MBA - I YEAR

DKR15 : BUSINESS LAW

SYLLABUS

Unit I

Legal environment and business – Forms of business – Forms of Business organisation – Indian contract – performance of contract – Essentials of agreements – Void and voidable and illegal contract – Offer and Acceptance – Capacities of the parties to create contract – Consideration – Breach of contract – Remedies.

Unit – II

Sale of goods Act – Transfer of property from buyer and seller. Law of Agency – relation of principal and agency – Personal liabilities of agents – Termination of agency.

Unit – III

Indian Companies Act – Definition – Kinds – Incorporation of Companies – Memorandum of association articles of Association and Articles of Association – Certificate of Incorporation – Prospectus.

Unit – IV

Monopolies and Trade restrictive practices Act – Securities Exchange Board of India Act – Custom and Central Excise Act – Central and States Sales Tax Act.

Unit – V

Foreign Exchange Management Act – Patent Act. Intelligent Property Right – Consumer Protection Act.

References :

1. N.D. Kapoor – Elements of Commercial Law
2. N.C. Shukla – A Manual of Mercantile Law
3. R.S. Daver – Indian Mercantile Law

UNIT I

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INTRODUCTION

A business is also known as an enterprise' company or a firm is an organizational entity involved in the provision of goods and services to consumers. Businesses are prevalent in capitalist economies, where most of them are privately owned and provide goods and services to customers in exchange for other goods, services, or money. Businesses may also be social non-profit enterprises or state-owned public enterprises targeted for specific social and economic objectives. A business owned by multiple individuals may be formed as an incorporated company or jointly organized as a partnership. Countries have different laws that may ascribe different rights to the various business entities.

Business can refer to a particular organization or to an entire market sector, e.g. "the music business". Compound forms such as agribusiness represent subsets of the word's broader meaning, which encompasses all activity by suppliers of goods and services. The goal is for sales to be more than expenditures resulting in a profit or gain or surplus.

A very detailed and well-established body of rules that evolved over a very long period of time applies to commercial transactions. The need to regulate trade and commerce and resolve business disputes helped shape the creation of law and courts. The word "corporation" derives from the Latin corpus, meaning body, and the Maurya Empire in Iron-Age India accorded legal rights to business entities.

In many countries, it is difficult to compile all the laws that can affect a business into a single reference source. Laws can govern treatment of labour and employee relations, worker protection and safety, discrimination on the basis of age, gender, disability, race, and in some jurisdictions, sexual orientation, and the minimum wage, as well as unions, worker compensation, and working hours and leave.

Some specialized businesses may also require licenses, either due to laws governing entry into certain trades, occupations or professions, that require special education, or to raise revenue for local governments. Professions that require special licenses include law, medicine, piloting aircraft, selling liquor, radio broadcasting, selling investment securities, selling used cars, and roofing. Local jurisdictions may also require special licenses and taxes just to operate a business.

Some businesses are subject to ongoing special regulation, for example, public utilities, investment securities, banking, insurance, broadcasting, aviation, and health care providers. Environmental regulations are also very complex and can affect many businesses.

What Is Law?

Law is a word that means different things at different times. Black's Law Dictionary says that law is "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law."

Functions of the Law

In a nation, the law can serve to

- keep the peace,
- maintain the status quo,
- preserve individual rights,
- protect minorities against majorities,
- promote social justice, and
- Provide for orderly social change.

Legal Environment

The government, in every country, regulates the business according to its defined priorities. Legal system of a country is framed by the government. The laws which are passed by the government for business operation is called legal environment. In every country, the government regulates business activities. These regulations of government are considered as legal environment. In practice legal and regulatory goes hand in hand. The limits for business operations are decided by regulatory environment & this is also called legal environment.

Legal environment in a country has a dominating position on all decisions of organization. As all business policies are highly influenced by government, the organization should have thorough knowledge of these policies because non-implementation of legal policies results in heavy fines, penalties & punishment & therefore every organization must follow all these regulations.

Following are some of the government Acts & government policies relating to legal or regulatory environment for business operations:-

- The Sale of Goods Act, 1930.
- Indian Companies Act, 1956.
- Income Tax Act, 1961.

- The Consumer Protection Act, 1986.
- The Weights & Measures Act, 1958.
- Environment Protection Act, 1986.
- Agricultural Policy.
- Industrial Policy.
- Foreign Investment Policy.
- Monetary Policy.
- The Factories Act, 1948.
- The Minimum Wages act, 1948.

Legal and Regulatory Factors Affecting Business

The legal and regulatory environment plays a very crucial role in determining the success of any businesses. The government imposes taxes among other regulatory measures to promote economic growth and to cushion consumers from exploitation. Therefore, before establishing or when running a business, it is imperative to understand the role of regional tax measures and regulatory measures to determine how they affect your business. Understanding legal and regulatory measures also help you to adapt to your business environment and to account for all your regional economic analysis.

Tax

Tax is one of the legal and regulatory factors that affect business. Tax codes may vary from one country to the other and from one region in a country to the other. They can support a business while other tax restricts certain business operations. The government can also increase or reduce taxes to promote or control economic growth. Increase in tax can affect a business negatively because it reduces consumer spending and vice versa.

It is also essential to note that tax come in form of income tax, individual income tax, corporate income tax, gross receipts tax and fiscal balance tax among others. Therefore, as a business person, it is wise to understand the kind of tax imposed in your location, population and the criterion used to run your business smoothly and profitably.

Trade policies

Trade policies also affect business. They include tax policies, monetary policies, fiscal policy, government policy, regulatory policy and property rights policies. These policies can allow for business growth or prevent growth of business. For example trade policies can prevent free trade in a specific area. Establishing a business under strict trade policies can mean trading in losses.

Politics

Politics can affect a business a great deal. This is form of government where political environment determines whether a business will be stable or not. A stable political environment builds investor confidence and boosts the growth of a business.

It is also essential to note that parliament can exert pressure on the government to allow for establishment of certain businesses and closure of others. As a business person, it is therefore, imperative to keep in mind the role of government in creating a stable political environment. A good government does not allow for politics to affect business. Instead it creates rules and regulations that cushions businesses from political interferences. There are governments that encourage diplomatic events that promote growth of business for the benefit of its people. Such a government creates a good business environment thus, allowing for increased productivity and profitability.

Economic policy

Economic policy of the government also affects business. It is a legal and regulatory factor that helps to promote economic growth in a country. With favorable economic policy, a business can grow enormously without any problem. However, a bad economic policy that restricts businesses and free trade cripples much business. Other legal and regulatory factory includes high costs of business operations to prevent establishment of certain business. Therefore, before running a business, it is important to consider legal and regulatory factors in a country or location. This will enable us to operate a successful business.

FORMS OF BUSINESS

Forms of Business Organization

- Sole Trader
- Joint Hindu Family
- Partnership
- Joint stock Company
- Cooperatives

Sole Trading Organization

Any business unit which is owned and controlled by a single individual is known as a sole trading concern. The person, who manages it, is called a sole trader. It is also named sole proprietorship business or single entrepreneurship or individual proprietorship. It is stated to be the oldest of all the forms of business enterprises. He may use his own savings for carrying on the business. He may borrow from his friends, relatives and others. He himself manages

the business with assistance from relatives or employees. The sole trader makes all purchases and sells on his own and maintains all the account. He alone enjoys all profits and bears all losses in business. He is the founder as well as the controller of the business. The sole trading concern is run on the principle "All is he and he is all in all". It is easy to set up and manage the sole proprietors business.

Definition

A sole proprietorship, also known as the sole trader or simply a proprietorship, is a type of business entity that is owned and run by one natural person and in which there is no legal distinction between the owner and the business. The owner is in direct control of all elements and is legally accountable for the finances of such business and this may include debts, loans, loss, etc.

Encyclopedia of Business and Commerce defines sole trading concern as, " a form of organization, in which an individual alone invests his capital, uses his own skill and intelligence in the Management of its affairs and is entitled to enjoy all the profits as also is solely responsible for all the risks of ownership".

Features of Sole Trading Organization

- One-man Ownership and Control
- Unlimited Liability
- Enjoyment of Entire Profit
- No Separate Legal Entity
- No Special Legislation
- Simplicity
- Local business
- Self Employment
- Small Capital

Advantages of Sole Trading Organization

- ✓ **Control** - Sole traders maintain full control of their business. Running it how they please without the interference of others.
- ✓ **Profit retention** – Sole traders retain all the profits of their business.
- ✓ **Private data** – Information about sole traders is kept private, unlike that of limited companies which is necessarily made public after registration with Companies House.

- ✓ **Specialist** – Often a small business, sole traders can offer a more personal service with local roots and ties. This can be more appealing to potential customers in the local community.
- ✓ **Personal** – Because there is no need to confer with other decision makers, sole traders can make decisions quickly and act on them swiftly, providing for the needs of their customers.

Disadvantages of Sole Trading Organization

Limited capital

The resources of a sole proprietor are limited. He depends only on his personal resources and his borrowing capacity. The borrowing capacity depends on his assets and credit worthiness. It is obvious that financial resources of a single person will be insufficient for business expansion.

Limited Managerial Ability

The managerial ability of a sole trader is limited because a person may not be an expert in each and every field of business such as purchasing, selling, accounting etc.

Short Life

Anything which affects the personal life of a sole trader affects his business also. Prolonged illness or death of the sole trader brings the affairs of his business to a stand- still. If his children are interested and efficient to run the business, the sole trader business can be continued. Otherwise it will be closed.

Hasty Decisions

Decisions arrived at, after deep deliberations and discussions are sure to be better than that of a decision taken by one man. It is rightly said two heads are always better than one. The chances of Wrong decision-making are quite high in a sole trader business.

Risk of Entire Loss

As the sole trader is the sole owner of the business, he has to bear all losses of his business.

SUITABILITY

Sole proprietorship is suitable for the following business:

1) Where small amount of capital is required,

e.g., Sweet shops, Bakery shops, Petty shops, etc,

2) Where quick decisions are very important,

e.g., Share-brokers, Doctors, etc.

3) Where limited risk is involved,

e.g., Automobile repair shops, Small retail stores, etc.

4) Where personal attention to individual tastes and fashions of customers is required,

e.g., Beauty parlors, Tailoring shops, etc.

5) Where the demand is local, seasonal or temporary,

e.g., Retail trade, Laundry, Fruit sellers, etc.

ROLE OF SOLE PROPRIETORSHIP IN THE SOCIETY

- Solution to unemployment problem
- Provides Investment Avenues
- Provision of goods at low price
- Helps small producers
- Supply of Quality goods
- Equal Distribution of Income and Wealth

Joint Hindu Family

India is unique in the system of Joint Hindu Families. A Joint Hindu Family comprises of father, mother, sons, daughters, grandsons and granddaughters. They hold the property jointly. They do the business under the control of the head of the family. These families have been engaged in occupations like agriculture ,handicrafts, small industries etc. These business units are known as Joint Hindu family business. This system is found only in India

The system of Joint Hindu family came into existence by the operation of Hindu law. There will not be any agreement among members. The firm is owned by the members of the family who have inherited their ancestral property. Their membership is conferred upon the members by virtue of their birth in the family. The head of the family is known as 'KARTA'. The members are called coparceners. It is regulated by the provisions of Hindu Law.

With the advent of industrialisation the joint families are reduced to small families. As a result, this system is not exist.

PARTNERSHIP

The need for partnership form of organization arose from the limitations of sole proprietorship. In sole proprietorship, financial resources and managerial skills are limited. One man cannot supervise personally all the business activities. Moreover, risk bearing capacity of an individual is also limited. It is at this stage that a need for associating more

persons arises. The partnership form of organization comes into existence in two ways. It may come into existence either as a result of expansion of the sole trading concern or two or more persons joining together through an agreement to form a partnership. In other words, it is an extension of sole trading concern.

Definition of Partnership

According to the Section 4 of Indian Partnership Act of 1932, partnership is "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all".

