

CS Professional
Paper - 2
Drafting, Appearances and Pleadings
December - 2012

Chapter - 3

2012 - Dec [1] {C} (a)

Answer:

Sir,

Sub : Dealership allotment to petroleum dealers of Andhra Pradesh.

Manufacturers, barring a very few, do not have their own retail sale outlets. They sell their products through a network of sole selling agents, distributors, dealers, co-operative stores, supper bazars, fair price shops etc. In this chain of sellers and distributors, dealer is a very important link.

1. He is not an agent to the manufacture as he functions in his own-independent capacity and not as an agent or a representative of the manufacture.
2. He purchases goods either against specific orders from the prospective consumers or keeps stock of goods of one or more manufacturers in anticipation of the sale orders.
3. The manufacturer extends to him certain facilities like the supply of goods on credit for an agreed period based on the custom in the market, capacity of the manufacturer, demand of the goods, quality image an goodwill of the goods and other relevant factors.

Both the manufacturer and the dealer enter into an agreement known as Dealership Agreement, which incorporates the important terms and conditions of their relationship so as to avoid any ambiguity and resultant dispute in order to maintain lasting cordial business relationship.

Elements of a Dealership Contract

Such an agreement or contract must be drawn in accordance with the provisions of the Indian Contract Act, 1872. All the essential ingredients of a contract, such as, a proposal, its acceptance, its due communication to the proposer, lawful consideration, lawful purpose and competence of parties to the contract etc. must be duly satisfied and ensured while drafting such contracts.

1. It is essential to ascertain not only the legal position or condition of each of the parties to the contract, e.g. an individual, a firm or partnership, a company, to contract.
2. The contract should clearly state the full names, addresses processes, should be sent, and capacities of each of the contracting parties and, in the case of firm, partnership or company the name or complete style of the firm, partnership or company, its legal status.
3. The date and place of its incorporation, Registered office, and so on.

In the title (or introductory part) of the contract, care should be taken clearly to state that it is a commercial agency or dealership contract, so as to avoid any doubt as regards the legal nature of the contract and the position of the parties

thereunder.

For M/s XYZ & Associates.

Sd/-

(Partner)

2012 - Dec [4] (iii)

Answer:

Arbitration agreements

The 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined relationship whether contractual or not.

1. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. It has to be in writing.
3. It is in writing if it is contained in a document signed by the parties, or in an exchange of letters, telex telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of agreement is alleged by one party and not denied by the other.

The important demands of the arbitration agreement is the consent in writing to submit dispute to arbitration. Consent in writing implies the application of mind to the reference of dispute to arbitration in accordance with Arbitration and Conciliation law and the binding nature of the award made thereunder.

Chapter - 4

2012 - Dec [4] (ii)

Answer:

Surrender of lease

Surrender of lease is not a transfer but mere yielding up by the lessee of his interest under the lease to the lessor by mutual agreement. It is in effect merger of the estate of the lessee into the reversion. It is not a transfer or an assignment of any right or estate within the meaning of Section 5 of the Transfer of Property Act (Makhanlal v. Nagendranath, (1933) 60 Cal 379). The person who surrenders is called the surrenderee. A surrender must be made with clear intention to yield up as mere non-payment of rent for year together or abandonment of the site does not amount to surrender (Misri Lal v. Durga Narain, AIR 1940 all. 317). A Requisition Order by the Government does not amount to any surrender (Torabai v. Padan Chand, 62 CWN 176). It may be expressed or implied. Except in a case of some special kinds of lease as required by special Act, no writing or registration is necessary. A surrender may be oral, if accompanied by delivery of possession.

2012 - Dec [5] (a)

Answer:

Please refer 2004 - June [6] (a) on page no. 2.90

Chapter - 5

2012 - Dec [4] (iv)

Answer:

Principles governing the construction of a power of attorney

The principles governing the construction of a power of attorney are:

- (1) the operative part of the deed is controlled by the recitals;
- (2) where an authority is given to do particular acts, following by general words, the general words are restricted to what is necessary for the performance of the particular acts;
- (3) a power of attorney is construed so as to include all incidental powers necessary for its effective execution.

2012 - Dec [7] (b) (i), (ii)

Answer:

- (i) 'Registration of partnership firm under the Income-tax Act, 1961' and 'registration of partnership firm under the Indian Partnership Act, 1932'

Registration of Partnership Firm

Registration of partnership firm has been made optional under the provisions of Section 58 of the Indian Partnership Act, 1932. Consequences of non-registration of a partnership firm are set out in Section 69 of the Partnership Act. An unregistered firm cannot enforce a right or claim arising out of a contract against any third party.

Registration of Partnership Firm under the Income-tax Law

Registration of partnership under the Income-tax Law is distinct from registration of firm under the Partnership Act. Rule 22 of Income-tax Rules, 1962 provides that an application for registration of partnership firm should be accompanied with an instrument of partnership specifying the apportionment of shares of profit and loss of the business amongst the partners of the firm. This registration is required to be renewed every year under the orders of the concerned Income-tax Officer.

