 days from the date of the order of the Regional Transport Authority. The section provides thirty days from the date of order. On the question whether the application to the State Transport Authority was in time, the Supreme Court held:

"Interpreting the provisions of limitation equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. The words should not be read as from the date of knowledge of the order' in the absence of clear indication to that effect if the legislature had intended that an application may be made within 30 days from the date of intimation or knowledge of the order, it would have said so as it did in Sections 13, 15, 16 and 35. In the absence of any such thing the court is bound to hold that the application will be barred unless made within 30 days from the date of the order by which the person is aggrieved."

The Golden Rule says that if there is anything absurd, etc. one can rely on in addition to its literal meaning of the crucial words; but what happens if the judge says "I do not find anything absurd in the literal meaning." That is what happened in the last two cases mentioned. In *Quaise Begum* the Court thought the literal meaning leads to an absurdity. In the latter case the court thought that the literal meaning did not lead to any absurdity or inconvenience. How is the Golden Rule to be applied then?

In the case of *Shankari Prasad*¹⁷ and *Golaknath*¹⁸ the conflict was resolved by the court between Art. 13(2) and 368. The Art 13(2) says that the State cannot make a law which has the effect of abridging fundamental rights prescribed in part III of the constitution while the

latter Article 368 apparently gives unlimited power to parliament to amend the constitution, including fundamental rights. Here is a conflict and according to the Golden Rule one must choose that interpretation which gets rid of the conflict and harmonises the two Articles. And that is exactly what the learned Judges who decided these two cases did. Only, one set of judges held that Article 368 prevails, and a majority of the other set held that Article 13(2) prevails. What is the correct approach or do we say that much cannot be said for both views; what then is the utility of the Golden Rule?

Consider also the case of *M.S.M. Sharma v. Shri Krishna Sinha*¹⁹. The petitioner, the editor of a newspaper, published a speech made in the State Legislative Assembly without expunging certain remark, as directed by the Speaker. He was asked to show cause why appropriate action should not be taken against him for breach of privilege of the House. He contended, in a petition under Art. 32, that the proposed action was in violation of his fundamental right to freedom of speech. The Supreme Court by a majority, dismissing the petition, held:

Knowing and being satisfied by the reasonableness of the powers, privileges and immunities of the House of Commons at the Commencement of the Constitution, they did not, in their wisdom, think fit to make such powers, privileges and immunities subject to the fundamental Rights conferred by Art. 19 (1) (a). We must by applying the cardinal rules of construction ascertain the intention of the Constitution-makers from the language used by them. Article 19 (1) (a) and Art. 194 (3) have to be reconciled.

The principle of harmonious construction must be adopted and so construed, the provisions of Art. 19 (1) (a), which are general, must yield to Art. 194 (1) and (3).

The dissenting judge 'Subba Rao, J.' however said: "I cannot appreciate the argument that Art. 194 should be preferred to Art. 19(1) and not vice versa. Under the constitution it is the duty of the court to give a harmonious construction to both the provisions so that full effect may be given to both without the one excluding the other. Where there is a conflict, the privilege should yield to the extent it affects the fundamental rights."

Finally, in *Nanavati v. State of Bombay*²⁰ the appellant was sentenced to imprisonment for life for the offence of murder by the High Court in appeal. On the same day, the Governor of the State passed an order suspending the sentence under Art. 161. The appellant's application for special leave was dismissed by the Supreme Court, by a majority, holding that the appellant's special leave petition could not be listed for hearing unless he surrendered to his sentence as required by Art. 142 (1) and the rules of the Supreme Court under Art. 145.

In his dissenting judgment, 'Justice Kapur, J' however, observed: "The two Articles, 142 and 161 operate in two distinct fields where different considerations apply. The two Art. are reconcilable and should be reconciled. The rule of statutory coexistence stated in text books on Interpretation of statutes, is as follows:

'It is sometimes found that the conflict of two statutes is apparent only, as their objects are different and' the language of each is restricted to its own subject. When their language is confide, they run in parallel lines without meeting.'

The proper rule of construction was laid down in *Warburton v. Loveland*. "No rule of construction of statutes can require that when the words of a statute convey a clear meaning, it shall be necessary to introduce another part of the statutes which speaks with less perspicuity, and of which the words may be capable of such construction as by possibility to diminish the efficacy of the other provisions of the Act."

The above cases show that the Golden Rule fails when it is sought to be applied to concrete situations. It fails because there is no objective criterion by which one can say a particular interpretation is absurd. It seems to leave it to each judge to say whether an interpretation is absurd or not. If so, judges would be at liberty to decide what the law is according to their notions of the context. It is true that by a process of interpretation judges do make a lot of law, but it is only the legislature that can create law and, therefore, judicial discretion cannot be unlimited.

The want of an objective criterion is due to the fact that according to the orthodox rules of interpretation the intention of the legislature must be sought within the four corners of the Act and judges are prohibited from traveling outside, If judges free themselves from this inhibition,

and with the assistance of counsel, refer to all material connected with the legislation, as press agitation, comments and notes in legal and other journals, debates on the floor of the legislature, select committee reports, etc. which from the best commentary on the legislation, then they can know the object of each provision of the statute and how the legislature intended to achieve that object. Therefore, the rules of interpretation should be first to find out the object of the enactment and then, language permitting, choose that interpretation which achieves the object all other interpretations being 'absurd' because, they do not achieve this object. This rule as laid down by Lord Coke in Heydon's case,²¹ but, as I have shown above, the rule has not been pursued to its logical conclusion. This rule is called the mischief rule.

4 EXPLAIN WITH RELEVANT CASE LAWS WHAT IS HAYDEN'S RULE?

This rule is also known as Henry VIII rule because in the Heydon's case the statute, 31 Henry VIII provided rules related with term of lease of religious land. In this case Heydon was the intruder and against this the Attorney-General filed damages on behalf of crown.

In the above case brief facts are as under: The case related with the lands were copyholds of a college. The warden of the college granted a part of the land to Wand his son for their lives and the rest to Sand G at the will of the warden in the time of King Henry VIII. While so, the warden granted all the lands to Heydon on lease for 80 yrs. Thereafter, the warden surrendered their college to the king. The Attorney-General filed an information, on behalf of the Crown, for obtaining satisfaction in damages for the wrong committed in the lands, against Heydon, as an intruder on the lands. The statute, 31 Henry VIII, provided that if a religious or ecclesiastical house had made a lease for a term of years, of lands in which there was an estate and not determined at the time of the lease, such lease shall be void. It was decided by the Barons of the exchequer:

Lord Coke in this case has observed that "For the sure and true interpretation of all statutes in general, be they penal, or beneficial, restrictive or enlarging of the common law, four things are to be considered,

- a) What was the common law before the making of the Act,
- b) What was the mischief and defect for which the common law did not provide,

- c) What remedy the Parliament has resolved and appointed to cure the disease. of the Common wealth, and
- d) The true reason of the remedy and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and pro-privato commodo and to add force and life to the cure and the remedy, according to the true intent of the makers of the Act, probono publico.

A statute should be so construed as will suppress the mischief and advance remedy and avoid evasions for the continuance of the mischief.

In Heydon's case, the common law was that religious and ecclesiastical persons might have leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases. The statute-31H8 provides the remedy and principally for such religious and ecclesiastical houses which should be dissolved after the Act, such as the college in the instant case, that all leases of any land, whereof any estate or interest for life or years was then in being, should be void, and their reason was, that it was not necessary for them to make a new lease, so long as a former had continuance, and therefore the intent of the Act was to avoid doubling of estates, and to have but one single estate in being at a time, for doubling of estates implies itself deceit, and private respect, to prevent the intention of parliament. If the copy-hold estate for two lives and the lease for 80 yrs. shall stand together, here will be doubling of estates, which will be against the true meaning of the Act.

Maxwell said in the Interpretation of Statutes that "General words and phrases therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act."

When the rules of construction are relied upon, the court must always bear in mind - "When Rules of construction are relied on they are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction presumptions of pointers. Not infrequently one 'rule' points in one direction, another in a

different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment that weight to attach to any particular 'rule'."

In R.C. Cooper's (Bank Nationalisation Case) case the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 was passed for the nationalisation of banks. But the Act was struck down by a majority opinion on the ground of inadequacy of compensation.

The problem of law is to reconcile general security on the one hand, and the life of an individual acting in the fullest and freest exercise of his powers and the development of those powers on the other. To achieve this great reconciliation at any moment, law, like science, has an adequate system that corrects itself. The process it adopts, or at any rate should adopt, is to test principles by their consequences and to judge consequences in the light of principles. That is why, law is neither all reason nor all experience. It is experience which becomes meaningful by meditation and the application of reason.

It is obvious that an enactment without a purpose or social objective will be meaningless. Therefore, the enactment must be read in the light of such assumed purpose, for then only will it make sense, and the court will also be doing its duty of merging the enactment into the general system of law taking into account its policy; and necessarily, the reports of select committees, the debates on the floors of the legislatures and a historical knowledge of contemporary thinking and campaigning which highlight the goal to be achieved and the evil to be eradicated will have to be given due weight by the interpreting judge. In this process, so that courts may not themselves go on a voyage of discovery and waste precious time, advocates may collect all the relevant material and supply them to courts while emphasising their points of view as to what the object of the legislature was and how the legislature intended to achieve that object.

Even when the rule is applied, there may be an honest difference of opinion, amongst judges as to what the object of a particular legislation is, and how the legislature intended to achieve that object.

But then there is this merit: "The theory goes that every measure is introduced by the executive for the welfare of the people, the statute is passed with or without modifications by the legislature for the welfare of the people and every judge chooses his interpretation because, in his opinion, his interpretation by achieving the object advances the welfare of people, because their existence depends upon the satisfaction of the people. Judges do not have to satisfy the people in that sense, but when they give their reasons for a particular interpretation as being conducive to the welfare of the people, the legislature will consider those reasons and either will accept the interpretation of the particular judge or make suitable modifications if that interpretation is rejected.

The members of the three branches of the government would be acting only for the welfare of the people, for, after all, the loyalty of every public man should only be to the public good.

In *Utkal Contractors & Joinery (P) Ltd. v. State of Orissa*²² it was held: "The reason for a statute is the safest guide to its interpretation. The words of a statute take colour from the reason for it. the reasons can be discovered from the external and internal aids. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. Further the parliament is neither expected to use unnecessary expressions nor is expected to express itself. Even as parliament does not use any word without meaning something, parliament does not legislate where no legislation is called for. Again, while the words of an enactment are important, the context is no less important. The general words should be read in the context and not in isolation. The context of an Act may well indicate that wide or general words should be given a restrictive meaning. But the rules of construction are mere aids to construction, presumptions. having no binding force. In each case, court must look at all relevant circumstances and decide the weight to be attached to any particular rule of construction.

In *Shashikant Laxman Kale v. UOI*²³ it was held: "There is a distinction between the legislative intention and the purpose or object of the legislation. While the purpose or object of the legislation is to provide a remedy, the legislative intention relates to the meaning or exposition of the remedy." The court will be having larger material available for reliance

when determining the purpose or object of the legislation as distinguished from the meaning of the enacted provision.

"For determining the purpose or object of the legislation, it is permissible to look into the circumstances, which prevailed at the time when that law was passed and which necessitated the passing of the law. For the limited purpose of appreciating the background and the antecedent factual matters leading to the legislation, it is permissible to look into the statement of objects and reasons of the Bill which actuated the step to provide a remedy".

For the purpose of construing and meaning of the enacted provision, it is not permissible to use these aids, yet it is permissible to look into the historical facts and surrounding circumstances for ascertaining the evil sought to be remedied.

In *Delhi Transport Corpn. v. DTC Mazdoor Congress*²⁴ "Legislation, both statutory and constitutional, is enacted, it is true, from experience of evils. But its general language should not therefore, necessity be confined to the form that evil had taken. Time works changes, brings into existence new conditions and purposes and new awareness of limitations. Therefore, a principle to be valid must be capable of wider application than the mischief, which gave it birth.

This is particularly true of the constitutional constructions. Law as evolved in India today, makes the limitations on user of power quite clear and distinct, in this branch. These are constitutional limitations. Therefore, every provision in any legislation by limited legislatures, should be judged bearing in mind that the legislature and the law-making authorities were aware and are bound by these constitutional limitations. These inhibitions must be read into these provisions so that law becomes effective, purposeful and legal. The court should approach the question of constitutional limitations or inhibitions in our interpretation in deciding in each individual case by not 'what has been' but 'what may be'. This is the role and purpose of constitutional interpretation by the Apex Court of the country. I would like to hope that one day or the other the Supreme Court would be mature enough to fulfill what is purposeful and I believe to be the true role and purpose of the court in interpretation in the light of constitutional inhibitions."

In Directorate of Enforcement v. Deepak Mahajan,²⁵ it was held, "Every law IS designed to further the ends of justice but not to frustrate on mere technicalities. Though the function of the courts is only to expound the law and not to legislate, nonetheless the legislature can not be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statute.

In State of Karnataka V.BV Thimmappa²⁶, it was held "where the Act postulated that non-passing of the prescribed examination by a government servant would entail the consequences as specified in rules and the rules enumerated the consequences, held, no additional consequence could be inferred solely on the basis of supposed object and purpose of the rules.

It is respectfully submitted that courts should find out the object of the legislation and give that interpretation to the legislation which achieves the object. Apart from this rule of interpretation being simple, it has also this virtue, namely, that if it had been applied in the interpretation of our constitution with reference to the

vexed question of the scope of the amending power, the convulsion that almost shook the fabric of Indian society by bringing about an unnecessary and unseemly confrontation between the Judiciary and Parliament, would never have occurred."

One of the objects of the constitution, as disclosed by Article 39, is to secure a more equitable distribution of property - if not absolute equality on the basis that all work, as far as society is concerned, is equally important.

In the end, we can very well say that for the interpretation of statutes there are three fundamental or primary rules. Firstly, the literal rule that, if the meaning of a section is plain, it is to be applied whatever the result; secondly, the 'golden rule' that the words should be given their ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the instrument; and thirdly the 'mischief rule' which emphasizes the general policy of the statute and the, evil at which it was directed.

But in the overall situations it is one of the well-established rule of construction that if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such a case best declaring the intention of the legislature. It is equally a well-settled principle of construction that where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating, and that alternative is to be rejected which will introduce uncertainty, fiction or confusion into the working of the system.

In the latest case of Prof. Yashpal v. State of Chattisgarh²⁷ Hon'ble Supreme Court while interpreting the term 'universities' observed that the golden rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning. The state list confers the power on the state legislature to incorporate universities whereas the centre has been given the power to determine and co-ordinate standards of education ... The state legislature can make an enactment providing for incorporation of universities under Entry 32 of List II and also generally for universities under Entry 25 of list III.

The subject 'University' as a legislative head must be interpreted in the same manner as it is generally or commonly understood, namely, with proper facilities for teaching of higher level and continuing research activity. An enactment which simply clothes a proposal submitted by a sponsoring body or the sponsoring body itself with the juristic personality of a university so as to take advantage of S. 22 of UGC Act 1956 and thereby acquires the right of conferring or granting academic degrees but without having an infrastructure or teaching facility for higher studies or facility for research is not contemplated by either of these Entries. Sec. 5 and 6 of the Chhatisgarh Niji Kshetra Vishwavidyalaya (Sthapna aur Viniyaman) Adhiniam, 2002 are therefore, Wholly ultra vires being a fraud on the constitution.

In the last according to a former Chief Justice of India, Dr. P.B. Gajendragadkar - "If law, speaking in the name of the people of this country, attacks the problem of poverty and seeks to remove from the lives of its innumerable citizens the evils of want, disease, ignorance, and idleness, it will have achieved a noble purpose, without class conflict, in a peaceful, non-violent and democratic way. In assisting Indian democracy on its way to the establishment of

socio" economic justice, law has to keep in mind the great purpose which it is intended to serve: that the social structure must be steady but no static; stable but not stationary.

This is possible only when we absorb knowledge by constant application. Therefore, it is, that one must study cases to know and feel how judges wrestled with words to hammer out a meaning and gather the

intention. The young advocate by constantly reading it and cases decided by great judges will sharpen his instinct and intellect and when he is called upon to act as a judge or to give his opinion as an advocate he will be able to give a reasonably correct opinion with greater ease and confidence.

Rule of Harmonious Construction: During interpretation of statutes there is a need to interpret the provisions of the two Acts, one central and other state, harmoniously so that both are able to survive their respective fields and also able to achieve their respective objectives. It is only when the provisions of the state Act are repugnant to that of Central Act that the provisions of State Act have to give way to the provisions of Central Act.

In a statute with large number of sections, with its numerous orders and still more numerous rules there under, it is of great importance that, if possible, a construction of a particular section is not so made as to be in conflict with other specific sections rules or orders. If possible, a construction is to be preferred which reconciles the different sections, orders and rules without doing violence to express provisions. This approach to construction is essential in every statute. It is a general rule that law relating to procedure operates retrospectively. No one has a vested right in the course of procedure. But there is another equally important principle that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amendment or new Act came into force. The same principle is embodied in Sec. 6 of the (General Clauses Act).

In the case of *MSM Sharma v. Shri Krishna Sinha* (AIR 1959 SC 395) dispute arises between Art 19 (1) (a) and Art. 194 (3) Petitioner filed petition under Art. 32 for quashing of show

cause notice for breach of privilege of the house for publishing a speech without expunging certain remarks:

The Hon'ble Supreme Court by a majority, dismissing the petition, held: "knowing and being satisfied by the reasonableness of the powers, privileges and immunities of the House of commons at the commencement of the constitution, they did not, in their. Wideom, think fit to make such powers, privileges and immunities subject to the judgmental rights conferred by Art. 19(1)(a). We must by applying the cardinal rules of construction ascertain the intention of the constitution - makers from the language used by them. Art. 19 (1)(a) and Art. 194(3) have to be reconciled. The principle of harmonious construction must be adopted and so construed; the provisions of Art. 19 (1) (a), which are general, must yield to Art. 194(1) and (3).

The dissenting judge Subbarao J. said that "I cannot appreciate the argument that Art. 194 should be preferred to Art. 19(1) and not v'ice-versa. Under the constitution it is the duty of the court to give a harmonious construction to both the provisions so that full effect may be given to both without the one excluding the other. Where there is a conflict the privilege should yield to the extent it affects the fundamental rights.

According to Maxwell, 1953 Edn. P.170, the rule of statutory coexistence stated in text books on Interpretation of Statutes, is as follows: 'it is sometimes found that the conflict of two statutes is appoint only, as their objects are different and the language of each is restricted to its own subject. When their language is confined, they are in parallel lines without meeting.

The principle of Harmonious construction is discussed by Crawford in 'Statutory Construction': "The court should, when it seeks the legislative intent, construe all the constraint part of the statute together and seek to ascertain the legislative intention from the whole Act, considering every provision thereof in the light of general purpose and object of the Act itself and endeavoring to make every part effective, harmonious and sensible.....

This means of course, that the court should avoid absurd consequences in any part of the statute.

5 EXPLAIN IN DETAIL SUBSIDIARY RULE OF NOSCITUR A SOCIIS?

Noscere means to know and sociis means association. Therefore noscitur a sociis means to know from the association.

In the words of Maxwell - "Noscitur a sociis means that when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take it as it were their colour from each other, that is the meaning of the more general being restricted to a sense analogous to that of the less general."

In other words, in doubtful cases other words supply guidance to ascertain the meaning of a particular expression, which were in isolated state, it is not possible to ascertain in what sense it is employed in the statute.

In the words of Supreme Court - "Noscitur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is where the intention of the legislature associating wider words with words of narrower significance is doubtful, or otherwise not clear that present rule of construction can be usefully applied."

Thus the doctrine of noscitur a sociis means that it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them.

The cases in which this rule has been applied are:

In *Commissioner v. Savoy Hotel* while interpreting a Purchase Tax Act; which used the expression 'manufactured beverages including fruit juices, bottled water, syrups, etc.', it was held that the description 'fruit-juices' as occurring therein should be construed in the context of the preceding words and that orange juice unsweetened and pressed was not within the description.

In *State of Karnataka v. UOI*, Art. 194 (3) of the Constitution which refers to powers, privileges and immunities of a House of the legislature of a state was construed. The Supreme Court held that the word 'powers' must take its colours from words in immediate connection with it and that it should be construed to refer not to legislative powers but to powers of a house which are necessary for the conduct of its business.

Limitation of the Rule: The rule cannot be applied where the series of words convey a clear and definite meaning. It is not always correct to interpret the general words in the light of the particular instances given in the provision. Random application of this rule may lead to a wrong conclusion, unless the interpreter knows the society as to which the socio belong. Association or juxtaposition of words must be carefully looked into. If the statute defines a thing as including certain other matters, it must be construed according to the meaning of the terms as they convey, and not by application of this rule.

Thus *noscitur a sociis* is not an invariable rule of construction, but it is a useful rule of construction where words are of doubtful meaning.

6 WHAT DO YOU UNDERSTAND BY THE DOCTRINE OF EJUSDEM GENERIS?

Ejusdem Generis means of the same kind or nature. Normally, general words should

be given their natural meaning like all other words unless the context requires otherwise. When a general word follows specific words of a distinct category, the general word may be given a restricted meaning of the same category. The general expression takes its meaning from the preceding particular expressions because the legislature by using the particular words of a distinct genus has shown its intention to that effect. This principle is limited in its application to general words following less general words only. (If the specific words do not belong to a distinct genus, this rule is inapplicable. Consequently, if a general word follows only one particular word, that single particular word does not constitute a distinct genus, and therefore *ejusdem generis* rule cannot be applied in such a case).

This rule is one to be applied with caution i.e. not to be applied where legislative intention is clear. The rule of *ejusdem generis* is not to be absolute rule of law, it is only a part of a wider principle of construction. This being so, this rule should not be applied where the intention of

the legislature is clear, where a perusal of the provision as a whole clearly indicates that the general words have been employed in their general sense and are not in any way connected with specific things, and the particular words, if used in the section embrace all objects of their class and there is no room to impose any limitation on the general words by reference to the specific things or particular words.

Application of this rule requires care and caution. As held by the Supreme Court in *Kochuni v. State of Madras*²⁸ "it is not an inviolable rule of law, but it is only permissible inference in the absence of an indication to the contrary."

There are six conditions necessary for the application of the principle of *Ejusdem Generis*:

1. A statute must contain an enumeration by specific words;
2. The enumerated thing must constitute a class by itself;
3. The things that must be included in the class should not be exhausted.
4. There must be generalisation behind the enumeration;
6. There should be no clear proof that the general term has no broader meaning.

In such cases, the doctrine 'can be applied and the generalisation can be extended to other cases which the conditions satisfy.

The rule of *ejusdem generis* is not one of universal application. It is merely a rule of construction and as such it may be of no assistance when the intention of the legislature is not plain as to require no resort to canons of construction. The rule is to be made use of only where the language of the statute under consideration is somewhat vague or uncertain. The rule of *ejusdem generis* is applicable when particular words pertaining to a class, category or genus are followed by 'general words. In such a case the general words are construed as limited to things of the same kind as those specified.

The principle underlying the doctrine is designed to reconcile an incompatibility between specific and general words in view of other rules of construction; for instance, all words in a statute have, if possible, to be given due effect, the legislature does not use superfluous words

and all parts of a statute are to be considered together. It is then really a question of assumed intention of a statute; it is not a rule of law, but a rule of construction.

The doctrine of ejusdem generis should not be invoked :

- a. Where the intention of the legislature is clear,
- b. Where it would result in disregarding the plain language of the statute,
- c. Where a perusal of the statute as a whole indicates that the legislature intended the general words to go beyond the class specially designated.
- d. Where the specific things enumerated have no common characteristic and differ greatly from one another, or
- e. Where the particular words embrace all objects of their class so that the general words must bear a different meaning from the particular words or be meaningless.

In *AL Ranjane Vs: Ravindra Eshwarnath Sethna* (AIR 2003 SC 300), the question was whether the appellant could be granted permission to run a tea-stall in accordance with S. 313 of the Bombay Municipal Corporation Act, 1888. Art. 313(1) of the Bombay Municipal Corporation Act states that:

- a) Place or deposit upon any street or upon any open channel, drain or wall in any street (or in any public place) any stall, chain, bench, box, ladder, bale or other things so as to form an obstruction thereto or encroachment thereon.....

The court held thus:

"This provision nowhere authorises the commissioner to grant permission with respect to a stall/ structure of the type described by the appellant. The structure for which permission can be granted by the commissioner has to be similar to items mentioned in the class. Permission has to be for something which can be read as ejusdem generis with the items mentioned in clause (a). The items mentioned in clause (a) indicate that they are of a temporary nature and

are easily removable as and when required. The structure in present case is of a size which ever if not permanently embedded on road, cannot be said to be a kin to items mentioned in clause (a).

Ejusdem generis comes into play only when generic words follow the more specific words and not when the specific word follow a general term. Lokmat Newspapers Pvt. Ltd., v. Shankar Prasad [(1999) 6 SCC 275], illustrates this position. In this case it was held that the principle of ejusdem generis can't be invoked in connection with item 1 of sch. IV to the Industrial Disputes Act 1947. The Act provides that during the pendency of the proceedings before the conciliation officer, a workman cannot be 'discharged' or 'dismissed'. The word discharge is a general word. It is followed by the word 'dismissal' which contemplates only one category of cases or situations where penalty is imposed by the employer on the workman concerned. The rule of ejusdem would have applied if the word 'discharge' represented a particular species belonging to the genus reflected by the general word 'dismiss'. This is a converse case where a general word 'discharge' is followed by the word 'dismiss' which is of a particular nature or pertains to a limited class or category of penal situations. Obviously, therefore, neither of them is a genus and none of them is a species of the very same genus. The word 'discharge' can note an entirely different category of orders comprising both simplicities - discharge orders not by way of penalty as well as discharge orders by way of penalty but not involving extremely pernicious results flowing from such orders while the word 'dismiss' is purely an order of penalty and that too of an extreme type. The words 'discharge' and 'dismissal' as employed by the legislature in Item 1 of Sch. IV covered different types of situations and circumstances under which they are passed.

It is said in an old case that unless it is possible to find a category or class, there is no room for the application of this doctrine. According to Sutherland, a 'class' is an artificial creation to provide ease in dealing with numerous items when similar characteristics occur. Thus 'a class' is a generalization which accurately or inaccurately associates items for a particular purpose or treatment. Without some objective or purpose, classification is impossible. Consequently, the rule of Ejusdem generis, depending as it does on pure form, provides a dangerous yardstick with which to measure the statutory coverage which the legislature intended.

To invoke the application of the Eiusdem generis rule, there must be distinct genus or category. The specific word must apply not to different objects of a widely differing character but to something which can be called a class or kind of objectives. Where this is lacking, the rule cannot apply.

In the leading case of State of Bombay v. Ali Gulshan²⁹ the interpretation of S. 6(4) (a) of the Bombay Land Requisition Act, 1948 which said that state government may requisition for the purpose of State or any other public purpose, was involved. It was contended that under this provision the appellant was entitled to requisition premises for housing a member of the foreign consulate. The High court held that the expression 'any other public purpose' should be read ejusdem generis with the purpose of state and providing accommodation to the member of the foreign consulate being a purpose of the union and not of the state, the state government had no authority to requisition. The Supreme Court held that the High Court was in error in applying the principle of ejusdem generis. The expression 'any other public purpose' follows only a single expression for the purpose of a state which is not a distinct genus. In the absence of a genus the rule has no application. Further the intention of the legislature is quite clear by the words used in the enactment. By giving the words their natural meaning, it is apparent that the expression 'any other public purpose' includes providing accommodation to a member of a foreign consulate.

To sum up in the words of V. Ramasamy J., in Union of India v. Devki Nandan Agarwala³⁰ the power to legislate has not been conferred on the courts. The courts cannot rewrite, recast or reframe the legislation for the reason that it has no power to legislate.

The court cannot add word to a statute or read words into it which are not there. Assuming there is defect or an omission in the words used by the legislature, the court cannot go to its aid to correct or to make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

7 WHAT ROLE DOES DOCTRINE OF REDDENDA SINGULA SINGULIS

The phrase, *reddenda singula singulis*, indicates that different words in one part of a section or statute are to be applied respectively to the other portions or sentences to which they respectively relate, even if strict grammatical construction should demand otherwise. Where several words importing power, authority and obligation are found at the commencement of a clause containing several branches, it is not necessary that each of those words should be applied to each of the different branches of the clause; it may be construed *reddenda singula singulis*, the words giving power and authority may be applicable to some branches, those of obligation to others.

Where a sentence contains several antecedents and several consequents, they are to be read distributively. That is, the words are to be applied to the subjects to which they appear by context most properly to relate and to which they are most applicable.

The method of construction applied in a sentence: If anyone shall draw or load any sword or gun the word

'draw' is applied to 'sword' only and the word 'load' to 'gun' only, the former verb to the former noun, and the later to the latter, because it is impossible to load a sword or draw a gun, and so of other application of different sets of words to one another.

The rule was used in *Quim v. Lowell Electric Light Corporation*³¹. The method of limiting the effect of expressions, which are obviously too wide to be construed literally, is most frequently adopted when the 'opening words of a section are general, while the succeeding parts of it branch out into particular instances.

According to *Sutherland*³² the difficult problems of interpretation involved in the rule of *reddendo singula singulis*, may be almost entirely eliminated by careful drafting. If sentences are short and contain but a single subject and a single object, this problem will be resolved.

In the case of *Bishop v. Deakin*³³ Sec. 59(1) of the Local Government Act 1933. provided for disqualification from acting as an elected member of a local authority, if the candidate has within five year before the date of election or since he was elected been convicted of an offence and imprisoned for three months at least, without the option of a fine.

The defendant was convicted and sentenced to imprisonment for more than three months. All action was brought for a declaration that he was disqualified from acting as a member of the local authority. Clauson J. observed that the sections provided for two disqualifications and two definitions:

- a) What is to be a qualification for election; and
- b) What is to be a disqualification for being member after election.

By applying the first definition to (a) and the second to (b) (based on the rule of *reddendo singula singulis*) he held that a conviction within five years before election, disqualified the person from election, and that conviction after election disqualified him from continuance in office.

He said; "If the section is to be read as providing that a person is disqualified from being a councilor if he was convicted within five years before his election, it may well be that he is so disqualified when he acts as a councilor at a date later than 5 yrs. from the date of conviction. In that case the effect of disqualification operating would be that he would cease to be a councilor, but he would be eligible a once for re-election to the vacant office, the five years having expired before the new election. All difficulty can be avoided by applying the well-known method of construction commonly known as *Reddendo singula singuiis*, and applying the first disqualification mentioned to the first case dealt with, a construction which so far as I can see, infringes no rule of syntax or grammar.

The result reached seems to be quite sensible, namely, that conviction with five years before the day of election, disqualifies from election, and conviction after election disqualifies from continuance in office.

8 HOW DOES INTERNAL AIDS LIKE TITLE HELP IN CONSTRUCTION OF AMBIGIOUS STATUTE?

- It is now settled that Long Title of an Act is a part of the Act and is admissible as an aid to its construction.

- The long title which often precedes the preamble must be distinguished with the short title; the former taken along with the preamble or even in its absence is a good guide regarding the object, scope or purpose of the Act,

- whereas the latter being only an abbreviation for purposes of reference is not a useful aid to construction.

- The title of the Madras General Sales Tax, 1939, was utilised to indicate that the object of the Act is to impose taxes on sales that take place within the province

The title although part of the Act is in itself not an enacting provision and though useful in case of ambiguity of the enacting provisions, is ineffective to control their clear meaning

- AMARENDRA KUMAR MOHAPATRA & ORS. V. STATE OF ORISSA & ORS.,
the Supreme Court has held that:

“The title of a statute is no doubt an important part of an enactment and can be referred to for determining the general scope of the legislation. But the true nature of any such enactment has always to be determined not on the basis of the given to it but on the basis of its substance.

- We may also refer to Maxwell,

where on the basis of authorities on the subject, short title of the Act has been held to be irrelevant for the purpose of interpretations of statutes

- LORD MOULTON

VACHER AND SONS LTD. V. LONDON SOCIETY OF COMPOSITORS,

described the short title of an Act as follows: “A title given to the Act is solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title Its object is identification and not description.”

9 IS PREAMBLE PART OF THE STATUTE AND HOW DOES IT HELP IN RESOLVING AMBIGUITY?

- The preamble of a statute like the long title is a part of the Act and is an admissible aid to construction.

- Although not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the long title.