Features of Partnership

1. **Agreement**:

The partnership arises out of an agreement between two or more persons.

2. **Profit sharing**:

There should be an agreement among the partners to share the profits of the business.

3. **Lawful business**:

The business to be carried on by a partnership must always be lawful.

4. **Membership**:

There must be at least two persons to form a partnership. The maximum number is 20. But in case of banking business the maximum is 10 members.

5. **Unlimited liability**:

The liability of every partner is unlimited, joint and several.

6. **Principal-agent relationship**:

Every partner is an agent of the firm. He can act on behalf of the firm. He is responsible for his own acts and also for the acts done on behalf of the other partners.

7. **Collective management**:

The firm and the partners are one. When a contract is made in the name of the firm all the partners are responsible for it individually and collectively.

8. **Non-transferability of shares**:

A partner cannot transfer his share of interest to others without the consent of the other partners.

Advantages of Partnership

Easy Formation.

A partnership firm is very easy to form. No formal documents is required to be prepared as necessary in the case of joint stock company. A simple agreement among the partners is sufficient to start a partnership firm.

Larger Financial Resources

As a number of partners contribute to the capital of the firm, it is possible to collect larger financial resources than the sole proprietorship.

Greater Managerial Talent

The partners may be assigned duties according to their talent. Different functional departments may be managed and controlled by different partners.

Quicker and Better Business Decisions

In partnership, there are many partners. Every partner has the right to be consulted. Hence business problems can be thoroughly discussed and the best decisions can be arrived.

Sharing of Risk

The risk in a business is shared by more persons. The burden of every partner will be much less as compared to the burden of sole trader.

Disadvantages of Partnership

Division of responsibility:

In a partnership the management is divided. As such responsibilities are also divided. Every partner might try to shift the burden on to the shoulders of others; finally none takes the responsibility properly.

Lack of continuity:

A partnership gets dissolved on the death, insolvency, insanity or retirement of any partner. So, there is no guarantee for the continuity of the firm.

Internal conflicts:

Differences and disputes among the partners are very common. These conflicts harm the firm as a whole.

Misuse of assets:

The partners may use the assets of the firm for their personal purposes. Misuse of assets is harmful to business interests.

Lack of public confidence:

A partnership firm is purely a private organization. It is not controlled or regulated by the Government. As such public may not have confidence in the firm.

Types of Partners

There are different kinds of partners classified on the basis of managerial interests, profit sharing, behaviour and status. They are as follows.

Active Partner

A partner who takes active part in the management of the partnership firm is known as active or working or managing or general partner. His liability is unlimited.

Sleeping Partner or Dormant Partner

The partners who merely contribute capital and do not take active interest in the conduct of the business of the firm are called sleeping or dormant or financing partners.

Nominal or Ostensible Partner

He is a partner who neither contributes capital nor takes any part in the management of the firm. He lends his name to be used as partner in the business to increase the reputation of the firm. They are not eligible for a share in the profit.

Partners in Profit Only

A person who shares the profit of a firm but does not share the loss, is called " partner in profit only " . Usually he has no voice in the management of the firm. But his liability to third parties is unlimited

Partner by Estoppel

A person may not be really a partner in the business. But by his behaviour he makes outsiders believe that he is a partner in the business. Then, he is liable to such outsiders who advance money to the firm or enter into a contract under such false belief.

Partner by Holding out

When a person who is not really a partner in a business, is described as a partner to others, then he must at once deny it when he comes to know about it. If he keeps quiet, then he is liable to other persons who do business with that partnership believing that he is also a partner.

Rights and duties of Partners

(a) Every partner has a right to take part in the conduct and management of business.

(b) Every partner has a right to be consulted and heard in all matters affecting the business of the partnership.

(c) Every partner has a right of free access to all records, books and accounts of the business, and also to examine and copy them.

(d) Every partner is entitled to share the profits equally.

(e) A partner who has contributed more than the agreed share of capital is entitled to interest at the rate of 6 per cent per annum. But no interest can be claimed on capital.

(f) A partner is entitled to be indemnified by the firm for all acts done by him in the course of the partnership business, for all payments made by him in respect of partnership debts or liabilities and for expenses and disbursements made in an emergency for protecting the firm from loss provided he acted as a person of ordinary prudence would have acted in similar circumstances for his own personal business.

(g) Every partner is, as a rule, joint owner of the partnership property. He is entitled to have the partnership property used exclusively for the purposes of the partnership.

(h) A partner has power to act in an emergency for protecting the firm from loss, but he must act reasonably.

(i) Every partner is entitled to prevent the introduction of a new partner into the firm without his consent.

(j) Every partner has a right to retire according to the Deed or with the consent of the other partners. If the partnership is at will, he can retire by giving notice to other partners.

(k) Every partner has a right to continue in the partnership.

(l) A retiring partner or the heirs of a deceased partner are entitled to have a share in the profits earned with the aid of the proportion of assets belonging to such outgoing partner or interest at six per cent per annum at the option of the outgoing partner (or his representative) until the accounts are finally settled.

Duties of Partners

- To carry on the business to the greatest common advantage
- To be just and faithful to each other
- To render true accounts
- To provide full information
- To attend diligently to his duties
- To indemnify for loss caused by fraud or willful neglect
- To hold and use partnership property exclusively for the firm
- To share losses
- To act within authority
- Duty to be liable jointly and severally

Liabilities of partners

- Partners have unlimited personal liability for partnership liabilities.
- Partners are jointly liable on all firm contracts.
- They are jointly and severally liable for all torts committed by one of the partners or by a firm employee within the scope of the partnership’s business.
- A partner remains liable after dissolution unless expressly released by creditors.
- An incoming partner is not liable for the existing debts of the partnership unless the new partner expressly assumes those debts.

PARTNERSHIP DEED

A partnership firm can be formed through an agreement among two or more persons. In India this agreement may be oral or in writing. But it is desirable to have it in writing to avoid any misunderstanding among the partners in future. All the terms and conditions of partnership are included in the agreement. The partnership agreement is also known as Partnership Deed or Articles of Partnership.

Contents of a partnership deed

1. The name of the firm.
2. The names and addresses of the partners.
3. The nature of the business.
4. The term or duration of partnership.
5. The amount of capital to be contributed by each partner.
6. The drawings that can be made by each partner.
7. The interest to be allowed on capital and charged on drawings.
8. Rights of partners.
9. Duties of partners.
10. Remuneration to partners.
11. The ratio in which the profits or losses are to be shared among the partners.
12. The basis for the calculation of goodwill at the time of admission, retirement, and death of a partner.
13. The keeping of proper books of accounts and the preparation of Balance Sheet.
14. Settlement of amount on the dissolution of the firm.
15. The procedures to be adopted in the case of disputes among the partners.
16. Procedure for settlement of disputes among partners by arbitration

REGISTRATION OF FIRM

Registration of a partnership firm in India is not compulsory. It is only optional. Indian Partnership Act, 1932, provides that if the partners so desire, they may register their firms with the registrar of firms of the state. The procedure for registration is explained below.

1. Procedure for Registration

A partnership firm can be registered at any time by filing a statement in the prescribed form. The form should be duly signed by all the partners. It should be sent to the registrar of firms along with the prescribed fee. The statement should contain the following particulars.

1. Name of the firm
2. Principal place of its business
3. Name and address of each partner
4. Date of admission of each partner
5. Date of commencement of business of the firm
6. Duration of the firm

On receipt of the statement and the fees, the registrar makes an entry in the register of firms. A certificate is issued by the registrar which is known as Certificate of Registration. The firm is considered to be registered when the entry is made. Any change in the above particulars must be communicated to the registrar of firms within a reasonable period of time so that necessary alteration may be made in the register of firms. This register is open for inspection on payment of a nominal fee.

2 Effect of Non-Registration

Registration of partnership is only optional in India. But if a firm is not registered, it has to face the following drawbacks.

1. A partner of an unregistered firm cannot file any case against the firm or against any other partner, including an ex-partner for enforcing his contractual rights under the partnership agreement or under the Act.
2. An un-registered firm cannot file any suit against third parties in any civil court for recovering the money due.
3. Any third party can take legal action against the business or the partners.
4. The firm cannot take legal action against its partners.
5. An unregistered firm cannot enforce its claims against third parties for recovering a sum exceeding rupees one hundred.
6. A partner cannot sue for dissolving the firm or realising the property of the dissolved firm or for the settlement of accounts on dissolution.
7. The firm forfeits its rights in restricting the outsiders from using the trademarks and copyrights of the firm.

DISSOLUTION OF PARTNERSHIP FIRM

Dissolution of partnership firm means putting an end to the relationship among the partners. This may be of two types: they are

a) Dissolution of firm
b) Dissolution of partnership

a) Dissolution of firm

Dissolution of firm means dissolution of partnership. On dissolution of firm, partnership business comes to an end. Its assets are realised and the creditors are paid off. The business cannot be continued after dissolution of partnership firm.

b) Dissolution of partnership

Dissolution of partnership means the termination of the original partnership agreement. A partnership is dissolved by insolvency, retirement, expiry or completion of the term of partnership. The business will continue after dissolution of partnership

Circumstances leading to dissolution of partnership

- D - Death of partner
- I - Incapacity of a partner
- S - Stipulated period of partnership completed in the case of particular partnership
- S - Serious misconduct of a partner
- O- Object is completed (Particular partnership)
- L - Lunacy of a partner U - Unavoidable continuous loss
- T - Transfer of interest of the firm
- I - Insolvency of a partner
- O- Objectionable unlawful objectives
- N - Notice of dissolution by a partner.

JOINT STOCK COMPANIES

Introduction

With the advent of Industrial Revolution and the factory system of production, large scale production has become the order of the day. To meet the ever-expanding needs of the fast growing population, large-sized industrial organisation has become indispensable. The traditional forms of business units, namely, sole proprietary concerns and partnership firms, with their limited financial resources and managerial capability, cannot meet the challenges forced by the need for massive production and speedy distribution. Joint stock company form of organisation provides the key to this problem With the advent of Industrial Revolution and

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Meaning and Definition

A Company is a legal entity made up of an association of persons, be they natural, legal, or a mixture of both, for carrying on a commercial or industrial enterprise. Company members share a common purpose and unite in order to focus their various talents and organize their collectively available skills or resources to achieve specific, declared goals.

A company can be defined as an "artificial person", invisible, intangible, created by or under law, with a discrete legal personality, perpetual succession, and a common seal. It is not affected by the death, insanity, or insolvency of an individual member.

In the words of Lord Justice Lindley, “ By a company we mean, “an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business and also share the profit and loss, as the case may be, arising there from”.

Features of a Company

Voluntary Association

A company is voluntary association of persons who have come together for a common object which generally is to earn profit. The activities of this association are governed by the law and are limited by its memorandum of association

Incorporated association

A company is created when it is registered under the Companies Act. It comes into being from the date mentioned in the certificate of incorporation.

Artificial legal person.

A company is an artificial person. Negatively speaking, it is not a natural person. It exists in the eyes of the law and cannot act on its own. It has to act through a board of directors elected by shareholders. It was rightly pointed out in Bates V Standard Land Co. that : “The board of directors are the brains and the only brains of the company, which is the body and the company can and does act only through them”.

Common seal

As a company is an artificial person it cannot sign its name on a contract. So it function with the help of seal. All contract entered into by the members will be under the common seal of the company.

Limited Liability

In case of limited companies liability of members will be limited to the amount unpaid on the shares.

Legal restrictions

The formation, working and winding up of a company are strictly governed by laws, rules and regulations

Perpetual Existence.

A company is a stable form of business organization. Its life does not depend upon the death, insolvency or retirement of any or all shareholder (s) or director (s). Law creates it and law alone can dissolve it. Members may come and go but the company can go on for ever.

Transferable Shares.

In a public company, the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision in the articles.