- (ii) *Please refer 2007 - June [6] (a) (iii) on page no. 2.119*

2012 - Dec [8] (a)

Answer:

Please refer 2005 - Dec [5] (b) on page no. 2.129

Chapter - 6

2012 - Dec [3] (a)

Answer:

Please refer 2011 - June [7] (a) on page no. 2.173

- (b) According to Section 76(1) of the Companies Act, 1956 a company may pay a commission to any person who agrees to subscribe or procure subscription for an agreed number of shares or debentures of the company.

An 'underwriting agreement' is delivered to the Registrar at the time of filing of the draft prospectus or statement in lieu of prospectus with the Registrar. Once the terms of the 'underwriting agreement' are approved by the Registrar along with the draft prospectus or statement in lieu thereof the company enters into an 'underwriting contract' with the underwriters which is irrevocable on the part of the underwriters.

2012 - Dec [6] (a)

Answer:

Please refer 2009 - June [6] (i) on page no. 2.167

Chapter - 7

2012 - Dec [2] (a) (ii)

Answer:

Please refer 2010 - June [3] (a) on page no. 2.183

Chapter - 8

2012 - Dec [4] (i)

Answer:

Please refer 2005 - Dec [8] (a) on page no. 2.199

Chapter - 9

2012 - Dec [4] (v)

Answer:

Court craft

1. Company Secretaries act as an authorized representative before various Tribunals/quasi judicial bodies.
2. It is necessary for them to learn the art of advocacy or court craft for effective delivery of results to their clients when they act as an authorized representative before any tribunal or quasi judicial body.
3. The aim of advocacy is to make the judge prefer your version of the truth.
4. Apart from the legal side of the profession, advocacy is often useful and sometimes vital, in client interviewing, in negotiation and in meetings, client seminars and public lectures.
5. Technical and legal knowledge about the area in which Company Secretaries are acting is essential.
6. Better their knowledge, the better their advocacy skills and the greater their impact. Good advocacy or negotiating skills will not compensate for lack of appropriate knowledge.

2012 - Dec [7] (a)

Answer:

Please refer 2009 - [8] (a) (ii) on page no. 2.210

2012 - Dec [8] (b)

Answer:

Please refer 2009 - Dec [7] (b) on page no. 2.213

Chapter - 10

2012 - Dec [2] (a) (i)

Answer:

Please refer 2010 - Dec [2] (a) on page no. 2.224

2012 - Dec [2] (b)

Answer:

Please refer 2011 - Dec [4] (iv) on page no. 2.219

Chapter - 11

2012 - Dec [1] {C} (b)

Answer:

- (i) Recitals carry **evidentiary** importance in a deed. It is an evidence against the parties to the **instrument** and those claiming under it.
- (ii) The term 'force majeure' relates to excuses for **non-performance**.
- (iii) Draftsmen should avoid the use of words 'less than' or 'more than'; instead they should use **not exceeding**.
- (iv) Section 129 of the Indian Contract Act, 1872 lays down that a guarantee which extends to a series of **transactions** is called a **continuing** guarantee.
- (v) The term 'deed' normally refers to all the instruments by which two or more persons agree to effect any **right** or **liability**.

2012 - Dec [3] (c)

Answer:

- (i) **This statement is false:** Though wakfs are trusts, the Indian Trust Act does not apply to Wakfs under the Muslim Law. However, it is open to a Muslim to create a secular trust of a public and religious character. Such a trust would be governed by the India Trust Act, 1882.
- (ii) **This statement is true:** the fundamental rule of pleadings as provided in the civil Procedure Code remains the same vis-a-vis petitions /applications under other statutes. They ought to be so framed as not only to assist the party in the statement of his case, but the court in its findings of the truth between the litigants.
 - (a) Facts only, then again material facts;
 - (b) Not law;
 - (c) Not evidence; and
 - (d) Immaterial facts should be discarded.
- (iii) **This statement is true:** The absence of prayer for relief in appeal does not appear to be fatal and the court is bound to exercise its powers under Section 107 of the Code of Civil Procedure and to give to the appellant such relief as it thinks proper.
- (iv) **This statement is false:** Both the terms "drafting and conveyancing" provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas "drafting" gives a general meaning synonymous to preparation of drafting of documents.

2012 - Dec [5] (b)

Answer:

Match the following :

- | | |
|-------------------------------------|----------------------------|
| (i) To have the body | (e) Habeas corpus |
| (ii) Command | (f) Mandamus |
| (iii) Witnessing clause | (b) Testatum |
| (iv) Extra remuneration to an agent | (g) Del credere commission |

- | | |
|--|----------------------|
| (v) Excuses for non performance | (a) Force majeure |
| (vi) Deed having two or more parties | (c) Deed pool |
| (vii) Written between two or more copies | (d) Cyrographum |
| (viii) For the benefit of | (h) Cestui que trust |

2012 - Dec [6] (b)

Answer:

- (i) Special Civil Application - Prohibition, mandatory injunction and habeas corpus are all forms of writs.
- (ii) Decree holder - The terms ratio, obiter and issues are all related to plaint and judgement.
- (iii) Dilatory pleas - Dilatory pleas are a way to delaying the judicial process all others are related to appeals.