- It may recite the ground and cause of making the statute, the evils sought to be remedied or the doubts which may be intended to be settled

- In the words of SIR JOHN NICHOLL : “It is to the preamble more specifically that we are to look for the reason or spirit of every statute, rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making or passing the statute itself
- MUDHOLKAR, J., speaking for the court observed: “It is one of the cardinal principles of construction that where the language of an Act is clear, the preamble may be resorted to explain it
- the preamble may be used to indicate to what particular instances, the enactment is intended to apply.
- The preamble may, no doubt, be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning, but it can, however, not be used to eliminate as redundant or unintended, the operative provision of a statute
- A preamble retrospectively inserted into an earlier Act is not of much assistance for gathering the intention of the original Act. Similarly, it seems the
- repeal of a preamble simpliciter will not affect the construction of the Statute.
- The Preamble of the Constitution like the Preamble of any statute furnishes the key to open the mind of the makers of the Constitution more so because the Constituent Assembly took great pains in formulating it so that it may reflect the essential features and basic objectives of the Constitution. The Preamble is a part of the Constitution.
- The Preamble embodies the fundamentals underlining the structure of the Constitution. It was adopted by the Constituent Assembly after the entire Constitution has been adopted. The true functions of the Preamble is to expound the nature and extend and application of the powers actually confirmed by the Constitution and not substantially to create them.

10 HOW IS HEADING RELEVANT AS AN INTERNAL AID?

- The view is now settled that the Headings or Titles prefixed to sections or group of sections can be referred to in construing an Act of the Legislature
- But conflicting opinions have been expressed on the question as to what weight should be attached to the headings
- A Heading”, according to one view, “is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation;

- and so the headings might be treated “as preambles to the provisions following them.
- they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision.
- Only in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision.

Marginal notes

- older statutes marginal notes were not inserted by the legislature and hence were not part of the statute and could not be referred to for the purpose of construing the statute.
- If they are also enacted by the legislature they can be referred to for the purpose of interpretation. In the case of the Indian Constitution, the marginal notes have been enacted by the Constituent Assembly and hence they may be referred to for interpreting the Articles of the Constitution.
- *Thakurain Balraj Kunwar v. Rao Jagpatpal Singh*, it was observed that it is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act
- Where the language is clear and can admit of no other meaning, the marginal note cannot be read to control the provisions of the statute.

11 WHAT ROLE DOES PUNCTUATION, ILLUSTRATION, EXPLANATION AND SCHEDULE PLAY IN CONSTRUCTION?

- Punctuation’ means to mark with points and to make points with usual stops. It is the art of dividing sentences by point or mark
- Punctuation is considered as a minor element in the construction of statutes. Text book writers comment that English Court pay little or no attention to punctuation while interpreting while interpreting the statutes. The same is not the cases in Indian Courts.
- If a statute in question is found to be carefully punctuated, punctuation may be resorted for the purpose of construction
- *Mohd. Shabbir v. State of Maharashtra*,
- while interpreting Section 27 of the Drugs and Cosmetics Act, 1940,
- the Supreme Court pointed out that the presence of ‘comma’ after ‘manufactures for sale’ and ‘sells’, and absence of any ‘comma’ after ‘stocks’ would indicate that only

stocking for sale could amount to offence and that mere stocking cannot be treated as an offence for the purpose of the Drugs and Cosmetics Act

- B. K. MUKHERJEE, J., in *Aswini Kumar Ghose v. Arabinda Bose*
- When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text.”

ILLUSTRATIONS

- Illustrations in enactment provided by the legislature are valuable aids in the understanding the real scope.
- In *Mahesh Chandra Sharma V.Raj Kumari Sharma*, (AIR 1996 2 7 SC 869), it was held that illustrations are parts of the Section and help to elucidate the principles of the section

• Proviso

- The normal function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. There may be cases in which the language of the statute may be so clear that a proviso may be construed as a substantive clause. But whether a proviso is construed as restricting the main provision or as a substantive clause, it cannot be divorced from the provision to which it stands as a proviso. It must be construed harmoniously with the main enactment.”

- *CIT vs. Ajax Products Ltd.*

Explanation4

- An Explanation is added to a section to elaborate upon and explain the meaning of the words appearing in the section. An Explanation to a statutory provision has to be read with the main provision to which it is added as an Explanation.
- An Explanation appended to a section or a sub-section becomes an integral part of it and has no independent existence apart from it.
- The purpose of an Explanation is not to limit the scope of the main section.
- An Explanation is quite different in nature from a proviso; the latter excludes, excepts and restricts while the former explains, clarifies or subtracts or includes something by introducing a legal fiction.

• schedule

- Schedules form part of a statute.

- They are at the end and contain minute details for working out the provisions of the express enactment. The expression in the schedule cannot override the provisions of the express enactment.

12 WHAT IS INTERPRETATION CLAUSE AND ELABORATE ON ITS IMPORTANCE IN INTERPRETATION OF STATUTES?

- It is common to find in statutes “Definitions” of certain words and expressions used elsewhere in the body part of the statute.
- The object of such definitions is to avoid the necessity of frequent repetitions in describing all the subject matter to which the word or expression so defined is intended to apply.
- Definition section may borrow definitions from an earlier Act and the definitions so borrowed need not be found in definition section but in some other provisions of the earlier Act.
- The Legislature has power to define a word even artificially.
- So the definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same.
- When a word is defined to ‘mean’ such and such, the definition is prima facie restrictive and exhaustive;
- whereas, where the word defined is declared to ‘include’ such and such, the definition is prima facie extensive.
- When by an amending Act, the word ‘includes’ was substituted for the word ‘means’ in a definition section, it was held that the intention was to make it more extensive.
- Further, a definition may be in the form of ‘means and includes’, where again the definition is exhaustive; on the other hand, if a word is defined ‘to apply to and include’, the definition is understood as extensive.
- The definition section may itself be ambiguous and may have to be interpreted in the light of the other provisions of the Act and having regard to the ordinary connotation of the word defined.
- A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realizing that the function of a definition is to give precision and certainty to a word or phrase which would otherwise be vague and uncertain but not to contradict

13 WHAT ARE EXTERNAL AIDS ?

When internal aids are not adequate, courts have to take recourse to external aids. They are very useful tools for the interpretation or construction of statutory provisions. In *B. Prabhakar Rao and others v. State of A.P. and others*[10], O. Chennappa Reddy J. has observed: “Where internal aids are not forthcoming, we can always have recourse to external aids to discover the object of the legislation. External aids are not ruled out. This is now a well settled principle of modern statutory construction.”[11]

Further, in the case of *District Mining Officer and others v. Tata Iron & Steel Co. and another*[12], the Supreme Court has observed: “It is also a cardinal principle of construction that external aids are brought in by widening the concept of context as including not only other enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in pari materia and the mischief which the statute was intended to remedy.

14 HOW PARLIAMENTARY HISTORY HELPS IN INTERPRETATION?

If the wordings are ambiguous, the historical setting may be considered in order to arrive at the proper construction, which covers parliamentary history, historical facts, statement of objects and reasons, report of expert committees.

a) Parliamentary history means the includes conception of an idea, drafting of the bill, the debates made, the amendments proposed, speech made by mover of the bill, etc. Papers placed before the cabinet which took the decision for the introduction of the bill are not relevant since these papers are not placed before the parliament.

Cases

1. The Supreme Court in *S.R. Chaudhuri v. State of Punjab and others*[14] has stated that it is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a Constitutional provision because it is the function of the Court to find out the intention of the framers of the Constitution.[15]

But as far as speeches in Parliament are concerned, a distinction is made between speeches of the mover of the Bill and speeches of other Members.

2. Regarding speeches made by the Members of the Parliament at the time of consideration of a Bill, it has been held in *K.S. Paripoornan v. State of Kerala and others*[16] that they are not admissible as extrinsic aids to the interpretation of the statutory provision. However, speeches made by the mover of the Bill or Minister may be referred to for the purpose of finding out the object intended to be achieved by the Bill.

15 ELABORATE ON HISTORICAL FACTS , STATEMENT OF OBJECT AND REASON , AND REPORT OF COMMISSION?

Historical facts of the statute are the external circumstances in which it was enacted. The object is to understand whether the statute in question was intended to alter the law or leave it where it stood.

Statement of objective and reasons provides why the statute is being brought to enactment. It is permissible to refer to it for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute and the evil which the statute sought to remedy

Cases

But, as held in *Devadoss (dead) by L. Rs, v. Veera Makali Amman Koil Athalur*[17], it cannot be used to ascertain the true meaning and effect of the substantive provision of the statute.

Reports of Commissions including Law Commission or Committees including Parliamentary Committees preceding the introduction of a Bill can also be referred to in the Court as evidence of historical facts or of surrounding circumstances or of mischief or evil intended to be remedied.

Cases

The Supreme Court in *Rosy and another v. State of Kerala and others*[18] considered Law Commission of India, 41st Report for interpretation of section 200 (2) of the Code of Criminal Procedure, 1898.

16 DISCUSS SOCIAL, POLITICAL AND ECONOMIC DEVELOPMENTS AND SCIENTIFIC INVENTIONS WITH RELEVANT CASE LAWS?

A Statute must be interpreted to include circumstances or situations which were unknown or did not exist at the time of enactment of the statute. Any relevant changes in the social conditions and technology should be given due weightage.

Cases

In *S.P. Gupta v. Union of India*[20], it was stated – “The interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirement of the fast changing society which is undergoing rapid social and economic transformation ... It is elementary that law does not operate in a vacuum. It is, therefore, intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He

has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice.”[21]

Therefore, court has to take into account social, political and economic developments and scientific inventions which take place after enactment of a statute for proper construction of its provision.

Reference to Other Statutes

For the purpose of interpretation or construction of a statutory provision, courts can refer to or can take help of other statutes. It is also known as statutory aids. For e.g. the General Clauses Act, 1897.

The application of this rule helped to avoid any contradiction between a series of statutes dealing with the same subject as it allows the use of an earlier statute to throw light on the meaning of a phrase used in a later statute in the same context.

Dictionaries

When a word is not defined in the statute itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. For e.g. Black’s Law Dictionary.

Judicial Decisions

Decisions by courts on the same manner act as precedents for the interpretation of statutes. Indian judicial pronouncements may have binding value when issued by a higher court, and have persuasive value when issued by a court having same or lower authority. These foreign decisions from countries following the same system of jurisprudence have persuasive value only and cannot be used to contradict binding Indian judgements.

Other materials

Courts also refer passages and materials from eminent text books, articles and papers published in journals.

Cases

The Supreme Court used information available on internet for the purpose of interpretation of statutory provision in Ramlal v. State of Rajasthan.[22]

Hence to conclude, there are various Aids of Interpretation of statutes.

17DOCTRINE OF PARI MATERIA ?

It is no doubt a recognized rule of interpretation, that where statutes are parimateria that is to say, are so far related as to form a system or code of legislation, such Acts are to be taken together as forming one system and as interpreting and enforcing each other. It is permissible to read the provisions of the two Acts together when the same are complementary to each other. The principle of parimateria is based on the idea that there is continuity of legislative approach in such acts and common terminology is used. No change in meaning should be attributed unless this was intended.

Lord Mansfield has observed that:

“Statues in parimateria are to be all taken as one system to suppress the mischief..... The two laws are only parts of the same provision”.

In respect of definitions it has been observed “Where a term is used without definition in one Act, but is defined in another Act which is in parimateria with the first Act, the definition may be treated as applicable to the use of the term in the first Act. This may be done even where the definition is contained in a later Act.”

The sole question to apply this doctrine is whether, in borrowing the word, Parliament also intended to borrow its previous processing. This can be a very difficult matter to determine. One test is whether the two Acts are in parimateria.

Considerations for parimateria act:

There are certain considerations discussed in Bennion on Statutory Interpretation for terming acts to be paramateria and the same has been referred to by the Delhi High Court in Raees-Uz-Zama and Anr. v. State NCT of Delhi.

The conditions are as follows:

1. Acts which have been given a collective title. This is a recognition by Parliament that the Acts have a single subject matter.
2. Acts which are required to be construed as one. Again there is parliamentary recognition of a single subject matter.
3. Acts having short titles that the identical (apart from the calendar year).
4. Other Acts which deal with the same subject matter on the same lines. Here it must be remembered that the Latin word part or paris means equal, and not merely similar. Such Acts

are sometimes described as forming a code. This does not mean that the Acts are codifying Acts however.

If the Acts are in parimateria it is assumed that uniformity of language and meaning was intended, attracting the same considerations as arise from the linguistic canon of construction that an Act is to be construed as a whole. This principle governing Acts in parimateria was thus expressed by twelve judges to mean such Acts 'are to be taken together as forming one system, and as interpreting and enforcing each other. In other words they are to be construed as one, whether or not the relevant enactment expressly requires this. This has been applied even to repealed Acts within a group'.

The doctrine of parimateria is a useful tool for interpretation of statutes that work towards the same objective. It is an ordinary rule of interpretation of statutes that the words of a statute when there is a doubt about their meaning are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. The doctrine helps in harmonizing the aim and subject of the legislations.

Thus, to summarize, statutes are considered to be in parimateria to pertain to the same subject-matter when they relate to the same person or things, or to the same class of persons or thing, or have the same purpose or object. The doctrine of 'parimateria' provides that reference to other statutes dealing with the same subject or forming part of the same system is a permissible aid to the construction of provisions in a statute. Where there are different statutes in parimateria, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system and as explanatory to each other. The effect of this is in one sense to supply the equity of the statute; but in truth no more is done than to construe the statute according to its plain language, though the effect of the construction is incidentally and equitably to deny to local authorities an overriding privilege, such as would exempt them from all forms of injunction.

Rationale behind the rule

It is to be inferred, that a code of statutes relating to one subject was governed by one spirit and policy and, intended to be consistent and harmonious in its several parts and provisions.

It is therefore an established rule of law, that all Acts in parimateria are to be taken together as if they were one Law, and they are directed to be compared in the construction of statutes,

because they are considered as framed upon one system, and having one object in view. The rationale behind this rule is based on the interpretative assumption that words employed in legislations are used in an identical sense. However, this assumption is rebuttable by the context of the statutes.

The rule is thus an extension of the principle that the whole statute is to be viewed and compared in all its parts, in order to ascertain the meaning of any of its parts. All laws relating to a particular matter or subject, that is laws in parimateria bear the same relation to any law within the group or system as the whole statute bears to any of its several parts. The application of this rule of construction has the merit of avoiding any apparent contradiction between a series of statutes dealing with the same subject, it allows the use of an earlier statute to throw light on the meaning of a phrase used in a later statute in the same context, it permits the raising of a presumption, in the absence of any context indicating a contrary intention, that the same meaning attaches to the same words in a later statute as in an earlier statute if the words are used in similar connection in the two statutes, and it enables the use of a later statute as parliamentary exposition of the meaning of ambiguous expressions in an earlier statute.

Application of the doctrine:

This doctrine thus provides that all legislations pertaining to labour regulatory regime or taxation, inter alia, others can be used to interpret the legislations belonging to the same genre. There are certain cases wherein the Court has used the said doctrine to derive meaning for certain words not defined in the Act in question. However, care must be taken while importing meaning of words from other legislations. When a word is not defined in the Act itself, it is permissible to refer to dictionaries or any similar legislations to find out the sense in which that word is understood. However, in selecting one out of the various meanings of a word, regard must always be had to the context as it is a fundamental rule that “the meanings of words and expressions used in an Act must take their colour from the context in which they appear”. Therefore, “when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers”.

In the matter of *J.K. Steal Ltd. v. Union of India and Ors*, the Hon'ble Supreme Court, while considering parimateria provisions of Central Excises and Salt Act, held that Acts being in

parimateria must be taken together as forming one code and as interpreting and enforcing each other.

Referring to its earlier judgment in the matter of C.A. Abraham v. I.T.O., Kottayam it was observed that “In interpreting a fiscal statute the Court cannot proceed to make good deficiencies if there may be any; the Court must interpret the statute as it stands and in case of doubt in a manner favourable to the tax payer.”

However, the majority in J.K.Steel case did not accept the contention that an entry in the Excise Act could be interpreted with reference to a similar entry in Tariff Act which was in parimateria with the Excise Act. Justice Sirki, who delivered the majority judgment observed as under:

“I am not able to appreciate how the insertion of item No. 63(36) in the First Schedule of the Tariff Act or the subsequent amendment of the Indian Tariff Act, 1934, by Indian Tariff (Amendment Act) 1963 throw any light on the interpretation of item 26AA(i)”.

Justice Hegde who gave the minority opinion appear to have been based on two important factors which existed in that case, i.e., that both the said entries were inserted in the said statutes on one and the same day and the surrounding circumstances showed that they were so incorporated for a common purpose.

Another important aspect of such interpretation is that the socio-legal aspect of legislations is also considered before the acts are considered to be parimateria. Acts such as the Ceiling Act and the Tenancy Act which have been implemented with the intention achieving various socio-economic plans have to be read in a complementary manner. Any interpretation to the contrary can create contradiction and it would become impossible to achieve the goals set out in the legislations. It is, therefore, necessary to take a constructive attitude in interpreting provisions of these types and determine the main aim of the particular Act in question for adjudication before the Court. Similarly, in another Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 was to be read along with other labour legislations like Industrial Disputes Act, 1947 and Contract Labour (Regulation and Abolition) Act, 1970 as they strived to achieve the same socio-legal aspect of welfare of labor force.

In *Employees State Insurance Corporation, Madras v. S.M. Sriramulu Naidu*, it was held that this doctrine could not be used to say that the Factories Act and the Employees State Insurance Act are, in parimateria, though they were enacted in the same year and both of them were intended to benefit the wage earners. The Court said that the Factories Act was essentially concerned with the regulation of the factory in the interests and for the safety of the worker, a person employed in the manufacturing process or in any work incidental thereto. Whereas the Factories Act was essentially concerned with the regulation of the factory in the interests and for the safety of the worker, a person employed in the manufacturing process or in any work incidental thereto. Thus, both could not be treated to be in the same genre.

The Court referred to the Heydon's case and held:

“That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. What was the common law before the making of the Act? What was the mischief and defect for which the common law did not provide? What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and pro privatocommodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico.”

The Andhra Pradesh High Court in *RCI Power Limited v. Union of India*, referred to *J.K.Steel* case and held that the Reforms Act, Central Electricity Regulatory Commission Act (Central Enactment), the Electricity Act, and the Supply Act are cognate legislations and the State Commission constituted under Central Act is vested with the power to determine the tariff payable for the use of transmission facilities by the Generating Company in the manner provided in Section 29 of that Act.

In *State of Madhya Pradesh v. M.V. Narasimhan*, it has been observed as under:-

“It seems to us that even if Section 2 of the Prevention of Corruption Act, 1947 had not applied the provisions of the Penal Code and had not defined public servant, then the

provisions of the Penal Code would have come into operation by implied reference because the Act was a supplemental Act to the Penal Code. It was only by way of abundant caution that Section 2 of the Act incorporated the definition of "public servant" as mentioned in Section 21 of the Penal Code and in that sense alone the Act can be treated as being parimateria with the Penal Code. For these reasons, therefore, we are clearly of the opinion that the judgment of the High Court holding that the respondent was not a public servant is legally erroneous and cannot be allowed to stand.”

In the case of *Shah & Co., Bombay v. The State of Maharashtra & Anr*, the Rent Act and the Requisition Act were not considered to be paramateria as the Rent Act was enacted for the purpose of amending and consolidating the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions. The Requisition Act was passed to provide for the requisition of land, for the continuance of requisition of land and for certain other purposes. It will therefore be seen that this Act deals with a matter, so totally different from that dealt with by the Rent Act. There is absolutely no similarity between the two enactments; and we cannot hold that the Requisition Act relates to the same person or thing, or to the same class of persons or things, as the Rent Act. Hence the two Acts were not considered to be in parimateria.

In *State of Madras v. Vaidyanatha Iyer*, the definition of “shall presume” in the Evidence Act and the words “it shall be presumed” in the Prevention of Corruption Act, 1947 were considered to be the same. In *State of Assam and Another v. Deva Prasad Barua & Another*, section 19 of Assam Agricultural Income Tax Act, 1939 was held to be similar to section 22 of the Income Tax Act, 1922. In *Dy. Chief Controller of Imports and Exports, New Delhi v. K. T. Kosalram*, the Indian Tariff Act, 1934 and Import and Exports (Control) Act 1947, were considered to be throwing some light on each other as both statutes formed part of the Import Control Scheme of the Government.

Conclusion:

Thus, to conclude the doctrine plays a significant role in bridging the gaps in interpretation of similar statutes. The legislation aiming at the same goals have to be read together in order to give effect to the provisions in the statutes. The doctrine has provided a guide to the Courts to interpret and import meaning from legislation working for the same aim and objective. The

case laws discussed above clearly show that the Court delve into the working and aim of various legislations in order to term Acts as paramateria. Hence, the doctrine is an important tool to interpret and effectively enforce legislations.

18 DOCTRINE OF STARE DECIS?

The doctrine of precedent refers to the doctrine that the court is to follow judicial decisions in earlier cases, when the same questions or points are raised before it in subsequent matters.

According to Salmond, the phrase 'the doctrine of precedent' has two meanings. In its loose sense, it means that precedents are reported, may be cited and will probably be followed by courts. In strict sense, it means not only that a precedent has great authority but in certain circumstances, courts are bound by previously decided cases. Thus, what a court really does is to apply principles or decisions laid down in past.[ii] It is now appropriate to turn to the question of how the doctrine of binding precedent works in the context of the English common law, with particular reference to

- The way in which the courts decide what it is that is binding in earlier decisions; and
- the extent to which, and the circumstances in which, the highest court should feel free to depart from its own previous decisions.

According to Hart and Sacks, stare decisis furthers three primary goals. First, the doctrine promotes private ordering of citizens affairs by enabling them to plan their social and economic transactions with confidence that they are in compliance with existing law. Stare decisis also encourages private settlement of disputes by discouraging individuals from forum and judge shopping (Eskridge and Frickey 1994, 568; Hanssen 1999).

Second, stare decisis furthers fair and efficient adjudication by sparing litigants the need to relitigate (and judges the need to reconsider) every issue in every case, and it discourages a rush of litigation whenever a change of personnel occurs on the bench. Third, stare decisis promotes public confidence in the judiciary by providing some constraints on judges power through the obligation to build upon prior decisions in a fashion that may withstand professional criticism.[iii]

The doctrine that holdings have binding precedence value is not valid within most civil law jurisdictions as it is generally understood that this principle interferes with the right of judges to interpret law and the right of the legislature to make law.[citation needed] Most such systems, however, recognize the concept of jurisprudence constante, which argues that even

though judges are independent, they should judge in a predictable and non-chaotic manner. Therefore, judges' right to interpret law does not preclude the adoption of a small number of selected binding.

My primary project in this Article is to isolate the various components of the Supreme Court's stare decisis jurisprudence and to study their individual and collective functions. That analysis yields two overarching conclusions.

First, the modern doctrine of stare decisis is essentially indeterminate. The various factors that drive the doctrine are largely devoid of independent meaning or predictive force. Fairly or not, this weakness exposes the Court to criticism for appearing results-oriented in its application of stare decisis. The second conclusion is forward-looking, and it provides the groundwork for transforming stare decisis into something more predictable, meaningful, and theoretically coherent. Most of the considerations that populate the Court's current jurisprudence are best understood—or, perhaps, reimagined—as efforts to gauge the reliance interests that would be affected by the decision to overrule a given precedent. There is no inherent problem with such focusing case laws.[iv]

2. Foundation of Stare Decisis

The basic reason behind the doctrine of stare decisis is the maintenance of consistency and certainty. Certainty, predictability, and stability in law are considered to be the major objectives of the legal system, and the doctrine of stare decisis aims at achieving these objectives.

In *Hari Singh v. State of Haryana*, it was noted that it is true that in the system of justice which is administered by courts, one of the basic principles to be kept in mind that the courts of co-ordinate jurisdiction should have consistent opinions in respect of similar sets of facts and circumstances or question of law. If opinions given on identical facts are inconsistent, instead of achieving harmony in the judicial systems, it will lead to judicial anarchy. The view that has held the field for a long time must not be disturbed merely because of the possibility of another view.

The reason behind Stare Decisis

Understanding the Notion of Precedent For the common-law mind steeped in the tradition of progressive advancement on a foundation of progressively refined reason, there is a self-evident quality to the notion of precedent. Precedent appeals to primal desires for—and, in a system of laws, justified expectations of—rationality, regularity, and stability.[v]

The Values that Animate Stare Decisis

The notion that judges should adhere to authoritative decisions of the past has a deep lineage in America's common-law heritage. After two hundred years of domestic judicial pronouncements on the subject, legal scholars have had ample source material for examinations of the foundations of stare decisis. The most recognizable value of stare decisis is its ability to enhance stability and consistency across time and similar circumstances.

At its most elemental level, it satisfies the impulse that, all other things being equal, a legal system is better advised to resolve matters firmly and finally than to search for normatively more appealing solutions on a case-by-case basis. In the same vein, adherence to precedent fosters the orderly and efficient administration of justice by discouraging successive relitigation of issues that have already been authoritatively resolved. Finally, stare decisis serves to sustain the public's trust in a principled, law-bound judiciary.

. The Stare Decisis Antivalues

The Justifications for Reexamining Precedent Under the combined weight of these considerations, the doctrine of stare decisis ultimately functions as a strong presumption against revisiting precedent. The Supreme Court has described this presumption in a variety of ways, but the basic thrust has been the same: stare decisis imposes a "severe burden" on those judges who are dissatisfied with established precedent. Although the grounds for overruling precedent are easily stated, their application is necessarily highly specific to each particular situation.

One standard consideration is whether a precedent has proved to be "unworkable" in practice. On a similar note, reconsideration is appropriate when an earlier decision is seen as poorly reasoned from the outset or otherwise "has been the subject of continuing controversy and confusion. "When carefully considered, each of these related ideas is simply another way of saying that a particular precedent never succeeded in establishing the stability and predictability that justify stare decisis in the first place. An even more significant consideration has been the influence of subsequent developments on the foundation of a precedent. Reevaluation of a precedent is justified when "facts have so changed, or [have] come to be seen so differently, as to have robbed the old rule of significant application or justification. "Of most relevance," case law.[vi]

Institutional and Instrumental Considerations

A further fixture of stare decisis jurisprudence is perhaps the most important for understanding the doctrine in application. The Supreme Court has long held that stare decisis is most potent in statutory cases and is weakest in constitutional cases.⁶⁵ At its most

elemental level, this distinction is grounded in the availability—both formally and practically—of alternative constitutional vehicles for error correction. Stated simply, when a court interprets a statute, the legislative branch is available to correct, update, or otherwise revise the judicial determination. Thus, as the Supreme Court has reiterated, “considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”

19 EXPLAIN IN DETAIL HOW RULE OF LAW AND DOCTRINE OF STARE DECISIS ARE RELATED?

We can now see that the relationship between stare decisis and the rule of law is not all to the good. Deferring to precedent can generate rule-of-law costs that may offset the countervailing benefits. What is to be made of the resulting tension?

In doctrinal terms, there are three possible reactions. First, the rule-of-law concerns might lead a legal system to consider jettisoning stare decisis altogether. Second, judges might attempt to work out the tension on the micro level by resolving individual cases in such a way as to promote the rule of law. And third, the rule-of-law ambivalence might operate at the macro level to influence how much deference judicial precedents receive. I discuss each option in turn before suggesting that the third holds the most promise.

4. Jettisoning Stare Decisis

The most severe response would be to treat rule-of-law concerns as undermining the very foundations of stare decisis. That approach strikes me as an overreaction, in large part because it would sacrifice the potential rule-of-law benefits that Professor Waldron so effectively describes. Nor is the abolition of stare decisis a realistic alternative as a practical matter, at least in the foreseeable future. Despite its tendency to come under fire in particular cases and to generate disputes about its proper application, the abstract notion of stare decisis continues to command significant allegiance among most judges and scholars.

- The Rule-of-Law Case for Precedent

In constructing his operating definition of the rule of law, Professor Waldron emphasizes the generality principle. Briefly stated, generality entails making legal decisions by developing and announcing general rules whose application extends beyond the case at hand. This is not simply a matter of treating like cases alike; the requirement of generality goes further, “commanding judges to work together to articulate, establish, and follow legal norms.”^[viii]

To examine the mechanisms by which stare decisis fosters generality and contributes to the rule of law, Professor Waldron divides the adjudicative process into distinct layers. The bottom layer involves the “Precedent Judge,” who is initially called upon to resolve a dispute. The requirement of generality compels the Precedent Judge to approach the case before her as an instantiation of a broader problem. She must resolve the case by reference to a general rule that will carry over into the future.

In discharging this duty, the Precedent Judge acts as if she is both deciding a concrete dispute and setting a precedent. Professor Waldron helpfully notes that the Precedent Judge’s mandate of generality does not depend on any subsequent decisionmaker’s actually according to respect to her decision. To the contrary, the Precedent Judge’s obligation is the same regardless of what the future may hold. But within a system that recognizes judicial precedents as meaningful, the Precedent Judge also sets the tone for later adjudication by establishing the general norm that will serve as the guiding framework for subsequent jurists. The onward march of time inevitably brings the march of more aggrieved litigants into the courts. As it does, Professor Waldron leads us through additional layers of the rule-of-law case for stare decisis. These upper layers relate to the actions of the “Subsequent Judge,” who determines how to apply past decisions to a new dispute. The norm of generality remains crucial. The Subsequent Judge must imagine herself as working alongside the Precedent Judge to decide cases according to a generally applicable rule.

Of course, any such rule must resolve the dispute that is pending before the Subsequent Judge by reference to a broader framework that extends across cases; after all, today’s Subsequent Judge is tomorrow’s Precedent Judge. Yet the Subsequent Judge must also ensure that the rule she articulates pays appropriate respect to the Precedent Judge’s decision. This is the second way in which stare decisis affects the rule of law: By giving precedents their due regard as embodying “genuine legal norms,” Subsequent Judges promote the ideal of a legal order that transcends the details of particular disputes and the proclivities of particular judges. Legal rules become the products not of individuals, but of courts.

Professor Waldron also considers the rule-of-law effects of a court’s decision to overturn a precedent despite its applicability. A legal system that accepts some overruling does not remain simpatico with the rule of law, he explains, so long as it meets certain conditions. In particular, a baseline regard for the value of legal constancy must guide the Subsequent Judge who is contemplating a departure from precedent. Adopting that perspective will lead to the preservation of an essentially stable equilibrium notwithstanding occasional incidences of

adjudicative change. Recognizing the importance of systemic stability is vital in dissuading the Subsequent Judge from overruling each and every precedent that she finds unconvincing. Instead, the judge will reserve her overruling's for situations in which the need for judicial correction or innovation is pronounced, and she will reasonably expect her successors on the bench to do the same.[ix]

- The Rule-of-Law Case against Precedent

Professor Waldron provides a valuable service by applying his characteristic rigor to the rule-of-law benefits of precedent. My modest aim is to offer some thoughts about how the relationship between precedent and the rule of law can run in the opposite direction as well. Professor Waldron himself notes this point, but given the focus of his project on articulating the layers of justification for stare decisis, he understandably devotes less attention to the implications of its rule-of-law costs. It will thus be instructive to say something more about the rule-of-law case against precedent.

One category of potential rule-of-law costs relates to the dangers of stifling the practical effectiveness of reasoned argumentation. There is value in a citizen's power to advocate her interests before governmental bodies and to receive an explanation for defeat that is more satisfying than unadorned path-dependence. That value can find itself at odds with judicial deference to precedent. This tension is mitigated to some extent by the prevailing American characterization of stare decisis as a rebuttable presumption rather than an "inexorable command." Nevertheless, the prospect of overruling does not entirely eliminate the rule-of-law concerns that may arise from deference to past decisions; the litigant who seeks change must still overcome a presumption that her case is a loser.[x]

A second category of rule-of-law costs involves a court's choice to depart from its best reading of a primary legal source in order to remain faithful to precedent. Imagine that you are a Supreme Court justice faced with a case involving the right of corporations to make independent expenditures on behalf of political candidates. Your understanding of the Constitution—whether based on its original public meaning, its implementation in light of contemporary mores and policy objectives, or some other interpretive referent—indicates that corporations do, in fact, possess such a right. Yet there is clear precedent to the contrary. You might well conclude that the importance of leaving matters settled, as informed by the rule-of-law benefits of constancy and stability, overrides the importance of applying the Constitution in the manner you would otherwise favor.

