**1505160935Law**

**Answer 1:**

**Scope of Patent:**

The scope of patent is again important concept to be considered. This is because in most of the new invention, significant part including raw material will be commonly used in the industry. Hence patent holder is entitled to get patent on his entire product to want of novelty. In this case the applicant is required to highlight novel part in his invention. The patent will be granted on novel part of entire product.

In the given case:

1. Patent is available on the unique combination of ingredients which generate the unique test of the product.
2. No patent is available on raw material used in the process.
3. Patent is not available on process used to develop the unique test as the process of development of product is common in the industry.

**Legal Provision:**

*Patent* is the intellectual property which protects the invention of inventor. It can be defined as exclusive right to use, assign and file suit for infringement available with inventor of inventive product or process. However every invention is not patentable. According to patent laws, the invention which satisfies the criteria for patentability is eligible for patent.

Criteria for patentability:

1. Invention:

In order to have patent there must be new product, new process or some inventive steps. The patent is not available if there is no invention.

1. Novelty:

The novelty is one of the important and crucial elements of patentability. Accordingly if the invention is not novel, patent cannot be granted.

The term novelty indicates that the invention must not be known to or used by the public before the date of filling of application. That is to say if the invention is part of *State of Art,* the same will not be regarded as novel.

The invention is considered as part of state of art if the invention is made available to public by written, oral or any other means before the date of filling of application.

Novelty may be absolute, mixed or local novelty.

1. Industrial Application:

The next important criterion for patentability is industrial application of the invention. The invention must be capable of being used in the industry.

In case if the new product satisfies the aforesaid criteria, then inventor can get the patent on his new invention.

**Application:**

In the given case, the following points should be noted in relation to patentability of the product:

1. The product developed by the *Pure Drink*, can be considered as invention under patent law as the product is unique in the market and has better nutrition value compare to existing product in market.
2. The product is capable of being marketed; hence is also satisfies industrial application criteria.
3. The product can be considered as *novel* this is because the type of test offered by the product is unique and no similar test is available in the market.

Conclusion:

The product developed by Pure Drink satisfies criteria for patentability. However looking to the facts given in the case, it seems difficult to get patent on the invention. This is because as Mr. Cable has already launched the invention in the market before date of application, the invention has lost its novelty.

***Answer 2:***

The applicant is required to adopt below mention procedure in order to get patent o his invention:

1. The applicant is required to file application for obtaining patent with IP Australia. The application can be filed online or manually. The application must be accompanied with requisite fees.
2. The application form must be followed by *complete specification*. The complete specification is the document that describes invention, its usage, composition and scope of the patent. One may file provisional application or complete application. In case where the provisional application is filed, the applicant is under obligation to file complete application within 12 months from the date of filling of complete application, failing to which the application is treated as cancelled.
3. After filing of application, the IP Australia will publish the application after 18 months from the date of application filling. The publication of patent allows the public to examine the data relating to invention and enables interest person to file objection.
4. The next step after publication is request for examination. The patent applicant is required to file *Request for Examination* within 5 years from the date of application.
5. On examination, the patent authority will invite the objection from the interested person and after satisfaction of objections, the patent will be granted.

***Answer 3:***

The next alternative with Mr. Cable is to go for *Trade Secrete*, if the patent is not available. The trade secrete differs from patent in following ways:

|  |  |  |
| --- | --- | --- |
| ***Point of Difference*** | ***Patent*** | ***Trade Secrete*** |
| Governing Law | The protection of patent is governed under Patent Act. | There is no governing law for trade secrets. It purely depends upon the ability of management to maintain secrecy of invention. |
| Tenure | Patent will provide protection up to 20 years | There is no fixed tenure for trade secret. It will be available till the time management maintains secrecy. |
| Public Disclosure | The patent requires disclosure of method of developing product. | There is no such requirement. |

***Answer 4:***

Mr. Cable needs to consider the following points regarding the proposed contract with Mr. David for manufacturing and designing bottle:

1. ***Exclusiveness:***

The exclusiveness clause requires seller to design and manufacture the goods exclusively for buyer.

The contract must contain clause relating to exclusiveness of supply to be made. The contract must create obligation on Mr. David to create design exclusively for the product of *pure drink.* That is to say Mr. David will be restricted from proving bottles of *Similar Design* to any other person without written consent of Mr. Cable.

1. ***Indemnity:***

The indemnity clause protects the buyer for any claim in relation to title or intellectual right of the product supplied by buyer. It transfers the risk of payment of damages on account of wrong title or claim of infringement.

The contract must provide that it shall be responsibility of seller to verify his title and intellectual ownership of other person. This will creates obligation on the seller to make the loss good which may be caused due to wrong title of seller or infringement claim of third party.

1. ***Quality and Quantity specification:***

The quality and quantity clause in the contract helps the buyer to treat the contract voidable in case if the goods so supplied are of not as per the quality and quantity specification. The clause regarding quality of the proposed bottle must be specified in the contract.