Merits of Joint stock Company

Mobilisation of huge financial resources:

The biggest advantage of company organisation is that it has the inherent ability to mobilise huge financial resources. Because of 'number of persons' in India and abroad who can become members in a company.

Limited Liability

The liability of a member of a joint stock company is limited to the amount remaining unpaid on his shares. In view of this feature of limited liability, people come forward readily to invest in the shares of joint stock companies. Thus the savings of the community which lie scattered can be easily mobilised for financing business enterprises.

Continuity and stability:

Death, insolvency or insanity of any member of the company will not affect its life and existence. Men may come and they may go but a company remains forever. It can be wound up under the provision of the act.

Economies of scale:

A company operates on a high scale and so it enjoys economies in production, distribution, management and financing.

Separate Entity

Due to its very nature, a limited company is deemed to be a separate legal entity from its owners. This has several advantages, including the fact that the company will exist beyond the life of its members. If they retire or die, the company will continue to exist and operate.

Professionalisation of Management

In a company form of organisation there is complete divorce between ownership and management. Though shareholders are the real owners, they do not have any right to manage its affairs. Management of a company is entrusted to a Board of Directors elected by the shareholders from among themselves. The Board can secure the services of experts in various fields of production and management.

Demerits of Joint stock Company

Complicated legal formalities

The legal formalities to be complied with at the time of forming a company are complicated and difficult. Even after incorporation, its functioning is subject to severe restrictions. A number of documents have to be filed with the Registrar of joint stock companies from time to time and every failure in this regard invites penalties

Dilution of Powers

Due to the nature of Public Limited Companies, sometimes disputes will arise between Directors and Shareholders as their ideas of what is best for the company vary. Sale of shares to increase company funds will further dilute the management, as more and more people have a say in how the company is run. There is also a risk (since Companies can buy shares) that a takeover might occur this way.

Double Taxation :

This is the biggest disadvantage which the company faces. Firstly, company needs to pay tax for the earned profits and again the shareholders are taxed for the earned income.

Speculation and Manipulation:

As the shares of a joint stock company are easily transferable thus the shares are purchased and sold in the stock exchanges on the value or price of a share based on the expected dividend and the reputation of the company.

MULTINATIONAL COMPANIES (MNC's)

The term "multinational" consists of two different words, 'multi' and 'national.' The prefix 'multi' means 'many', while the word 'national' refers to nations or countries. Therefore, a multinational company may be defined as a company that operates in several countries. Such a company has factories, branches and in more than one country. According to the United Nations

Commission on Multinational Corporations, a multinational corporation is a corporation which operates, in addition to the country in which it is incorporated, in one or more other countries. A multinational corporation is also known as a transnational corporation, namely, 'Global giant', or 'World enterprise' or 'international enterprise'. All forms of business organisation that transcend political frontiers may be called as multinational firms .In simple words, a multinational company is a company carrying on business in two or more countries. According to Neil H.Jocoby "A multinational corporation owns and manages business in two or more countries"

FEATURES

1. A multinational company is operated in more than one country simultaneously.
2. It is generally very large in size.
3. Its purpose is to reduce transport costs and to make use of raw materials, labour, capital and market of foreign countries. There are 500 to 700 MNCs operating in the world today, half of them are U.S multinationals and the rest are based outside United States. The multinationals based in the USA have the largest share of foreign direct investment, followed by the U.K, Germany, Japan, Switzerland, France and Canada. In underdeveloped countries the investment and employment created by the MNCs have been chiefly concentrated in about a dozen nations, namely, Brazil, Mexico, Hong Kong, Philippines, Singapore and South Korea. According to the study of International Labour Organisation (ILO) Latin America accounts for about 60% of the MNC employment in developing countries, followed by Asia 30% and Africa 10%. Foreign investment has moved to a limited number of developing countries which offer political stability and a convenient economic environment, including tax incentives, large markets, cheap labour and easy access to oil and other natural resources.

GOVERNMENT INSTITUTIONS

In the present age, in order to expedite the economic progress of the country the government also establishes and conducts business .Public sector enterprises are those enterprises which are owned, controlled and operated by the central or state government or by both. Such enterprises are run mainly to provide service to the public. The performance of public enterprises is discussed in the parliament. These enterprises are generally established as semiautonomous or autonomous bodies. They are engaged in industrial and commercial activities. In India, the central and state governments have established several public enterprises. These enterprises produce a wide variety of goods such as iron and steel electronics, ships, aircrafts, locomotives, heavy machinery, fertilizers, chemicals, insecticides, drugs and consumer products. Many of the public enterprises are very large in size employing thousands of workers and having investment of several hundred cores of rupees.

1. Departmental Undertaking

This is considered as a department attached to the ministry of a government. Its administration is in the hands of the chief administrative officer of the ministry. Here the department is a part of the government. This is the oldest form of organisation of state enterprise. It may be run either by central government or by the state government. Railways, B.S.N.L.,(telephones) Broadcastings like Doodharsan are the examples of Departmental Undertakings.

2. Public Corporation

This is established under a specific statute passed in the parliament. It is known as a statutory corporation because it is created by a statute. The statute defines its objectives, powers and functions. It is an autonomous body fully financed by the government. It has a separate legal existence independent of the government. The corporation is wholly owned by the government. Its entire share capital is contributed by the state. Its management is vested with a Board of Directors appointed or nominated by the government. There is no government interference in the day to day working of the corporation. The main object of the corporation is to serve the public. A statutory corporation has its own staff. Its employees are not government servants. It is fully accountable to the parliament or state legislature. Reserve Bank of India, Life Insurance Corporation and Unit Trust of India are the examples of public corporation.

3. Government Company

Government Company is also established under the Companies Act of 1956. It is a company in which not less than 51% of paid up share capital is held by the central government or by one or more state governments or jointly by the central and state governments. In India the Government Companies also subscribe share capital of the Private Company and so sometimes it is known as mixed ownership company. It is a body corporate independent of the government. It is managed by a Board of Directors nominated by the government and other shareholders. Its employees are not Government servants. They are not governed by civil service rules.

Cooperative store

A co-operative society is a voluntary association of persons. Persons hailing from the same locality voluntarily join together to achieve a common economic objective. Any person can join the society. There is no compulsion to become a member of a society. A person can join a co-operative society whenever he likes and leave it whenever he wishes. In a co-operative society all the members are equal. Every member has only one vote irrespective of the number of shares held by him. "One man one vote" is the most important principle. The society is managed on democratic principles. Every member has equal voice in the management of a society to render service to its members. Service is primary and profit is secondary. The business of a co-operative society is generally carried on cash basis. Every state government has appointed a Registrar of co-operative societies for registering, controlling and supervising the societies. When a co-operative society is registered, it becomes a body corporate. It has separate legal existence. It is exempted from payment of stamp duty and registration fees. It also enjoys the special feature of limited liability.

INDIAN CONTRACT ACT 1872

The law relating to contracts in India is contained in INDIAN CONTRACT ACT, 1872. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to all the states of India except the state of Jammu and Kashmir. It determines the circumstances in which promises made by the parties to a contract shall be legally binding on them. All of us enter into a number of contracts everyday knowingly or unknowingly. Each contract creates some rights and duties on the contracting parties. Hence this legislation, Indian Contract Act of 1872, being of skeletal nature, deals with the enforcement of these rights and duties on the parties in India.

The Act as enacted originally had 266 Sections, it had wide scope and included.

- General Principles of Law of Contract- Sections 01 to 75
- Contract relating to Sale of Goods- Sections 76 to 123
- Special Contracts- Indemnity, Guarantee, Bailment & Pledge- Sections 124 to 238
- Contracts relating to Partnership- Sections 239 to 266

Definition of Contract

Sec 2(h) of Indian Contract Act 1872 defines contract as “an agreement enforceable by law”

According to salmond ,a contract is “an agreement creating and defining obligations between the parties”

From the above two definitions we come to know a contract must consist of two elements

1. Agreement
2. Enforceability

Agreement

Sec 2(e) of Indian Contract Act 1872 defines agreement as ”every promise and every set of promises ,forming consideration for each other”

Promise

Sec 2(b) of Indian Contract Act 1872 “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted become promise”

Agreement = Offer + Acceptance

Essential element of a valid Contract

I. Offer and Acceptance

There must be 2 parties to an agreement i.e., Offeror and offeree

For Example A sold the pen to B at Rs 10.B is paying 10 Rs to get the pen from A. Here A is an Offeror B is an offeree.

II. Consensus ad idem

Consensus ad idem means identity of minds. To constitute an agreement or a contract there must be a meeting of the minds of both parties agree to same thing in the same sense.

For example A, a civil engineer, agrees to construct a house of B and B agrees to pay A the sum of Rs 10 lakes upon the satisfactory completion of work. In this case, there is a meeting of minds of A and B on the subject of what is to be done and at what price.

III. Lawful consideration

Consideration means something in return. If an agreement becomes enforceable by law must have consideration. It refers to benefits moving from one party to another because of the contractual relationship.

IV. Capacities of Parties

In order to take part in any contracts the parties must have some capacities in the eyes of law. The following persons are eligible to enter into a contract.

Every person is competent into a contract If he/ She

- Is of the age of majority
- Is of sound mind
- Is not disqualified from contracting by any law

V. Free consent

Free and genuine consent of the parties is essential to a valid contract. If the agreement is induced by threatening, any fraudulent activity, mistakes there is a absence of free consent. Any contract without free consent will be treated as invalid contract.

VI. Lawful object

The purpose of any agreement must be lawful. The agreement must not be

- Illegal
- Immoral
- Opposed to Public Policy

VII. Agreement not declared void

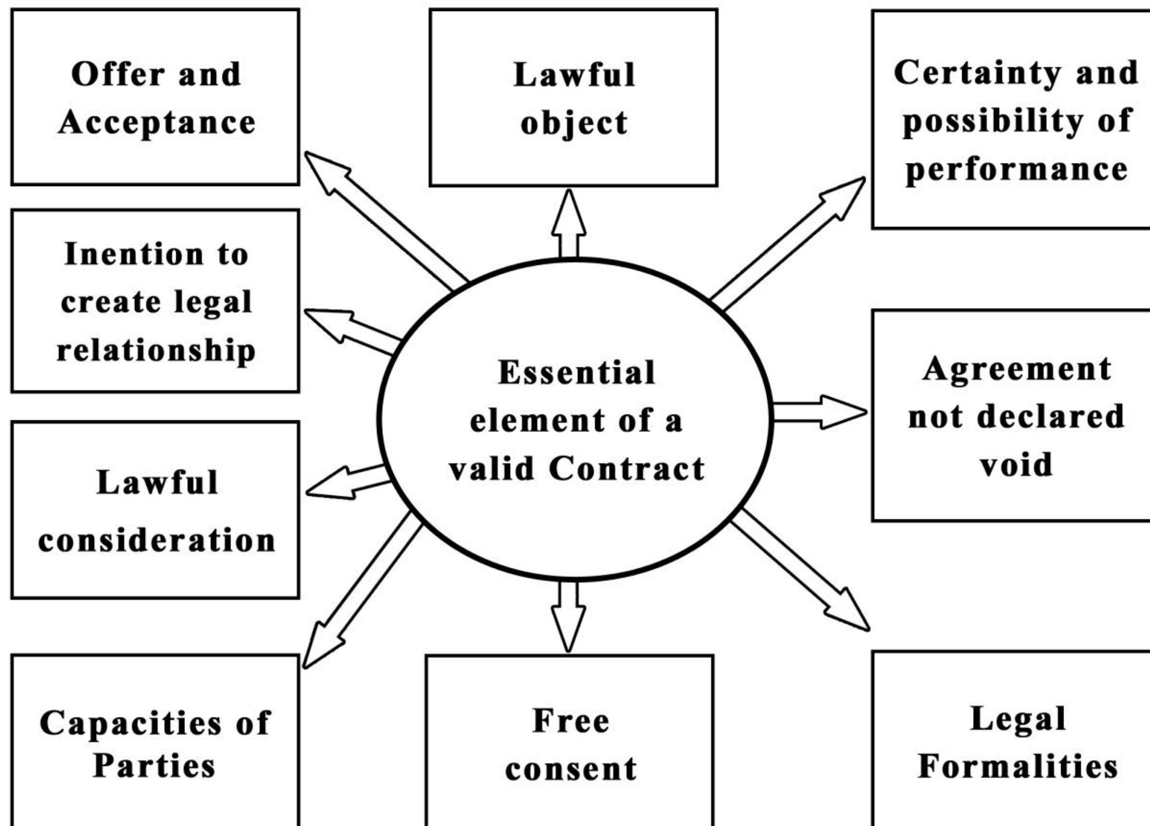
The agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country. Agreements mentioned in Section 24 to 30 of the Act have been expressly declared to be void for example agreements in restraint of trade, marriage, legal proceedings etc.