But note that your decision is not an unmitigated boon for the rule of law. By deviating from the reading of the Constitution that you view as most compelling, you compromise your solicitude for the Constitution's role in contributing to the "framework of public norms" that "provide a basis of legal accountability" for the exercise of governmental power. Fidelity to judicial precedent sometimes entails the subordination of "fidelity to the Constitution." This is no accident; it is inherent in the nature of constitutional stare decisis. Even so, the fact remains that the principle of generality demands regard for judicial precedent and enacted law alike. Tilting the scales in favor of the former can undermine the resonance of the latter to the detriment of the rule of law.[xi]

- Cases-by-Case Assessments of the Rule of Law

Rather than abandoning stare decisis, courts might respond to its rule-of-law ambivalence at the level of individual cases. The decision of whether to defer to precedent would depend on the rule-of-law implications of deference in the case at hand.

Judges also make individualized inquiries into the rule-of-law effects of stare decisis where one line of precedent stands in tension with another. In such cases, the Subsequent Judge might declare that abandoning the "errant precedent" is the outcome best aligned with enhancing jurisprudential coherence and promoting the rule of law. Yet even where a prior judge offers a less-than-compelling basis for distinguishing a precedent, her decision still becomes part of the general rule that all future judges on her court are jointly charged with respecting and applying.

When a Subsequent Judge confronts the body of relevant precedents in a future case, she must accord respect not only to the original precedent, but also to its intervening applications.

If the Subsequent Judge chooses to renounce certain precedents because she views them as unfaithful to others, her action has both costs and benefits for the rule of law. To be sure, her decision may promote the rule of law in some measure by enhancing jurisprudential coherence and bringing the governing legal norm into closer proximity with the general principle that the original precedent embodied. But fidelity to the original precedent comes at the expense of fidelity to the intervening applications, and it is profoundly difficult to discern whether the rule-of-law benefits of the former outweigh the rule-of-law costs of the latter.

The more basic point is simply to illustrate the challenges of making on-the-fly determinations about whether deference to precedent supports the rule of law in a given case.

The rule of law is a valuable principle for organizing the operation of a legal system, and it can certainly take some options-for instance, resolving a dispute based on personal affinity or

political preference-off the table in individual cases. But it is an awkward tool for determining when to stand by a particular precedent and when to depart.

5. Stare Decisis in Civil Law System

Stare decisis are not usually a doctrine used in civil law systems, because it violates the principle that only the legislature may make law. However, the civil law system does have jurisprudence constant, which is similar to Stare decisis and dictates that the Court's decision condone a cohesive and predictable result.

One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should, therefore, follow that a court could not decide purely prospective cases, cases which do not govern the rights and disabilities of the parties to the cases. Courts have regularly asserted that this principle is true, only applying the decision retroactively effect to the parties in the immediate case. Yet, occasionally, the Court did not apply its holding to the parties before it, and in a series of cases beginning in the mid-1960s it became embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively—constitutional-criminal law decisions. The results have been confusing and unpredictable.

Prior to 1965, “both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions.” Statutory and judge-made law have consequences, at least to the extent that people must rely on them in making decisions and shaping their conduct. Therefore, the Court was moved to recognize that there should be a reconciling of constitutional interests reflected in a new rule of law with reliance interests founded upon the old. In both criminal and civil cases, however, the Court's discretion to do so has been constrained by later decisions. What the rule is to be, and indeed if there is to be a rule, in civil cases has been evenly disputed in recent cases.

As was noted above, there is a line of civil cases, constitutional and nonconstitutional, in which the Court has declined to apply new rules, the result often of overruling older cases, retrospectively, sometimes even to the prevailing party in the case. As in criminal cases, the creation of new law, through overrulings or otherwise, may result in retroactivity in all instances, in pure prospectivity, or in partial prospectivity in which the prevailing party obtains the results of the new rule but no one else does. In two cases raising the question when States are required to refund taxes collected under a statute that is subsequently ruled to be unconstitutional, the Court revealed itself to be deeply divided.[xii]

Precedential Effect of Court Decisions

Under the doctrine of stare decisis, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. The rule of stare decisis is a judicial policy, based on the principle that absent powerful countervailing considerations, like cases should be decided alike in order to maintain stability and continuity in the law. The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.

Stare decisis is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Stare decisis is intended to insure that people are guided in their personal and business dealings by prior court decisions, through established and fixed principles they announce. Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. Stated otherwise, stare decisis is the most important application of a theory of decision-making consistency in our legal culture and it is an obvious manifestation of the notion that decision-making consistency itself has normative value.

The doctrine of stare decisis permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. The doctrine of stare decisis is crucial to the system of justice because it ensures predictability of the law and the fairness of adjudication.

- **Doctrine of Precedent: Pros and Cons**

A number of commentators have explored the pros and cons of the doctrine of stare decisis. Supporters of the system, argue that obeying precedent makes decisions “predictable.” Another advantage of this doctrine, as mentioned earlier is that it brings certainty, stability and consistency in law. It also saves time and energy of judges as they are not required to determine the same question of law over and over again once it has been settled. As noted by Bodenheimer, the doctrine also plays a role in curbing arbitrariness on the part of judges as they are bound to follow established precedents thus preventing bias and error. The doctrine brings flexibility in law and law is shaped according to the social, economic and other circumstances.

However, critics argue that stare decisis is an application of the argument from authority logical fallacy and can result in the preservation and propagation of cases decided wrongly. Another argument often used against the system is that it is undemocratic as it allows unelected judges to make law. A counter-argument (in favor of the concept of stare decisis) is that if the legislature wishes to alter the case law (other than constitutional interpretations) by statute, the legislature is empowered to do so. Critics sometimes accuse particular judges of applying the doctrine selectively, invoking it to support precedents which the judge supported anyway, but ignoring it in order to change precedents with which the judge disagreed.[xiii] Regarding constitutional interpretations, there is concern that over-reliance on the doctrine of stare decisis can be subversive. An erroneous precedent may at first be only slightly inconsistent with the Constitution, and then this error in interpretation can be propagated and increased by further precedents until a result is obtained that is greatly different from the original understanding of the Constitution.

Stare decisis is not mandated by the Constitution, and if it causes unconstitutional results then the historical evidence of original understanding can be re-examined. In this opinion, predictable fidelity to the Constitution is more important than fidelity to unconstitutional precedents. Another factor is that the doctrine of binding precedent can in a sense hinder the development of law. Society is not static and there are changes in social, economic and other circumstances with time. Changed circumstances may require a different interpretation of law.

7. Doctrine of Prospective over Ruling

Although the doctrine of precedent is the normal course followed, decisions that are erroneous or that do not hold good in view of challenged circumstance, may be overruled by higher forums. Prof. Lakshminath notes that a decision may be overruled where it is recent or there is a divided opinion, the opinion is erroneous, the decision is unclear, causes inconvenience and hardship, the error in the prior decision cannot be easily corrected by the legislative process or the decision is vague. Once overruled, a prior decision is no longer a binding precedent.

However, if a precedent is overruled, this may lead to the re-opening of old disputes on the ground of change in the legal position and consequently, multiplicity of proceedings. By the application of this doctrine, changes in the position of law that are laid down by the court are made applicable only prospectively from the date that the change in law has been brought

about by the court or from any other date specified by the Court so as not to disturb past matters that have been finally settled.[xiv]

The doctrine of prospective overruling which is a feature of American Jurisprudence and an exception to the normal principles of law, was imported and applied for the first time in LC Golaknath v. State of Punjab which overruled its earlier decisions in Shakari Prasad`s case and Sajjan Singh`s case by which the first and seventeenth amendments.

The court does not clearly define the doctrine during this case. But court limited the scope of application of this doctrine by laying down “(1) The doctrine of prospective overruling can be invoked in matters arising under the constitution. (2) It can be applied only by the highest court of the country i.e, Supreme Court as it has Constitutional Jurisdiction to declare law binding on all courts in India. (3) The scope of the retroactive operation of the law declared by the Supreme court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it”.

The doctrine has been adopted to avoid multiplicity of proceedings, and avoid uncertainty in law. It was observed in the case of M.A. Murthy v. State of Karnataka that the doctrine of prospective overruling was a part of the constitutional cannons of interpretation.[xv]

While Golak Nath`s case, certain guidelines have been laid down as regards the application of doctrine of prospective overruling, as observed in Somaiya Organics India Ltd.v. State of U.P.

The parameters have not been adhered to in practice. It may be mentioned here that unless the court expressly makes the operation of a decision of a decision prospective, it will be retrospective in operation.

This doctrine has been applied in service matters. In Managing Director, ECIL v.

B.Karunakar, the view was adopted. Prospective over ruling is a part of the principles of constitutional cannon of interpretation and can be resorted to by the Supreme Court while superceding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings and to avoid uncertainty and avoidable litigation. In other words action taken contrary to the law declared prior to the date of declaration is validated in larger public interest. The law as declared applies to future cases. It is for the Supreme Court to indicate as to whether the decision in question will operate prospectively. In other words there shall be no prospective over ruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective

overruling. The doctrine of binding precedent helps in promoting certainty and consistencies in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of the transaction forming part of the daily affairs.

So, the concept of Prospective Overruling, as the title of the project reflects, is a deviation from the principle of retroactive operation of a decision and thus, a deviation from the traditional Blackstonian principle too. To illustrate, in very simple words, the implication of the invocation of the doctrine is that the decision of such a case would not have retrospective operation but would operate only in the future, i.e., have only prospective operation. This project now seeks to embark on a detailed analysis of the application and implications, both positive and negative, of the doctrine in the light of its invocation in the above mentioned cases.

8. Doctrine of stare decisis in India

The doctrine of stare decisis as is understood today appears to not have existed in India during the ancient or medieval times. It is only with the establishment of British rule in the country that the concept of binding precedent came to be applicable in India. The British Rule led to the hierarchy of courts as well as reporting of decisions, i.e., the two pre conditions for the stare decisis. In 1813, Dorin suggested the adoption of the doctrine of stare decisis in India.

The establishment of British Rule led to the setting up of the Sardar Diwani Adalats and the Supreme Courts at Calcutta, Bombay and Madras. In 1861, the high court Act was enacted providing for the establishment of high Courts by issue of letters patent. Such courts had original as well as appellate jurisdiction. A hierarchy of courts was thus established.[xvi]

The Government of India Act, 1935 expressly made the decisions of the Federal court and the Privy Council binding on all Courts in British India and thus gave statutory recognition to the doctrine of stare decisis. The Federal courts were not bound by its own decisions. After independence, the doctrine of precedent continues to be followed in the country.

Article 141 of the Constitution of India makes the 'law declared' by the Supreme Court binding on all courts within the territory in India. The Expression 'law declared' implies the law creating role of the Supreme Court. The Supreme Court is not bound by its own decisions. In *Bengal Immunity Co. v. State of Bihar* the court observed that there is nothing in the Indian constitution that prevent the Supreme Court from departing from its own previous decision if it is convinced of its error and baneful effect on public interest. In so far

as high court are concerned, the decisions of a High Court are binding on all subordinate courts within the jurisdiction of High Court.

20 PLEASE ELABORE ON SEPARATION OF POWERS, STARE DECISIS, AND JUDICIALLY ENFORCEABLE

1. International Law

A deeper appreciation of the relationship between precedent and separation of powers also counsels in favor of a reassessment of stare decisis as to questions of international law. In foreign affairs matters, in particular those that touch on international law, the Supreme Court has repeatedly cautioned that the judiciary should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches.” To reiterate one of my major themes, this concern—grounded in the separation-of-powers relationships between the judiciary and the political branches—does not dissolve merely because a court has created a precedent.

2. Antiquity

The Court sometimes instructs that older opinions are entitled to more deference than newer ones. Interestingly enough, it occasionally takes the opposite position, explaining that recent opinions receive the greatest deference. This ambivalence itself is enough to raise doubts about whether a precedent’s antiquity can help to predict whether it will be upheld. Nevertheless, it is worth taking a moment to explore the underlying theories that these two divergent practices seem to reflect. On the side of enhanced stare decisis effect for recent precedents, one potential justification is that reversing course too quickly could harm the Court’s legitimacy.

As discussed in greater detail below, this sort of rationale is problematic in several respects. Most notably for present purposes, there is no reason to believe that the Court’s legitimacy is in greater danger when it overrules a recent precedent than when it refuses to overrule a flawed precedent in an explicit effort to enhance its own public standing. To justify the opposite presumption—that long-standing precedents are entitled to the most deference—the best argument draws on the concept of reliance.

The idea would be that the length of time an opinion has been on the books is correlated (positively) with the amount of reliance it has engendered, for the simple reason that stakeholders have had more time to understand the opinion, embrace it as governing law, and shape their conduct accordingly. Recent opinions, by comparison, deserve relatively little deference because they are less likely to have generated significant reliance, giving the Court the opportunity to set matters straight before too much water is under the bridge. As Justice

Scalia has put it, “the freshness of error not only deprives [a precedent] of the respect to which long-established practice is entitled but also counsels that the opportunity of correction be seized at once before state and federal laws and practices have been adjusted to embody it...”

The Court adopts a similar approach in dealing with a precedent’s track record of affirmance. In the words of one recent opinion, deference to precedent is particularly important where a rule of decision “has become settled through iteration and reiteration over a long period of time.” We might posit two explanations for this rule. First, opinions that have been reconsidered and reaffirmed are more likely to be correct on the merits; reviewing the issue on multiple occasions reduces the risk of an erroneous result. Such a theory, I have argued above, cannot serve as a component of stare decisis doctrine, which must operate independently of merits considerations to carry any real meaning.[xvii]

3. Remnants and Anachronisms

Another intriguing subset of precedents are those that have escaped overruling for themselves but that belong to disfavored lines of cases—in the parlance of the Court, precedents whose “underpinnings” have been “eroded” by subsequent decisions.¹¹² When a precedent falls into this category, the Court is more inclined to treat it as an anachronism that should be overturned. The Court has framed the inquiry as “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.”

4. Unclean Hands

If a precedent represents a break from the cases that came before it, it tends to receive diminished stare decisis effect. The principle resembles an “unclean-hands” exception to the doctrine of stare decisis: An opinion borne of inadequate respect for its ancestors should expect the same irreverent treatment from its heirs.

5. Voting Margins and Dissents

The number of votes a precedent commanded and the presence of a vigorous dissent can affect the degree of deference the precedent receives. The Court has described the question as whether the precedent was “decided by the narrowest of margins, over spirited dissents challenging its basic underpinnings.”

One possible justification for this practice is that a divided Court and a vigorous dissent signal an opinion’s debatable foundations on the merits.²¹⁹ Such a theory is problematic for the reasons explained above; in short, shoehorning consideration of the merits into the stare

decisis inquiry is unhelpful in determining whether a precedent warrants preservation notwithstanding its wrongness.[xviii]

10. How stare decisis subverts the Law

The doctrine tends to disfavor legal argument that precedents were wrongly decided, especially if they are precedents established at a higher level in the appeals hierarchy, and to demand the litigants “distinguish” their cases from adverse precedents, arguing that those precedents do not apply to the present case because of elements that make it different from the cases on which the precedents were established. This can be very difficult to do if there are a great many recent cases on the same issues which cover most of the possibilities.

The situation can be made more difficult by the rules of most courts which limit the length of briefs the litigants may file. In working backward through a long line of wrongful precedents, a litigant can reach the length limit before the argument can make it back to the foundations where the chain of precedents began to drift away from its authority in the constitutional enactments.

Stare decisis to abide or adhere to decided cases

It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of stare decisis is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary to principle. Many hundreds of such overruled cases may be found in the American and English books of reports. Mr. Greenleaf has made a collection of such cases, to which the reader is referred.

This is accomplished by opinions that do not define a set of consistent propositions that extend beyond A. That is, every judge is careful to anticipate all the ways the words of his opinion might be misconstrued to support decisions beyond what is authorized by the constitutional enactments, and in particular, the Constitution.[xix]

There are two variants on the doctrine of stare decisis. The problem we have discussed here is with the strong form, which treats precedents as binding. However, there is a weaker form, which treats precedents as merely persuasive.

In this second variant, a dissenting opinion could be more persuasive than the prevailing opinion, if the person citing it agreed with it. In this variant, precedent becomes merely a convenient way to save time and words by citing the reasoning in another case, saying “My reasoning is similar to that”, and nothing more. Historically, what came to be treated as binding started as persuasive. Returning to treatment of precedents as merely persuasive

would solve the problem discussed here, but history shows us that judges are prone to drift back to treating them as binding unless some corrective mechanism is instituted to prevent it. Finding such a check would then be an essential component of any lasting reform.

Stare decisis is the way judges seek the safety of the herd. We need to demand they exhibit more courage, and return to fundamental principles, resorting to stare decisis only when the positions lie on the fuzzy boundary of the region of legitimacy.

Legal argument when there is a precedent

Thus noting the court ranking of the judge before whom the lawyer will be appearing and guided by the doctrine of stare decisis, the lawyer will then prepare his or her argument.

Usually, the best position for the lawyer occurs when there is a precedent case supporting his or her client's case.

The lawyer will then argue that the court is either bound, or that the court, if not actually bound, ought to be persuaded by the precedent case to find in the client's favour. In his or her research, the lawyer will, therefore, look for cases with results which support the client's position and the lawyer will prepare to argue that the ratio decidendi of those precedent cases covers the facts of the case at bar. However, just locating and evaluating the prospects of precedent cases is not easy since it is often difficult to determine and articulate the authority of a case. Moreover, skill is necessary to analyze and organize the material facts of both the precedent case and the case at bar. That said, more difficult problems of legal reasoning and legal argument occur when the lawyer is unable to find a close case or any case at all or, worse yet, when a case presents itself which appears to be unfavorable. [xx]

To get around an apparently unfavourable case, there are a number of tools and techniques available to the lawyer. The lawyer may not simply ignore the unfavourable case and hope that the other side does not discover the authority. This is unethical²⁸ and with respect it may be submitted that it is also unethical and intellectually dishonest for a judge in deciding a case to simply ignore a precedent case which stands in the way of the decision that the judge wants to make. This is not to say that lawyers and judges must deal with every case that remotely touches on a subject but only that there should be an honest effort to play by the rules.

stare decisis. The techniques structure and direct the lawyer's legal reasoning and argument.

The techniques that are available follow as a consequence of accepting and then manipulating the doctrine of following are generally recognized:

Stare decisis inexorable command?

“Stare decisis are not an inexorable command” or “a mechanical formula of adherence to the latest decision.” It is instead “a principle of policy,” and this Court has a “considered practice” not to apply that principle of policy “as rigidly in constitutional as in nonconstitutional cases.” This Court has not hesitated to overrule decisions offensive to the First Amendment (a “fixed star in our constitutional constellation,” if there is one, — and to do so promptly where fundamental error was apparent. Just three years after our erroneous decision in *Minersville School Dist. v. Gobitis*, the Court corrected the error in *Barnette*. Overruling a constitutional case decided just a few years earlier is far from unprecedented.

Conclusion

While statutes and enactments of the legislature lay down the general rules to be applied in the adjudication of disputes between parties, the final authority for the interpretation of those rules are the courts. The doctrine of stare decisis makes the decisions of courts, usually the higher forums, binding on subordinate courts in cases in which similar or identical questions of law are raised before the court. The application of this doctrine ensures that there is uniformity and certainty in the law. It saves time and efforts of judges and helps in preventing arbitrary action on the part of judges. The doctrine thus ensures that at least over a certain period of time law remain certain and people are able to conduct their business in accordance with the prevalent interpretation of law. The doctrine is thus in the interest of public policy. In India, the doctrine is constitutionally recognized in respect of the decisions of the Supreme Court which have been declared under Article 141 to be binding on all courts and tribunals in the country. This of course implies that even a single pronouncement of the Supreme Court would be binding on subordinate courts. However, as held in the *Bengal Immunity case*, the decisions of the Supreme Court are not binding on itself. It is only the reasons for deciding a case i.e., the ratio decidendi of the case which are binding on future courts. There is no definite view as to how the ratio decidendi is to be determined but there are a number of tests for its determination of which some are the material facts test proposed by Prof. Goodhart and the Reversal Test Proposed by Wambaugh.

In order for the doctrine of stare decisis to be applicable, there are two basic prerequisites, first that there must be authentic reporting of decisions of courts. The second requirement is an established hierarchy of courts. The principle that the decisions of higher forums would be binding on lower forums is referred to as vertical stare decisis while that the decisions of forums would be binding on coordinate or coequal benches is known as horizontal stare decisis. The great value of the doctrine of stare decisis is that it provides certainty. While the

doctrine of stare decisis is in the interest of public policy, there are number of disadvantages of the doctrine.

In view of the large numbers of pronouncements of the Supreme Court and high courts it is difficult to locate all the precedents. Also, even in case of an erroneous decision, lower forums are bound to follow the decision as precedent. Contrary decisions, of coordinate benches can create confusion for lower forums. Another major disadvantage is that if a strict interpretation is given to this doctrine, and precedents are considered to be binding even on the highest forums, it may hinder the development of law which is necessary with changes in society. Stare decisis is not meant to be an inflexible rule that hinders the development of law.

The Supreme Court appears to have taken this view in the Mirzapur Moti Kureshi Kasab case that while stare decisis is ordinarily to be adhered to, precedents can be reconsidered in view of changed circumstances where there are compelling reasons to do so. Thus, while the doctrine of stare decisis should generally be adhered to, the same should not be interpreted in a manner as to hinder the development of law and the correction of erroneous decisions. At the same time, the power to reconsider decisions cannot be given forum and thus, it is appropriate that the power remains with higher forums to the court that rendered the decision.

INTERNATIONAL TRADE LAW (Paper Code 408)

1. Write an essay on Mercantilism.

Ans. Mercantilism is economic nationalism for the purpose of building a wealthy and powerful state. ADAM SMITH coined the term “mercantile system” to describe the system of political economy that sought to enrich the country by restraining imports and encouraging exports. This system dominated Western European economic thought and policies from the sixteenth to the late eighteenth centuries. The goal of these policies was, supposedly, to achieve a “favorable” balance of trade that would bring gold and silver into the country and also to maintain domestic employment. In contrast to the agricultural system of the physiocrats or the laissez-faire of the nineteenth and early twentieth centuries, the mercantile system served the interests of merchants and producers such as the British East India Company, whose activities were protected or encouraged by the state.

The most important economic rationale for mercantilism in the sixteenth century was the consolidation of the regional power centers of the feudal era by large, competitive nation-states. Other contributing factors were the establishment of colonies outside Europe; the growth of European commerce and industry relative to agriculture; the increase in the volume and breadth of trade; and the increase in the use of metallic monetary systems, particularly gold and silver, relative to barter transactions.

During the mercantilist period, military conflict between nation-states was both more frequent and more extensive than at any other time in history. The armies and navies of the main protagonists were no longer temporary forces raised to address a specific threat or objective, but were full-time professional forces. Each government's primary economic objective was to command a sufficient quantity of hard currency to support a military that would deter attacks by other countries and aid its own territorial expansion.

Most of the mercantilist policies were the outgrowth of the relationship between the governments of the nation-states and their mercantile classes. In exchange for paying levies and taxes to support the armies of the nation-states, the mercantile classes induced governments to enact policies that would protect their business interests against foreign Competition.

These policies took many forms. Domestically, governments would provide capital to new industries, exempt new industries from guild rules and taxes, establish monopolies over local and colonial markets, and grant titles and Pensions to successful producers. In trade policy the government assisted local industry by imposing tariffs, quotas, and prohibitions on imports of goods that competed with local manufacturers. Governments also prohibited the export of tools and capital equipment and the emigration of skilled labor that would allow foreign countries, and even the colonies of the home country, to compete in the production of manufactured goods. At the same time, diplomats encouraged foreign manufacturers to move to the diplomats' own countries.

Shipping was particularly important during the mercantile period. With the growth of colonies and the shipment of gold from the New World into Spain and Portugal, control of the oceans was considered vital to national power. Because ships could be used for merchant or military purposes, the governments of the era developed strong merchant marines. In France, Jean-Baptiste Colbert, the minister of finance under Louis XIV from

1661 to 1683, increased port duties on foreign vessels entering French ports and provided bounties to French shipbuilders.

In England, the Navigation Act of 1651 prohibited foreign vessels from engaging in coastal trade in England and required that all goods imported from the continent of Europe be carried on either an English vessel or a vessel registered in the country of origin of the goods. Finally, all trade between England and its colonies had to be carried in either English or colonial vessels. The Staple Act of 1663 extended the Navigation Act by requiring that all colonial exports to Europe be landed through an English port before being re-exported to Europe. Navigation policies by France, England, and other powers were directed primarily against the Dutch, who dominated commercial marine activity in the sixteenth and seventeenth centuries.

During the mercantilist era it was often suggested, if not actually believed, that the principal benefit of foreign trade was the importation of gold and silver. According to this view the benefits to one nation were matched by costs to the other nations that exported gold and silver, and there were no net gains from trade. For nations almost constantly on the verge of war, draining one another of valuable gold and silver was thought to be almost as desirable as the direct benefits of trade. Adam Smith refuted the idea that the wealth of a nation is measured by the size of the treasury in his famous treatise *The Wealth of Nations* a book considered to be the foundation of modern economic theory. Smith made a number of important criticisms of mercantilist doctrine. First, he demonstrated that trade, when freely initiated, benefits both parties. Second, he argued that specialization in production allows for economies of scale, which improves efficiency and growth. Finally, Smith argued that the collusive relationship between government and industry was harmful to the general population. While the mercantilist policies were designed to benefit the government and the commercial class, the doctrines of laissez-faire, or free markets, which originated with Smith, interpreted economic welfare in a far wider sense of encompassing the entire population.

While the publication of *The Wealth of Nations* is generally considered to mark the end of the mercantilist era, the laissez-faire doctrines of free-market economics also reflect a general disenchantment with the imperialist policies of nation-states. The Napoleonic

Wars in Europe and the Revolutionary War in the United States heralded the end of the period of military confrontation in Europe and the mercantilist policies that supported it.

Despite these policies and the wars with which they were associated, the mercantilist period was one of generally rapid growth, particularly in England. This is partly because the governments were not very effective at enforcing the policies they espoused. While the government could prohibit imports, for example, it lacked the resources to stop the smuggling that the prohibition would create. In addition, the variety of new products that were created during the Industrial Revolution made it difficult to enforce the industrial policies that were associated with mercantilist doctrine.

By 1860 England had removed the last vestiges of the mercantile era. Industrial regulations, monopolies, and tariffs were abolished, and emigration and machinery exports were freed. In large part because of its Free Trade policies, England became the dominant economic power in Europe. England's success as a manufacturing and financial power, coupled with the United States as an emerging agricultural powerhouse, led to the resumption of protectionist pressures in Europe and the arms race between Germany, France, and England that ultimately resulted in World War I.

2. What are the concepts of Absolute Advantage and Comparative Advantage, according to David Ricardo?

Ans. Before the publication of Adam Smith's *Wealth of Nations* (1776) the prevalent theory of foreign trade was mercantilism. This doctrine suggested that a country should do all it could to increase exports, but should restrict imports and so build up 'treasure'. This view was criticised by Adam Smith. He argued that restrictions on foreign trade limited the benefits which could be obtained from market forces.

In essence, the case for free trade is the one in favour of markets on a large scale. If complete free trade were introduced the market would consist of the whole world and consumers would benefit from a wide choice of goods. Moreover, international

competition would force domestic firms to keep down prices. Innovations in production techniques and product design would spread more rapidly, so benefitting consumers.

Absolute Advantage:

Smith argued that trade should be based on absolute advantage. This term describes the position when one country is absolutely more efficient at producing good A, whilst another country is absolutely 'better' at producing good B. Both countries would benefit if they specialised in producing the goods at which they have the advantage and then exchanged their products.

Thus, Britain has an absolute advantage compared to Jamaica in the production of cars whilst Jamaica has an absolute advantage in the production of tropical fruits. It will benefit both countries if they specialise and trade. Absolute advantage is a specific example of the advantages of specialisation and division of labour.

Comparative Advantage:

Smith's argument about absolute advantage was refined and developed by David Ricardo in 1817. Ricardo, improving upon Adam Smith's exposition, developed the theory of international trade based on what is known as the Principle of Comparative Advantage (Cost). International trade involves the extension of the principle of specialisation or division labour to the sphere of international exchange.

As a person specialises in the trade in which he has best advantages, a country also specialises in the production of the commodity in which it has the best natural advantages. A country may produce many things at a time, but it may have comparative advantages in the production of some commodities (say, tea or jute as in India) over others and it will specialise in those goods.

Similarly, another country would produce those goods (say, machineries and engineering goods as in Germany or Japan) in which it has comparative advantage. If these two countries produce goods according to their respective areas of comparative advantage, each country would be able to produce the goods at the lowest cost; and both these countries will gain from trading with each other. This is the substance of the principle of comparative advantage (cost).

The principle of comparative cost states that (a) international trade takes place between two countries when the ratios of comparative cost of producing goods differ, and (b) each country would specialise in producing that commodity in which it has a comparative advantage.

3. What are the sources of International Trade Law?

Ans. In domestic law, law sources basically include constitution law, common rules and precedents supplemented by the customs and law scholars' viewpoints. The law sources are different in international law. The most important source of international trade law is bilateral and multilateral treaties. Then, international commercial practice, general principles of law and trade custom law (lex mercatoria).

Treaties

In international relations, those international agreements entered into between the states and/or between one state and one international organization to exercise sovereignty is called a treaty. As per article 2, clause 1 of 1969 Vienna convention concerning treaties' law, treaty means, "An international agreement which has been made between the states in writing and was included by an international law. But agreements concluded between a state and the other states and/or international organizations to exercise incumbency and performance of business and commercial affairs are not treaties.

A treaty may include special obligations and certain legal requirements for its members such as: a convention, a charter, a protocol and a code or regulates the general framework of its members' obligations such as framework convention and outline convention or solely states the parties' viewpoints concerning a subject matter or reflects their moral obligations.

International commercial practice

International commercial practice includes operations and behavioral norms between merchants and commercial companies binding to some extent.

Another approach considers international commercial practice as an implied condition in international contracts and its binding feature arises from parties' implied agreement. According to article 1-205, clause 2 of American Uniform Commercial Code(UCC), trade practice means, "any operation or behavioral method observed regularly in a jurisdiction, profession or trade and is expected to be observed in the same contract and transaction."

General principles of law

General principles of law are those principles and rules which are general and have been recognized by different states. The principle of binding power of contracts loyal towards its provisions(pacta sunt servanda) is one of the general principles of law accepted by different law systems.

Trade custom law (lex mercatoria)

Trade custom law or mercantile law in UK law has been existed since many years ago. Generally, trade custom law features in the middle ages were as follows:

Firstly, this branch of law didn't belong to a certain state and was used in commercial relations with foreign countries. Secondly, this branch of law was based on the customs and commercial practices specially of marine trade made between the merchants. Thirdly, the commercial disputes and claims were basically settled by the merchants-not by the judges-themselves very quickly with the least procedure of proceedings based on usual customs and practices. Fourthly, the principle of equity and good faith had a special position in this legal system. In this period, the merchants established new legal institutions based on their need including bill of exchange.

Domestic laws

Another source of international trade law is the domestic laws of the states related to the considered economic and business activities. Domestic laws can be divided into public law and private law.

Public law

Each state legislates and enacts statutes to regulate economic and commercial activities in its own country and also to provide special policies and social-economic objectives. In

this respect, some of the activities are forbidden, some are promoted and some become restricted. The most important of these rules and regulations are those of export and import, foreign investment and economic activities done by foreign companies and individuals, rules and regulations concerning purchase and sale of goods, currency transfer, banking, employment law , taxes and duties.

Private law

In this field of law, there are few certain rules solely concerning international economic and commercial activities in Iran, and the existing rules govern both local and foreign commercial activities. For example, the civil law and the rules of making contracts, rights and obligations of the parties and/or contract termination cases govern both local and international contracts subject to the governance of Iranian law. While in some countries there are certain local laws solely govern the international contracts. There is the same situation, in Iran, for commercial law .Commercial activities, local or foreign, are subject to commercial law and there are no certain rules but public law for foreign commercial activities in Iran.

4. Elaborate all the principles of International Trade Law.

Ans. The modern international trade regime is based on four main principles. These principles are, in no particular order of importance, Most-Favored-Nation Treatment (MFN), National Treatment (NT), tariff binding, and the general prohibition of quantitative restrictions. Each of these is codified as a separate rule in the GATT.