1. ***Dispatch Principles:***

The dispatch principles in the contract generally govern communication flow including the definition of responsible party for communication and mode of communication. There must be proper specification regarding the time period when the communication becomes effective, the liability of person for communication and matter covered under this clause. Generally this clause covers the notice regarding non delivery, non conformity, request of non performance, fixing additional period for performance, notice of default and declaration of avoidance etc.

1. ***Non-disclosure clause:***

The contract must specify the information

1. ***Consideration clause:***

The contract must specify the terms relating to payment including the mode, time, currency of payment.

1. ***Risk transfer clause:***

In case of international trade contract, the risk transfer clause becomes very important. The contract must specify the exact time when the ownership and risk gets transferred to buyer. The draftsman can use INCOTERM to indicate the transfer of risk and cost associated with risk transfer.

1. ***Dispute resolution clause:***

The contract must specify the dispute resolution clause. As the contract involves international trade, one can adopt the dispute resolution mechanism specified by WTO.

1. ***Delivery clause:***

In international trade contract, the contract must specify the obligation of seller relating to delivery. This clause includes the time, place and cost of delivery.

1. ***Conformity clause:***

This clause relates with the obligation of seller regarding the purpose for which gods are to be delivered. Here the contract must specify the purpose of goods, its quality, quantity and instruction relating to packing. This will help the buyer to avoid the performance if the goods seem unfit for purpose or avoid liability of damages if the goods are not packed as per packing instruction.

***Answer 5:***

In case if Mr. Cable wants to sell his product all over the world, he must ensure the followings before the distribution of product:

1. The product must be protected under intellectual property law of the country of distribution. In case if the legal protection is not available because of non compliance of patentability, the non disclosure agreement must be entered into with concern party to the distribution process.
2. Mr. Cable is required to examine the following in relation to product to be exported:
3. Custom requirements relating product in home and host country
4. Examination of list of prohibited goods in host country
5. Labeling requirement of host country
6. Requirements under Legal Metrology Act of the host country.
7. Mr. Cable is required to execute distribution agreement with distributor. The distribution agreement must specify clause relating to consideration, manner of export, passing of risk, non disclosure, goods return policy and transportation cost.

***Answer 6:***

In case of contract with Mr. David regarding supply of designed bottle, the INCOTERM *CIP* is more suitable. This is because INCOTERM CIP is more suitable for container shipping. It can be assumed over here that the goods i.e. bottles are to be shipped through container. In this case CIF INCOTERM is not suitable for container shipping. In case of CIP the following points should be noted:

1. CIP tends for “*Carriage and Insurance Paid To*”.
2. In case of CIP, the cost of transportation including cost of export, carriage charges and fees at port destination are to be paid by seller. Apart from this seller is required to pay insurance cost for goods under transportation.
3. The risk is transferred to buyer when the goods are loaded onto the first carriage vessel.

This INCOTERM is suitable in the given case. This is because the transportation of goods under contract i.e. bottle is full of risk of damage in transits. Hence the insurance cost is essential. In this case INCOTERM CIP helps the buyer to accept the risk free delivery.

***Answer 7:***

There are various options for payment in international trade. This includes prepayment, documentary method, account method and documentary collection method. In the given case payment through *Documentary Credit* payment option is more suitable.

In Documentary Credit mode of payment, third party provides the guarantee for the payment to the exporter after shipment of goods and due verification by importer.

This method provides protection to both importer and exporter of goods. Here the bank of the buyer will release the payment only after clearance of the goods and receipt of the document. Hence there will be no default risk on the side of seller. Moreover as the third party provides assurance for payment there will be no credit risk on the side of seller.

***Answer 8:***

It is advisable to include *Arbitration Clause* in contract. Mr. Cable is advised to follow arbitration method for dispute resolution. This is because out of available methods for dispute resolution, this is most convenient and judicial way to resolve the dispute.

In Arbitration, parties to dispute appoints third person known as *arbitrator* to resolve the dispute arising out of contract. Under this method arbitrator so appointed will adjudicate the matter, examine the evidence and then pronounce judgment. The arbitral award has binding effect. Hence parties to the dispute are under obligation to obey the order of arbitrator.

Unlike conciliator and mediation, arbitrator provides legally enforceable method to resolve dispute. This is method provides flexible method for dispute resolution. It saves the time and cost of lengthy legal proceeding.

Parties to the dispute will be given liberty to select the law and rules for adjudication of dispute. The major advantage of arbitration court is that it provides *Natural Forum* for resolution of dispute. That is to say no home court advantage is available to any party.

Hence it is advisable to follow arbitration method for dispute resolution.

***Reference:***

*Patent Application Process | IP Australia* (2016) Ipaustralia.gov.au <https://www.ipaustralia.gov.au/patents/patent-application-process>

*Journal Of Law & Commerce* (2016) Webcache.googleusercontent.com <https://webcache.googleusercontent.com/search?q=cache:pzNJoVpu7FUJ:https://jlc.law.pitt.edu/ojs/index.php/jlc/article/download/39/60+&cd=1&hl=en&ct=clnk&gl=in>

*WTO | Dispute Settlement Understanding - Legal Text* (2016) Wto.org <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>

(2016) <http://www.export.gov/tradefinanceguide/eg_main_043221.asp>