VIII. Certainty and possibility of performance

If the act is impossible in itself, physically or legally, it cannot be enforced at law. For example, Mr. A agrees with B to discover treasure by magic. Such Agreements is not enforceable.

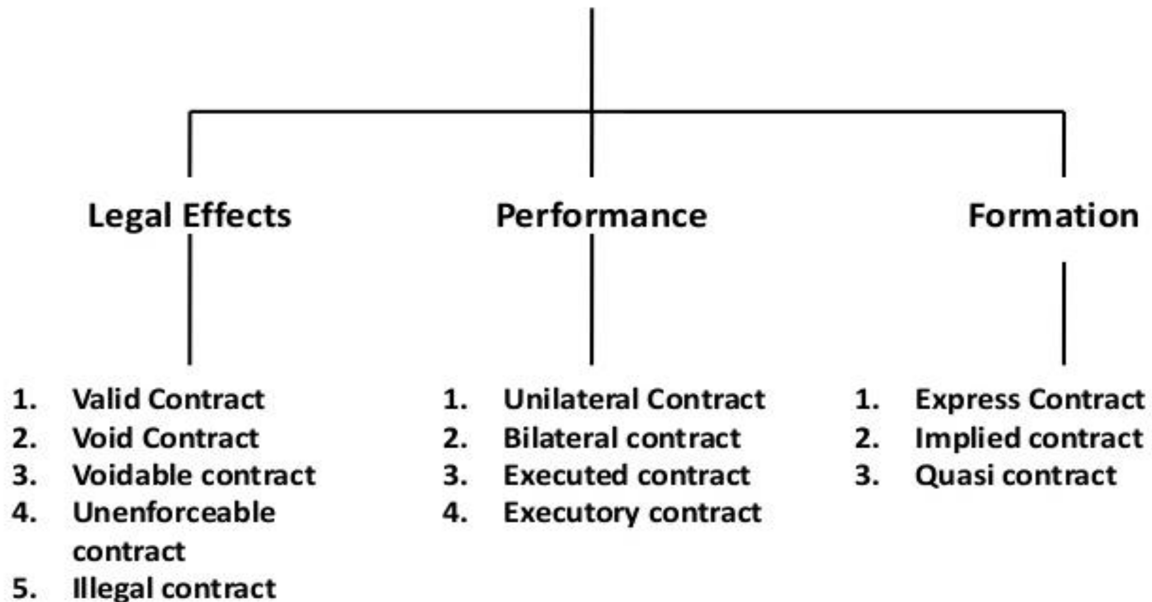
IX Legal Formalities.

An oral Contract is a perfectly valid contract, expect in those cases where writing, registration etc. is required by some statute. In India writing is required in cases of sale, mortgage, lease and gift of immovable property, negotiable instruments; memorandum and articles of association of a company, etc. Registration is required in cases of documents coming within the scope of section 17 of the Registration Act.



Types of Contracts;

1. On the basis of Formation,
2. On the basis of Nature of Consideration,
3. On the basis of Execution and
4. On the basis of Validity.



Types of Contracts on the basis of Formation

Express Contracts:

An express contract is a contract whose terms the parties have explicitly set out. In an express contract, all the elements would be specifically stated. In an express contract, the agreement of the parties is expressed in words, either in oral or written form. For example, where a landlord presents “A” with a preprinted lease on the apartment that “A” wants and if he agrees to the terms and signs it, then it is an express, written contract.

Implied Contract:

The Contracts where there is no expression are called implied contracts. Sitting in a Bus can be taken as example to implied contract between passenger and owner of the bus.

Quasi Contract:

In case of Quasi Contract there will be no offer and acceptance so, Actually there will be no Contractual relations between the partners. Such a Contract which is created by Virtue of law is called Quasi Contract.

On the basis of Nature of Consideration,

Bilateral Contracts

It is like as Executory contracts. A bilateral contract is one in which the obligation on the part of both parties to the contracts are outstanding at the time of the performance of contract.

Unilateral Contract

A unilateral or one sided contract is one in which only one party has to fulfill his obligation at the time of formation of contract, the other party having fulfilled his obligation at the time of contract or before it existence.

Types of Contracts on the basis of Execution

Executory contract-One party fulfill his obligation the other party still want to fulfill. Executed contract-Both parties fulfilled their obligations.

Types of Contracts On the basis of Validity

Valid Contract

The Contracts which are enforceable in a court of law are called Valid Contracts. To attain Validity the Contract should have certain features like consensus ad idem, Certainty, free consent etc

Void Contract

A Contract which is not enforceable in a court of law is called Void Contract. For Example: there is a Contract between X and Y where Y is a minor who has no capacity to contract. It is Void Contract.

Voidable Contract

A Contract which is deficient in only free consent, is called Voidable Contract. That means it is a Contract which is made under certain pressure either physical or mental. For Example: there is a Contract between A and B where B has forcibly made A involved in the Contract. It is voidable at the option of A.

Illegal Contract

If the contract has unlawful object it is called Illegal Contract. Example: There is a contract between X and Z according to which Z has to murder Y for a consideration of Rs. 10000/- from X. It is illegal contract.

Unenforceable Contract

unenforceable contract suffers from some technical defect like insufficient stamp etc. After rectification of that technical defect, it becomes enforceable or valid contract.

For Example: A and B have drafted their agreement on Rs. 10/- stamp where it is to be written actually on Rs. 100/- stamp. It is unenforceable contract.

PERFORMANCE OF CONTRACT

The term performance of a contract means both parties have fulfilled their respective obligations. For instance, A visits a stationery shop to buy a note book. The shopkeeper

delivers the note book and A pays the price. The contract is said to have been discharged by mutual performance**.**

Types of performance of contract

Actual Performance

When a promisor to a contract has fulfilled his obligation in accordance with the terms of the contract, the promise is said to have been actually performed.

Actual performance can further be subdivided into

- substantial performance, and
- partial Performance

Substantial performance

- This is where the work agreed upon is almost finished. The court then orders that the money must be paid, but deducts the amount needed to correct minor existing defect.
- Substantial performance is applicable only if the contract is not an entire contract and is severable.

Partial Performance

- This is where one of the parties has performed the contract, but not completely, and the other side has shown willingness to accept the part performed.
- Partial performance may occur where there is shortfall on delivery of goods or where a service is not fully carried out.

Attempted Performance

When the performance has become due, it is sometimes sufficient if the promisor offers to perform his obligation under the contract. This offer is known as attempted performance

CAPACITIES OF THE PARTIES TO ENTER INTO A CONTRACT

The parties who enter into a contract must have the capacity to do so. Capacity here refers to competence of the party to enter into a valid contract.

Competent persons (Sec 11)

Every person is a competent person to enter into a valid contract who

- Is of the age of majority
- Is of sound mind
- Is not disqualified from contracting by any law

Incompetent persons (Sec 11)

The following persons are incompetent persons in the eyes of law Incompetent persons cannot enter into a valid contract. Incompetent persons are

a) Minors
b) Unsound mind Person
    I. Lunatics
    II. Idiots
    III. Drunken
c) Alien enemies
d) Insolvent person

Minors

Minor is the person who is not attaining the age of 18.A minor cannot enter into a valid contract. Contract with minors treated as not valid.

Unsound Mind Persons

Sound mind is the one of the essential competency of every individual. All the parties in a contract must have sound mildness. Unsound mind persons can also classified as

I. Lunatics
II. Idiots
III. Drunken

A **lunatic** is a person who is mentally deranged due to some mental strain or other personal experience.

An **idiot** is a person who has completely lost his mental powers.

Drunken person is one who is temporarily incapacity to enter into a contract. If he is drunk at the time of contract he cannot take a rational judgment.

Alien enemies:

An alien whose state is at war with the republic of india is not competent to enter into a valid contract. An alien enemy is an individual who, due to permanent or temporary allegiance to a hostile power, is regarded as an enemy in wartime.

Insolvent Person

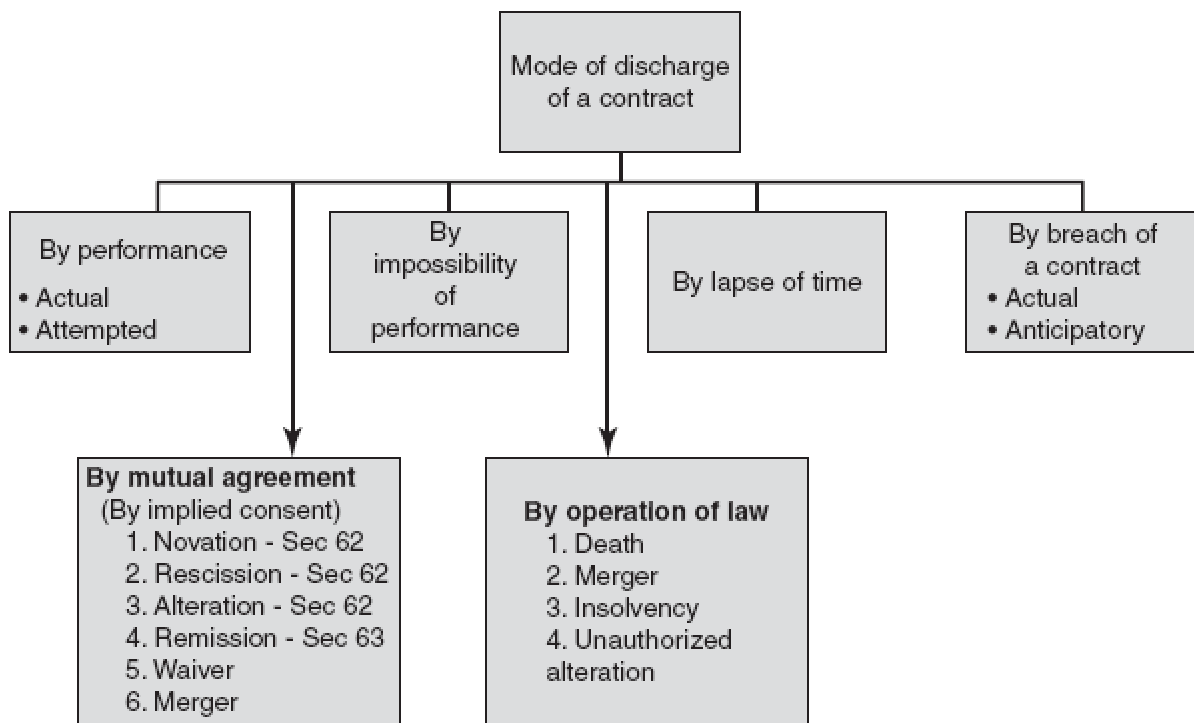
Under the Uniform Commercial Code, a person is considered to be insolvent when the party has ceased to pay its debts in the ordinary course of business, or cannot pay its debts as they become due, or is insolvent within the meaning of the Bankruptcy Code. These persons are disqualified to enter into a valid contract.