Treating all Countries Equally: The Principle of Most-Favored Nation

The first substantive rule of international trade that we will delve into is known as Most Favored-Nation Treatment (MFN). Most-Favored-Nation is based on the idea that every member state should treat each of its trading partners equally. Assuming that the products of country X are the same as those of country Y, a state should not give preferential treatment to the goods of one country in detriment of those of another. The importance of Most-Favored-Nation is underscored by the fact that it is addressed in Article I of the GATT. Article I of the GATT provides that any “advantage, favor, privilege or immunity” granted by a contracting party to the goods of another contracting party, “shall be accorded immediately and unconditionally to the like product” of all other contracting parties

Article I was envisioned to have two main applications. First, whenever WTO members negotiate and grant trade concessions to other countries, such concessions must automatically be extended to all other WTO Members. Second, outside of trade negotiations, whenever a WTO Member enacts legislation or certain trade-restrictive rules or requirements, it cannot, according to Most-Favored-Nation, discriminate between products from a WTO Member and the like products of any other country.

Treating all Goods Equally within a Given Market: The Principle of National Treatment

Like Most-Favored-Nation, National Treatment (NT) is a subset of the principle of non discrimination. However, National Treatment has a domestic focus. Essentially, National Treatment is based on the idea that a country should treat imported goods the same way as it treats domestically produced goods. For instance, assuming that the products that Country X imports are substantially the same as those it produces domestically, it should not offer imported products worse treatment than that offered to domestically produced goods. National Treatment has two distinct applications. The first is based on internal taxation, and the second is based on internal regulation. GATT Article III codifies National Treatment through its provisions on Internal Taxation and Internal Regulation. Ad Article III explains the rule's scope. An Ad Article is an explanatory note provided by the drafters of treaties to clarify the purpose and intended interpretation of a specific treaty provision. At its core, Article III:2 stipulates that imported products should not be subject to internal taxes or other internal charges in excess of those applied to like domestic products. Internal Taxes are those applied to a good after it has crossed a country's borders. Similarly, Article III:4 provides that imported products may not be subject to more stringent laws, regulations, or requirements than those applicable to like domestic products. Internal Regulations are those applied to a product after it has crossed a country's borders.

Tariff Binding

Most products are subject to tariffs (import taxes) upon being imported to another country. There are two different types of tariffs that can be imposed, ad valorem and specific. Ad valorem tariffs are those that are equal to a certain percentage of the value of a good. For instance, a tax equal to 10% of the value of an imported car is an ad valorem tariff. A specific duty is a tariff that does not depend on the value of the good, but is applied on a per-unit basis. A tariff of 10 Iraqi Dinars charged for each kilogram of apples imported into Iraq is

considered a specific duty. Protectionism is never desirable, but this does not mean that certain types of protectionism are not better than others. It is in every country's interest that their trading partners' protectionist practices are transparent. Transparent protectionist measures make it easier for producers worldwide to make informed decisions regarding which markets they should enter and which ones they should not. Transparent protectionist measures also make it easier for countries to identify situations where their producers are being unfairly discriminated against. Accordingly, tariffs are the least undesirable of protectionist measures. One of the most important elements of the GATT is its schedule of concessions. This schedule of concessions lists the results of several bilateral trade negotiations regarding tariff levels. If you look back to our discussion of the WTO accession process, you'll be reminded of the importance of tariff negotiations. GATT Article II codifies WTO Members' obligation to abide by negotiated tariff schedules, whereas GATT Article VIII limits the types of charges that may be applied by countries in addition to those imposed on the importation of a good. Additionally, Article II limits the charges that can be imposed on the importation of a good to those bilaterally agreed upon and listed in a country's tariff schedule. Conversely, Article VIII limits the charges that can be imposed in relation to the importation of a good, but not on the good itself. A country is free to negotiate different tariff levels for different products, but it must always abide by its MostFavored-Nation and National Treatment obligations.

Ban on Quantitative Restrictions

With only a few notable exceptions, the GATT forbids the imposition of quantitative restrictions on international trade. It should be no surprise that an agreement intended to liberalize trade would not look fondly upon measures that function as absolute barriers to it. Quantitative restrictions are usually in the form of quotas. A quota is a limit imposed on the quantity of a good that can be imported. Although quantitative restrictions may be politically popular given that their results are immediate and direct, they are not desirable from an economic perspective. The reason for this is that quantitative restrictions have a greater distortive effect on the market than any other protectionist measure. Unlike tariffs and internal measures, which affect the price of a good and leave it to importers and consumers to determine what the efficient quantity is, quantitative restrictions impair the economy's ability to determine an efficient price and quantity. A small enough quota may cause the price of a good to reach unsustainable levels, thereby forcing domestic consumers to either change their

preferences or purchase goods at unrealistically high prices. Moreover, it may encourage domestic producers to increase their output of low quality goods to fill the gap between domestic demand for a good and its availability. GATT Article XI codifies the general prohibition against quantitative restrictions. However, it lists a few exceptions to this ban, including quantitative restrictions imposed to “relieve critical shortages of foodstuffs” or other essential products, and restrictions intended to remove surpluses from the market.

5. Discuss Raymond Vernon’s Product Life Cycle Theory.

Ans. In 1966, Raymond Vernon published a model that described internationalisation patterns of organisations. He looked at how U.S. companies developed into multinational corporations (MNCs) at a time when these firms dominated global trade, and per capita income in the U.S. was, by far, the highest of all the developed countries.

Raymond Vernon was part of the team that overlooked the Marshall plan, the US investment plan to rejuvenate Western European economies after the Second World War. He played a central role in the post-world war development of the IMF and GATT organisations. He became a professor at Harvard Business School from 1959 to 1981 and continued his career at the John F. Kennedy School of Government.

The intent of his International Product Life Cycle model (IPLC) was to advance trade theory beyond David Ricardo’s static framework of comparative advantages. In 1817, Ricardo came up with a simple economic experiment to explain the benefits to any country that was engaged in international trade even if it could produce all products at the lowest cost and would seem to have no need to trade with foreign partners. He showed that it was advantageous for a country with an absolute advantage in all product categories to trade and allow its work force to specialise in those categories with the highest added value. Vernon focused on the dynamics of comparative advantage and drew inspiration from the product life cycle to explain how trade patterns change over time.

His IPLC described an internationalisation process wherein a local manufacturer in an advanced country (Vernon regarded the United States of America as the principle source of inventions) begins selling a new, technologically advanced product to high-income consumers in its home market. Production capabilities build locally to stay in close

contact with its clientele and to minimize risk and uncertainty. As demand from consumers in other markets rises, production increasingly shifts abroad enabling the firm to maximise economies of scale and to bypass trade barriers. As the product matures and becomes more of a commodity, the number of competitors increases. In the end, the innovator from the advanced nation becomes challenged in its own home market making the advanced nation a net importer of the product. This product is produced either by competitors in lesser developed countries or, if the innovator has developed into a multinational manufacturer, by its foreign based production facilities.

The IPLC international trade cycle consists of three stages:

a) NEW PRODUCT

The IPLC begins when a company in a developed country wants to exploit a technological breakthrough by launching a new, innovative product on its home market. Such a market is more likely to start in a developed nation because more high-income consumers are able to buy and are willing to experiment with new, expensive products (low price elasticity). Furthermore, easier access to capital markets exists to fund new product development. Production is also more likely to start locally in order to minimize risk and uncertainty: a location in which communication between the markets and the executives directly concerned with the new product is swift and easy, and in which a wide variety of potential types of input that might be needed by the production units are easily come by

Export to other industrial countries may occur at the end of this stage that allows the innovator to increase revenue and to increase the downward descent of the products experience curve. Other advanced nations have consumers with similar desires and incomes making exporting the easiest first step in an internationalisation effort. Competition comes from a few local or domestic players that produce their own unique product variations.

b) MATURING PRODUCT

Exports to markets in advanced countries further increase through time making it economically possible and sometimes politically necessary to start local production. The products design and production process becomes increasingly stable. Foreign direct investments (FDI) in production plants drive down unit cost because labour cost and transportation cost decrease. Offshore production facilities are meant to serve local markets that substitute exports from the organisations home market. Production still requires high-skilled, high paid employees. Competition from local firms jump start in these non-domestic advanced markets. Export orders will begin to come from countries with lower incomes.

c) STANDARDISED PRODUCT

During this phase, the principal markets become saturated. The innovator's original comparative advantage based on functional benefits has eroded. The firm begins to focus on the reduction of process cost rather than the addition of new product features. As a result, the product and its production process become increasingly standardised. This enables further economies of scale and increases the mobility of manufacturing operations. Labour can start to be replaced by capital. If economies of scale are being fully exploited, the principal difference between any two locations is likely to be labour costs. To counter price competition and trade barriers or simply to meet local demand, production facilities will relocate to countries with lower incomes. As previously in advanced nations, local competitors will get access to first hand information and can start to copy and sell the product.

The demand of the original product in the domestic country dwindles from the arrival of new technologies, and other established markets will have become increasingly price-sensitive. Whatever market is left becomes shared between competitors who are predominately foreign. A MNC will internally maximize offshore production to low-wage countries since it can move capital and technology around, but not labour. As a result, the domestic market will have to import relatively capital intensive products from low income countries. The machines that operate these plants often remain in the country where the technology was first invented.

Unit 2

6. Write a note on the Historical Background and principles of GATT

Ans. Introduction:

The General Agreement on Tariffs and Trade, known as the GATT, is one-third of the Bretton Woods system that was created after World War II to ensure a stable trade and economic world environment. The International Monetary Fund (IMF) and World Bank are the other two bodies of the Bretton Woods system.

While often referred to as an international organization, the GATT had a “defacto” role as an international organization before the creation of the World Trade Organization (WTO). The WTO was established on January’ 1, 1995 by the Final Act of the Uruguay Round of negotiations.

History and Basic Information:

After World War II, the United Kingdom (UK) and the United States (US) submitted proposals to the Economic and Social Council (ECOSOC) of the United Nations regarding the establishment of an international trade body that was to be named the International Trade Organization (ITO). That is, perhaps, why the GATT is often referred to as a UN related body and its documents are sometimes mistakenly referred to as UN documents.

ECOSOC convened a conference, the United Nations Conference on Trade and Employment in 1946, to consider the UK and US proposals. A Preparatory Committee drafted the ITO Charter and it was approved in 1948 at the conference in Havana, Cuba. The Charter is often referred to as the Havana Charter or the ITO Charter.

The first round of trade negotiations took place while the Preparatory Committee was still working on drafting the Charter because the participants were anxious to begin the process of trade liberalization as soon as possible. Their results were incorporated into the General Agreement, which was signed in 1947.

Since the original signatory nations expected the agreement to become part of the more permanent ITO Charter, the text of the GATT contains very little “institutional” structure. This lack of detail within the agreement has created increasing difficulties as the GATT membership and rules governing trade between so many of the world’s nations have grown. The GATT has function as an international organization for many years even though it has never been formalized as such.

ECOSOC established an Interim Commission for the ITO that is referred to as ICITO. Unfortunately, when time came for the members to ratify the ITO Charter, the Congress of the United States refused and the ITO never became a reality.

The GATT survived, but remained intact only due to the Protocol of Provisional Application of the General Agreement of Tariffs and Trade which was concluded in 1947 and which came into force in 1948.

The GATT completed 8 rounds of multilateral trade negotiations (MTNs). The Uruguay Round (the 8th round) concluded with the signing of the Final Action April 15, 1994, in Morocco and produced the World Trade Organization (WTO) and its annexes.

The contracting party’s means:

- i. When you see: CONTRACTING PARTIES in capital letters it is referring to the members acting jointly.
- ii. When you see: contracting parties in lower case letters, it is referring to individual member states.
- iii. When you see the words: Contracting Parties, they will be in press releases or in published works concerning the GATT.

The Basic Principles of the GATT:

a. Most-Favored-Nation (MFN) Treatment:

This is the fundamental principle of the GATT and it is not a coincidence that it appears in Article 1 of the GATT 1947. It states that each contracting party to the GATT is required to provide to all other contracting parties the same conditions of trade as the most favourable terms it extends to any one of them, i.e., each contracting party is

required to treat all contracting parties in the same way that it treats its “most-favoured nation”.

b. Reciprocity:

GATT advocates the principles of “rights” and “obligations”. Each contracting party has a right, e.g. access to markets of other trading partners on a MFN basis but also an obligation to reciprocate with trade concessions on a MFN basis. In a way, this is closely associated with the MFN principle.

c. Transparency:

Fundamental to a transparent system of trade is the need to harmonize the system of import protection, so that barriers on trade can be reduced through the process of negotiations. The GATT therefore, limited the use of quotas, except in some specific sector such, as agriculture and advocated import regimes that are based on “tariff-only”.

In addition, the GATT and now the WTO, required many notifications from contracting parties on their agricultural and trade policies so that these can be examined by other parties to ensure that they are GATT/WTO compatible.

d. Tariff Binding and Reduction:

When GATT was established, tariffs were the main form of trade protection and negotiations in the early years focused primarily upon tariff binding and reduction. The text of the 1947, GATT lays out the obligations on the contracting parties in this regard.

7. What was the impact of Uruguay Round in International Trade Law?

Ans. THE URUGUAY ROUND

At times it seemed doomed to fail. But in the end, the Uruguay Round brought about the biggest reform of the world’s trading system since GATT was created at the end of the Second World War. And yet, despite its troubled progress, the Uruguay Round did see some early results. Within only two years, participants had agreed on a package of cuts in import duties on tropical products — which are mainly exported by developing countries. They had also revised the rules for settling disputes, with some measures implemented on

the spot. And they called for regular reports on GATT members' trade policies, a move considered important for making trade regimes transparent around the world.

A round to end all rounds?

The seeds of the Uruguay Round were sown in November 1982 at a ministerial meeting of GATT members in Geneva. Although the ministers intended to launch a major new negotiation, the conference stalled on agriculture and was widely regarded as a failure. In fact, the work programme that the ministers agreed formed the basis for what was to become the Uruguay Round negotiating agenda.

Nevertheless, it took four more years of exploring, clarifying issues and painstaking consensus-building, before ministers agreed to launch the new round. They did so in September 1986, in Punta del Este, Uruguay. They eventually accepted a negotiating agenda that covered virtually every outstanding trade policy issue. The talks were going to extend the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in the sensitive sectors of agriculture and textiles. All the original GATT articles were up for review. It was the biggest negotiating mandate on trade ever agreed, and the ministers gave themselves four years to complete it.

Two years later, in December 1988, ministers met again in Montreal, Canada, for what was supposed to be an assessment of progress at the round's half-way point. The purpose was to clarify the agenda for the remaining two years, but the talks ended in a deadlock that was not resolved until officials met more quietly in Geneva the following April.

Despite the difficulty, during the Montreal meeting, ministers did agree a package of early results. These included some concessions on market access for tropical products — aimed at assisting developing countries — as well as a streamlined dispute settlement system, and the Trade Policy Review Mechanism which provided for the first comprehensive, systematic and regular reviews of national trade policies and practices of GATT members. The round was supposed to end when ministers met once more in Brussels, in December 1990. But they disagreed on how to reform agricultural trade and decided to extend the talks. The Uruguay Round entered its bleakest period.

Despite the poor political outlook, a considerable amount of technical work continued, leading to the first draft of a final legal agreement. This draft “Final Act” was compiled by the then GATT director-general, Arthur Dunkel, who chaired the negotiations at officials’ level. It was put on the table in Geneva in December 1991. The text fulfilled every part of the Punta del Este mandate, with one exception — it did not contain the participating countries’ lists of commitments for cutting import duties and opening their services markets. The draft became the basis for the final agreement.

Over the following two years, the negotiations lurched between impending failure, to predictions of imminent success. Several deadlines came and went. New points of major conflict emerged to join agriculture: services, market access, anti-dumping rules, and the proposed creation of a new institution. Differences between the United States and European Union became central to hopes for a final, successful conclusion.

In November 1992, the US and EU settled most of their differences on agriculture in a deal known informally as the “Blair House accord”. By July 1993 the “Quad” (US, EU, Japan and Canada) announced significant progress in negotiations on tariffs and related subjects (“market access”). It took until 15 December 1993 for every issue to be finally resolved and for negotiations on market access for goods and services to be concluded (although some final touches were completed in talks on market access a few weeks later). On 15 April 1994, the deal was signed by ministers from most of the 123 participating governments at a meeting in Marrakesh, Morocco.

The delay had some merits. It allowed some negotiations to progress further than would have been possible in 1990: for example some aspects of services and intellectual property, and the creation of the WTO itself. But the task had been immense, and negotiation-fatigue was felt in trade bureaucracies around the world. The difficulty of reaching agreement on a complete package containing almost the entire range of current trade issues led some to conclude that a negotiation on this scale would never again be possible. Yet, the Uruguay Round agreements contain timetables for new negotiations on a number of topics. And by 1996, some countries were openly calling for a new round early in the next century. The response was mixed; but the Marrakesh agreement did already include commitments to reopen negotiations on agriculture and services at the

turn of the century. These began in early 2000 and were incorporated into the Doha Development Agenda in late 2001.

What happened to GATT?

The WTO replaced GATT as an international organization, but the General Agreement still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations. Trade lawyers distinguish between GATT 1994, the updated parts of GATT, and GATT 1947, the original agreement which is still the heart of GATT 1994. Confusing? For most of us, it's enough to refer simply to "GATT".

8. Discuss descriptively the Marrakesh Agreement.

Ans. The Agreement Establishing the World Trade Organization, commonly known as the "Marrakesh Agreement", was signed in Marrakesh, Morocco, on April 15, 1994, at the conclusion of the Uruguay Round of Multilateral Trade Negotiations.

This Agreement defines the scope, functions and structure of the World Trade Organization (WTO). The agreements previously negotiated under the General Agreement on Tariffs and Trade (GATT), along with agreements concluded during the Uruguay Round, were incorporated as integral parts of the Marrakesh Agreement and are included in its Annexes. These agreements are now considered to be WTO agreements.

All WTO members are parties to the Marrakesh Agreement, including countries that have joined the WTO since it was signed.

This Agreement entered into force on January 1, 1995. It has no expiration date.

Who benefits from this Agreement?

While the Marrakesh Agreement itself does not apply directly to your company, the WTO agreements in its Annexes provide a comprehensive set of rules designed to make it easier to compete in today's global marketplace. Full texts of all WTO agreements, including those concluded since the WTO was established, can be found in the TARA database of the Trade Agreements Negotiation and Compliance of the U.S. Department of Commerce.

What are the main provisions of this Agreement?

The objective of the countries that signed the Marrakesh Agreement was to create an integrated multilateral trading system encompassing the General Agreement on Tariffs and Trade (GATT) and the results of all the trade rounds (including the Uruguay Round) that had been conducted since the GATT was signed in 1947. The Marrakesh Agreement: established the WTO and states that it will serve as the basic framework for trade relations among all WTO member countries on matters covered by the WTO agreements; defines the functions of the WTO, which include: 1) reviewing the operation and implementation of all WTO agreements; 2) administering the WTO's dispute settlement process; 3) providing a forum for further trade negotiations; and 4) working with other international organizations (such as the World Bank and the International Monetary Fund) to achieve greater coherence in global economic policy-making; provides for the organizational and administrative structure of the WTO; requires the WTO to hold a Ministerial Conference at least once every two years, where trade ministers from WTO member countries meet to assess the implementation of the WTO agreements and decide on future WTO initiatives; established the WTO General Council, which oversees WTO operations between meetings of the Ministerial Conference; provides that decisions in the WTO are to be made as a general rule by consensus, although voting is allowed in certain circumstances where a decision cannot be reached by consensus; gives the Ministerial Conference and the General Council the exclusive authority to adopt interpretations of this Agreement and all WTO agreements, and also grants the Ministerial Conference the authority to amend all WTO agreements; states that any country may join the WTO on terms that are agreed upon between the country applying for membership and the WTO; maintains that WTO members may choose not to apply the WTO Agreements to a country that is joining the WTO as long as the Ministerial Conference is notified before approving that country's accession terms, and permits any WTO member to withdraw from the WTO after giving six months advance notice to the WTO's Director-General.

9. How does the dispute settlement mechanism work under International Trade Law?

Ans. The Dispute Settlement Understanding of the World Trade Organization (WTO) establishes a set of rules and procedures and provides a forum for resolving trade disputes between WTO member countries. When disputes cannot be resolved, the Understanding

authorizes the use of trade sanctions against the member country that has been found in violation of a WTO agreement.

All WTO members are parties to this Agreement.

This Agreement went into effect on January 1, 1995.

Who benefits from this Agreement?

Any company conducting international business who believes that another WTO member country is not complying with its obligations under a WTO Agreement can benefit from this Dispute Settlement Understanding.

Individual exporters cannot take their trade complaints directly to the World Trade Organization. They must work through their own governments.

How does the WTO dispute settlement process work?

Here, in more detail, is how the WTO dispute settlement process works:

First, the complaining party requests formal consultations with the other WTO member country (or countries) involved in the dispute. All such requests for formal consultations must be notified to the WTO's Dispute Settlement Body (DSB), which consists of representatives from all WTO member countries and administers the rules and procedures governing the dispute settlement process.

The consultation period can last up to 60 days. If the consultations fail to resolve the problem, the complaining party can then request that the DSB establish a panel of experts to adjudicate the merits of the case. Panelists are normally selected in consultation with the parties to the dispute. If the parties cannot agree on panelists, the WTO will appoint them. The panel selection process can take up to 45 days.

The panel process in many ways resembles a typical court case. Both parties to the dispute submit written briefs and present oral arguments before the panel. After hearing arguments from both sides and after examining all the evidence, the panel makes its decision and prepares a draft report which is reviewed by both parties to the dispute, who are given an opportunity to comment on it. The panel then issues its final report, which

includes its findings and recommendations. The final report should be issued, as a general rule, within six months of the start of the proceedings.

Parties to a dispute have the right to appeal a panel's decision. This appellate process must be completed within 90 days. Appeals are heard by a separate group of experts, who review issues of law covered in the panel report and then issue their own report with their own findings and recommendations. In all, it can take about 15 months to settle a dispute in the WTO.

A party that loses a case in the WTO is supposed to follow the recommendations of the panel report (or the appellate report if the case has been appealed), and it must also state whether it intends to follow the panel's recommendations at a meeting of the DSB. If the party found in violation of a WTO agreement cannot immediately comply with the panels' recommendations, it will be given a "reasonable period of time" to comply (usually no longer than 15 months).

If the losing party fails to comply with the panel's recommendations within the allotted time, it must enter into consultations with the winning party to seek agreement on compensation. Compensation may be granted in a variety of ways (e.g., tariff reductions or the lifting of quotas on certain products). If an agreement on compensation cannot be reached within 20 days of the expiration of the allotted time, then the DSB can authorize the winning party to apply equivalent trade sanctions (e.g., increased tariffs) against the losing party.

10. Write a note on difference between GATT and GATS.

Ans. General Agreement on Tariffs and Trade was established in 1947. In 1995, GATT was replaced by the World Trade Organisation (WTO). As far as the old system or GATT was concerned, there were two GATTS: GATT, the organisation, and GATT, the agreement. The second one refers to the agreement between different governments setting out the rules for trade. GATT, the organisation, has been replaced by the establishment of the WTO. GATT, the agreement, however, exists along with the additional WTO new agreements, viz.

General Agreement on Trade in Services (GATS), and

It is, thus, clear that the WTO Agreements cover goods and services

The agreements establishing the WTO are

GATT

GATT is related to increasing market access by reducing various trade barriers operating in different countries. The dismantling of trade restrictions was to be achieved by the reduction in tariff rates, reductions in non-tariff support in agriculture, abolition of voluntary export restraints or phasing out the Multi-fibre Arrangement (MFA), cut in subsidies, etc.

To improve market access, industrialised countries will have to reduce tariffs by 36 percent over six years and 24 percent for developing nations over 10 years. World trade in textiles and clothing's is governed by the MFA which requires being phased out within 10 years (1993-2002).

On 1 January 2003, textiles and clothing sector will stand integrated into GATT, with the elimination of MFA restrictions. GATT aims at the elimination of farm support and export support in developed countries. The agreement says that all countries will have to reduce aggregate support levies if it is in excess of 5 percent of the total value of agricultural produce, but for developing countries, it is more than 10 percent. The value and the volume of direct export subsidies will have to be cut by 36 percent and 21 percent., respectively, over six years for developed countries.

GATS

Multilaterally agreed and legally enforceable rules and disciplines relating to trade in services are covered by General Agreement on Trade in Services. It envisages free trade in services, like banking, insurance, hotels, construction, etc., so as to promote growth in the developed countries by providing larger markets and in the developing countries through the transfer of technologies from the developed countries. GATS is more comprehensive in coverage than GATT. Trade in services is defined as covering more than a cross-border exchange of a service and includes also consumer movements and factor flows (Investment and labor).

As a result of this agreement, access of service personnel into markets of member countries will henceforth be possible on a non-discriminatory basis under the transparent and rule-based system. Under the agreement, service sector would be placed under most favored nation (MFN) obligations that prevent countries from discriminating among different nations in respect of services.

NAAC ACCREDITED

UNIT 3

11. Write an essay on Agreement on Agriculture (WTO).

Ans. The Agreement on Agriculture (AoA) is an international treaty of the World Trade Organization. It was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade, and entered into force with the establishment of the WTO on January 1, 1995. The idea of replacing agricultural price support with direct payments to farmers decoupled from production dates back to the late 1950s, when the twelfth session of the GATT Contracting Parties selected a Panel of Experts chaired by Gottfried Haberler to examine the effect of agricultural protectionism, fluctuating commodity prices and the failure of export earnings to keep pace with import demand in developing countries.

The 1958 Haberler Report stressed the importance of minimising the effect of agriculture subsidies on competitiveness and recommended replacing price support with direct supplementary payments not linked with production, anticipating discussion on green box subsidies. Only more recently, though, has this shift become the core of the reform of the global agricultural system.

The Agreement on Agriculture constitutes of three pillars—domestic support, market access, and export subsidies.

Domestic support

The first pillar of the Agreement on Agriculture is "domestic support". AoA divides domestic support into two categories: trade-distorting and non-trade-distorting (or minimally trade-distorting). The WTO Agreement on Agriculture negotiated in the Uruguay Round (1986–1994) includes the classification of subsidies by "boxes" depending on consequences of production and trade: amber (most directly linked to

production levels), blue (production-limiting programmes that still distort trade), and green (minimal distortion). While payments in the amber box had to be reduced, those in the green box were exempt from reduction commitments. Detailed rules for green box payments are set out in Annex 2 of the AoA. However, all must comply with the "fundamental requirement" in paragraph 1, to cause not more than minimal distortion of trade or production, and must be provided through a government-funded programme that does not involve transfers from consumers or price support to producers.

The Agreement on Agriculture's domestic support system currently allows Europe and the United States to spend \$380 billion a year on agricultural subsidies. The World Bank dismissed the EU and the United States' argument that small farmers needed protection, noting that more than half of the EU's Common Agricultural Policy subsidies go to 1% of producers while in the United States 70% of subsidies go to 10% of its producers, mainly agribusinesses. These subsidies end up flooding global markets with below-cost commodities, depressing prices, and undercutting producers in poor countries, a practice known as dumping.

Market access

Market access refers to the reduction of tariff (or non-tariff) barriers to trade by WTO members. The 1995 Agreement on Agriculture consists of tariff reductions of:

36% average reduction - developed countries - with a minimum of 15% per-tariff line reduction in next six years.

24% average reduction - developing countries - with a minimum of 10% per-tariff line reduction in next ten years.

Least developed countries (LDCs) were exempt from tariff reductions, but they either had to convert non-tariff barriers to tariffs—a process called tariffication—or "bind" their tariffs, creating a ceiling that could not be increased in future.

Export subsidies

Export subsidies are the third pillar. The 1995 Agreement on Agriculture required developed countries to reduce export subsidies by at least 36% (by value) or by 21% (by

volume) over six years. For developing countries, the agreement required cuts were 14% (by volume) and 24% (by value) over ten years.

12. Write a descriptive note on Agreement on Subsidies and Countervailing Measures (WTO)

Ans. The Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports. Multilateral disciplines are the rules regarding whether or not a subsidy may be provided by a Member. They are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the SCM Agreement are satisfied.

Part I of the Agreement defines the coverage of the Agreement. Specifically, it establishes a definition of the term “subsidy” and an explanation of the concept of “specificity”. Only a measure which is a “specific subsidy” within the meaning of Part I is subject to multilateral disciplines and can be subject to countervailing measures.

Definition of subsidy Unlike the Tokyo Round Subsidies Code, the WTO SCM Agreement contains a definition of the term “subsidy”. The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.

The concept of “financial contribution” was included in the SCM Agreement only after a protracted negotiation. Some Members argued that there could be no subsidy unless there was a charge on the public account. Other Members considered that forms of government intervention that did not involve an expense to the government nevertheless distorted competition and should thus be considered to be subsidies. The SCM Agreement basically adopted the former approach. The Agreement requires a financial contribution and contains a list of the types of measures that represent a financial contribution, e.g., grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, the purchase of goods.

In order for a financial contribution to be a subsidy, it must be made by or at the direction of a government or any public body within the territory of a Member. Thus, the SCM Agreement applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as state-owned companies.

A financial contribution by a government is not a subsidy unless it confers a “benefit.” In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex. For example, when does a loan, an equity infusion or the purchase by a government of a good confer a benefit? Although the SCM Agreement does not provide complete guidance on these issues, the Appellate Body has ruled (Canada – Aircraft) that the existence of a benefit is to be determined by comparison with the market-place (i.e., on the basis of what the recipient could have received in the market). In the context of countervailing duties, Article 14 of the SCM Agreement provides some guidance with respect to determining whether certain types of measures confer a benefit. In the context of multilateral disciplines, however, the issue of the meaning of “benefit” is not fully resolved.

Specificity. Assuming that a measure is a subsidy within the meaning of the SCM Agreement, it nevertheless is not subject to the SCM Agreement unless it has been specifically provided to an enterprise or industry or group of enterprises or industries. The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus, only “specific” subsidies are subject to the SCM Agreement disciplines. There are four types of “specificity” within the meaning of the SCM Agreement:

- Enterprise-specificity. A government targets a particular company or companies for subsidization;
- Industry-specificity. A government targets a particular sector or sectors for subsidization.
- Regional specificity. A government targets producers in specified parts of its territory for subsidization.

- Prohibited subsidies. A government targets export goods or goods using domestic inputs for subsidization.

13. What are the Countervailing Measures under Agreement on Subsidies and Countervailing Measures?

Ans. the SCM Agreement sets forth certain substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as in-depth procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance in place of countervailing measures. A failure to respect either the substantive or procedural requirements of Part V can be taken to dispute settlement and may be the basis for invalidation of the measure.

Substantive rules A Member may not impose a countervailing measure unless it determines that there are subsidized imports, injury to a domestic industry, and a causal link between the subsidized imports and the injury. As previously noted, the existence of a specific subsidy must be determined in accordance with the criteria in Part I of the Agreement. However, the criteria regarding injury and causation are found in Part V. One significant development of the new SCM Agreement in this area is the explicit authorization of cumulation of the effects of subsidized imports from more than one Member where specified criteria are fulfilled. In addition, Part V contains rules regarding the determination of the existence and amount of a benefit.

Procedural rules Part V of the SCM Agreement contains detailed rules regarding the initiation and conduct of countervailing investigations, the imposition of preliminary and final measures, the use of undertakings, and the duration of measures. A key objective of these rules is to ensure that investigations are conducted in a transparent manner, that all interested parties have a full opportunity to defend their interests, and that investigating authorities adequately explain the bases for their determinations. A few of the more important innovations in the WTO SCM Agreement are identified below:

- **Standing.** The Agreement defines in numeric terms the circumstances under which there is sufficient support from a domestic industry to justify initiation of an investigation.

- **Preliminary investigation.** The Agreement ensures the conduct of a preliminary investigation before a preliminary measure can be imposed.
- **Undertakings.** The Agreement places limitations on the use of undertakings to settle CVD investigations, in order to avoid Voluntary Restraint Agreements or similar measures masquerading as undertakings
- **Sunset.** The Agreement requires that a countervailing measure be terminated after five years unless it is determined that continuation of the measure is necessary to avoid the continuation or recurrence of subsidization and injury.
- **Judicial review.** The Agreement requires that Members create an independent tribunal to review the consistency of determinations of the investigating authority with domestic law.

14. What do you understand by Dumping Under GATT/WTO?

Ans. Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the “normal value”) and the appropriate price in the market of the importing country (known as the “export price”) so as to be able to undertake an appropriate comparison.

Article VI of GATT and the Anti-Dumping Agreement

The GATT 1994 sets forth a number of basic principles applicable in trade between Members of the WTO, including the “most favoured nation” principle. It also requires that imported products not be subject to internal taxes or other changes in excess of those imposed on domestic goods, and that imported goods in other respects be accorded treatment no less favourable than domestic goods under domestic laws and regulations, and establishes rules regarding quantitative restrictions, fees and formalities related to importation, and customs valuation. Members of the WTO also agreed to the establishment of schedules of bound tariff rates. Article VI of GATT 1994, on the other

hand, explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation, determination, and application, of anti-dumping duties.

Determination of dumping

Determination of normal value

General rule

The normal value is generally the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market. In certain circumstances, for example when there are no sales in the domestic market, it may not be possible to determine normal value on this basis. The Agreement provides alternative methods for the determination of normal value in such cases.

Sales in the ordinary course of trade

One of the most complicated questions in anti-dumping investigations is the determination whether sales in the exporting country market are made in the “ordinary course of trade” or not. One of the bases on which countries may determine that sales are not made in the ordinary course of trade is if sales in the domestic market of the exporter are made below cost. The Agreement defines the specific circumstances in which home market sales at prices below the cost of production may be considered as not made in the ordinary course of trade", and thus may be disregarded in the determination of normal value (Article 2). Those sales must be made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs, they must be made within an extended period of time (normally one year, but in no case less than six months), and they must be made in substantial quantities. Sales are made in substantial quantities when (a) the weighted average selling price is below the weighted average cost; of (b) 20% of the

sales by volume were below cost. Finally, sales made below costs may only be disregarded in the determination of normal value where they do not allow for recovery of costs within a reasonable period of time. If sales are below cost when made but are above the weighted average cost over the period of the investigation, the Agreement provides that they allow for recovery of costs within a reasonable period of time.

Insufficient volume of sales

If there are sales below cost that meet the criteria set out in the Agreement, they can simply be ignored in the calculation of normal value, and normal value will be determined based on the remaining sales. However, exclusion of these below-cost sales may result in a level of sales insufficient to determine normal value based on home market prices. It is obvious that, in the case where there are no sales in the exporting country of the product under investigation, it is not possible to base normal value on such sales, and the Agreement recognizes this. However, it is also possible that, while there are some sales in the exporting country's market, the level of such sales is so low that its significance is questionable. Thus, the Agreement recognizes that in some cases sales in the home market may be so low in volume that they do not permit a proper comparison of home market and export prices. It provides that the level of home market sales is sufficient if home market sales constitute 5 per cent or more of the export sales in the country conducting the investigation, provided that a lower ratio "should" be accepted if the volume of domestic sales nevertheless is "of sufficient magnitude" to provide for a fair comparison.

Alternative bases for calculating normal value

Two alternatives are provided for the determination of normal value if sales in the exporting country market are not an appropriate basis. These are (a) the price at which the product is sold to a third country; and

(b) the "constructed value" of the product, which is calculated on the basis of the cost of production, plus selling, general, and administrative expenses, and profits. The Agreement contains detailed and specific rules for the determination of a constructed value, governing the information to be used in determining the amounts for costs, expenses, and profits, the allocation of these elements of constructed value to the specific

product in question, and adjustments for particular situations such as start-up costs and non-recurring cost items.

Constructed normal value

The determination of normal value based on cost of production, selling, general and administrative expenses, and profits is referred to as the “constructed normal value” The rules for determining whether sales are made below cost also apply to performing a constructed normal value calculation. The principal difference is the inclusion of a “reasonable amount for profits” in the constructed value.

Third country price as normal value

The other alternative method for determining normal value is to look at the comparable price of the like product when exported to an appropriate third country, provided that price is representative. The Agreement does not specify any criteria for determining what third country is appropriate.

15. Write a detailed essay on GATS.

Ans. The creation of the GATS was one of the landmark achievements of the Uruguay Round, whose results entered into force in January 1995. The GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization.

While services currently account for over two-thirds of global production and employment, they represent no more than 25 per cent of total trade, when measured on a balance-of-payments basis. This — seemingly modest — share should not be underestimated, however. Indeed, balance-of-payments statistics do not capture one of the modes of service supply defined in the GATS, which is the supply through commercial presence in another country (mode 3). Furthermore, even though services are increasingly traded in their own right, they also serve as crucial inputs into the production

of goods and, consequently, when assessed in value-added terms, services account for about 50 per cent of world trade. All WTO members are at the same time members of the GATS and, to varying degrees, have assumed commitments in individual service sectors.

The GATS applies in principle to all service sectors, with two exceptions.

Article I (3) of the GATS excludes “services supplied in the exercise of governmental authority”. These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and any other public service, such as health or education, that is provided at non-market conditions. Furthermore, the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.

The supply of many services often involves the simultaneous physical presence of both producer and consumer. There are thus many instances in which, in order to be commercially meaningful, trade commitments must extend to cross-border movements of the consumer, the establishment of a commercial presence within a market, or the temporary movement of the service provider.

The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.

Cross-border supply is defined to cover services flows from the territory of one member into the territory of another member (e.g. banking or architectural services transmitted via telecommunications or mail);

Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another member's territory to obtain a service;

Commercial presence implies that a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

Presence of natural persons consists of persons of one member entering the territory of another member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that members remain free to operate

measures regarding citizenship, residence or access to the employment market on a permanent basis.

UNIT 4

16. Write a note on Trade and Environment.

Ans. Sustainable development and protection and preservation of the environment are fundamental goals of the WTO. They are enshrined in the Marrakesh Agreement, which established the WTO, and complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. While there is no specific agreement dealing with the environment, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled.

The WTO contributes to protection and preservation of the environment through its objective of trade openness, through its rules and enforcement mechanism, through work in different WTO bodies, and through ongoing efforts under the Doha Development Agenda. The Doha Agenda includes specific negotiations on trade and environment and some tasks assigned to the regular Trade and Environment Committee.

Allowing for the optimal use of the world's resources in accordance with the objective of sustainable development and seeking to protect and preserve the environment are fundamental to the WTO. These goals, enshrined in the Preamble of the Marrakesh Agreement, go hand in hand with the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. For WTO members, the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, on the one hand, and acting for the protection of the environment and the promotion of sustainable development, on the other, can and must be mutually supportive.

An important element of the WTO's contribution to sustainable development and protection of the environment comes in the form of furthering trade opening in goods and services to promote economic development, and by providing stable and predictable conditions that enhance the possibility of innovation. This promotes the efficient allocation of resources, economic growth and increased income levels that in turn provide

additional possibilities for protecting the environment. The importance of trade's contribution to efforts on sustainable development and the environment has been recognized in such forums as the 1992 Rio Summit, 2002 Johannesburg Summit and 2005 UN World Summit.

Under WTO rules, members can adopt trade-related measures aimed at protecting the environment. The commitment of WTO members to sustainable development and the environment can also be seen in WTO rules. In general terms the rules, with their fundamental principles of non-discrimination, transparency and predictability, help set the framework for members to design and implement measures to address environmental concerns. Moreover, WTO rules, including specialized agreements such as the Agreement on Technical Barriers to Trade (which deals with product regulations), and the Agreement on Sanitary and Phytosanitary Measures (which concerns food safety and animal and plant health), provide scope for environmental objectives to be followed and for necessary trade-related measures to be adopted. WTO rules set up the appropriate balance between the right of members to take regulatory measures, including trade restrictions, to achieve legitimate policy objectives (e.g., protection of human, animal or plant life or health, and natural resources) and the rights of other members under basic trade disciplines. For example, GATT Article XX on General Exceptions lays out a number of specific instances in which members may be exempted from GATT rules. The provision seeks, among other things, to ensure that environmental measures are not applied arbitrarily and are not used as disguised protectionism.

17. Write an essay on The Doha Round.

Ans. The Doha Round is the latest round of trade negotiations among the WTO membership. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about 20 areas of trade. The Round is also known semi-officially as the Doha Development Agenda as a fundamental objective is to improve the trading prospects of developing countries. The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and an intellectual property topic, which began earlier. In Doha, ministers also approved a

decision on how to address the problems developing countries face in implementing the current WTO agreements. The WTO's work is to help trade flow more smoothly and predictably, for the benefit of all. The work is two-pronged: lowering trade barriers where they can be lowered, and writing rules for maintaining trade barriers and for other trade policies. Both are the result of rounds of negotiations among governments since the 1940s.

The Doha Round continues that tradition. It's the ninth round since the Second World War and the first since the WTO inherited the multilateral trading system in 1995. It aims to produce the first major overhaul of the system in the 21st Century.

All WTO member governments, currently 157 participate. The talks are complex, with a broad array of subjects, and widely differing interests, even within countries. Binding the complexity together are two key principles: decisions are by consensus, which means everyone has to be persuaded before any deal can be struck, and "nothing is agreed until everything is agreed", sometimes called the "single undertaking"

Achievements of the Doha Round

The achievements of the negotiations are reflected in two ways:

Agreed texts (the "acquis", what has been acquired) the 2001 Doha Declaration set the broad objectives; the 2004 Frameworks narrowed down differences in interpreting the broad objectives and defined the shape of the final agreements, particularly in agriculture and non-agricultural market access; the 2005 Hong Kong Declaration narrowed the gaps further.

Chairs' drafts, although these have not been agreed, they drew on members' inputs in numerous meetings, and in many cases contain a considerable amount of detail now described as "stable". This means much of these texts is almost agreed. A small number of issues still need to be resolved, but they are politically difficult, which is why they are still unsettled. This is particularly true of the latest (December 2008) drafts in agriculture and non-agricultural market access.

Subjects of Doha Agreement

Agriculture

The aim: More market access, eliminating export subsidies, reducing distorting domestic support, sorting out a range of developing country issues, and dealing with non-trade concerns such as food security and rural development.

Non-agricultural market access (NAMA)

The aim: “To reduce or as appropriate eliminate tariffs, including the reduction or elimination of high tariffs, tariff peaks and tariff escalation (higher tariffs protecting processing, lower tariffs on raw materials) as well as non-tariff barriers, in particular on products of export interest to developing countries”.

Services

The aim: To improve market access and to strengthen the rules. Each government has the right to decide which sectors it wants to open to foreign companies and to what extent, including any restrictions on foreign ownership. Unlike in agriculture and NAMA, the services negotiations are not based on a “modalities” text. They are being conducted essentially on two tracks:

bilateral and/or plurilateral (involving only some WTO members) negotiations

multilateral negotiations among all WTO members to establish any necessary rules and disciplines

Trade facilitation

The aim: To ease customs procedures and to facilitate the movement, release and clearance of goods. This is an important addition to the overall negotiation since it would cut bureaucracy and corruption in customs procedures and would speed up trade and make it cheaper.

Rules

These cover anti-dumping, subsidies and countervailing measures, fisheries subsidies, and regional trade agreements.

The aim: “Clarifying and improving disciplines” under the Anti-Dumping and Subsidies agreements; and to “clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.

The environment

These are the first significant negotiations on trade and the environment in the GATT/WTO. They have two key components:

Freer trade in environmental goods. Products that WTO members have proposed include: wind turbines, carbon capture and storage technologies, solar panels.

Environmental agreements. Improving collaboration with the secretariats of multilateral environmental agreements and establishing more coherence between trade and environmental rules.

Geographical indications: multilateral register for wines and spirits

This is the only intellectual property issue that is definitely part of the Doha negotiations. The objective is to “facilitate” the protection of wines and spirits in participating countries. The talks began in 1997 and were built into the Doha Round in 2001.

Some members want negotiations on two other subjects and to link these to the register for wines and spirits. Other members disagree. These two topics are discussed in consultations chaired by the WTO Director-General (sometimes a deputy):

GI “extension”. Extending the higher level of protection for geographical indications beyond wines and spirits

Biopiracy, benefit sharing and traditional knowledge

Dispute settlement

Aim: To improve and clarify the Dispute Settlement Understanding, the WTO agreement dealing with legal disputes. These negotiations take place in special sessions of the Dispute Settlement Body (DSB). Exceptionally, they are not part of the “single undertaking” of the Doha Round.

18. Provide a detailed note on SAPTA.

Ans. The Agreement on SAARC Preferential Trading Arrangement (SAPTA) which envisages the creation of a Preferential Trading Area among the seven member states of the SAARC, namely Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka was signed in Dhaka in April 1993. The idea of liberalizing trade among SAARC countries was first mooted by Sri Lanka at the sixth Summit of the South Asian Association for Regional Co-operation (SAARC) held in Colombo in December 1991. It was agreed that SAPTA is a stepping stone to higher levels of trade liberalization and economic co-operation among the SAARC member countries.

Objective

The objective of the SAPTA is to promote and sustain mutual trade and the economic co-operation among the member states through exchange of trade concessions. SAPTA therefore is the first step towards higher levels of trade and economic co-operation in the region.

The basic principles

- Overall reciprocity and mutuality of advantages
- Step by step negotiations and periodic reviews so as to improve and extend the preferential trade arrangement, in stages
- Inclusion of all products, manufactures and commodities in their raw semi- processes and processed forms
- Special and favourable treatment to Least Developed Contacting States

Main components

- Tariff
- Para Tariff
- Non Tariff

Direct Trade Measures

SAPTA specified four negotiating approaches namely, product by product basis, across the board tariff reduction, sectoral basis and direct trade measures. However it was agreed

that tariff concessions would initially be negotiated on a product - by- product basis. The agreement also provides for negotiation of tariff concessions to be an ongoing process. The SAPTA envisages that concessions on tariff para-tariff and non tariff measures will be negotiated step -by step improved and extended in successive stages.

National Schedules of Concessions

The process of negotiation on the schedule of concession, which forms an integral part of the Agreement, commenced in 1993. For this purpose, the Inter Governmental Group on Trade Liberalization (IGG) was set up. The IGG met on six occasions in various capitals. At the sixth meeting held in Katmandu on 20 th and 21 st April 1995, the delegations held intensive rounds of bilateral and multilateral negotiations and agreed on the National Schedule of concessions to be granted by individual member states to other member states under the SAPTA Agreement.

Four rounds of trade negotiations were concluded under SAPTA covering over 5000 commodities. Each Round contributed to an incremental trend in the product coverage and the deepening of tariff concessions over previous Rounds. During the first and the second rounds, trade negotiations were conducted on a product by product basis. In the third and the fourth rounds, negotiations were conducted on chapter wise.

Maintenance of SAPTA Concession

The Agreement on the South Asian Free Trade Area (SAFTA) which was implemented with effect from 1st January 2006 will supercede the SAARC Preferential Trading Arrangement (SAPTA). On the issue of maintaining SAPTA concessions for LDCs, the Committee agreed that once the Non-LDCs member states complete the Trade Liberalization Programme (TLP) for LDC member states, SAPTA concessions would cease for LDC member states. However, if any item on which SAPTA concessions are available to LDC, appear in the sensitive lists of non-LDC, they shall maintain the same level of concession through derogation. The Committee has further agreed that if the items under TLP enjoy tariff preferences under SAPTA, the Non-LDCs shall reduce their tariff on those items to a rate not higher than the rate applicable for LDCs under SAPTA on the date agreed for base rate for TLP. It was also agreed at the first SAFTA Ministerial Council Meeting held in April that LDCs should also maintain concessions under SAPTA

for Non LDCs until the completion of TLP irrespective of whether the products are in the sensitive lists or not.

19. Write an essay on SAFTA

Ans. The South Asian Free Trade Area (SAFTA) is an agreement reached on January 6, 2004, at the 12th SAARC summit in Islamabad, Pakistan. It created a free trade area of 1.6 billion people in Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka to reduce customs duties of all traded goods to zero by the year 2016. The SAFTA agreement came into force on January 1, 2006, and is operational following the ratification of the agreement by the seven governments. SAFTA required the developing countries in South Asia (India, Pakistan and Sri Lanka) to bring their duties down to 20 percent in the first phase of the two-year period ending in 2007. In the final five-year phase ending in 2012, the 20 percent duty was reduced to zero in a series of annual cuts. The least developed nations in South Asia (Nepal, Bhutan, Bangladesh, Afghanistan and Maldives) had an additional three years to reduce tariffs to zero. India and Pakistan ratified the treaty in 2009, whereas Afghanistan as the 8th member state of the SAARC ratified the SAFTA protocol on 4 May 2011.

The purpose of SAFTA is to encourage and elevate common contract among the countries such as medium and long term contracts. Contracts involving trade operated by states, supply and import assurance in respect of specific products etc. It involves agreement on tariff concession like national duties concession and non-tariff concession. The main objective of the agreement is to promote competition in the area and to provide equitable benefits to the countries involved. It aims to benefit the people of the countries by bringing transparency and integrity among the nations. SAFTA was also formed in order to increase the level of trade and economic cooperation among the SAARC nations by reducing the tariff and barriers and also to provide special preference to the Least Developed Countries (LDCs) among the SAARC nations to establish framework for further regional cooperation.

SAFTA recognizes the need for special and differential treatment for LDCs in its preamble. This has been translated in the following measures

Market access: LDCs benefit from smaller sensitive lists in some of the SAFTA members (meaning that they have DFQF access in a larger number of products) and less stringent rules of origin (requirement of change of tariff heading and value addition of 10% less than the general requirement for non-LDCs; the general rule is 60% and there are some product-specific rules

Others:

- LDCs were allowed smaller initial tariff reduction and longer implementation periods under trade liberalization programmes;
- LDCs can have a longer list of sensitive products exempted from liberalization commitments than non-LDC signatories;
- LDCs were granted greater flexibility in the continuation of quantitative or other restrictions;
- There is a commitment of contracting states to give, until the trade liberalization programme has been completed by all Contracting States, special regard to the situation of LDCs when considering the application of anti-dumping and/or countervailing measures, providing an opportunity for consultations and favourably considering accepting price undertakings offered by exporters from LDCs;
- The agreement contains a rule whereby safeguard measures are not to be applied against products originating in LDC contracting states, “as long as its share of imports of the product concerned in the importing Contracting State does not exceed 5 per cent, provided Least Developed Contracting States with less than 5 per cent import share collectively account for not more than 15 per cent of total imports of the product concerned”;
- There is also a commitment to consider taking direct trade measures with a view to enhancing sustainable exports from LDC contracting states, such as long and medium-term contracts containing import and supply commitments in respect of specific products, buy-back arrangements, state trading operations, and government and public procurement;

- LDCs were to be given special consideration in requests for technical assistance and cooperation arrangements designed to assist them in expanding their trade with other Contracting States and in taking advantage of the potential benefits of SAFTA;
- A mechanism to compensate LDCs for their loss of tariff revenue upon liberalization is contained in Article 11 of the Agreement but was not implemented.

NAAC ACCREDITED

20. What is the relation between Environment and Doha Agreement?

Ans. The current Doha Round of negotiations gives members a chance to achieve an even more efficient allocation of resources on a global scale through the continued reduction of obstacles to trade. The Round is also an opportunity to pursue win-win-win results for trade, development and the environment. For example, the Doha Round is the first time environmental issues have featured explicitly in the context of a multilateral trade negotiation and the overarching objective is to enhance the mutual supportiveness of trade and environment. Members are working to liberalize trade in goods and services that can benefit the environment. They are also discussing ways to maintain a harmonious co-existence between WTO rules and the specific trade obligations in various agreements that have been negotiated multilaterally to protect the environment. Other parts of the Doha negotiations are also relevant to the environment, for example aspects of the agriculture negotiations and also disciplines on fisheries subsidies. The Doha Development Agenda also has a section specifying the priority items in the CTE's regular work.

The 2001 Doha Ministerial Declaration asks the regular Trade and Environment Committee to focus on a number of items in its work programme — work that is separate from the new negotiations on trade and environment that the declaration also launched.

There are areas which are taken into consideration and they are: -

Environmental requirements and market access: preventing 'green protectionism'

Environmental requirements can impede trade and even be used as an excuse for protectionism. The answer is not to weaken environmental standards, but to set appropriate standards and enable exporters to meet them. The Trade and Environment

Committee gives particular attention to this subject and its effects on developing countries. The effect of environmental measures on market access, especially for developing countries and in particular to the least developed among them, is one of the items on the committee's work programme. This was established in the 1994 Ministerial Decision on Trade and Environment. In 2001, the Doha Ministerial Declaration instructed the Committee to give particular attention to this subject. The effect of environmental measures on market access is particularly important to the work of the Trade and Environment Committee because it holds the key to ensure that sound trade and environmental policies work together.

WTO member governments consider that the protection of the environment and health are legitimate policy objectives. But they also acknowledge that measures designed to meet these objectives could hinder exports. And they agree that sustainable development depends on improved market access for developing countries' products. Environmental standards, objectives and priorities do need to reflect the particular environmental and developmental context to which they apply — so says Principle 11 of the 1992 Rio Declaration on Environment and Development. In other words, environmental standards applied by some countries could be inappropriate. They could cause unwarranted economic and social cost to others, particularly developing countries, by hindering exports. Small and medium sized enterprises (SMEs) are especially vulnerable.

The answer is not to weaken environmental standards, but to enable exporters to meet them. WTO agreements do have enough scope to ensure that environmental measures do not unduly restrict exports. Examples include the Sanitary and Phytosanitary Measures (SPS) Agreement — which deals with food safety and animal and plant health — and the Technical Barriers to Trade (TBT) Agreement — which deals with product standards and labelling.

Win-win-win situations

WTO Members recognized very early on in the CTE that one of the principal ways in which the WTO could contribute to environmental protection would be through the removal of environmentally harmful trade distortions. In this context, the CTE took up the issue of fisheries subsidies, which after a number of years culminated in the launch of negotiations, as part of the DDA, to “clarify and improve” the WTO rules concerning

such subsidies. The demand for the negotiating mandate arose from the conjunction of a high level of subsidization of the sector (estimated at up to 20 per cent of total sectoral revenues), and the depletion of many world fish stocks (with FAO estimating that 75 per cent of world fish stocks are fully — or over —exploited)

Demandeurs argue that subsidization has contributed to structural overcapacity in the sector, as well as overfishing, by reducing the cost of fishing, with the result that too many boats are chasing too few fish. Other participants in the negotiation counter that the factor that determines whether subsidization contributes to overcapacity and overfishing is the adequacy of the fisheries management system that is in place. Ministers at Hong Kong, noting broad agreement among participants to strengthen disciplines, including through a prohibition of certain subsidies contributing to overcapacity and overfishing, called on the participants to intensify their work in this area, taking into account the importance of the fisheries sector to developing Members. Proposals under consideration range from a broad ban of most subsidies to the fisheries sector (including certain downstream activities), subject to specified exceptions; to prohibition of certain listed subsidies, if those subsidies do not meet specified conditions as to management and capacity parameters; and other proposals in between. Within the various proposed general frameworks, participants are discussing a variety of proposals for special and differential treatment for developing Members. In their analysis of the proposals on the table, participants are taking up a number of technical issues related to enforcement of the proposed disciplines, including transparency, surveillance and dispute settlement, and the degree to which WTO rules on fisheries subsidies should incorporate environmental as well as commercial elements.

Labelling

Environmental labelling schemes are complex, causing concerns about developing countries' and small businesses' ability to export. Labelling is one of the subjects assigned to the Committee on Trade and Environment (CTE). It is part of an item (3b) on the committee's work programme in which the committee is assigned to consider the relationship between the provisions of the WTO's agreements and the requirements governments make for products in order to protect the environment. (In addition to

labelling, this includes standards and technical regulations, and packaging, and recycling requirements.)

In 2001, the Doha Ministerial Conference made this an issue of special focus for the regular CTE (i.e. the regular committee sessions that are not part of the Doha Round negotiations). The use of eco-labels (i.e. labelling products according to environmental criteria) by governments, industry and non-governmental organizations (NGOs) is increasing. Concerns have been raised about the growing complexity and diversity of environmental labelling schemes. This is especially the case with labelling based on life-cycle analysis, which looks at a product's environmental effects from the first stages of its production to its final disposal. These requirements could create difficulties for developing countries, and particularly small and medium-sized enterprises in export markets.

WTO members generally agree that labelling schemes can be economically efficient and useful for informing consumers, and tend to restrict trade less than other methods. This is the case if the schemes are voluntary, allow all sides to participate in their design, based on the market, and transparent. However, these same schemes could be misused to protect domestic producers. For this reason, the schemes should not discriminate between countries and should not create unnecessary barriers or disguised restrictions on international trade.

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INTERNATIONAL COMMERCIAL LAW - 410 (a)

1. LETTER OF CREDIT ARE DESCRIBED AS LIFE AND BLOOD OF INTERNATIONAL SALES OF GOODS. ELUCIDATE. DISCUSS ABOUT THE PARTIES INVOLVED IN LETTER OF CREDIT?

A Letter of Credit, simply defined, is a written instrument issued by a bank at the request of its customer, the Importer (Buyer), whereby the bank promises to pay the Exporter (Beneficiary) for goods or services, provided that the Exporter presents all documents called for, exactly as stipulated in the Letter of Credit, and meet all other terms and conditions set out in the Letter of Credit. A Letter of Credit is also commonly referred to as a **Documentary Credit**.

There are two types of Letters of Credit: **revocable and irrevocable**. A revocable Letter of Credit can be revoked without the consent of the Exporter, meaning that it may be cancelled or changed up to the time the documents are presented. A revocable Letter of Credit affords the Exporter little protection; therefore, it is rarely used. An irrevocable Letter of Credit cannot be cancelled or changed without the consent of all parties, including the Exporter. Unless otherwise stipulated, all Letters of Credit are irrevocable. A further differentiation is made between Letters of Credit, depending on the payment terms. If payment is to be made at the time documents are presented, this is referred to as a sight Letter of Credit. Alternatively, if payment is to be made at a future fixed time from presentation of documents (e.g. 60 days after sight), this is referred to as a term, deferred payment Letter of Credit.

The International Chamber of Commerce (ICC) publishes internationally agreed-upon rules, definitions and practices governing Letters of Credit, called —**Uniform Customs and Practice for Documentary Credits** (UCP). The UCP facilitates standardization of Letters of Credit among all banks in the world that subscribe to it. These rules are updated from time to time; the last revision is referred to as UCP 600.

A key principle underlying Letters of Credit is that banks deal only in documents and not in goods. The decision to pay under a Letter of Credit is entirely on whether the documents presented to the bank appear on their face to be in accordance with the terms and conditions of the Letter of Credit. It would be prohibitive for the banks to physically check all merchandise shipped under Letters of Credit to ensure merchandise has been shipped exactly as per each Letter of Credit. Accordingly, the integrity of both the Exporter and Importer are very important in a Letter of Credit transaction. The appropriate due diligence should be exercised by both parties.

Elements of a Letter of Credit

- A payment undertaking given by a bank (issuing bank)
- On behalf of a buyer (applicant)
- To pay a seller (beneficiary) for a given amount of money
- On presentation of specified documents representing the supply of goods
- Within specified time limits
- Documents must conform to terms and conditions set out in the letter of credit
- Documents to be presented at a specified place Step by Step Process

The following is a step-by-step description of a typical Letter of Credit transaction:

1. An Importer (Buyer) and Exporter (Seller) agree on a purchase and sale of goods where payment is made by Letter of Credit.

2. The Importer completes an application requesting its bank (Issuing Bank) to issue a Letter of Credit in favour of the Exporter. Note that the Importer must have a line of credit with the Issuing Bank in order to request that a Letter of Credit be issued.
3. The Issuing Bank issues the Letter of Credit and sends it to the Advising Bank by telecommunication or registered mail in accordance with the Importer's instructions. A request may be included for the Advising Bank to add its confirmation. The Advising Bank is typically located in the country where the Exporter carries on business and may be the Exporter's bank but it does not have to be.
4. The Advising Bank will verify the Letter of Credit for authenticity and send a copy to the Exporter.
5. The Exporter examines the Letter of Credit to ensure:
 - a) it corresponds to the terms and conditions in the purchase and sale agreement;
 - b) documents stipulated in the Letter of Credit can be produced; and
 - c) the terms and conditions of the Letter of Credit may be fulfilled.
6. If the Exporter is unable to comply with any term or condition of the Letter of Credit or if the Letter of Credit differs from the purchase and sale agreement, the Exporter should immediately notify the Importer and request an amendment to the Letter of Credit.
7. When all parties agree to the amendments, they are incorporated into the terms of the Letter of Credit and advised to the Exporter through the Advising Bank. It is recommended that the Exporter does not make any shipments against the Letter of Credit until the required amendments have been received.
8. The Exporter arranges for shipment of the goods, prepares and/or obtains the documents specified in the Letter of Credit and makes demand under the Letter of Credit by presenting the documents within the stated period and before the expiry date to the —available withl Bank. This may be the Advising/Confirming Bank. That bank checks the documents against the Letter of Credit and forwards them to the Issuing Bank. The drawing is negotiated, paid or accepted as the case may be.

9. The Issuing Bank examines the documents to ensure they comply with the Letter of Credit terms and conditions. The Issuing Bank obtains payment from the Importer for payment already made to the —available withl or the Confirming Bank.

10. Documents are delivered to the Importer to allow them to take possession of the goods from the transport company. The trade cycle is complete as the Importer has received its goods and the Exporter has obtained payment.

2. WHAT IS BILL OF LADING? BRIEFLY EXPLAIN ITS DIFFERENT TYPES.

Bill of lading" is a multiple purpose document; it acts as contract of carriage of goods by sea, as a formal receipt for the goods shipped and as a document of title. The function attributed to Bill of lading is based on ancient customs and usages followed by merchants in trade known as *lex mercatoria* (law merchants). Unlike charter party, the contract of carriage of goods by sea in liner trade is evidenced by —Bill of lading" which itself is not a contract of carriage of goods rather an evidence of an already concluded contract of carriage between shipper and carrier orally. The terms and conditions appearing on reverse side of every standard —Bill of lading" do not form a contract of carriage. Thus if the terms and conditions mentioned in standard bill of lading are inconsistent with the oral commitment, the parties are at liberty to adduce evidence in support of their oral contract.

Leduc & Co v Wards (1888); where the —Bill of lading" contained a clause enabling the carrier to deviate from agreed route which caused the ship to be lost and delivery of goods was delayed. The lawful holder sued the carrier. The carrier took the plea that the shipper knew about the deviation clause in the —Bill of lading". Therefore no breach of contract whatsoever has been created. However the court refused to accept the plea of carrier and held that —Lawful holder who has no knowledge of any such commitment may not be made, bound to follow it" A bill of lading is a document of title, written receipt issued by a carrier, a transport company, that it has taken possession and received an item of property and usually also confirming the details of delivery (such as method, time, place or to whom), and serves as the carrier's title for the purpose of transportation. A document of title', is —any document used in the ordinary course of business, purporting to authorize the possessor of the document

to receive goods thereby represented. A bill of lading serves as evidence for a contract of affreightment. This usually arises when a ship owner, or other person authorized to act on his behalf employs his vessel as a general ship by advertising that he is willing to accept cargo from people for a particular voyage. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of the shipment as against the master or other person signing the bill of lading, notwithstanding that the goods or some part thereof may not have been shipped, unless the holder of the bill of lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary, but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims. In addition to acknowledging the receipt of goods, a bill of lading indicates the particular vessel on which the goods have been placed, their intended destination, and the terms for transporting the shipment to its final destination. A bill of lading can be used as a traded object.

The standard short form bill of lading is evidence of the contract of carriage of goods and it serves a number of purposes:

- It is evidence that a valid contract of carriage, or a chartering contract, exists, and it may incorporate the full terms of the contract between the consignor and the carrier by reference (i.e. the short form simply refers to the main contract as an existing document, whereas the long form of a bill of lading issued by the carrier sets out all the terms of the contract of carriage);
- It is a receipt signed by the carrier confirming whether goods matching the contract description have been received in good condition (a bill will be described as clean if the goods have been received on board in apparent good condition and stowed ready for transport); and
- It is also a document of transfer, being freely transferable but not a negotiable instrument in the legal sense, i.e. it governs all the legal aspects of physical carriage, and, like a cheque or other negotiable instrument, it may be endorsed affecting ownership of the goods actually being carried. This matches everyday experience in that the contract a person might make with a commercial carrier like FedEx for mostly airway

parcels, is separate from any contract for the sale of the goods to be carried; however, it binds the carrier to its terms, irrespectively of who the actual holder of the B/L, and owner of the goods, may be at a specific moment.