Discharge of Contract

Discharge of a contract means the contractual relationship between the parties comes to end. Generally when the obligations of two parties fulfilled the contract will be discharge.

Modes of discharge of a contract

1) By performance
2) By agreement
3) By impossibility of performance
4) By lapse of time
5) By operation of law
6) By breach



By Performance

Performance means doing what is required in a contract. If both parties fulfilled their obligations the contract comes to end.

By agreement

In order to create contractual relationship agreement is must .Likewise the parries in a contract can discharge their relationship by mutual agreement. A contract can be discharged by mutual agreement in any of the following ways:

Novation [Section 62]

Novation means the substitution of a new contract for the original contract. Such a new contract may be either between the same parties or between different parties.

Rescission [Section 62]

Rescission means cancellation of the contract by any party or all the parties to a contract.

Alteration [Section 62]

Alteration means a change in the terms of a contract with mutual consent of the parties. Alteration discharges the original contract and creates a new contract. However, parties to the new contract must not change.

Remission [Section 63]

Remission means acceptance by the promisee of a' lesser fulfillment of the promise made. According to Section 63, "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

Waiver

Waiver means intentional relinquishment of a right under the contract. Thus, it amounts to releasing a person of certain legal obligation under a contract.

By impossibility of performance

The law does not compel a man to do the impossible thing.

- Due to destruction of subject matter
- Due to death of a party
- Due to subsequent change of legislation.

The contract will be discharged in the above mentioned situation.

By lapse of time

The contract is performed within the stipulated period of time. The period is called as period of limitation. If the contracts exceeds time it will be discharged.

By operation of law

A contract may be discharged by operation of law in the following cases:

- Death
- Insolvency
- Unauthorized Material Alteration
- Identity of promisor and promise

By Breach of contract

Breach of a contract means the failure of a party to perform his obligations. The party who fails to perform his obligations is said to have committed a breach of contract. A breach of contract discharges the aggrieved party from performing his obligation.

Breach of Contract

Breach of contract means a breaking of the obligation which a contract is imposes. Breach of contract may be

- Actual Breach of contract
- Anticipatory or constructive breach of contract

Actual Breach of contract

Actual Breach of contract is a breach that permits the aggrieved party to terminate performance of the contract. In addition that party is entitled to sue for damages.

Anticipatory or constructive breach of contract

A breach by anticipatory repudiation is an unequivocal indication that the party will not perform when performance is due, or a situation in which future non-performance is inevitable. An anticipatory breach gives the non-breaching party the option to treat such a breach as immediate, and, if repudiatory, to terminate the contract and sue for damages

Remedies for Breach of contract

- ✓ Suit for Damages.
- ✓ Suit for specific performance.
- ✓ Suit for injunction.
- ✓ Suit for rescission.
- ✓ Punitive damages.
- ✓ Suit for Damages.

The aggrieved party of the contract is entitled for monetary compensation when the contract is breached. The aggrieved / injured party must be able to prove the actual loss or no damages will be awarded. Damages can be of four kinds.

1. Ordinary or General Damages
2. Special Damages
3. Exemplary or Punitive Damages
4. Nominal Damages

- **Suit for specific performance**

  The suit for Specific Performance is regulated by the Specific Relief Act, 1963. Specific Performance means the actual carrying out of the contract as agreed. The Court may grant for specific performance where it is just and equitable to do.

- **Suit for injunction**

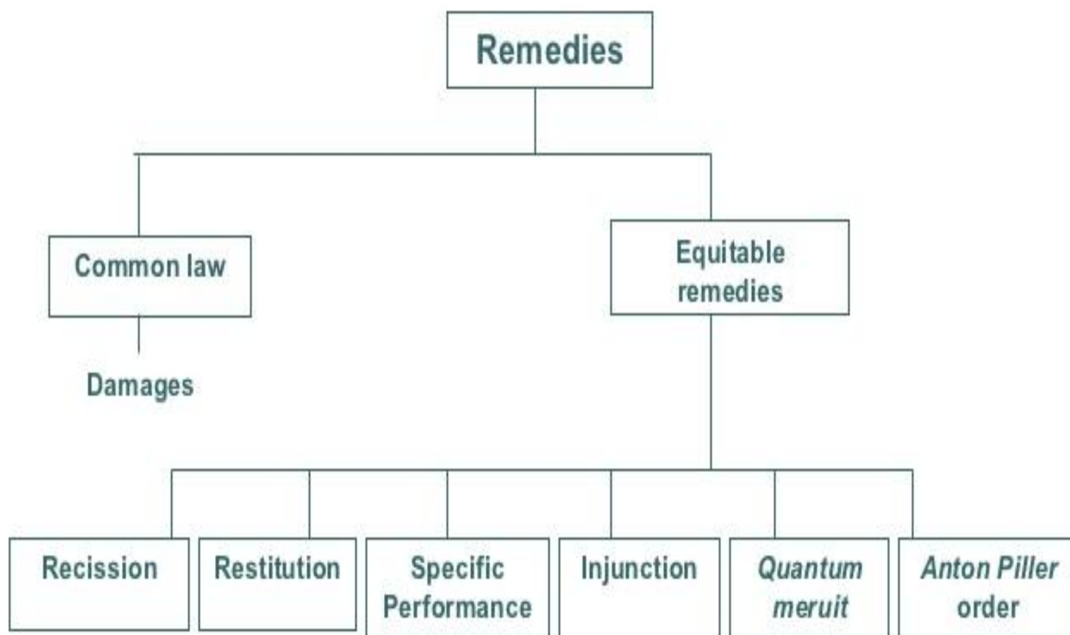
  Injunction is an order of the Court restraining a person from doing a particular act. Where the defendant is doing something which he is promised not to do, then the injured party will get a right to file a suit for injunction.

- **Punitive Damages**

  Punitive damages are rarely awarded for breach of contract. They arise more often in tort cases, to punish deliberate or reckless misconduct that results in personal harm.

- **Suit for rescission**.

  Rescission means a right not to perform the obligation or cancel the contract. When there is a breach of contract by bone party the aggrieved party may rescind the contract and need not perform his obligation.



Flaw in Consent

Contracts are usually described as valid, void and voidable. Valid Contract is an agreement enforceable at the law courts. Those agreements which are not enforceable at the law courts, i.e., for the enforcement of which legal recourse cannot be taken, are known as

Void Contracts. In between the valid and the void contracts are the voidable contracts. Such contracts are the outcomes of Flaw in Consent.

At an early stage you have read that, “an agreement can be called a contract provided it is made with the Free Consent of the parties, competent to contract for a lawful consideration and for a lawful object and is not expressly declared to be void”. When we analyse this statement we come to know that to be a contract, an agreement must be made with the Free Consent of the parties to the contract. Here is the importance of “Free Consent” which is very much necessary for the validity of the contract. The genuineness of the consent implies that the parties to the contract must mean the something in the same sense and not only that but they should mutually agree voluntarily. If their minds do not meet at the same thing in the same sense voluntarily, then their consent shall not be called Free or Voluntary.

The consent in such case might have been obtained under Fraud or Misrepresentation or Coercion or undue influence. In such a case the party giving his consent under any of these four elements shall have a right to withdraw his consent. Such a contract where the consent of a party or parties to the contract is caused by any of the elements stated above, i.e. Fraud Misrepresentation, Coercion or Undue Influence/shall be called a Voidable Contract and shall be enforceable at the option of the aggrieved party or parties and not at the option of the other or others.

Let us make our point clear with the help of an example. Suppose A is willing to sell his car to B for Rs. 15,000, but B is willing to purchase it for Rs. 10,000 only. A tells B if he (B) refuses, to purchase the car for Rs. 15,000 he (A) shall fire upon him. Due to this threat of getting himself hit by A’s gun, B gives his consent to purchase the car for Rs.15,000 only. Here B’s consent cannot be said to be obtained freely or voluntarily. It is cause by threat to the injury of B’s person. Therefore B has a right to withdraw his consent even at a later stage. B’s consent shall be said to be caused by Coercion. Such similar examples can be multiplied.

Thus Free Consent plays a very important role in the validity of a Contract. If there is no Consent, there is no Contract. Sir John Salmond has called flaws in Consent as ‘Error in Causa’. According to him error has been made in causing consent of one of the parties to the agreement which has become responsible for vitiating the validity of the contract. Error in Causa is created by the cause of either Coercion, or Undue Influence or Fraud or Misrepresentation.

Let us now take up these elements, i.e.

a) Coercion,

b) Undue Influence,
c) Fraud and
d) Misrepresentation
e) Mistake

a)Coercion (Section 15)

Meaning:

It is committing, or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation : It is immaterial whether the Indian Penal Code is or is not in force in the place where coercion is employed.

Example :

(a) A threatens to Kill C (B's son), if B does not lend Rs. 10,000 to A. B agrees to lend the aforesaid amount. The agreement is caused by Coercion.

(b) A threatens to Kill B if B does not lend Rs. 10,000 to C.B agrees to lend the amount to C. This agreement is made under Coercion.

Effect of Coercion

Coercion vitiates Free Consent. The party or parties whose consent is taken under the effect of Coercion get a right to avoid the contract, if he so likes. However, if the aggrieved party has received any benefit under the contract which he is avoiding on the basis of Coercion, he has to return that benefit to the other party or parties

b) Undue Influence,

A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

Example

A being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

Salient Features

1. One of the two parties to the contract is in a position to dominate the will and mind of the other party.

2. The dominating party should have obtained an unfair advantage from the weaker party: and
3. The transaction between the contracting parties is unconscionable.

Effect of undue influence

A contract vitiated by undue influence is voidable at the option of weaker party. The court can set aside such contract-

(i) either wholly: or

(ii) where the weaker party has enjoyed some benefit under the terms of the contract, then upon just and equitable terms

Example

A, a money-lender, advances Rs. 100 to B, an agriculturist, and by undue influence induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay Rs. 100 with such interest as may seem just.

Distinction between Coercion and Undue Influence

We can distinguish between Coercion and Undue Influence. The distinction can be made on the following basis:

(i) Definition,

Coercion is an act punishable under the Indian Penal Code, while Influence is not a penal act.

(ii) Nature of force used,

Coercion requires physical force exercised by one of the parties to contract, while undue influence requires moral force.

(iii) Parties

Even a stranger's act may account to coercion, but undue influence can be exercised only by one of the parties to the contract. Stranger has no place in undue influence.

(iv) Effect.

Coercion gives a right to the effected party to repudiate the contract in full but under undue influence court may set aside the contract absolutely or modify the terms of the contract on such terms which it feels just and equitable.

c) Fraud

"Fraud" means and includes any of the following acts committed by a party to contract or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract:

(1) the suggestion, as to fact, of that which is not true, by one who does not to believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fited to deceive;

(5) any such act or commission as the law specially declares to be fraudulent.

Characteristics

From the above definition we can state the following characteristics of Fraud:

(1) The act done by the party is done with an intention to device.

(2) The act may be done by the party himself or with his connivance by some one else or by his agent.

(3) The act amounting to fraud may be a suggestion of fact (suggestion false) i.e., the statement being made is without belief to its truth.

(4) The act may amount to an active concealment of a fact (suppressio veri) i.e. the party has concealed a fact which was duty bound to disclose.

(5) The act amounting to fraud is in the form of a false promise.

(6) The act or mission is declared fraudulent by the Court or regarded by the Court as a deceit. (7) The act committed must have deceived the other party and the party has suffered the damage.

Effects of Fraud

Fraud gives the following rights to the aggrieved party.

(1) He can avoid the contract and file a suit on the other party for damages; or

(2) He can revoke the contract, or

(3) He can refuse to fulfill his part of the promise and defend the suit filed by the other party for the breach of contract for damages or specific performance, or

(4) He can treat the contract as a valid one and ask for the specific performance, or for damages in addition to the substitution of the original contract.

d) Misrepresentation

Misrepresentation has been defined by the Act as follows: “Misrepresentation” means and includes:-

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true;

(b) any breach of duty which without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him.