The BL must contain the following information:

- Name of the shipping company;
- Flag of nationality;
- Shipper's name;
- Order and notify party;
- Description of goods;
- Gross/net/tare weight; and
- Freight rate/measurements and weight of goods/total freight

While an air waybill (AWB) must have the name and address of the consignee, a BL may be consigned to the order of the shipper. Where the word order appears in the consignee box, the shipper may endorse it in blank or to a named transferee. A BL endorsed in blank is transferable by delivery. Once the goods arrive at the destination they will be released to the bearer or the endorsee of the original bill of lading. The carrier's duty is to deliver goods to the first person who presents any one of the original BL. The carrier need not require all originals to be submitted before delivery.

It is therefore essential that the exporter retains control over the full set of the originals till payment is effected or a bill of exchange is accepted or some other assurance for payment has been made to him. In general, the importer's name is not shown as consignee. The bill of lading has also provision for incorporating notify party. This is the person whom the shipping company will notify on arrival of the goods at destination. The BL also contains other details such as the name of the carrying vessel and its flag of nationality, the marks and numbers on the packages in which the goods are packed, a brief description of the goods, the number of packages, their weight and measurement, whether freight costs have been paid or whether payment of freight is due on arrival at the destination. The particulars of the container in

which goods are stuffed are also mentioned in case of containerised cargo. The document is dated and signed by the carrier or its agent. The date of the BL is deemed to be the date of shipment. If the date on which the goods are loaded on board is different from the date of the bill of lading then the actual date of loading on board will be evidenced by a notation the BL. In certain cases a carrier may issue a separate on board certificate to the shipper

Main Types of BOL

Order bill of lading This bill uses express words to make the bill negotiable, e.g. it states that delivery is to be made to the further order of the consignee using words such as "delivery to A Ltd. or to order or assigns". Consequently, it can be indorsed (legal spelling of endorse, maintained in all statute, including Bills of Exchange Act 1909 (CTH)) by A Ltd. or the right to take delivery can be transferred by physical delivery of the bill accompanied by adequate evidence of A Ltd.'s intention to transfer.

Bearer bill of lading This bill states that delivery shall be made to whosoever holds the bill. Such bill may be created explicitly or it is an order bill that.

Surrender bill of lading Under a term import documentary credit the bank releases the documents on receipt from the negotiating bank but the importer does not pay the bank until the maturity of the draft under the relative credit. This direct liability is called Surrender Bill of Lading (SBL), i.e. when we hand over the bill of lading we surrender title to the goods and our power of sale over the goods.

A clean bill of lading states that the cargo has been loaded on board the ship in apparent good order and condition. Such a BL will not bear a clause or notation which expressively declares a defective condition of goods and/or the packaging. Thus, a BL that reflects the fact that the carrier received the goods in good condition. The opposite term is a soiled bill of lading, which reflects that the goods are received by the carrier in anything but good condition.

A sea or air waybill is a non-negotiable receipt issued by the carrier. It is most common in the container trade either where the cargo is likely to arrive before the formal documents or where the shipper does not insist on separate bills for every item of cargo carried (e.g. because this is one of a series of loads being delivered to the same consignee). Delivery is made to the consignee who identifies himself. It is customary in transactions where the

shipper and consignee are the same person in law making the rigid production of documents unnecessary.

A straight bill of lading by land or sea, or sea/air waybill are not documents that can convey title to the goods they represent. They do no more than require delivery of the goods to the named consignee and (subject to the shipper's ability to redirect the goods) to no other. This differs from an "order" or "bearer" bill of lading which are possessory title documents and negotiable, i.e. they can be endorsed and so transfer the right to take delivery to the last endorsee. Nevertheless, bills of lading are "documents of title", whether negotiable or not, under the terms of the Uniform Commercial Code.

3. DISCUSS ARBITRATION AS A METHOD OF SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES?

With the growth of globalization, liberalization regimes and rapid advancement in international business relationships, it is increasingly pertinent to have a flexible and quick method of resolving disputes. Arbitration is a preferred process of dispute resolution chosen by parties, wherein parties intentionally agree to submit their case to a neutral third party and agree to be bound by his/her decision.

Section 2(1)(f) of The Arbitration and Conciliation Act, 1996, defines an International Commercial Arbitration which means: an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) An individual who is a national of, or habitually resident in, any country other than India; or
- (ii) A body corporate which is incorporated in any country other than India;
- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India;
- (iv) The Government of a foreign country

The scope of this section was determined by the Supreme Court in the case of **TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd** , where in spite of

company having a foreign control, the Supreme Court concluded that, “a company incorporated in India can only have Indian nationality for the purpose of the Act.”

When Arbitration is deemed to be International

In the United Nation Commission on International Trade Law (UNCITRAL) Model Law, arbitration is deemed to be international if any one of four different situations is present: Article 1 (3) (a) The parties to the arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States. (b) One of the following places is situated outside the State in which the parties have their places of business: (i) The place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the State in which the parties have their places of business (ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected (iii) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. **Meaning of Commercial:**

The word commercial includes the day to day international business activities that have become part of the international trade nowadays.

In Koch Navigation Inc v Hindustan Petroleum Corp Ltd , it was held that “liberal construction is to be given to any expression or phrase used in the Act”.

In Atiabari Tea Co. Ltd v State of Assam , it was held that “trade and commerce in India has a wide meaning.”

Applicability of Part 1 of the Act in International Commercial Arbitration:

In Bhatia International v Bulk Trading , it was held that Part I of Arbitration and Conciliation Act, 1996 would equally apply to International Commercial Arbitrations having seat outside India, unless any or all the provisions have been expressly excluded.

In Bharat Aluminium v Kaiser Aluminium, the Court decided that a constitutional bench of the Court would reconsider the Court's own ruling in Bhatia International case. The Supreme Court gave following ruling in the above mentioned case: 1. “Part I not applicable to International Commercial Arbitrations having seat outside India: Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. 2. No Interim Injunction: No suit for interim injunction

simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India. 3. Section 9 i.e. Interim Relief cannot be granted if seat is outside India: In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. 4. Law to be applied prospectively: In order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.”

Why Arbitration preferred in solving International Disputes

1. Speedy dispute solving mechanism: Court process involves extensive procedures and rules, which a party needs to follow. If parties refer their dispute to arbitration, they need not follow strict procedures of law. Hence, the dispute solving becomes speedy.
2. Enforceability of Arbitral Awards: It is more readily and swiftly enforced as compared to the court judgements.
3. Arbitrator is impartial: Neutral third party is chosen to decide disputes. This third party is chosen mutually by both the parties to dispute.
4. Arbitrator chosen may be an expert: based on the issue of dispute, parties may choose a specific arbitrator having that particular technical experience and expertise in the area disputed.
5. Arbitration less expensive: since arbitration is a time effective remedy and does not involve too many procedures, it is less expensive as compared to litigation procedures.

Conclusion:

In recent years there has been a significant increase in international businesses operating out of India. This has led to an increase in international arbitrations having its seat of arbitration in India. Both arbitration and litigation perform the same function i.e. effective delivery of justice but the fact is that arbitration has few characteristics which makes it a more viable option as compared to its counterpart. Thus, the degree of protection that it guarantees is far reaching.

NOTE

Arbitration and Conciliation (Amendment) Act, 2015

The modifications introduced by the 2015 Amendment Act have made significant changes to the Act and are in the right direction to clarify several issues with regard to the objectives of the Act. The 2015 Amendment Act provides strict timelines for completion of the arbitral proceedings along with the scope for resolving disputes by a fast track mechanism. The 2015 Amendment Act has introduced the insertion of new provisions in addition to the amendments to the existing provisions governing the process of appointment of an arbitrator. It has also clarified the grounds to challenge an arbitrator for the lack of independence and impartiality.

As a welcome move, the 2015 Amendment Act provides for assistance from the Indian courts, even in foreign seated arbitrations, in the form of interim relief before the commencement of the arbitration. Further, with the introduction of the 'cost follow the event' regime in the Act, it has been brought in line with the international standards. The process of enforcement and execution under the Act has also been streamlined so that challenge petitions do not operate as an automatic stay on the execution process. Below are the snapshots to the major amendments introduced by the 2015 Amendment Act:

A. Pre-arbitral Proceedings

i. Independence and impartiality

- Applications for appointment of an arbitrator should be endeavored to be disposed of within a period of (60) sixty days from date of service of notice on the opposite party.
- Detailed schedule on ineligibility of arbitrators have been put in place.

ii. Interim reliefs

- Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts for aid in foreign seated arbitrations.
- Section 9 applications to be made directly before the High Courts in case of international commercial arbitrations seated in India as well as outside.
- Interim reliefs granted by arbitral tribunals seated in India are deemed to be the orders of courts and are, thus, enforceable in the new regime.

- Post grant of interim relief, arbitration proceedings must commence within 90 days or any further time as determined by the court.

B. Arbitral Proceedings

i. Expeditious disposal

f A twelve-month timeline for completion of arbitrations seated in India has been prescribed.

f Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts in relation to interim reliefs, appointment of arbitrators, and challenge petitions.

f Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

ii Costs

f “Costs follow the event” regime has been introduced.

f Detailed provisions have been inserted in relation to determination of costs by arbitral tribunals seated in India.

C. Post-arbitral proceedings

i. Challenge and enforcement

f In case of an ICA seated in India, the grounds on which an arbitral award can be challenged has been narrowed.

f Section 34 petitions to be filed directly before the High Courts in case of ICA seated in India.

f Section 34 petitions to be disposed of expeditiously and, in any event, within a period of one year from date on which notice is served on opposite party.

f Upon filing a challenge under Section 34 of the Act, there will not be an automatic stay on the execution of the award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings.

4. EXPLAIN THE STANDARD TRADE TERMS CIF, FOB, AND FAS COMMONLY USED IN THE INTERNATIONAL CONTRACTS OF SALE. WHAT ARE THE OBLIGATION OF BUYERS AND SELLERS UNDER THESE CONTRACTS?

CIF (Cost, Insurance & Freight) contract is that when the seller has delivered the goods or provides them afloat. He has to perform the contract by tendering conforming documents to the buyer. The significant feature of a CIF contract is that performance of bargain is to be fulfilled by delivery of documents and not by actual physical delivery of goods by the seller.

FOB (Free On Board) contract can be described as a flexible instrument. Because, the buyer has to nominate a ship and the seller has to put the goods on board of vessel for account of the buyer and procuring a bill of lading.

The important differences between FOB and CIF contract is that, FOB contract specifies the port of loading, however CIF contract specifies the port of arrival.

A) The Right and Duties of Seller and Buyer

Seller's Rights and Duties

1. The main duty of the seller under the FOB contract is loading. The seller must deliver the goods on board the vessel, at a place where the buyer has already identified as the port of loading and within the period of shipment which the parties indicated in the contract of sale. Name of the port in a FOB contract is a condition. For instance, the seller sends the goods to the other port from the port where it has been identified in the contract of sale. The seller commits a breach of a condition, so the buyer is entitled to refuse the delivery of the goods (*Manbre S. Co. Ltd. v Corn p. Co. Ltd. [1915] 1 KB 198*)

Under the CIF contact, the seller is required to deliver the goods on board of the vessel at the agreed port of delivery. However, in contrast to an FOB contract, the seller can also procure the goods afloat which are already shipped.

2. Under the FOB contract, the seller has to bear all cost such as the payment of handling, transferring the goods to the ship and loading. Furthermore the seller has to make all necessary arrangements for the buyer's account such as making a contract of carriage by sea and insuring the goods under an insurance contract. Moreover, the seller is not responsible to pay the freight and cannot be force to provide —freight pre-paid bill of lading‖ from the carrier. This is because; the contract of carriage and the freight are made between the carrier and the buyer.

According to the CIF contract, the seller has to bear all costs relating to the goods until delivery of the goods on board the vessel. However, under the CIF contract, the seller's duty to provide a contract of carriage and has to insure the goods under the insurance contract. Moreover, the insurance policy has to protect to the buyer. Otherwise, the seller commits to breach of the contract(Hickox v Adams [1876] 34 L.T.404)

3. Under the English Law, there is no general rule to obtain an export licence. It depends on the contract, which the party, who has the best position to obtain it. According to Brandt &co. case is that, —..... both seller and buyer were British traders albeit that the buyer was securing goods from an overseas merchant so he has to apply for the export licence, because he alone knows full facts regarding the destination of the goods. On the other hand, if the seller is in a better position than the buyer, he is responsible to provide a licence. Under the CIF contract, it is also seller's responsibility to provide an export licence.
4. Under the FOB contract, unless otherwise agreed, the seller has to provide the documents such as bills of lading, which is necessary for the buyer to obtain a possession of the goods. These documents have to deliver to the buyer in return for payment. Compared with the FOB contract, CIF seller has to provide a commercial invoice in order to get a payment. These documents must include the full description of the goods, the parties, price, shipping mark and numbers, the part of loading, route, and the port of discharging. The seller must tender the documents to the buyer.
5. The seller must give notice to the buyer that this notice may enable him insure the goods during the sea transit. The notice must be given without delay. Any fail to give notice, makes the seller still liable on the goods during the sea transit. According to the CIF contract, the seller has also to give the buyer sufficient notice that the goods have been delivered on board the vessel.

Buyer's Rights and Duties

6. Under the FOB contract, the buyer's duty is identify to the port of shipment. If it is not clean in the contract of sale, three different alternatives can be choose: First, the seller can choose the port of shipment, second the buyer can choose it, and

third the contract is left for ambiguously. The buyer has also provided a suitable ship for loading. He has to determine a shipping period, place and also must give notice to the buyer of readiness to the vessel. Nomination of vessel is a condition of the contract. When the seller failure to nominate vessel, the buyer can refuse the contract and claim damages. Unless otherwise agreed, the buyer can also make a second nomination within a shipment period, if the first one is insufficient. By comparison with the FOB contract, under the CIF contract the buyer has no under obligation to procure a ship, place, and shipping time. On the other hand, the buyer main duty is to accept the documents, which will be explained in detail later, if these documents are in conformity with the contract of sale.

7. The buyer's duty under the FOB contract, to pay the price is determined by the contract. However, there is no such a time in the contract; the buyer must pay the price in due as soon as the seller delivered the goods according to the contract. In contrast to the FOB contract, when a CIF buyer has accepted the documents; he must pay the full price of the goods. Furthermore, the buyer must take delivery of the goods at the agreed destination and has to bear all unloading costs.
8. Under the FOB contract, the buyers must pay all cost to the goods, when the goods passed the ship's rail. According to the CIF contract, the buyer has only to pay any customs or other duties, which may impose in a CIF contract. For instance, payment of the freight is the buyer's duty and also it is a condition of the contract.

Passing of Title and Passing of Risk

Passing of Title

Under the FOB contract, when the goods are placed on board the vessel, the buyer has a title of the goods, because property in goods passes at the same time. Another reason of this, he becomes a shipper of the goods after shipment and he has a contractual relationship with the carrier. However, the problem may arise when property in goods were supposed to pass on shipment. This could be leave the seller exposed to the risk of not to paid the balance of the full price. So property in goods will not pass until the full price is paid and bill of lading is delivered to the buyer.

Under the CIF contract, the documents play a very important role. When the buyer has received the documents, he has a title on the goods. After receiving documents, he can demand to delivery of the goods at the port of the arrival and also can sue if there is any damage or loses in the goods. That is to say, the general presumption is that the property in goods pass to the buyer, when the documents is delivered to him, but the buyer, at the same time, has to do payment. Shortly, the buyer takes responsibilities from the seller which is the whole rights and liabilities in the commercial contract.

However, his responsibility occurs if only tendered documents such as the bill of lading, policy insurance, and the commercial invoice, are in conformity with the contract. The essential feature of an ordinary CIF contract is that, performance of the bargain is to be fulfilled by delivery of documents and not by the physical delivery of the goods.

Moreover, when the buyer received both the documents and the goods, he has a right to reject them. If the documents are not in conformity with the contract, he may reject them. However, the seller has an opportunity to remedy the defect by a new and conforming tender of documents, if he has got enough time to do. Having accepted the documents, if the buyer found any nonconformity on the goods with the contract, he can still reject the goods. This rule is applied by a FOB contract as well.

Passing of Risk

Under the FOB contract, risk passes on shipment. When the seller delivered the goods on a ship's rail, he will not be responsible of any damages or loses after that. It is presumed that property in goods passed at the same time. However, the passing of property has been delayed as a result of the failure of the parties; this will not affect the passing of risk.

Under the CIF contract, risk passes on shipment to the buyer while property in them passed, or as from shipment. This rule indicates two different methods of passing of risk under the CIF contract. First one is that, when the seller completed his contractual duty on CIF terms and delivered the goods on board the vessel, and then risk passes to the buyer on shipment. Second one is that, the seller bought the goods which are already afloat; he thereupon can make the goods subject of the contract with the buyer, then the risk passed —as from shipment. In this sense, it can be said that risk passed before the shipment, because of the intention of the parties.

Another important thing of the passing of risk is that when the seller delivered the goods on board the vessel, he has to give notice to the buyer, which the buyer may insure the goods during the sea transit. If he seller fails to notify him, the goods will be at his own risk during the sea transit.

Relationships between the parties to contract on fob term were described in details by Lord Hewart CJ in *J. & J. Cunningham, Ltd. v Robert A. Munro & Co., Ltd.* (1922) 13 Ll. L. Rep. 216 at pp.216-217: The contract under consideration was for 200 tons of Dutch bran for shipment during October, 1920, price £13 per ton —f.o.b. Rotterdam, buyers finding freight room”. Under such an agreement it was he duty of the purchasers to provide a vessel at the appointed place, Rotterdam, at such a time as would enable the vendors to bring the goods alongside the ship and put them over the ship’s rail, so as to enable the purchasers to receive them within the appointed time – in this case October. It would not, for example, be sufficient for the vendors to bring them to a warehouse in Rotterdam or bring them alongside the vessel at five minutes before midnight on Oct. 31. The usual practice under such a contract is for the buyer to nominate the vessel and to send notice of her arrival to the vendor in order that the vendor may be in a position to fulfil his part of the contract. When the vendors tender the goods in question to the purchasers theoretically by placing them on the ship’s rail, it is open to the purchasers to reject if the goods are not in accordance with the contract.

This being the relationship between the parties the liability on either side may be varied:

- (1) by express contract altering the place or date of loading
- (2) by the conduct of the parties.

For example, there may be circumstances which disentitle the purchaser to reject the goods when they are being placed on the ship’s rail, as for instance where he has by his conduct already accepted them before their arrival there; there may also be circumstances where, although the purchaser may be entitled to reject when the goods are being placed over the ship’s rail, yet the vendor may be entitled to recover damages in respect of the deterioration of the goods. Assuming the sale of a perishable cargo, say of fresh vegetables for October shipment, suppose the purchasers nominate their vessel and write to the vendors saying "she will be at the quayside in three days time." The vendors gather their vegetables and send them

to the quayside; but the nominated ship does not arrive for a fortnight, during which time the vegetables go bad. It may be that the purchasers are entitled to reject the vegetables which have so deteriorated, but the vendors are then entitled to rely upon and bring into play another legal principle. It is not exactly an estoppel which prevents the purchasers from rejecting, but it is the doctrine that where one person makes a statement to another meaning that statement to be relied upon and acted upon by that other, if the other suffers damage by so relying and acting upon it he is entitled to recover such damage from the person making the statement. In the case put forward the damage would be the loss of price which the vendors would otherwise have obtained from the purchasers. This legal doctrine might be put in ordinary language as it is put in the case stated by the arbitrator, viz., that under such circumstances after the vendor has brought the goods to the quay at the invitation of the purchaser the goods remained at the purchaser's risk.

Buyer has a right but not duty to examine the goods upon delivery to him at the place of destination and reject them if they do not meet contractual specification. Risk of loss or damage passes from the seller to the buyer together with property on goods crossing 'ship's rail' or, generally, on the loading of the goods onto the vessel. Such point of the risk transfer is peculiar to FOB contracts and must be carefully examined when FOB terms applied to containerised and roll on roll off shipments. FOB term is considered to be best suited for shipments of bulk commodity cargoes such as oil or grain, where the goods invariably pass the 'ship's rail'. In instances where the parties intend to have the risk transfer to be passed at a point other than 'ship's rail' they might opt for FCA (Free Carrier) term which limits the seller's responsibility by the moment when the goods are 'delivered to the named place and collected by the carrier nominated by the buyer'.

Recent development of the matter of risk transfer at the crossing of ship's rail, is a decision in *Soufflet Negoce S.A. v Bunge S.A.* [2010] EWCA Civ 1102 where it was held that if the buyer assumes the risk of loading the cargo into unclean holds the seller cannot reject loading on the basis that holds are not clean enough, because the state of the holds is not a matter in which he has any real legitimate interest.

CIF and FOB contracts are the most important contracts in the field of International Trade. Both of them resemble each other. However, CIF contract has a very significant difference from FOB contract. Mainly, under the CIF contract, the parties have to deal with

delivery of documents and not actual physical delivery of goods by the seller. As a matter of fact, FOB contract is known as a flexible instrument which could be useful to International Trade companies while on the other hand, CIF contract is in demand much more than FOB contracts by companies in the field of International Trade.

FREE ALONGSIDE SHIP (FAS)

FAS is a less commonly known or used incoterm. It is used most commonly in sales of bulk cargo such as grains, oil, etc. In FAS – Free Alongside Ship – the seller/exporter arranges to have the goods placed alongside the vessel at the named port of origin.

FAS is ONLY used for ocean or inland waterway transport. Under FAS terms, the seller's risk and responsibility end the moment the goods are delivered alongside the vessel at the named port of origin :

Seller's Responsibilities:

- 1) Produces the goods and commercial documents as required by the sales contract.
- 2) Arranges for export clearance – IF stipulated in the sales contract.
- 3) Makes the goods available to the buyer alongside the vessel at the named port of shipment.
- 4) Assumes all risk to the goods (loss or damage) only up to the point they have been delivered to the port at the named place and time stipulated in the sales contract.
- 5) Seller must advise the buyer of the location and time that goods have been delivered alongside the named vessel.
- 6) Seller has to provide the buyer with proof of delivery to the carrier or transport documents.

Buyer's Responsibilities:

- 1) Buyer must pay for the goods as per the sale contract
- 2) Buyer must obtain all commercial documentation, licenses, authorizations, and import formalities at own risk and cost.
- 3) Buyer must take delivery of the goods when they have been made available by the seller alongside the vessel at the named port of origin.

4) Buyer must assume all risk and responsibility for the goods from the time the goods have been delivered alongside the vessel to delivery into the buyer's warehouse or other specified location.

5) Buyer pays for all costs of transportation, insurance, export and import customs and duty fees, and all other formalities and charges related to the transportation of the shipment from the time the goods have been delivered alongside the vessel. This includes all costs relating to loss or damage of goods or non-delivery from the time the goods have been delivered alongside the vessel.

6) Buyer would accept the seller's proof of delivery to the carrier or transport documents.

Difference between F.O.B. & F.A.S.

In a F.O.B. (Free on Board) shipment, the risk passes to buyer at the F.O.B. point. The F.O.B. point can be the seller's factory or warehouse. In that case, the sale price quoted does not include freight which is the responsibility of the buyer as is the risk from the warehouse onward. If, however, the term is F.O.B. point of destination, seller bears the risk during transit and is responsible for payment of the freight.

The term F.A.S. (Free Alongside) followed by "vessel" at some specific port is a variation of F.O.B. The sale is consummated when the seller delivers the goods alongside the vessel. The difference between the terms "F.O.B. vessel" and "F.A.S. vessel" is that in the F.O.B. the seller bears the risk until the loading has been completed. C.I.F. stands for Cost, Insurance, Freight, a term followed by the port of destination. "C.I.F. London", for example, would mean that the quoted price would include the price of the goods plus freight up to London and insurance.

5 WRITE A NOTE ON UCP 600?

UCP 600 is the latest version of the rules that govern letters of credit transactions worldwide. UCP 600 is prepared by International Chamber of Commerce's (ICC) Commission on Banking Technique and Practice. Its full name is 2007 Revision of Uniform Customs and Practice for Documentary Credits, UCP 600, and (ICC Publication No. 600). The ICC Commission on Banking Technique and Practice approved UCP 600 on 25 October 2006. The rules have been effective since 1 July 2007.

UCP 500 was the rules that had been in implementation before UCP 600. There are several significant differences exist between UCP 600 and UCP 500. Some of these differences are as follows;

The number of articles reduced from 49 to 39 in UCP 600;

In order to reach a standard meaning of terms used in the rules and prevent unnecessary repetitions two new articles have been added to the UCP 600. These newly added articles are Article 2 “Definitions” and Article 3 “Interpretations”. These articles bring more clarity and precision in the rules;

A definitive description of negotiation as “purchase” of drafts of documents;

New provisions, which allow for the discounting of deferred payment credits;

The replacement of the phrase “reasonable time” for acceptance or refusal of documents by a maximum period of five banking days.

History of UCP

First uniform rules published by ICC in 1933. Revised versions were issued in 1951, 1962, 1974, 1983 and 1993.

Currently majority of letters of credit issued every day is subject to latest version of the UCP. This widely acceptance is the key sign that shows the importance of the UCP, which are the most successful private rules for trade ever developed.

Some important features are discussed here:

Article I (Application of UCP)

a. UCP 600 are rules that apply to any documentary credit & any standby letter of credit when the text of the credit expressly indicates it is subject to these rules. These rules are binding on all parties thereto

b. UCP are rules not Law: - UCP governs documentary Credit primarily, but not solely. UCP does not prevent a Court from applying its country's national law.

Article 2 (Definitions)

Credit means any arrangement however named or described that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.

Complying presentation means a presentation that is in accordance with the terms & conditions of the credit, the applicable provisions of these rules & international standard banking practice.

Honour means: a. to pay at sight if the credit is available by sight payment. b. to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment.

To accept a bill of exchange drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

Negotiation means the purchase drafts or documents by the nominated bank under a complying presentation, by advancing or agreeing to advance funds to the beneficiary.

Nominated bank means the bank with which the credit is available.

Presentation means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered. Presenter means a beneficiary, bank or other party that makes a presentation.

Article 3 (Interpretations)

Revocation: A credit is irrevocable even if there is no indication to that effect.

Any issuer except the beneficiary is allowed as the issuer of a document if credit required "first class" "well known" "qualified" "competent" issuer of a document.

"On or about" means a period of five calendar days before until five calendar days after the specified date.

Article 4 (Credit V. Contracts)

a. A credit by its nature is a separate transaction from the sale or other contract. Banks are in no way concerned with or bound by such contract, even if any reference to it is included in the credit.

b. Bank should discourage to include contract, proforma invoice, as an integral part of the credit.

Article 5 (Documents V. Goods, Services or performance)

Banks deal with documents and not with goods, services or performance to which documents may relate.

Article 6 (Availability, Expiry date & place for presentation)

a. Credit must state the bank with which it is available. A credit available with a nominated bank is also available with the issuing bank.

b. A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation.

- c. An expiry date is also the last date of presentation.
- d. The place of the bank with which credit is available is the place for presentation,,

Article 9 (Advising of credits and Amendments)

- a. Advising bank signifies the apparent authenticity of the credit & amendment.
- b. A credit & its amendment must be advised by the same bank.

Article 10 (Amendment)

- a. The beneficiary should give notification of acceptance or rejection of amendment. If the beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance.
- b. Partial acceptance of an amendment is not allowed.

Article 11 (Transmission of L/C and amendment)

- a. An authenticated Tele transmission of a credit or amendment will be deemed operative. If Tele transmission states "full details to follow" then Tele transmission not be deemed to be operative. Then issuing bank must issue the operative credit or amendments without delay in terms not inconsistent with the tele transmission.

Article 13 (Reimbursement)

- a. The reimbursement authorization should not be subject to an expiry date.
- b. Claiming bank need not submit compliance certificate to the reimbursing bank.
- c. An issuing bank will be responsible for any loss of the Beneficiary due to non payment.

Article 14 (Examination of documents)

Nominated bank, confirming bank and the issuing bank each have a maximum of five banking days following the presentation date to determine if a presentation is complying.

- a. documents to be presented not later than 21 calendar days after the date of shipment but not later than the of the credit.
- b. Data in a document need not be identical but must not conflict with data in that-document, any other stipulated document or the credit.
- c. The description of the goods in other than commercial invoice may be in general terms not conflicting with their description in the credit.

d. the applicant become part of the consignee or notify party, details on a transport document they must be as stated in the credit.

Article 16 (Discrepant documents)

a. Refusal notice must state each discrepancy in a single notice.

b. Notice must state that the bank is holding the documents until it receives a waiver from the applicant or receive further instructions from the presenter prior to agreeing to accept a waiver, or that the bank is returning the documents.

c. Notice must be given by telecommunication or, if that is not possible, by other expeditious means within the fifth banking day following the day of presentation.

Article 17 (Original documents and copies)

a. At least one original of each document must be presented.

b. Any document bearing an apparently original signature mark, stamp, or written, typed, performed by the issuers hand or issued on issuers original stationery or state that it is original to be accepted as original documents.

c. A document either labeled "copy" or not marked as an "Original" is a copy document which need not be signed.

Article 18 (Commercial invoice)

a. Commercial Invoice to be issued by the beneficiary in the name of the applicant /first beneficiary in the same currency as the credit and need not be signed.

b. Bank may accept a commercial invoice issued for an amount in excess, provided the excess amount has not honored or negotiated.

Article 20 (Bill of lading)

a. B/L must indicate the name of the carrier, also to indicate that the goods have been shipped on board a named vessel from the port of loading to the port of discharge and be the sole original B/L.

b. Must be signed by the carrier, or a named agent or the muster identifying their status.

c. Transshipment is acceptable if the goods have been shipped in a container, trailer or LASH barge and the entire carriage is covered by one and the same bill of lading.

Article 28 (Insurance):

a. Insurance document such as insurance policy, an insurance certificate or a declaration under an open cover must be signed by the company, an underwriter or their agents or their agents or their proxies.

b. Cover note will not be accepted.

c. If insurance amount is not indicated in the credit then Coverage must be at least 110% of CIF or CIP value of the Goods.

Article 29 (Extension of Expiry date)

If the expiry date of a credit falls on a holyday the expiry date will be extended to the first following banking day and the nominated bank will provide a statement that the presentation was made within the time limit extended in accordance with sub-article 29(a)

Article 30 (Tolerance)

a. The words 'about' or 'approximately' allowing a tolerance not to exceed 10% more or less than the amount, the quantity or the unit price to which they refer.

b. A tolerance not to exceed 5% more or less than quantity of goods is allowed, provided the quantity is not stated in number of packing units or individual items and the drawing amount is within the credit value.

Article 31 (Partial shipment)

a. More than one set of transport documents of the same means of conveyance and for the same journey and destination will not be regarded as partial shipment. If it is more than one means of conveyance then it will be regarded partial shipment.

b. Partial drawing or shipments are allowed.

Article 34 (Disclaimer on Effectiveness of does)

A bank assumes no liability for accuracy genuineness or legal effect of any document nor does it assume any liability for the description, quantity, weight, quality or existence of the goods.

Article 35 (Disclaimer on Transmission)

A bank assumes no liability for the consequences arising out of delay, loss in transit of any messages, letter or documents. If a complying document lost in transit issuing bank must honour or negotiate or reimburse the nominated bank.

Article 38 (Transferable credit)

a. Transferable credit means a credit that specifically states it is 'transferable'.

- b. A transferred credit cannot be further transferred at the request of the second beneficiary.
- c. Any request for transfer must indicate if and under what conditions amendments may be advised to the second beneficiary.
- d. The transferred credit may reduce the amount, unit price, expiry date, period for presentation and the shipment date.
- e. If the first beneficiary is to present its own invoice, but: fails to do so or presented a discrepant invoice, transferring bank has the right to present the documents as received from the second beneficiary.

6 DISCUSS ABOUT INCOTERMS 2010?

Differences in trading practices and legal interpretations between traders of different countries necessitated a need for a common set of rules. These rules needed to be easy to understand by all of the participants in order to prevent misunderstandings, disputes and litigation.

Incoterms were first created in 1936 and were designated Incoterms 1936. Since then, Incoterms have evolved into a codified worldwide contractual standard. They are periodically updated as events in international trade occur and require attention. Amendments and additions were made in 1953, 1967, 1976, 1980, 2000, 2010 and 2020.

Incoterms® are referred to as **International Commercial Terms**. They are a set of rules published by the International Chamber of Commerce (ICC), which relate to International Commercial Law. According to the ICC, Incoterms® rules provide internationally accepted definitions and rules of interpretation for most common commercial terms used in contracts for the sale of goods'. All International purchases will be processed on an agreed Incoterm® to define which party legally incurs costs and risks. Incoterms® will be clearly stated on relevant shipping documents.

[The most common Incoterms you should understand.](#)

EXW – Ex-Works or Ex-Warehouse

- Ex works is when the seller places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.).
- The seller does not need to load the goods on any collecting vehicle. Nor does it need to clear them for export, where such clearance is applicable.

FOB – Free On Board

- The seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered.
- The risk of loss of or damage to the goods passes when the products are on board the vessel. The buyer bears all costs from that moment onwards.

CFR – Cost and Freight

- The seller delivers the goods on board the vessel or procures the goods already so delivered.
- The risk of loss of or damage to the goods passes when the products are on board the vessel.
- The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination

FCA – Free Carrier

- The seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place.
- The parties are well advised to specify as explicitly as possible the point within the named place of delivery, as the risk passes to the buyer at that point.

CPT – Carriage Paid To

- The seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such site is agreed between parties).
- The seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.

CIP – Carriage And Insurance Paid To

- The seller has the same responsibilities as CPT, but they also contract for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage.
- The buyer should note that under CIP the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

DAT – Delivered At Terminal

- The seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the designated port or place of destination. "Terminal" includes a place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal.
- The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination.

DAP – Delivered At Place

- The seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination.
- The seller bears all risks involved in bringing the goods to the named place.

DDP – Delivered Duty Paid

- The seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination.
- The seller bears all the costs and risks involved in bringing the goods to the place of destination. They must clear the products not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

FAS – Free Alongside Ship

- The seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment.
- The risk of loss of or damage to the goods passes when the products are alongside the ship. The buyer bears all costs from that moment onwards.

CIF – Cost, Insurance and Freight

- The seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the products are on the ship.
- The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.
- The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage.
- The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

7. DISCUSS THE ROLE OF CONCILIATION IN INTERNATIONAL DISPUTE SETTLEMENT?

The Halsbury's Laws of England defines Conciliation as a process of persuading the parties to reach an agreement. Conciliation may comprehensively be defined as a non-adjudicatory and no- adversarial.

Conciliation means, the settling the disputes without litigations". It is a process in which independent person or persons are appointed by the parties with mutual consent by agreement

to bring about a settlement of their dispute through consensus or by using of the similar techniques which is persuasive.

Conciliation is a process of persuading parties to reach agreement, and is plainly not arbitration; nor is the chairman of a conciliation board an arbitrator” Confidence, trust & Faith are the essential ingredients of conciliation. This effective means of ADR is often used for domestic as well as international disputes. Some Significant difference is there while using it for domestic or international disputes.

Gone are the days when arbitration was considered to be a cheap and efficacious remedy. Now the situation is completely reversed. Arbitration proceedings have become too technical and expensive. In this context, reference may be made to judgment of the Supreme Court of India.

In **Guru Nanak Foundation V. Rattan Singh & Sons**, it was observed:

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal more effective and speedy for resolution of disputes avoiding procedural claptrap and this led to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in the courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the court been clothed with” legalese“ of unforeseeable complexity.”

Broadly speaking, there are at least three advantages if the parties are able to reasonable settlement of their disputes through conciliation, viz.

- 1) Quickness. The parties can devote their time and energy for better and useful work.
- 2) Economic. Instead of spending hard earned money on litigation, one can invest it for better dividends.

3) Social. The parties go happily to their respective places and stand relieved from bickering, enmity, which in certain cases might have lingered on for generations.

The Arbitration and Conciliation Act, 1996 (“the Act”) is based on the UNCITRAL Model Law on international commercial arbitration and conciliation. While the Act was not intended to displace the judicial system, the new law ushered in an era of private arbitration and conciliation. It was also the first time that a comprehensive legislation was made on the subject of conciliation in India.

The UNCITRAL Rules on Conciliation, 1980 recognized “the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations” and that adoption of uniform conciliation rules by “countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.”¹ Accordingly, these rules were closely followed by the Indian legislators to formulate conciliation rules under Part III of the Act.

The term conciliation is not defined in the Act. However, simply put conciliation is a confidential, voluntary and private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. This method provides the disputing parties with an opportunity to explore options aided by an objective third party to exhaustively determine if a settlement is possible. Like arbitration, the Act covers both domestic and international disputes in the context of conciliation. International conciliation is confined only to disputes of “commercial” nature. As per the Act, the definition of international commercial conciliation is exactly similar to that of international commercial arbitration. Accordingly, the Act defines international commercial conciliation as conciliation proceedings relating to a dispute between two or more parties where at least one of them is a foreign party.

The foreign party may be

- (1) an individual who is foreign national,
- (2) a company incorporated outside India, or
- (3) the government of a foreign country.

Per section 80 of the Act, the conciliator does not decide for the parties, but strives to support them in generating options in order to find a solution that is compatible for both of them, thereby fulfilling

the mandate of section 67 of the Act under which the main function of the conciliator is to assist the parties to reach an amicable settlement.⁴ For achieving this, a conciliator is obliged to (1) act in an independent and impartial manner, and (2) abide by the principles of objectivity, fairness and justice.⁵ Section 67(4) specifically enables the conciliator to “make proposals for settlement of the dispute ... at any stage of the conciliation proceedings.”

Conciliation Procedure

Conciliation is a better alternative to the formal justice system. For selecting the mode of the conciliation it is not necessary to enter into a formal agreement. Because where arbitration clause is included in the agreement it is implied that the matter would be referred for conciliation first & if amicable settlement fails then only, it is referred to the arbitration. The other advantage of choosing conciliation is that though the amicable settlement in conciliation could not be reached then the evidence led, the proposal made during the conciliation proceedings cannot be disclosed in any other proceedings (in arbitration also). This protection has been provided by the Arbitration & Conciliation Act itself. Therefore parties can attempt Conciliation without any risk. It is a non-binding procedure in which an impartial third party assists the parties to a dispute in reaching a mutually agreed settlement of the dispute. For effective conciliation, it is necessary that the parties to dispute should be brought together face to face at a common place where they can interact with each other & with the conciliator to arrive at a settlement of the dispute. The importance of conciliation is that in other proceeding decision is given by the presiding authority & it is binding accordingly. But in conciliation there is amicable settlement where parties themselves have reached to the decision i.e. settlement & which is binding as per their decision. Third party i.e. conciliator is just helping to arrive at settlement & not dictating the term or decision.

Either party to the dispute can commence the conciliation process. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute. Generally, only one conciliator is appointed to resolve the dispute between the parties. The parties can appoint the sole conciliator by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any

international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not termed as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration. A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature.

Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings,

- (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings;
- (b) admissions made by any party during the course of the conciliation proceedings;
- (c) proposals made by the conciliator for the consideration of the parties;
- (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.

Conciliation has received statutory recognition as it has been proved useful that before referring the dispute to the civil court or industrial court or family court etc, efforts to concile

between the parties should be made. It is similar to the American concept of court-annexed mediation. However without structured procedure & statutory sanction, it was not possible for conciliation to achieve popularity in the countries like USA & also in other economically advanced countries.

Reasons to uplift conciliation in India

The importance of conciliation in the present Indian court system is increased as courts are facing with the problem of mounting arrears of pending cases & there is a serious need of disposing of them & for that amicable settlement, conciliation is the best alternative.

The Himachal Pradesh High court under took the project of disposing of the pending cases by conciliation & insisting on pre-trial conciliation in fresh cases. This idea was based upon the mediation in Canada & Michigan. The said project had great success in Himachal Pradesh.

The Law commission of India in its various reports (77th & 13th) has appreciated the project in Himachal Pradesh and recommended the other States to follow same path. The other important point to uplift the Conciliation is that, it has got statutory recognition as included in Arbitration & Conciliation act 1996 which is based on UNCITRAL Model & because of that it has Universal familiarity & can be used for settlement of domestic disputes as well as international commercial disputes.

The Concept of conciliation has received new dimension because of successful Himachal experiment. The movement of conciliation of awareness of conciliation has started long before, the only difference is, previously parties were willingly coming together & opting for conciliation but now, the conciliation in Himachal pattern is a court induced conciliation, making it mandatory for the parties to attempt a conciliation for settlement of their dispute & approach the court if conciliation fails. In Maharashtra also Mumbai High court is taking initiative for Himachal pattern i.e. pre-trial conciliation Therefore it is necessary to study conciliation as an organized procedure for settlement of dispute through formal proceedings.

Advantages of resolution of a dispute by conciliation

In contrast to arbitration, conciliation is nonbonding and confidential. If successful, conciliation results in a settlement of the dispute. Like arbitration, conciliators are selected by

and serve at the expense of the parties. Conciliation is less formal than arbitration, but is more evaluative than the facilitative process of most forms of mediation. Conciliators may be retired judges, senior advocates, or non-lawyers with expertise in the subject matter.

The court plays no formal role in sponsoring conciliation. Conciliation is becoming increasingly popular, as an alternative to other formal and informal modes of dispute resolution due to its obvious advantages:

- a) It offers a more flexible alternative, for a wide variety of disputes, small as well as large;
- b) It obviates the parties from seeking recourse to the court system;
- c) It reserves the freedom of the parties to withdraw from conciliation without prejudice to their legal position inter se at any stage of the proceedings;
- d) It is committed to maintenance of confidentiality throughout the proceedings and thereafter, of the dispute, the information exchanged, the offers and counter offers of solutions made and the settlement arrived at.
- e) It is cost-effective and produces quicker resolution of dispute.
- f) It facilitates the maintenance of continued relationship between the parties even after the settlement or at least during the period of settlement is attempted at. This feature is of particular significance to the parties who are required to continue their relationship despite the dispute, as in the case of disputes arising out of construction contracts, family relationships, family properties or disputes between members of any business or other organizations;
- g) There is no scope for corruption or bias.

8.DISCUSS THE RELEVANCE OD DOCTRINE OF FRUSTATION UNDER INTERNATIONAL SALES OF GOODS?

The right to rescind a contract for breach depends on the gravity of the breach.^[i] A party is entitled to rescind a contract where the breach is material and wilful, or vital. Similarly, a party to a contract is entitled to rescind where the other party has made a substantial breach, or a breach so substantial as to defeat the object of the contract, or a substantial and

fundamental breach, so as to defeat the purpose or object of the contract.^[ii] It is sometimes known as a **Repudiatory Breach** and is a breach so fundamental that it permits the distressed party to terminate performance of the contract, in addition to entitling that party to sue for damages.

The law of fundamental breach was historically treated as an extension of the doctrine of deviation.^[iii] The development of this doctrine can be traced down to the first half of the 19th century, when Tindal C.J. stated in *Davis v. Garrett*^[iv] that deviation made by the carrier from the agreed voyage route brings the latter outside of contract and therefore outside of exceptions or limitation clauses provided by such a contract. This harsh attitude to deviation cases originated from the earlier marine insurance practice when cargo insurance policy was lost in case of deviation. Thereby strict obligations imposed to the carrier were designed to afford protection to the cargo owner.

The doctrine of fundamental breach^[v] is chiefly predicated on the facts or assumption that a party to a contract or contract of sale has committed a misnomer in the contract that goes to the root of the contract, thereby knocking the bottom off its commercial relevance. There is hardly any better legal doctrine which anchors activities surrounding international sale of goods like the doctrine of fundamental breach of contract. It is an important legal instrument that rears its head up from time to time due to induced or sometimes supervening commercial non-performance.

The CISG

The origin of the 1980 Vienna Convention on the International Sale of Goods, of April 11, 1980 (hereinafter, the CISG) must be sought in the exponential growth of international trade in the twentieth century, which showed that the various national legal systems needed to be adapted to enable them to resolve the particular problems arisen from the volume of international transactions, including the need to harmonize the various remedies of the parties in case of breach.

According to Article 1 through 6 of the CISG, the CISG only applies to contracts of sale of goods concluded between parties (typically, contracts of sale of goods among traders with the aim to resell) having their places of business in different States when those States are contracting States or when the rules of Private International Law lead to the application of the law of a Contracting State, regardless of the nationality of the parties or the civil or commercial character of the parties or of the contract.

In this context, the CISG, set up as a uniform instrument and inspired by the Uniform Commercial Code, regulates the international sale of goods, dealing exclusively with: (i) the formation of the contract; and (ii) the rights and obligations of buyer and seller under the contract. As a result, unless expressly provided otherwise in the CISG itself, it is not concerned with the validity of contracts nor their clauses, nor with the ownership of the goods.

Fundamental breach under the CISG

It has to be taken into account that the CISG synthesizes different traditions of Common Law and Civil Law. This predominance has become apparent, among others, in a favourable

orientation toward maintaining the contract and the resulting restrictive interpretation of “breach” to the “fundamental breach”.

According to the Article 25 of the CISG, a breach by one of the parties is fundamental if

“it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result”.

A. Substantial deprivation

In order for a breach to be fundamental under the CISG, it must cause a ‘detriment’ to the aggrieved party. When considering such a detriment, it is important to bear in mind that the preservation of the contract and ensuring that both parties receive what was promised to them under the contract are important incentives under the CISG. The Secretariat’s Commentary on the 1978 Draft states that ‘the determination whether the injury is substantial must be made in light of the circumstances of each case, for example, the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.’ This is a criterion which looks to the harm suffered by the injured party. However, when compensation for damages can serve as a remedy for non-performance, this should be an indication of the fact that there is no detriment within the meaning of the CISG. What matters most in commercial relations are economic results and not the formal fulfilment of obligations.

To constitute a fundamental breach, the detriment must be substantial. For instance, the Oberlandesgericht (Appellate Court) in Frankfurt held that:

‘[a] breach of contract is fundamental when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, the interest in the fulfilment of the contract ceases to exist as a consequence of the breach of the contract (and the party in breach of the contract was aware of this or should have been).’

And, according to the Zivilgericht (Civil Court) in Basel, what is decisive is the importance of the interest which is affected by the breached term of the contract.^[x] In other words, there will be a fundamental breach of contract by the defaulting party if a party fails to receive the essence of what he was entitled to expect according to the contract. The focus is on the substantial deprivation of the contractual expectation of the aggrieved party.

B. The contractual expectation

The concept of substantial deprivation is thus fused together with the concept of contractual expectation, since a detriment can be characterised as a fundamental breach only if the injured party has no further interest in accepting the performance of the contract. The expectations of the aggrieved party are qualified by such phrases as ‘what he is entitled to expect under the contract’ in Article 25 CISG, or ‘what it was entitled to expect under the contract’ under Article 7.3.1(2)(a) UNIDROIT Principles or Article 8:103(b) PECL. It must be stressed that the expectations of the aggrieved party have to be discernible from the

contract. This element is quite evident in itself and is also contained in the element of foreseeability.

C. Foreseeability

The criterion of foreseeability as set out in Article 25 CISG is meant to prevent parties from avoiding the contract because of a fundamental breach when the substantial detriment has occurred unforeseeably. Since it is unlikely that the party in breach will admit to foreseeing the detriment in question, the ‘reasonable person standard’ was introduced. In order to prevent the other party from avoiding the contract, the party in breach has to show that it did not foresee the negative — result, nor would a reasonable person of the same kind and under the same conditions have foreseen it.

The question arises as to the point in time at which the detrimental result should have been foreseeable; Article 25 CISG does not state whether foreseeability should be decided by the time the contract was formed, or when the breach took place. Some scholars argue that since the contractual terms establish the rights and obligations of the buyer and seller, the decisive time for when foreseeability is determined should be when the contract is entered into. If not, one party could provide the other with further information, thereby changing what was deemed to be a substantial interest and could now give rise to a fundamental breach. Others disagree with this, arguing that if the notion of good faith is taken into account, consideration must be given to any information received by the party in breach after the contract was formed.

In any event, where a contract expressly states that the performance of an obligation is of the essence, there will be little room for proving that the breach caused an unforeseeable detriment. Conversely, where a contract does not clearly state the importance of an obligation, the conduct of the party in breach may be interpreted with more tolerance.

Fundamental breach vs perfect tender

Under the CISG, the options available to a buyer, upon the tender of goods, do not include such terms as rejection, acceptance or revocation like the UCC. Under the CISG, if a buyer wishes to reject tendered goods, she must avoid the contract. To accept the goods, he simply does not avoid the contract. With that being said, where a seller makes a non-conforming tender of goods, avoiding the contract under the CISG performs a function very similar to rejecting or revoking acceptance under the UCC, and failure to avoid has consequences resembling those for accepting‘ under the UCC.

Although these two doctrines are undoubtedly similar, the prerequisites which enable a buyer to avoid under the CISG or reject under the UCC are not the same. Under the CISG, in order to avoid a contract for the international sale of goods, a buyer may show, inter alia, that the seller fundamentally breached the contract. Under the UCC, Article 2 allows a buyer to reject the goods if what is tendered is not perfect the so called perfect tender rule. While the overall effect of these two approaches may be fundamentally similar, the route in which a buyer must take to get to this destination is far from the same.

The CISG approach

Under the CISG, a buyer is under a much heavier burden to avoid the contract than he would be under the UCC. Article 49 states that the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of the contractto avoid the contract, he must provide notice of the avoidance to the other party. The notice must clearly express that the buyer now treats the contract as at an end. A mere announcement of future termination, a statement urging delivery or returning the goods without comment will not suffice. Thus, if a buyer wishes to avoid the contract because the seller has tendered non-conforming goods, not only must the non-conformity constitute a fundamental breach of the contract, but the buyer must also have given the seller notice of the non-conformity within a reasonable time after its discovery or when it should have been discovered. If the buyer fails to timely give such notice to the seller the buyer forfeits the right to rely on such non-conformity to avoid the contract.

As stated in Article 49 1(a), a buyer may declare the contract avoided for any fundamental breach of the contract by the seller. A breach of contract under the CISG is fundamental:

“if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result”

Thus, according to the CISG, in order for a buyer to properly avoid a contract for the international sale of goods, (1) the seller must have failed to perform an obligation under the contract which (2) substantially deprived the buyer of what he was entitled to expect under the contract. Also, as discussed, if the buyer is relying on a non-conforming tender as the fundamental breach, he must give the seller proper and timely notice of such non-conformity.

A fundamental breach requires that the seller . . . violate a duty, it was obliged to perform either under the contract, according to trade usages or practices established between the parties, or under the Convention. An example of contractual duty would be any duty agreed to by the parties beyond those mandated by the CISG. Examples of duties arising under the Convention include compliance with Articles 30 and 35 of the CISG. Article 30 states that the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this convention. Article 35 states that the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

Such a violation of a duty is fundamental if it frustrates or essentially deprives the buyer of its justified contract expectations; what expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on usages and established practices between the parties, and on additional provisions of the Convention.

For example, buyers are not normally justified in an expectation that delivered goods will comply with regulations and official standards in the buyer's county. It is generally the standards in the seller's country that determine whether goods are fit for their ordinary

purpose. That being said, the contracting parties may always otherwise agree to different terms, expectations and duties than those provided by the CISG.

Guidelines as Determined by the Courts

Some guidelines have developed through case law which may assist a practicing lawyer in determining whether a breach would amount to the fundamental breach needed for a party to avoid a contract under the CISG. For example, a serious, definitive and unjustified refusal of the seller to fulfil its contractual obligations amounts to a fundamental breach. The helpfulness of such a holding remains questionable at best. Based on the plain language of the CISG's definition of fundamental, a situation where a seller seriously, definitively and unjustifiably refuses to fulfil one of its contractual obligations undoubtedly amounts to a fundamental breach since the buyer is substantially deprived of something he expects under the contract. Such a holding simply replaces vague language with more vague language, i.e., replacing fundamental and substantial deprivation of an expectation with a serious, definitive and unjustifiable refusal to fulfil a contractual obligation. Further case law has concluded that a non-conformity relating to the quality of the goods delivered is a non-fundamental breach if the buyer, without unreasonable inconvenience, can use or resell the non-conforming goods, even at a discounted price. A contract for the sale of goods was entered into between a Dutch seller and German buyer. The contract was for the sale of cobalt sulphate of British origin and required that the seller supply certificates of origin and of quality. Following delivery of the goods, the German buyer declared the contracts to be avoided since the cobalt sulphate was made in South Africa and the certificate of origin was wrong. The buyer also claimed that the quality of the goods was less than the quality agreed upon. Despite the non-conformity of such goods the Dutch seller demanded payment, and the German Supreme Court held that there were no grounds for avoidance of the contract, thus finding for the seller. In so holding the German court found that there was no fundamental breach with respect to the non-conforming goods since the buyer failed to show that the sale of the South African cobalt sulphate in Germany or abroad was not possible. Consequently the buyer failed to show that he was deprived of what he was entitled to expect under the contract. Corollary to these holdings, if the non-conforming good cannot be used or resold by the buyer using reasonable efforts, a fundamental breach will likely be found and a buyer may pronounce the contract avoided.

In another case, a French buyer and Italian seller contracted for the sale of Italian wine. Having learned that the seller delivered non-conforming adulterated wine, the buyer sought to avoid the contract. Finding the wine unfit for consumption, the French Court de Cassation declared the contract avoided on the ground the seller did not honour its contractual obligation, and, therefore, fundamentally breached the contract.

When attempting to avoid a contract, the burden of proof is on the buyer to show that the seller's breach of the contract was fundamental and substantially deprived the buyer of what he was entitled to expect under the contract. As the German Federal Supreme Court stated "the buyer—who is insofar burdened with the obligation to submit and prove the facts—did not substantially submit that it was substantially deprived of what it was entitled to expect under the contract as a result of the seller's breaches." Once a contract is properly avoided, both parties are released from the obligations of the contract, subject to any damages which may be due.

The UCC approach

Contrary to the CISG, the UCC contains no requirement of a fundamental breach before rejection of non-conforming goods. Under the UCC, delivered goods may be rejected if they are in any way non-conforming to the contract. According to § 2-601 of the UCC, and unless otherwise agreed, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest. This is the so-called “perfect tender rule”.

If a buyer chooses to reject the non-conforming goods, such rejection must be within a reasonable time after the tender, and the seller must be seasonably notified. If the buyer fails to effectively reject the non-conforming goods, his failure will constitute an acceptance after the buyer has had a reasonable opportunity to inspect the goods.

If the buyer properly rejects the goods and the rejection is rightful (as opposed to wrongful rejection) because the seller has breached the contract in a fashion that justifies rejection (i.e., the goods do not conform to the contract, the buyer is relieved of the obligation to pay for the goods tendered.

While some scholars and courts have sought to ameliorate the harshness of the perfect tender rule and bring the law of sales of goods in closer harmony with the law of contracts, i.e. rescission only for material breaches, their efforts have been in vain. The chief objection against the perfect tender rule was that buyers in a declining market would reject goods for minor nonconformities and force the loss on surprised sellers. Despite this objection, the UCC has retained the perfect tender rule. Section 2-106 states that goods conform to a contract when they are in accordance with the obligations under the contract. Section 2-601 authorizes a buyer to reject goods if they or the tender of delivery fail in any respect to conform to the contract.

CISG: disadvantages

A. Legal uncertainty and unpredictability

The remedy of termination (avoidance) is considered to be the last resort in [the CISG’s] scheme of remedies which include other less drastic remedies such as price reduction and the award of damages. As a general rule, the buyer is not allowed to terminate the contract unless the breach is fundamental. The strongest argument against the application of the CISG, especially with respect to non-conforming goods and fundamental breach, is its lack of legal certainty and predictability. The CISG rules do not provide a high degree of legal certainty and predictability largely because the rules rely upon ambiguous concepts such as ‘fundamental breach’.

Article 25 of the CISG defines a ‘fundamental breach’ as a breach of an international sale of goods contract which results in such detriment to the (non-breaching) party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. As can be seen by the definition, fundamental breach in turn relies upon nebulous concepts such as ‘substantial’ (substantially to deprive) and ‘reasonable’ (reasonable person). This is another instance in which the CISG defines an ambiguous

concept with more ambiguity. The difference here, however, is that the CISG itself is supplying the ambiguity, rather than the courts.

Because of this, it will likely be very difficult for any practicing attorney or counsel to confidently respond to the basic question of whether a contract is avoidable or not in a particular fact pattern; a question and answer which will undoubtedly have a significant mental and financial impact on both contracting parties.

One scholar has taken a broad view in that the failure to present the documents required by the contract or relevant usage or practices, or the presentation of defective documents, must be regarded as a fundamental breach.

Indeed, the German Supreme Court has expressed sympathy for this view, acknowledging that the delivery of contractually stipulated documents can be an essential contractual obligation, which, if breached, may entitle the buyer to declare the contract avoided according Art. 49(1). Despite such sympathy, the German court still refused to avoid the contract, stating that the buyer's failure to show that it could not resell or use the non-conforming goods precluded a finding of fundamental breach. So, while the court expressly stated that a failure to deliver contractually obligated documents can constitute a fundamental breach, it seems as though such a situation will only arise when the contract is solely for the delivery of such documents and not the delivery of any actual tangible commodity a rare situation indeed. For, if any tangible commodity is delivered along with the contractual documents, and neither the good nor the documents conform to the contract, the buyer will always be required to, if reasonable, use or resell the non-conforming good; and if they fail to take such steps, and instead rely on the non-conformity of the good coupled with the non-conforming contractual documents, the buyer will still be liable to pay, despite this acknowledgment by the court.

Thus, such dictum by the German Supreme Court seems largely inapplicable in any real-world situation, and simply adds to the legal uncertainty and unpredictability accompanying a fundamental breach analysis. One of the strictest, yet most clear and effective ways to restore certainty to the doctrine, would be through the use of a presumption that the failure to supply contractually required documents, or the delivery of defective documents, in-of-itself constitutes a fundamental breach of the contract, and therefore entitles the buyer to avoid the contract if they so choose.

Such suggestions will undoubtedly remedy one of the issues with respect to the ambiguity of the CISG's fundamental breach provisions. Such a remedy, however, is quite strict (like the perfect tender rule), and may not be necessary. For example, American domestic courts have dealt with vague concepts such as —'substantial' and —'reasonable' for hundreds of years. How successful such dealings have been may be debatable, yet the fact remains that such concepts remain a staple part of our legal system; what would a tort lawyer do without the omnipresent concept of reasonableness? That being said, one must not forget the context in which such terms are being applied. The CISG applies to contracts for the international sale of goods. While tort law benefits from the doctrine of *stare decisis* in each individual state, the same may not be said for the CISG. While the different articles of the Convention largely remain the same for the different contracting parties, they are interpreted and applied by courts of an individual contracting party not an international body or tribunal set up to adjudicate matters arising under the CISG. Thus, even if one nation were to establish such a

presumption as outlined above, the applicability of such a presumption to another nation's court is lacking. The only way for this presumption to work, unlike domestic state's tort law, is to amend the CISG, and then have both contracting parties sign on to the amendment. Considerations must be taken into account in the international law context. Without an amendment to the CISG, it seems as though contracting parties will be left to their own devices in navigating the legal uncertainty and unpredictability created by the doctrine of fundamental breach.

B. Structure and plain language

The structure and plain language of Article 25 leaves one grasping for air in its interpretation. As scholars have noted, the attempt of the CISG drafters to reconcile the dichotomy between common and civil law created some problems as to the drafting technique of the Convention, of which Article 25 is an example. Looking at the structure of Article 25, readers will quickly find themselves in a provision containing different conditions, exceptions and affirmative statements, all within the same sentence. As Professor Grebler has so succinctly stated:

“The structure of the proviso contains an affirmative qualifying statement (A breach of contract committed by one of the parties is fundamental), followed by a condition (if it results in such detriment to the other party), which is subject to another condition of relative content (as substantially to deprive him), followed by an unspecified object (of what he is entitled to expect under the contract), followed by an exception (unless the party in breach did not foresee), finally accompanied by another negative exception (and a reasonable person of the same kind in the same circumstances would not have foreseen such a result).

Thus, as can be seen by Article 25's structure alone, the interpretation of the provision itself is a literary minefield. At first sight, this provision can be incredibly intimidating due to its relatively unique language and structure. In addition to the structure of Article 25, the plain language of the provision is also very difficult to interpret. Courts of different countries have attempted to supply some legal certainty to the doctrine, but, as discussed, their attempts have largely led to even more ambiguity. Substantively, the concept of fundamental breach depends upon the concept of substantial deprivation, but the Convention does not provide a definition of the latter. Because of this, the reader is left without a benchmark as to the extent of deprivation required to constitute a fundamental breach.

Moreover, the language of the section dealing with what (the party) is entitled to expect under the contract can also be confusing. Initially, this statement deals with the deprivation of what the party is entitled to, rather than what the breaching party promised to deliver under the contract. By doing this, the drafters of the CISG “shifted the focus of the dispute, as the interpreter must (now) decide on what the aggrieved party had the right to expect from the contract, instead of deciding on whether or not the contractual obligation was complied with by the party in breach.” Additionally, the last part of Article 25 subjects the doctrine of fundamental breach to the foreseeability of such breach. A breach will not be fundamental if the breaching party did not foresee, or a reasonable person of the same kind in the same circumstances would not have foreseen, the result of their breach. So, a non-breaching party can be substantially deprived of what he or she was entitled to expect under the contract, yet it still may not be a fundamental breach if the party in breach shows that it did not foresee, and a reasonable person of the same kind in the same circumstances would not foresee, such a result.

CISG advantages

The CISG actively favours the performance of the contract as far as possible, and thus limits avoidance to exceptional cases of “fundamental breach”. It attempts to preserve the parties’ commitments and . . . favour the performance of their agreement and completion of the bargain, thus relying on a general principle of *favor contractus*. The reason for this treatment is undoubtedly financial; when dealing with an international transaction—especially one involving the sale of goods—costs of the transaction can easily skyrocket. Professor Grebler, “the rationale adopted by the Convention drafters was that the avoidance of a transaction between parties located in different countries is economically inefficient, given that the goods have to be re-exported from one country to the other.

The drafters of the CISG wanted to curtail these potential problems as best they could, and thus ended up with a doctrine that greatly favours keeping the contract intact. Limitations such as the fundamental breach rule —help to contain the number of cases in which the damaged party may take advantage of the defaulting party’s breach in order to revise an agreement based on a specific economic situation or to shift the risk of a change in the market conditions to the other party. Accordingly, the CISG —ensures the performance of the contract despite a (non-fundamental) breach to avoid considerable unnecessary and unproductive costs, such as those associated with the return or storage of the goods. And, as stated earlier, these unnecessary and unproductive costs, when considered in the context of an international sale of goods transaction, can be extremely high.

A quick comparison to the perfect tender rule will reveal why the UCC’s approach would fail to effectuate the goals of the CISG. In its most basic form, if the perfect tender rule were to apply to contracts subject to the CISG, parties would be able to avoid the contract for relatively minor—when compared to what is needed for a fundamental breach—defects or non-conformities. Because the perfect tender rule lacks any emphasis on *favor contractus*, the CISG’s intention of favouring the contract and preserving the parties’ commitments in all but the most exceptional cases is lost.

The UCC:

Disadvantages

The biggest disadvantage of the UCC’s perfect tender rule is that it subjects the seller to the will of the buyer regarding any non-conforming tender. This, of course, is qualified by the obligation of good faith on the part of the buyer. Yet, any non-conformity of the goods, before acceptance, will permit the buyer to reject the goods tendered. This is quite unlike the CISG rule which requires the much more stringent standard of fundamental breach before a buyer may avoid the contract.

As can be seen, the perfect tender rule does not place the same emphasis on preserving the contractual obligations of the parties as the fundamental breach rule. Many have commented on the strictness of this rule, yet it remains a fundamental piece of the Code. Indeed, in the course of the most recent revision of the UCC, there was great discussion as to whether the perfect tender rule should be replaced with a requirement that would permit rejection only if non-conformity substantially impairs the value of the performance to the buyer. Such a suggestion would seem push the UCC in the direction of the CISG’s emphasis on the

preservation of the contract. However, —ultimately, a majority of the Study Group recommended that the perfect tender rule remain the standard. Thus, the UCC is left with the perfect tender rule, and sellers are subject to the will of a buyer with respect to any non-conformity of the goods tendered.

Advantages

While some may view the strictness of the perfect tender rule as a detriment, it is really its greatest advantage. This strictness provides the legal certainty and predictability that the CISG's fundamental breach rule lacks. Now, to reject goods (or avoid the contract in CISG terms), a buyer must simply make a good faith showing that the goods tendered do not conform to the contract entered into; there is no need to get into all the ambiguity which accompanies a fundamental breach analysis. Furthermore, such a rule reduces the domestic costs associated with a transaction of goods and promotes efficiency.