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Characteristics

(a) There must be a misstatement of a material fact.

(b) The statement must not be a mere opinion, or hearsay, or commendation, because praise carries no obligation.

(c) The mis-statement must be made with the intention that the other party shall act upon he contract.

(d) The other party must have been induced by the mis-statement.

(e) The statement being made is a wrong one, although the party making it has not known it to be false.

(f) The statement has been made by the party to the contract or his agent and not by a stranger.

Difference between Fraud and Misrepresentation

Fraud

1. Fraud is defined under Sec. 17.
2. Fraud means a misrepresentation made with an intention to cheat
3. The distinction between fraud and misrepresentation is solely on intention.
4. In case of fraud, the aggrieved party can avoid the contract even if the means to discover the truth were available.
5. In case of fraud not only the agreement is voidable but also the aggrieved party can claim damages.

Misrepresentation

1. Misrepresentation is defined under Sec. 19
2. Misrepresentation means a misstatement made innocently.
3. In case of misrepresentation misstatement is made innocently.
4. In case of misrepresentation if the aggrieved party has the means to discover the truth, it cannot avoid the contract.
5. In case of misrepresentation no damages can be claimed, the aggrieved party can only avoid the contract.

e) Mistake

In contract law, a mistake is an erroneous belief, at contracting, that certain facts are true. It can be argued as a defense, and if raised successfully can lead to the agreement in question being found void ab initio or voidable, or alternatively an equitable remedy may be provided by the courts. Common law has identified three different types of mistake in contract: the 'unilateral mistake', the 'mutual mistake' and the 'common mistake'. The distinction between the 'common mistake' and the 'mutual mistake' is important.

Mistake can be -

(1) Mistake of Law

(2) Mistake of Fact

Mistake of law:

when a party enters into a contract, without the knowledge of the law in the country, the contract is affected by such mistakes but it is not void. The reason here is that ignorance of law is not an excuse. However if a party is inducedto enter into a contract by the mistake of law then such a contract is not valid.

Illustration:

Harjoth and Danny make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of Limitation; the contract is not voidable.

Mistake of Fact:

Where both the parties enter into an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation:

An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Unilateral mistake

A unilateral mistake is where only one party to a contract is mistaken as to the terms or subject-matter contained in a contract. This kind of mistake is more common than other types of mistake. One must first distinguish between mechanical calculations and business error when looking at unilateral mistake. For mechanical calculations, a party may be able to set aside the contract on these grounds provided that the other party does not try to take advantage of the mistake, or 'snatch up' the offer (involving a bargain that one did not intend to make, betrayed by an error in arithmetic etc.). This will be seen by an objective standard, or if a reasonable person would be able to know that the mistake would not make sense to one

of the parties. Unless one of the parties 'snatched up' the one-sided offer, courts will otherwise uphold the contract.

Bilateral mistake

A mutual mistake occurs when the parties to a contract are both mistaken about the same material fact within their contract. They are at cross-purposes. There is a meeting of the minds, but the parties are mistaken.

Difference between Misrepresentation, Mistake and fraud

Misrepresentation occurs when a person makes an untrue assertion of fact (or in some cases an omission of fact). It is based on someone's actions.

Fraud is essentially knowing or intentional misrepresentation, and is differentiated from negligent misrepresentation and innocent misrepresentation. Negligent misrepresentation occurs when a person did not know he or she was making a misrepresentation when he or she should have known that he or she was doing so. Innocent misrepresentation is where there was a misrepresentation but the person making the misrepresentation had no duty to know that it was.

Assuming that the other party relied on the untrue statement and was justified in doing so, any of the three forms of misrepresentation could be grounds for recession of a contract; however, fraud and negligent misrepresentation could also allow for a cause of action in tort, and, especially for fraud, a claim for punitive damages.

Mistake is where someone believes that a fact was true when in fact it was not. It is based on someone's belief.

Usually, when both parties are mistaken about the fact, either party may have the contract voided. The classic case is where the parties contracted to sell and buy a cow that both parties believed to be barren; when it was found that the cow was actually pregnant, the seller sought to take back the cow because it was not what both parties believed it was -- seller won.

When only one person makes a mistake, then a contract is usually not voidable unless the mistake would make enforcing the contract "shocking to the conscience," or where the other party was somewhat at fault with regard to the mistake.

Lastly, there is also the principle of mistake of law. This is basically a mistake as to what the law is concerning something about the contract. It will not make a contract voidable because of the principle ignorantia iuris non excusat (ignorance of the law is no excuse),

unless one party basically caused the other party to believe in the mistaken law, in which case the contract may be voidable.

UNIT - II : SALE OF GOODS ACT

Sale of goods Act – Transfer of property from buyer and seller. Law of Agency – relation of principal and agency – Personal liabilities of agents – Termination of agency.

SALE OF GOODS ACT 1930

Introduction

The Sale of Goods Act is a kind of Indian Contract Act. It came into existence on 1 July 1930. It is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for price. It is applicable all over India, except Jammu and Kashmir. The goods are sold from owner to buyer for a certain price and at a given period of time. The sale of goods is the most common of all commercial contracts. Knowledge of its main principles is of the utmost importance to all classes of the community. Prior to this act, he law of sale of goods was contained in chapter VII of Indian Contract Act, 1 872.

Important definitions relating to contract of sales

"According to section 4(1) of the Indian sales of goods act, a contract of sales means such contract by which the seller transfer the title or ownership of the goods to the buyer or makes an agreement to transfer it against a fixed price "

1. **Buyer** A person who buys or agrees to buy goods.
2. **Seller** A person who sells or agrees to sell goods.
3. **Goods** Every kind of movable property other than actionable things and money.
4. **Existing goods** Goods which are in existence at the time of contract of sale.
5. **Future goods** Goods which are to be manufactured /produced by seller after making contract of sale.
6. **Specific goods** Goods which are identified & agreed upon at the time of contract of sale has been made.

Essentials of Contract of Sale

Two Parties

A contract of sale of goods is bilateral in nature wherein property in the goods has to pass from one party to another. One cannot buy one's own goods.

Goods

The subject matter of a contract of sale must be goods. Every kind of movable property except actionable claims and money is regarded as 'goods'

Price

The buyer must pay some price for goods. The term 'price' is 'the money consideration for a sale of goods'. Accordingly, consideration in a contract of sale has necessarily to be in money. Where goods are offered as consideration for goods, it will not amount to sale, but it will be called barter or exchange, which was prevalent in ancient times.

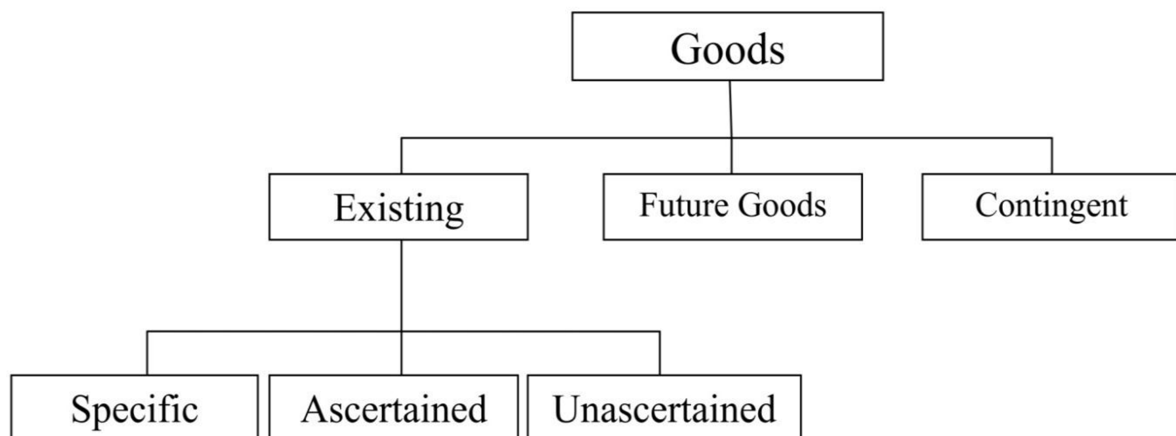
Transfer of general property

What a contract of sale stipulates is the transfer of property i.e. the ownership of the goods and not the possession of the goods.

Essential element of a valid contract

A contract of sale is a special type of contract, therefore, to be valid, it must have all the essential elements of a valid contract, viz., free consent, consideration, competency of contracting parties, lawful object, legal formalities to be completed, etc.

Classification of goods



Goods:

Every kind of movable property other than actionable things and money according to the sale of goods act. It can be classified into 3 categories.

- Existing goods
- Future goods
- Contingent goods

I Existing goods

These are goods which are in actual existence at the time of contract of sale. These goods are owned and possessed by the seller at the time of contract of sale. The existing goods further classified as

- Specific goods

- Ascertained goods
- Unascertained goods

Specific goods

These are the goods which are identified and agreed upon at the time when a contract of sale is made-For example, specified TV,VCR, Car, Ring.

Ascertained goods

Goods are said to be ascertained when out of a mass of unascertained goods, the quantity extracted for is identified and set aside for a given contract. Thus, when part of the goods lying in bulk are identified and earmarked for sale, such goods are termed as ascertained goods.

Unascertained goods

These are the goods which are not identified and agreed upon at the time when a contract of sale is made e.g. goods in stock or lying in lots.

II Future goods

Goods to be manufactured or acquired by a seller after a contract of sale has been made. Future goods must be distinguished as the subject of a contract of sale from existing goods, which are owned or possessed by a seller.

III Contingent Goods

These are goods which are not existence at the time of contract of sale. The contingent goods are a type of future goods. In this case, the acquisition of goods by the seller depends upon the uncertain contingencies, i.e., upon uncertain events which may or may not happen..

Distinction between sale and agreement to sell

Sales	**Agreement to sell**
Sales is a Executed contract.	It is Executory contract.
Transfer of property is made immediately	Transfer of property is made in future.
The contract is made for existing and specific goods.	The contract is made for Future and contingent goods.
Risk passes to the buyer.	Risk is within the seller.
Rights of unpaid seller are to sue for price.	Rights of unpaid seller are to sue for damages.

Distinction between sale and Hire purchase

Sale	Hire purchase
Property in the goods is transferred to the buyer immediately.	Property in the goods passes to the hirer upon payment of the last installment.
Position of the buyer is that of the owner of the goods.	Position of the hirer is that of a bailee till he pays the last installment.
The buyer cannot terminate the contract	The hirer may terminate the contract.
Buyer can pass a good title to a bonafide purchaser.	The hirer cannot pass any title even to a bonafide purchaser.
Sales tax is levied at the time of the contract.	Sales tax is not leviable until it eventually ripens into a sale.

Condition and warranty

- A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.
- A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.
- A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.
- Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

When condition to be treated as warranty

- Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
- Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

- Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise.

Conditions & Warranties:

Oscar Chess Ltd v Williams [1957]:

Mrs. Williams purchased a second hand Morris car on the basis that it was a 1948 model. The registration document stated it was first registered in 1948. The following year her son used the car as a trade in for a brand new Hillman Minx which he was purchasing from Oscar Chess. The son stated the car was a 1948 model and on that basis the Oscar Chess offered £290 off the purchase price of the Hillman. Without this discount Williams would not have been able to go through with the purchase. 8 months later Oscar Chess ltd found out that the car was in fact a 1939 model and worth much less than thought. They brought an action for breach of contract arguing that the date of the vehicle was a fundamental term of the contract thus giving grounds to repudiate the contract and claim damages.

Warranty in its ordinary English meaning denotes a binding promise. Everyone knows what a man means when he says, ‘I guarantee it’, or ‘I warrant it’, or ‘I give you my word for it.’ He means the he binds himself. Lawyers use it to denote a subsidiary term in a contract as distinct from a vital term which they call a ‘condition’.