Conclusion

The CISG's fundamental breach rule and the UCC's perfect tender rule are similar, yet different in many respects. Both doctrines deal with similar situations and will ultimately get a buyer to the same end result. That being said, the prerequisites which must be fulfilled before a buyer may avoid a contract under the CISG are very different from those which must be fulfilled to reject under the UCC. In comparison, the perfect tender rule is much stricter in its application than the fundamental breach rule. Whether a fundamental breach has occurred is subject to much interpretation, and one is hard pressed to give a confident answer when asked. The doctrine of fundamental breach is replete with legal uncertainty and unpredictability.

Moreover, case law interpreting the doctrine has only added to the ambiguity, thus making it nearly impossible for any interpreter to confidently answer the seemingly basic question of whether a contract for the international sale of goods has been fundamentally breached. Yet, despite these facially disastrous shortcomings, when one considers the context in which the CISG applies, it can be seen why such ambiguity exists.

One of the main goals of the CISG is the preservation of the contract and the parties' obligations. Accordingly, the doctrine of fundamental breach makes it extraordinarily difficult to avoid the contract, and saves such a remedy for the most exceptional cases. Thus we are left with an incredibly unpredictable and uncertain doctrine by which the courts have done little to make any clearer. It seems as though the goal of contract preservation has outweighed the desire for any bright line rules, and maybe rightly so when considering the international context in which these cases are decided.

9. WRITE A SHORT NOTE ON UNCISG?

There are a number of conventions which relate to the international sale of goods including the United Nations Convention on the Limitation Period in the International Sale of Goods 1974, the International Institute for the Unification of Private Law (UNIDROIT) Convention on Agency in the International Sale of Goods 1983, and the United Nations Commission on

International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services 1994.

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) is the main convention for the International Sale of Goods. The CISG is an international set of rules designed to provide clarity to most international sales transactions involving the sale of goods. The CISG went into effect on January 1, 1988, with the United States as a party. Most Western countries are now signatories to the CISG. The CISG can be both a discretionary and mandatory set of rules. It is discretionary when both parties agree to be bound by its rules; it has mandatory application when the parties do not choose to use it but become bound to it by virtue of its automatic application. As a result of the mandatory application of the CISG, most international sale of goods contracts with parties in western countries will be subject to the CISG, unless specifically excluded in accordance with the CISG's terms.

The purpose of the CISG is to make it easier and more economical to buy and sell raw materials, commodities and manufactured goods in international commerce. Without the Convention, there is greater room for uncertainty and disputes. The trading law of one country often differs from that of another. In international transactions, there is often doubt about which nation's law is in control. Where there is doubt about the rules that apply, the parties cannot be sure of their rights and obligations. Such uncertainty breeds inefficiency and mistrust.

The CISG does not deprive parties to the contract of the freedom to form their contracts to their specifications. Generally, the parties are free to modify the rules established by the Convention or to agree that the Convention is not to apply at all.

Domestic law also affects the International Sale of Goods provided that no inconsistency arises between the application of these domestic laws and the performance of the country's obligations under any international conventions: See *Williams v The Society of Lloyd's* and *Hi-Fert Pty ltd v Kiukiang Maritime Carriers Inc.*

10. WRITE A SHORT NOTE ON PCIA?

PCA is an intergovernmental organization established by treaty at the First Hague Peace Conference, Netherland in 1899. It is not a court in the traditional sense, but a permanent framework for arbitral tribunals constituted to resolve specific disputes. PCA seeks to facilitate arbitration and other forms of dispute resolution involving various combinations of states, state entities, international organizations and private parties.

It was the first permanent intergovernmental organization that provided a forum for the resolution of international disputes through arbitration and other peaceful means. The Permanent Court of Arbitration is the oldest global institution for the settlement of international disputes. The Court offers a wide range of services for the resolution of international disputes which the parties concerned have expressly agreed to submit for resolution under its auspices.

The PCA is not a court, but rather an organizer of arbitral tribunals to resolve conflicts between member states, international organizations, or private parties. The PCA also administers cases under the arbitration rules of the UNCITRAL.

What are the matters generally includes in the PCA?

It is not a court and does not have permanent judges. The PCA is a permanent bureaucracy that assists temporary tribunals to resolve disputes among states (and similar entities), intergovernmental organizations, or even private parties arising out of international agreements.

The cases span a range of legal issues involving territorial and maritime boundaries, sovereignty, human rights, international investment, and international and regional trade.

What are the methods to solve the case?

The sessions of the Permanent Court of Arbitration are held in private and are confidential. The Court also provides arbitration in disputes between international organizations and between states and international organizations.

All decisions, called "awards" are binding on all the parties in the dispute and have to be carried out without delay. There are some post-award proceedings available to parties unhappy with the tribunal's decision, but they are limited, particularly in inter-state disputes.

Who are members of PCA?

Parties to the Convention on the Pacific Settlement of disputes of 1899 (71 member states) and 1907 (101 member states) are automatically parties to the PCA. As 51 are parties to both conventions, the PCA has 121 member states: 119 members of the United Nations, as well as Kosovo and Palestine.

India is a party of the PCA according to the Hague Convention on 1899.

Which are the important cases related to India in PCA?

• **An Italian marine accused of killing two Indian fishermen:**

Two Italian marines — Massimiliano Latorre and Mr. Girone are facing the charge of murdering 2 Indian fishermen in 2012 off the Kerala coast. The fishermen were killed when the marines on duty aboard MV Enrica Lexie, an Italian-flagged oil tanker, fired at them. The order is binding for both countries as there is no appeal process in the UN tribunal. For his return to his homeland, the tribunal has suggested conditions such as Girone surrendering his passport so that he doesn't travel abroad and reporting his presence to an Italian authority designated by the Indian top court.

• **Rules against “Antrix”:**

In 2005, the Indian Space Research Organisation's (ISRO) commercial arm Antrix Corporation entered into an agreement with Devas to lease out satellite spectrum which the Bangalore-based company could use to provide high-quality telephony and Internet services. The deal involved Antrix committing to manufacturing and launching two ISRO satellites and then leasing nearly 70 MHz of S-band satellite spectrum to Devas for a period of 12 years. In return, Devas committed to paying upfront fees of a little over \$30 million. In 2011 however, a leaked draft audit report noted that there were potentially a number of irregularities in the agreement including conflict of interest, favouritism, financial mismanagement and non-compliance of standard operating procedures.

An international tribunal in The Hague has ruled against the Indian government over the cancellation of a contract between telecommunications firm Devas Multimedia and Antrix Corporation Ltd., in a decision that could cost the Centre billions of dollars in damages.

11. WRITE A NOTE ON ICSID?

International Centre for Settlement of Investment Disputes (ICSID)

- ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment.
- States have agreed on ICSID as a forum for investor-State dispute settlement in most **international investment treaties** and in numerous **investment laws and contracts**.
- Bilateral investment treaties (BITs) are proliferating, many such treaties contain text that refers present and future investment disputes to the ICSID.
- ICSID provides for settlement of disputes by conciliation, arbitration or fact-finding.
- Governance of ICSID

Administrative Council:

- One representative of each Member State, and one vote per State.
- Adopts ICSID arbitration, conciliation and fact-finding rules.
- Adopts an annual budget and approves annual report.
- **Elects Secretary-General and Deputy Secretaries-General.**
- Each State designates persons to a list of arbitrators and conciliators.

Secretariat:

- Led by Secretary-General. Provides technical and administrative support to proceedings.
- Offers training and technical assistance to governments and the public.
- Contributes to the development of investment law through publishing and outreach.

ICSID Panel of Arbitrators and Panel of Conciliators:

- Each ICSID Member State may designate four persons to each Panel.
- **Conciliation Commission or Arbitral Tribunal:** an Arbitral tribunal or Conciliation Commission is constituted by Secretary-General. In most instances, the tribunals consist

of **three arbitrators**: one appointed by **the investor**, another appointed by **the State**, and the third, **presiding arbitrator** appointed by **agreement of both parties**.

- Each case is considered by an **independent Conciliation Commission** or **Arbitral Tribunal**, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process.
- An ICSID award according to **Article 53 of the ICSID Convention** is final and binding and immune from appeal or annulment, other than as provided in the ICSID Convention.

International Arbitration Court (ICSID) has imposed over \$5 billion penalty on Pakistan for unlawful denial of a mining lease to a company called Tethyan Copper Company for Reko Diq project in 2011. This penalty on cash-strapped Pakistan is one of the biggest in its history.

About:

The Tethyan Copper Company (TCC) had filed claims for international arbitration before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) in 2012 after the Balochistan government rejected a leasing request from the company.

The company had claimed 11.43 billion dollars in damages. The case between the Pakistan government and the company continued for seven years.

The Reko Diq mine in Balochistan province of Pakistan is famous for its vast gold and copper reserves.

12. DISCUSS RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN INDIA?

The Arbitration and Conciliation Act 1996 (hereinafter referred to as The Act) specifically provides for the manner in which a Foreign Award is to be dealt with for the purposes of its enforcement. The Act of 1940 had no such provision.

The primary framework as regards the enforcement of arbitral awards is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also

known as the New York Convention. The Convention facilitates the enforcement of arbitral awards in all the contracting states, that is, those nations which are a party to and are signatories to the Convention, one among which is India. Prior to the New York Convention, enforcement of arbitral awards of another country in the jurisdiction of another State was provided for in the Geneva Protocol on Arbitration Clauses, 1924 as well as the Geneva Convention on the Enforcement of Awards of 1927.

The Foreign Awards are to be dealt with separately under the New York Convention and the Geneva Convention both of which are dealt with under Chapter I and II of Part II of the Act.

According to Section 44 of Chapter I of the Arbitration and Conciliation Act 1996, Foreign Awards means an arbitral Award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after 11th October 1960 in pursuance of an Agreement in writing for Arbitration. The Award has to be passed in one such territory with which India has a reciprocal treaty. Similar conditions are specified under Section 53 for the Geneva Convention Awards. The said Awards can be executed as if it was a decree passed by the Civil Court of original jurisdiction in India as envisaged under Section 36 of the Act. For execution of the Award the format laid down in Order 21 Rule 11 (2) of the Code of civil Procedure 1908 for execution of decree is required to be followed.

Under Section 48, the Executing Court shall enforce the Award only after it is satisfied that the parties were not under some incapacity, were given proper notice and that the disputes submitted to arbitration were not beyond the scope of Arbitration Agreement. Section 57 lays down some more conditions while dealing with the Geneva Convention Award, that the Executing Court shall enforce the Award only after it is satisfied that the conditions are fulfilled.

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject- matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) The enforcement of the award is not contrary to the public policy or the law of India. Without prejudice to the generality of clause an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

The Party enforcing the Award has to show beyond doubt that the Award has become final in the country in which it was passed.

However, for Awards falling under both the conventions some rules are generally applicable, one of them being that there is no need to take out separate proceedings in the nature of an application for seeking an order from the Court that the Foreign Award can be enforced as a decree of the court and a separate one for execution. The Hon'ble Supreme Court in the case of M/s Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. AIR 2001 SC 2293 observed that In our opinion, for enforcement of foreign Award there is no need to take separate proceedings , one for deciding the enforceability of the Award to make rule of the Court or decree and the other to take up execution thereafter. In one proceeding , as already above, the Court enforcing the Foreign Award can deal with the entire matter.

In the case of Noy Velessina Engineering Spa Vs. Jindal Drugs Ltd., 2006 Bom CR 155, the Hon'ble Court while considering the observations of the Hon'ble Supreme Court in the case of M/s Fuerst Day Lawson held that From the observations of the Supreme Court quoted above , it is clear that it is not necessary for the person who has foreign Award in his favour to apply for recognition of the Award by the Court separately, he could make application for execution of the Award and in that Application a request for inquiry by the Court as required by the statute to find out whether the Award is enforceable is implicit and the Court in that

application can make an inquiry as to the enforceability of the Award and the Court after recording its satisfaction that the Award is enforceable can proceed to execute that Award as if the Award is a decree made by that Court.

No notice is required to be issued to the Judgement Debtor in case the execution /enforcement has been proceeded with within 2 years of the passing of the Award in terms of Order 21 Rule 22 Code of Civil Procedure.

For the New York Convention Awards, incorporated in Section 48 (2) of the Act, enforcement of Arbitral Award may be refused on two grounds:

- a) That the subject matter of the difference is not capable of settlement by Arbitration under the law of India, or
- b) The enforcement of the Award would be contrary to the public policy of India, which means that the making of the Award was induced by fraud or corruption

As per Section 57 (2) of the Act, for the Geneva Convention Awards, the executing Court may refuse to enforce the Award in case:

- a) the award has been annulled in the country in which it was made, or
- b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or
- c) that, being under a legal incapacity, he was not properly represented or
- d) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration,

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such

guarantee as the Court may decide.

The Courts can though intervene only to limited extents as stated above and shall not be entitled to go into the merits of the case as the same has not been provided in the scheme of the Act. Some recent judgements as that of ONGC Vs. Saw Pipes (AIR 2003 SC 2629) have held that the Award can be challenged only in case it is contrary to the Public Policy of India which would mean that the Award is against the

- (a) fundamental policy of Indian law;
- (b) the interest of India; or
- (c) justice or morality, or
- (d) if it is patently illegal.

In case of a refusal for enforcement an appeal would lie only to the Supreme Court under Article 136 on very limited grounds. This means that no appeal shall lie if the Executing Court approves of the enforcement. Such decisions by the Courts to limit intervention while executing Foreign Awards and scheme of the Act to make foreign Awards enforceable without much glitches only goes on to affirm what Lord Mustill & Stewart C. Stated in Boyd QC's "Commercial Arbitration" 2001

"Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the convention assumes that they will trust, the supervising authorities of the chosen venue.

Therefore for filing of execution for enforcement of foreign Awards passed in a Country with which India has a reciprocal treaty, the procedure is as follows:

File an execution application in the format provided for under the Code of Civil Procedure before the Court of competent Pecuniary jurisdiction

Accompany the same with the certified authenticated copy of the Award. An English translation would be required in case it is in some other language

An application/affidavit required to be filed along with the Execution Application seeking the executing Court to certify that the Award is enforceable in India

Once the Court certifies and is satisfied that the Award is enforceable in India, it shall make the Award a decree of the Court and shall issue warrants of attachment/execution

In cases of execution of such Awards which are not passed in Countries with whom India has a reciprocal treaty, the Award has to be filed as a regular civil suit and the proceedings would be the same as are applicable to a civil suit filed in India.

13. DISCUSS THE METHODS OF INTERNATIONAL PAYEMENTS SYSTEM?

The main international payment methods used around the world today include:

- Cash in Advance
- Letters of Credit
- Documentary Collections
- Open Account
- Consignment

Cash in Advance

Also known as pre-payments, cash in advance is as it sounds. The buyer completes the payment and pays the seller in full before the merchandise is delivered and shipped off to the buyer.

While there are plenty of cash in advance payment methods available, credit card payment and wire transfers (electronic payment via banks) are the more commonly used payment modes.

While this is an attractive option for sellers, it's presents a significantly high risk for buyers as it produces a disadvantageous cash flow and no definite guarantee of receiving the goods or the condition in which they arrive.

This is generally a recommended option for sellers who are dealing with new buyers or buyers with weak credit ratings, and/or for high-valued products.

Other cash in advance methods include:

- Debit card payment
- Telegraphic transfer
- International cheque
- etc.

Pros and Cons of Cash in Advance

	Pros	Cons
Buyer	→ Minimal	→ Risk of not receiving shipment or receiving damaged shipment → Unfavorable cash flow
Seller	→ Secure full payment before shipment → No risk of non-payment	→ Risk of losing business to competitors if offering this as the only accepted international payment method

Letters of Credit

A Letter of Credit is one of the most secure international payment methods for the importer and exporter as it involves the assistance of established financial institutions such as banks as an intermediary and a certain level of commitment from both parties.

With a Letter of Credit, payment is made through both the buyer and sellers' banks. Upon confirmation of trade terms and conditions, the buyer instructs his bank to pay the agreed-upon sum by both parties to the seller's bank. The buyer's bank then sends a Letter of Credit as proof of sufficient and legit funds to the seller's bank. Payment is only remitted after all stated conditions are met by both parties and shipment has been shipped.

Letters of Credit are also sometimes known as LC, bankers commercial credit or documentary credit.

Pros and Cons of Letters of Credit

	Pros	Cons
Buyer	<ul style="list-style-type: none"> → Guarantee of cargo being shipped before payment → Obligation by seller to fulfill stated and negotiated conditions 	<ul style="list-style-type: none"> → Reliance on seller to ship goods as specified
Seller	<ul style="list-style-type: none"> → Reliable proof of foreign buyers' credit prior to shipment of goods → Obligation by buyer to fulfill stated and negotiated conditions → Payment by buyer's bank in the event of a default → Low risk 	<ul style="list-style-type: none"> → Minimal

Documentary Collections

Documentary collections is a process in which both the buyer's and seller's banks act as facilitators of the trade.

The seller submits documents needed by the buyer, such as the [Bill of Lading](#), which is necessary for the transfer of title to the goods, to its bank. The seller's bank will then send these documents to the buyer's bank along with payment instructions. The documents are only released in exchange for payment, which is remitted immediately or at a specified date in the future.

With documentary collections, also known as Bills of Exchange, the seller is basically handing over the responsibility of payment collection to his bank.

Pros and Cons of Documentary Collections

	Pros	Cons
Buyer	→ More economical than Letters of Credit	→ Reliance on seller to ship goods as specified
Seller	→ Minimal	→ No verification involved → No guarantee of payment from bank → No protection against cancellations

Open Account

Under Open Accounts (also known as Accounts Payable), merchandise are shipped and delivered prior to payment, proving to be an extremely attractive option for buyers especially in terms of cash flow. On the other end of the spectrum, however, sellers are faced with high risks.

With this payment option, the seller ships the goods to the buyers with a credit period attached. This is usually in 30-, 60-, or 90-day periods, during which the buyer must carry out full payment.

Open Accounts are usually only recommended for trustworthy and reputable buyers, for buyers and sellers who have an established and trusting relationship, and/or for exports with relatively lower value to minimize risk.

Pros and Cons of Open Account

	Pros	Cons
Buyer	<ul style="list-style-type: none"> → Receives goods before payment is due → Positive cash flow 	→ Minimal
Seller	→ Can attract customers in competitive markets	→ High risk of default

Consignment

The consignment process is similar to that of an open account whereby payment is only completed after the receipt of merchandise by the buyer.

The difference lies in the point of payment. With consignment, the foreign buyer is only obliged to fulfill payment after having sold the merchandise to the end consumer. This international payment method is based on an agreement under which the foreign seller retains ownership of the merchandise until it has been sold. In exchange, the buyer is responsible for the management and sale of the merchandise to the end customer.

Consignment is usually only recommended for buyers and sellers with a trusting relationship or reputable distributors and providers. Given the high risk involved, sellers should make sure they have adequate insurance coverage that can cover both the goods from transit to final sale and mitigate any damages caused in the event of non-payment by the buyer.

Pros and Cons of Consignment

	Pros	Cons
Buyer	→ Payment is due only after final sale of goods to end consumer → Quick receipt of goods	→ May have large inventory to manage → Minimal
Seller	→ Lower storage fees → Less inventory management → More competitive	→ Payment not guaranteed until end sale → Lack of access to and management of merchandise

14. DIFFERENCE BETWEEN AD HOC AND INSTITUTIONAL ARBITRATION?

In India, arbitration proceedings are of two types: ad-hoc arbitration and institutional arbitration. The parties have the option to seek recourse to either of them depending on their choice and convenience. **Ad-hoc arbitration:**

It refers to an arbitration where the procedure is either agreed upon by the parties or in the absence of an agreement, the procedure is laid down by the arbitral tribunal. Thus, it is an arbitration agreed to and arranged by the parties themselves without seeking the help of any arbitral institution. In Ad-hoc arbitration, if the parties are not able to nominate arbitrator/arbitrators by consent, the appointment of arbitrator is made by the High Court (in case of domestic arbitration) and by the Supreme Court (in case of international commercial arbitration). In India, still most of the arbitrations are Ad-Hoc Arbitrations.

Institutional arbitration:

In an institutional arbitration, the arbitration agreement may stipulate that in case of dispute or differences arising between the parties, they will be referred to a particular institution such as:

- Indian Council of Arbitration(ICA)
- International Chamber of Commerce(ICC)
- Federation of Indian Chamber of Commerce & Industry(FICCI)
- World Intellectual Property Organisation(WIPO)
- The International Centre for Alternative Dispute Resolution(ICADR)
- London Court of International Arbitration(LCIA)

All these institutions have framed their

own rules of arbitration which would be applicable to arbitral proceedings conducted by these institutions. Such rules supplement provisions of the Arbitration Act in matters of procedure and other details as the Act permits. They may provide for domestic arbitration or for international commercial arbitration or both and the disputes dealt with by them may be general or specific in nature. Arbitration Ad-hoc Institutional Abhishek Kumar Associate Partner Email: abhishek@singhaniania.in The Indian Council of Arbitration, being the apex body in arbitration matters in the country, has handled the largest number of international cases in India. The Arbitral Institutions have fixed arbitrator's fees, administrative expenses, qualified arbitration panel, rules governing the arbitration proceedings etc., which help in the smooth and orderly conduct of arbitration proceedings.

Some of the prominent institutions which conduct institutional arbitration in India are:

1. Delhi International Arbitration Centre (DIAC) – New Delhi
2. Indian Council of Arbitration (ICA) – New Delhi
3. Construction Industry Arbitration Council (CIAC)- New Delhi
4. LCIA India – New Delhi 5. International Centre for Alternative Dispute Resolution (ICDAR) – New Delhi
6. ICC Council of Arbitration – Kolkata

14. WHAT IS MEDIATION? EXPLAIN THE DIFFERENT MODELS OF MEDIATION? WHAT ARE THE ADVANTAGE AND DISADVANTAGE OF MEDIATION?

An Alternative Dispute Resolution is an outcome of all such problems which are facing by the public constantly in the litigation. It is like a substitute to the traditional method of resolving dispute and justice. An ADR mechanism mainly focuses on delivering justice through mutual consent of the parties in the minimum time without any delay like in litigation. An ADR mechanism recognized four methods to resolve any dispute such as arbitration, conciliation, mediation and negotiation. Alternative methods are work on the mutual consensus and try to settle dispute with as early as practicable. ADR mechanism is an option to the public who don't want to go for conventional method or want to resolve their

matter without courts interference. These mechanisms have their own advantage as well as flaws, like any other process have might do.

Yet, particularly in the context of mediation, it needs emphasis that this is only one of the important objectives. Mediation as a processual intervention in the legal system fulfills other instrumental and intrinsic functions which are of an equal, if not greater importance. In its instrumental function, mediation is a means to fulfilling stated objectives. The intrinsic function of mediation emphasizes the value of mediation as an end in itself.

It is a non-binding procedure in which an impartial third party, the conciliator or mediator, assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute. Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator.

Principles of the mediation

Every process of ADR mechanism has its own basic principles on which it's work and giving positive outcomes. Like as other process mediation has its own fundamental principles which are helpful in settling disputes between the parties on their mutual consensus. Parties choose mediation process over litigation may be because of these principles which have given effective way to the process. Mediation usually has seen in the family matters or any neighboring issues which could be resolve by mediation process rather than go to court for justice.

In generally there are 5 basic principles usually seen in the mediation process and it should be followed strictly by the mediator as well as the parties for an effective outcome. Five basic principles of mediation process are as follows:-

Parties should participate voluntarily

It is necessary that no one should forced to mediate, it should be in the hands of parties and they have to decide whether they want to mediate or go to the courts. Parties have their voluntary participation in the mediation process. it is going to be more fruitful.

People will cooperate more fully if they know they are free to leave at any point. This engages their own free will and sense of purpose and enables them to drive the process towards agreement rather than to be led to an understanding by a third party. If they drive the process they are more committed to the outcome.

Confidentiality matters in the process

Within the mediation itself the mediator must not divulge any confidences that are shared with them unless given permission to do so. Unless someone shares a criminal intent or act that involves harm to self or other.

- In respect of further proceedings (except with the express permission of both sides)
- In order for people to feel safe to explore their fears and anxieties the process must be perceived to be entirely confidential.

All the information given in the mediation shall be kept confidential and it cannot be used in the court proceedings neither by the mediators nor court can ask why the mediation did not work.

Mediators are impartial

The mediator must act impartially and neutrally. He/she should observe all principles of mediation and consider only matters of procedure. He/she should not comment, value judgments, nor give advice or suggesting solutions. Impartiality of a mediator should ensure that the parties accept him/her as a person who is sincerely dedicated to resolving the dispute and who favors both sides in the dispute, seeking solutions that would satisfy both sides in the dispute. The mediator must keep in mind that his/her behavior, attitude, and sometimes the techniques of mediation can bring a sense of sympathy towards one side. When that happens, then the mediation went the wrong way. The mediator cannot perform the function if there are circumstances that indicate doubts about his impartiality and objectivity.

An agreement has to be settled with the satisfaction of parties concerned

The responsibility for defining the problem, setting the agenda and agreeing the solution rests with the people in the dispute. The mediation procedure can be started only if there is an agreement between the parties. Mediation will not be started without both parties intending to resolve the dispute. In such cases, mediation is misused only as a mean of withholding the court process and keeping the situation at the “status quo”.

A mediator needs to know how to explain the advantages of such dispute resolution to the parties, so that they themselves voluntarily agree to be part of such process. The parties should be informed on the possibility to interrupt the mediation process at any stage, if they express need for such. The principle of willingness applies at all stages of the proceedings. A party or the mediator may at any time withdraw and then transfer the case to the judge.

A mediator can interrupt mediation if he/she feels that parties turn away from the solution or that are even more opposed than they were at the start of mediation. The basic principle in the process of mediation is that the mediation procedure should not harm the parties in any way, but to contribute to the resolution of their dispute.

Given that mediation is only a supplement to the court proceedings, it must not prevent a party from exercising the right of access to court and use of judicial protection.

Mediation is without prejudice to other procedures

It is important that people reserve the right to invoke other measures. If the mediation were seen as an enforced procedure or one that removes an individual’s rights it would constrict the creativity and increases the potential for resistance.

Mediation is an effective ADR mechanism can be seen by these 4 benefits of the process such as

1. **Informality** – No court rules or legal precedents are involved in mediation. The mediator does not impose a decision upon the parties. As opposed to adversarial forums, the mediator helps to maintain a business like approach to resolving a dispute. There are no fixed solutions in mediation. Parties can look to developing

creative solutions to resolve matters and the solution rests with the parties themselves.

2. **Privacy and confidentiality** – The mediation conference takes place in a private setting such as a conference room at any of the Arbitration Associations. Mediation is not a matter of public record. Its confidentiality is maintained.
3. **Time and cost savings** – Mediation generally lasts a day. Complex matters may require more time due to highly technical issue and/ or multiple parties. Without the formalities found in litigation, mediation usually results in substantial costs savings.
4. **Control** – Parties have control over their participation in mediation. A party can decide to terminate their participation at any point in mediation. Mediators help parties maintain control over the negotiation that takes place.

MODELS OF MEDIATION

FACILITATIVE MEDIATION

One of the key factors in mediation models is the notion of decision making. In facilitative mediation, any decision making is left to those involved, the mediator has no decision making authority. This is based on the belief that the people involved in the situation have the best understanding of what they need for themselves and from each other. Facilitative mediation helps parties in a conflict make their own decisions, in the belief that such decision will have the best fit and therefore be highly sustainable. The mediator offers a structured process for the parties to make best use of in seeking mutually satisfactory solutions. The process consists of private, individual session first before being brought together for a joint session. This approach is ideally suited to relationship situations such as conflicts in the workplace, community, within families or with clients through complaints resolution where a win-win solution is needed in order to maintain and strengthen relationships.

EVALUATIVE MEDIATION

Evaluative mediators are usually legal practitioners, often with an expertise in a particular area of law relevant to the conflict. They will provide the parties with an evaluation of the strengths and weaknesses of their case with respect to their legal positions. If asked they may also advise as to a likely outcome at court. They may also offer direction towards settlement options. There is a strong drive towards equitable settlement as an efficient and economic alternative to legal measures. The process consists of opening statements in a joint session and then parties are separated for the day and the majority of work is done in side meetings. This approach is suited to business and contract disputes where there is no ongoing relationship and a compromise is sought. This approach is not suited to relationship issues such as workplace, community and complaints resolution where face to face communication is required and compromise is a limiting goal.

TRANSFORMATIVE MEDIATION

Transformative mediation is a much less structured approach that focuses on two key interpersonal processes – empowerment and recognition. A transformative mediator aims to empower the parties involved to make their own decisions and take their own actions. They also work to foster and develop recognition for and between the parties. This is an organic process and highly responsive to the parties needs. The parties are very much in charge of both the content (the substantive issues) and the process, and the mediator works to support both as their conflict unfolds and their relationship changes and strengthens.

NARRATIVE MEDIATION

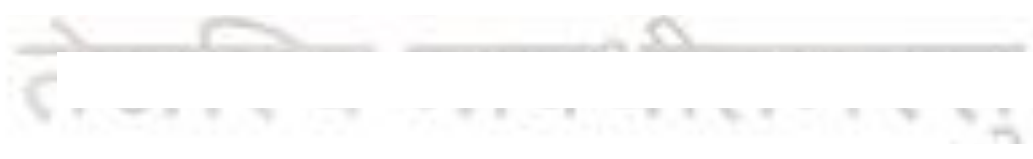
Narrative mediation takes a very different stance to conflict. Focusing less on negotiation and more on how people make sense of the world. By telling stories of events and by giving meaning to these events people construct their own reality. People in conflict will tell conflict stories that help them make sense of the situation, the other person and themselves. Conflict stories can be limiting and paralysing. Narrative mediators believe that for every conflict story there is an alternative story that can make co-operation and trust more available. Narrative mediators help parties rewrite new and more constructive stories.

ADVANTAGE OF MEDIATION

1. *Mediation is relatively inexpensive.* Seeing a case through trial is an expensive proposition.
2. *Mediation is relatively swift.* There is no dearth of mediators ready and willing to assist parties whose goal is to try to settle a matter. A quick web search will result in hundreds of mediators and mediation websites, some specializing in certain types of cases and some more experienced and able than others. Mediation does not run by a clogged court schedule and sessions can be easily scheduled any time at the mutual convenience of the parties and the mediator and can take place in a variety of locations.
3. *Mediation is relatively simple.* There are no complex procedural or evidentiary rules which must be followed. While most would agree that a general rule of fairness applies, the maximum penalty a party can impose for foul play is to walk away from the mediation and take his chances in court.
4. *Mediation allows the parties to revise and adjust the scope of their conflict.* In a trial, initial pleadings and rules of procedure limit the issues which a party can raise. In mediation, as circumstances change so can the topics up for discussion. This increased flexibility makes it easier for negotiators to act as problem-solvers instead of adversaries.
5. *Mediation allows for flexible solutions and settlements.* The relief available in court is usually based on pecuniary damages, and equitable relief is hard to come by. In mediation, however, the parties can agree to a settlement requiring, or restraining, action by one party which was not originally envisioned as something beneficial to the other party.
6. *Settlements reached in mediation are more agreeable to both parties than court judgments.* Because any settlement arrived at through negotiation is necessarily agreed to voluntarily by both parties, obligations under the agreement are more likely to be fulfilled than obligations imposed by a court.

Disadvantages of mediation.

1. *Mediation does not always result in a settlement agreement.* Parties might spend their time and money in mediation only to find that they must have their case settled for them by a court. Opting for mediation, therefore, presents something of a risk. Further, if mediation fails, much of a party's "ammunition" might have already been exposed to the opposing party, thereby becoming far less useful in the ensuing trial.
2. *Mediation lacks the procedural and constitutional protections guaranteed by the federal and state courts.* The lack of formality in mediation could be a benefit, as noted above, or a detriment. Mediation between parties of disparate levels of sophistication and power, and who have disparate amounts of resources available, might result in an inequitable settlement as the less-well positioned party is overwhelmed and unprotected.
3. *Legal precedent cannot be set in mediation.* Many discrimination cases, among others, are brought with the intention of not only securing satisfaction for the named plaintiff, but also with the hope of setting a new legal precedent which will have a broader social impact. These cases are only "successful" if a high court hands down a favorable decision on the main issue. Mediation is therefore not beneficial for such cases.
4. *Mediation has no formal discovery process.* If one of the parties to a dispute cannot fully address the case without first receiving information from the other party, there is no way to compel disclosure of such information. The party seeking disclosure must rely instead on the other party's good faith, which may or may not be enough.



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