Therefore, if used in this technical sphere, condition is a vital term and warranty is a subsidiary term.

Breach of Condition

It is the essential part or vital term of a contract whose breach creates the option for the buyer to terminate the contract.

Breach of Warranty

It is the subsidiary part of the contract. Its breach can only lead to a claim for damages but not to a repudiation of the contract.

Implied Conditions

- Condition as to title.
- Condition in a sale by description the buyer must get the described goods.
- Condition in a sale by sample, the bulk must correspond with the sample.
- Conditions as to fitness & quality (in the following cases only; in other cases caveat emptor applies)
    1. Buyer makes known to the seller the particular purpose for which he requires the goods.

2. Buyer relies on the skill & judgment of the seller (The seller's business is to supply such goods whether he is the manufacturer or producer or not)

- Condition as to merchantability (exception to the rule of caveat emptor)
- Where goods are bought by description from a seller who deals in goods of that description (whether he is manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.

  Merchantability means essentially that the goods must be fit for the ordinary purpose for which such goods are used.
- Condition as to merchantability when applied to food products, the condition of fitness of merchantability requires that the goods should be wholesome, i.e. fit for the purpose of consumption.

Implied Conditions

- Warranty as to quiet possession.
- Warranty as to non-existence of encumbrances.
- Warranty as to disclosure of dangerous nature of the goods to the innocent buyer.

Change of Condition to Warranty:

Option of the buyer…..

When a condition is reduced to the status of a warranty, the effect is not the condition becomes a warranty, but that the condition remains a condition, it is only the remedy which changes.

Circumstances:

Circumstances are such that goods cannot be returned ….

- When the buyer has accepted the goods & intimates to the seller.
- When goods have been delivered to the buyer & he does any act in relation to them which is inconsistent with the ownership of the seller.
- In a sale or return, after the lapse of reasonable time, the buyer retains them for unreasonably long time without intimating, the seller that he has rejected them.

Sale & Transfer of Ownership

- Goods must be ascertained and specific for the transfer of ownership to take place.
- In the case of specific and ascertained goods, we should explore whether the contract provides in express or implied terms, on the passing of ownership. These terms should be applied.

Transfer of Property

Rules regarding transfer of property

The primary rules for ascertaining when the property in goods passes to the buyer are as follows.

Goods must be ascertained

Where there is a contract of sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Intention of the parties

Where there is a contract for sale of specific or ascertained goods the property passes to the buyer at the time when the parties intend to pass.

PERFORMANCE OF A CONTACT OF SALE

Delivery

1.Meaning Sec.2(2):

Delivery means voluntary transfer of possession from one person to another.

2. Duty of Seller Sec. 31:

It is the duty of the Seller to deliver the goods and of the buyer to accept and pay for them in accordance with the contract of Sale.

3. Mode of delivery : Sec. 33:

Delivery of Goods sold may be made by

(a) doing anything which the parties agree shall be treated as delivery ; or

(b) which has the effect of putting the Goods in the possession of the Buyer or of any person authorized to hold them on his behalf.

Modes of Delivery of goods

Delivery of goods may be made in any of the following three ways:

1. **Actual Delivery**:

Also known as **physical delivery**, actual delivery takes place when the goods are physically handed over by the seller or his/her authorized agent to the buyer or his/her agent authorized to take possession of the goods.

For example, A, the seller of a car hands it over to B, the buyer; it is a case of actual delivery of the goods.

2. **Symbolic Delivery**:

Where the goods are bulky and heavy and it is not possible to physically hand them over to the buyer, delivery thereof may be made by indicating or giving a symbol. Here the goods itself are not delivered, but the means of obtaining possession of goods is delivered.

For example,

Delivering the keys of the warehouse where the goods are stored, or the keys of a purchased car to its buyer, bill of lading which will entitle the holder to receive the goods on arrival of the ship.

3. **Constructive Delivery**:

In this case neither physical nor symbolic delivery is made. In constructive delivery the individual possessing the products recognizes that he holds the merchandise for the benefit of, and at the disposal of the purchaser. Constructive delivery is also called attornment.

Constructive delivery may be effected in the following three ways.

- Where the seller, after having sold the goods, agrees to hold them as bailee for the buyer
- Where the buyer, who is already in possession of the goods as bailee of the seller, holds them as his own, after the sale, and
- Where a third party, for example, a carrier/transporter, who holds the goods, as bailee for the seller, agrees and acknowledges holding them for the buyer.

Rules regarding the delivery of good.

1. Delivery Ways :-

When goods are sold then delivery can be made by symbolic, actual or constructive way. It depends upon the parties that which way they adopt.

2. Time of Delivery :-

The seller should deliver the goods on a specified date. If the time is not fixed then delivery should be within a reasonable time.

3. Payment And Delivery :-

Both the actions should be at the same time. The buyer should make the payment and seller should deliver the goods in exchange of payment at the same time, just like the cash sale on the customer of a super stores.

4. Place of Delivery :-

A delivery of goods should be at a specified place mentioned in the contract.

Example :-

"X" agrees with "Y" to supply furniture on 38-Tipu Road Ahmadabad. "X" is bound to supply the goods on the same place, where parties made contract.

5. Delivery Expenses :-

The expenses of putting the goods into deliverable state must be born by the seller, otherwise as the parties agree.

Example :-

"X" sells the T.V to "Y". The expenses of packing the T.V will be born by the seller.

6. Delivery to Carrier :-

When seller is required to send the goods to the buyer, the delivery to carrier is considered delivery to the buyer.

Example :-

"X" sells computer to "Y". "X" handed over the computer to the carrier to be delivered to "Y". it means delivery has been made.

7. Defective Delivery :-

A buyer can reject or accept the defective and wrong delivery. In case of rejection buyer is not bound to return it to the seller.

Example :-

Mr. Imik buys 1000 books of Economics from Khan publishers. Publishers sends 500 books. Mr. Imik may reject the whole or accept 500 and ask for the rest.

8. Good In the Custody of Third Party :-

If the sellers goods are in the custody of the third party, the delivery is not possible until the third party agrees to handed over the sold goods to the buyer on behalf of the seller.

Example :-

"M" has his cycle in the store of "Y". "M" sells the cycle to "B" and gives him letter to take from "Y". "Y" agrees to deliver the cycle to "B".

9. Delivery in Installments :-

The buyer is not bound to receive the goods in installments but if the buyer and seller are agree then the delivery of goods may be made in installments.

10. Buyer Should Apply for Delivery :-

It is the duty of the buyer that he should apply for the delivery of goods. The seller is not bound to supply the goods without the demand of the buyer. If seller fails to supply the goods on demand then he will be held responsible.

11. Partial Delivery Effect :-

If some portion of the goods has been made with the intention of delivering the rest of goods then the ownership of the whole goods is deemed to pass to the buyer as some portion is delivered.

Example :- "

"X" sold 10 bikes to "Y". "Y" received 5 and paid their price. "Y" refused to accept the rest 5 bikes. It was a partial delivery.

12. Refusal of Buyers Liability :-

When seller is ready to sell the goods. While buyer is not ready to accept the delivery, then buyer will be liable to the seller for the loss arising due to his refusal.

Example :-

"X" agrees to sell out ten bags of apples to "B". "B" refuses to take delivery. Apples destroy and "X" suffers a loss. "X" is entitled to claim damages from "B".

13. Acceptance Of Buyer :-

The buyers acceptance can be judged by the following facts :

1. Buyer himself can intimate the seller that he has accepted the goods.
2. By his any action related to the goods like resale or by pledge.
3. When he retains for a reasonable time, it means he has accepted the goods.

Delivery of Wrong quantity

If the seller has delivered excess quantity, the buyer has the following options:

• To accept the whole of the goods delivered to him.

• To reject the whole of the goods delivered of him.

• To accept contracted quantity and reject the excess.

Seller has delivered short quantity, buyer has following options.

• To accept the goods delivered to him.

• To reject whole quantity delivered to him.

Right to reject the goods in excess of the contract does not apply where the variation is negligible.

- Further, the right to reject the goods is not similar to the right to cancel the contract. If the buyer rejects the goods (either because they are less than or in excess of the quantity contracted for), the seller has a right to tender again the contract quantity and the buyer is bound to accept the same.

Delivery of Mixed Quality – Quantity

- The seller is bound to deliver goods of exact quality – quantity otherwise buyer may:
  - Reject the whole.
  - Reject the goods not complying with quality or quantity and accept the rest.

“Nemo dat qui non habet” (Sale by Non Owners)

“Nemo dat qui non habet” means “no one can give that which one has not got” Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell: Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

Rowland v Divall (1923)

Sale of a stolen car – D bought a car – sold it to a motor dealer R – painted and sold by R police took possession from the buyer as car was found to be stolen – R refunds price to buyer & sues D to recover price paid to D.

Sale by Auction & Transfer of Ownership

Unless the parties provide otherwise, a contract of sale in an auction is concluded on the fall of hammer.

Dennat v Skinner (1948)

Sale of cars by auction – D knocks down 4 cars to King – King does not pay, but offers cheque – D accepts based on a condition that ownership will not pass until cheques are encashed – King sells car to S – Cheque dishonoured – King arrested – pleads guilty & jailed – D now claims from S contending that the property had never passed to King.To exercise right to retain possession & ‘seller’s lien’ possession of goods, as agent or bailee for the buyer, is required.

Goods not in a deliverable state

Ownership will pass only when the seller puts them in a deliverable state and informs the buyer about it.

Underwood Ltd V Burgh Castle Brick & Cement Syndicate (1922)

U Ltd, owners of a condensing engine agreed to sell it free on rail in London to B - weighed thirty tons and was bolted to and embedded in concrete- before it could be delivered on rail, it had to be detached and dismantled - in loading the engine on a railway truck, the sellers accidentally damaged it, and the buyers refused to accept it . Seller claims goods have been sold. "Buyers intention was to buy an article which would be a loose chattel (good) when the process of dismantling it were completed, and to convert it into a loose chattel (good), these processes had first to be performed."

Sale or Return Transactions

The property passes when the person to whom goods have been given on 'sale or return' signifies his approval or acceptance to the seller or does any other act adopting the transaction.

Kirkham v Attenborough & Gill (1895-99)

K sends jewellery to Winter on Sale or return basis – Winter pawns jewellery to A & G and dies – K wasn't paid for it – K demands return of the same from A & G – A&G refuse to return unless money borrowed is paid back.

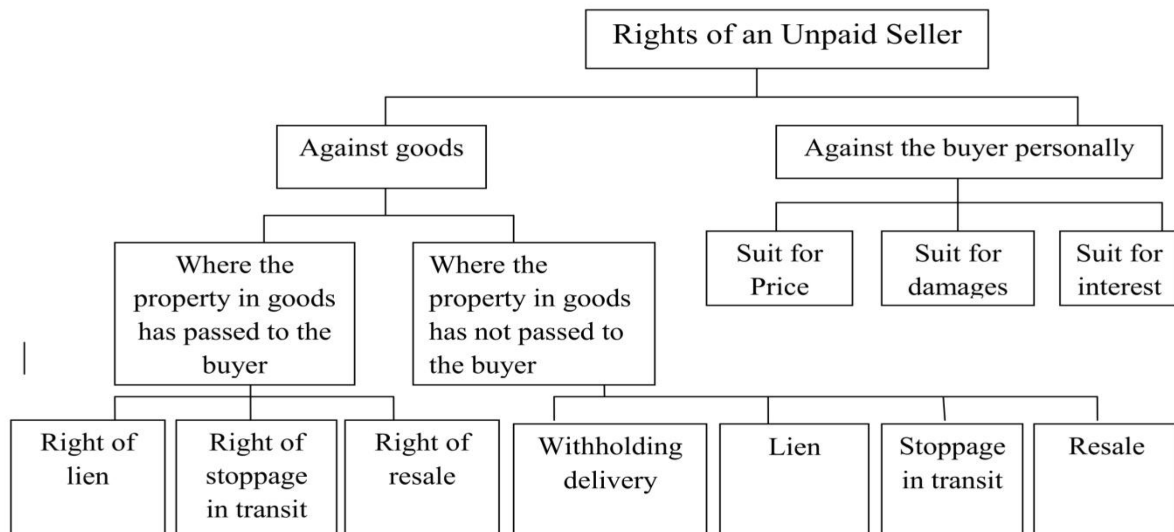
Unascertained Goods

No property in the goods is transferred to the buyer unless and until the goods are ascertained. This does not, however, mean that property would automatically pass once it is ascertained. It would depend on the intention of the parties as to when they want the property to pass.

Pignataro v Gilroy (1919)

(G sold to P 140 bags of rice - Sale by sample – G would deliver 125 bags to P at a warehouse – 15 bags were to be collected by P from G's place of business – G sends reciept for cheque received & delivery order for 125 bags – letter stating that 15 bags were ready for delivery – P neglected to collect bags – G sends two more letters – bags subsequently stolen – G took all care and was not negligent – Had ownership of 15 bags transferred?)

Rights of an unpaid seller:



I Rights against the goods where the property in the goods has passed to the buyer

a) Right of Lien [Section 47,48 and 49]

Meaning of Right of Lein:

The right of lien means the right to retain the possession of the goods until the full price is received.

Three circumstance under which right of lien can be exercised[Section 47(1)]

1. Where the goods have been sold without any stipulation to credit;
2. Where the goods have been sold on credit, but the term of credit has expired;
3. Where the buyer becomes insolvent.

b) Right of Stoppage of Goods in Transit:

The right of stoppage in transit means the right of stopping the goods while they are in transit, to regain possession and to retain them till the full price is paid.

c) Right of Resale

The right of resale is a very valuable right given to an unpaid seller. In the absence of this right, the unpaid seller's other rights against the goods, namely, 'lien' and 'stoppage in transit,' would not have been of much use because these rights only entitle the unpaid seller to retain the goods until paid by the buyer.

II Rights against the Buyer

a) Suit for price (Sec. 55).

Where property in goods has passed to the buyer; or where the sale price is payable 'on a day certain', although the property in goods has not passed; and the buyer wrongfully neglects or refuses to pay the price according to the terms of the contract, the seller is entitled to sue the buyer for price, irrespective of the delivery of goods.

b) Suit for damages for non-acceptance (Sec. 56).

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The seller's remedy in this case is a suit for damages.

c) **Suit for Interest[Section 61(2)]**

In case of breach of the contract on the part of seller, the buyer may sue the seller for interest from the date on which the payment was made.

Difference between Lien and Stoppage in Transit

Lien

1. A lien is a right to retain possession.
2. In case of a lien, the goods must be in seller's possession.
3. The right of lien can be exercised when the buyer does not pay.
4. The right of lien comes to an end when the possession of goods is lost.

Stoppage in Transit

1. Stoppage in transit is a right to regain possession. Where the first right is over, the second starts to take the original position.
2. In case of stoppage in transit, the goods must be in the possession of a carrier or any other bailee, i.e., a middle-man.
3. The right of stoppage can be exercised when the buyer has become insolvent.
4. The right of stoppage comes to an end when the buyer or his agent takes possession of goods.

Rights and Duties of the Buyer

RIGHT		DUTIES	
1.	To have delivery of the goods as per contract. (secs. 31 & 32)	1	To accept the delivery of goods, when the seller is willing to make the delivery as per the contract (Sec. 31)
2.	To reject the goods when they are not of the description, quality or quantity as specified in the contract (Sec 37).	2.	To pay the price in exchange for possession of the goods

3.	To repudiate the contract when goods are delivered in installments without any agreement to that effects [Sec. 38 (1)]	3.	To apply for delivery of the goods. (Sec. 35)
4.	To be informed by the seller, when the goods are to be sent by sea route, so that he may arrange for their insurance [Sec 39 (30]	4	To demand delivery of the goods at a reasonable hour (sec 36 (4)
5	To have a reasonable opportunity to examine the goods for ascertaining whether they are in conformity with the contract. (sec. 41)	5	To accept delivery of the goods in installments and pay for them, in accordance with the contract. (Sec. 38 (2)
6	To sue the seller for recovery of the price, if already paid, when the seller fails to deliver the goods.	6	To bear the risk of deterioration in the course of transit, when the goods are to be delivered at a place other than where they are sold (sec 40)
7	To sue the seller for damages if the seller wrongfully neglects or refuses to deliver the gods to the buyer (sec 57)	7	To inform the seller in case the buyer refuses to accept or rejects the goods (sec 43)
8	To sue the seller for specific performance	8	To take the delivery of the goods within a reasonable time after the seller tenders the delivery (Sec. 44)
9	To sue the seller for damages for breach of a warranty or for breach of a condition treated as breach of a warranty (Sec 59)	9	To pay the price, where the property in the goods are passed to the buyer, in accordance with the terms of the contract (Sec 55)
10	To sue the seller the damages for anticipatory breach of contract (Sec 60)	10	To pay damages for non-acceptance of goods (Sec 56)
11	To sue the seller for interest where there is a breach of contract on the part of the seller and price has to be refunded to the buyer(sec 61)		

Doctrine of Caveat Emptor

The doctrine of Caveat Emptor means let the buyer beware. In other words, the buyer must take care of his own interest while purchasing the goods. Buyer in a contract of sale of specific goods will purchase them at his own risk with regard to the quality or fitness of the goods except in case of fraud or where a condition to that effect is laid down in the contract itself.

Buyer cannot hold the seller liable if the goods turn out to be defective or do not suit his purpose or if the buyer makes a mistake in assessing the quality of the goods. It is for the buyer to ensure at the time of purchase that the goods conform to his requirements.

When a person buys some goods, it is his duty to examine them thoroughly. Generally, goods are purchased when the buyer is satisfied with its quality and need. Hence, the goods is purchased by the buyer at his own risk and to his best judgment. If the goods do not suit the purpose, he cannot blame anybody except himself. The buyer has to bear the consequences of his wrong selection of goods.

The buyer has to check the following elements.

- Title
- Ownership and possession
- Durability
- Perish ability.

Example to Caveat Emptor:

There was a sale by sample by a woolen manufacturer of cloth to merchant, who was also a tailor. The cloth was required for making liveries But the fact was not made known to the seller. On account of the latent defect in the cloth, liveries could not be made out of it. But there was nothing to show that it was unfit for other purposes. Held the buyer was without remedy due to non-communication of the purpose for which the cloth was required.

Exceptions to the Doctrine of Caveat Emptor

- Implied Condition regarding Quality or Fitness
- Sale of Goods by Description
- Usage of Trade
- Sale under a Patent or Trade name
- Sale by Sample
- Misrepresentation

Price

Price means the money consideration for a sale of a Goods 2(10)

The following are the modes of determining price: [Sec. 9]

⇒ Price is specified under the contract. It is the most common method of determining the price. Here, parties decide the price in advance.

⇒ Price may be determined as per the method specified in contract.

Example :

Delivery of rice on 1st December 2008 at the rate prevailing on that day.

- Price may be determined in accordance to custom and usage of trade. This method is applicable if parties regularly trade.

- Where the price is not fixed as above, the buyer shall pay the seller a reasonable price. ‘What is a reasonable price is a question of fact and circumstances.

Fixation of price by third party. (Sec. 10)

If it is so, contract shall specify name of third party. If third party fails to specify, contract is void but if goods are delivered to buyer and used by him, he is required to pay reasonable price. If the third party is prevented from fixing price, defaulting party is liable for the damages.

Consequences of Destruction of Specific Goods

The consequences of destruction of specific goods can be discussed under the following three heads:

If goods perish before making the contract

- Contract is void – ab – initio, due to mistake as to existence of subject matter.
- It is to be noted that if the seller has knowledge about the destruction of goods, even then the enters into the contract of sale with buyer, then seller is bound to compensate to the buyer.

Where a part of the goods is perished before making contract

If the goods was divisible, then the contract can be enforced party and if the goods was indivisible, then the contract becomes void – ab – inito.

Example:

A contracted to sell one wagon containing 700 bags of groundnut to B. Unknown to A, 109 bags had been stolen at the time of sale, Therefore, A made a delivery of 591 bags. Held, the sale was void.

If goods perish after the “Agreement to sell; but before’ Sale [Sec. 8]

The contract is void if subsequently the goods have perished, and there is no fault on the part of the buyer or seller in perishing the goods.

Example:

A horse was delivered upon trial for 8 days. However, the horse died within 8 days, without the fault of buyer or seller. Held, the seller must bear the loss, as the contract was void. However, parties to the contract may provide otherwise also.

LAW OF AGENCY

The law of agency is an area of commercial law dealing with a set of contractual, quasi-contractual and non-contractual fiduciary relationships that involve a person, called the agent, that is authorized to act on behalf of another called the principal to create legal

relations with a third party. Succinctly, it may be referred to as the equal relationship between a principal and an agent whereby the principal, expressly or implicitly, authorizes the agent to work under his or her control and on his or her behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him or her and third parties into contractual relationship. This branch of law separates and regulates the relationships between:

- Agents and principals (internal relationship), known as the principal-agent relationship;
- Agents and the third parties with whom they deal on their principals' behalf (external relationship); and
- Principals and the third parties when the agents deal.

Legal concept of Agency

The legal concept of agency is much more limited than the usage os the term in business or commerce. In legal terms, agency involves three persons, i. The principal ii. The agent iii. The third party An agent is a person authorized, expressly or impliedly, to act for his principal so as to create or affect legal relations between the principal and the third party. The principal makes use of the agent to enter into a legal relationship with a third party. The most important feature of legal agency is that the agent by his act of agency affects the principal's legal position towards third parties. Legal agency arises by operation of law rather than by agreement between the parties.

Example :

Piyal is the principal. Sunil is the agent and Prasad is the third party. Piyal wishes to buy a large number of coconuts from Prasad. He sends his agent Sunil to purchase the coconuts on credit from Prasad. If Prasad gives the coconuts on credit to Sunil, then Sunil has contracts with Prasad on behalf of his principal, Piyal. It is Piyal (the principal) who is liable to pay for the coconuts to Prasad (the third party). By his act of taking delivery of the coconuts on credit, Sunil (the agent) has imposed legal liability on his principal (Piyal) to pay the third party (Prasad)

Essentials of relationship of agency

- ✓ Agreement between the agent and principal
- ✓ Intention of the agent to act on behalf of the principal

Relation of principal and agent

Creation of Agency

The relationship between principal and agent may arise in the following ways

i. By express agreement

ii. By implied agreement
   a) Agency by estoppels
   b) Agency by holding out
   c) Agency by necessity
iii. By ratification
iv. By operation of law

i. By express agreement

Generally an authority is conferred by the Principal to the Agent. If the agent exceeds this authority, then the principal will not be bound and the agent will be personally liable to the third party for breach of warranty of authority.

Example :

If a customer of a bank wishes to transact his banking business through an agent, the bank will require written evidence of the appointment of the agent and will normally ask to see the registered power of attorney appointing the agent.

ii By implied agreement

This type of agency comes into force by virtue of relationship between parties or by conduct of parties.

For example: A and B are brothers, A has got settled in foreign country without any request from A, B has handed over A`s agricultural land on these basis to a farmer and B is collecting and remitting the amount of rent to A. Here automatically A becomes principal and B becomes his agent.

Agency by implied authority is of three types as shown below;

- Agency by Necessity
- Agency by Estoppel
- Agency by Holding out.

Agency by Necessity

At times it may become necessary to a person to act as agent to the other. For example: A has handed over 100 quintals of butter for transportation, to a road transport company. Actually it is bailment contract, assume that in the transit all vehicles has got stopped where it takes one week for further movement. So the transport company authorities have sold away the butter in those nearby villages. Here agency by necessity can be seen.

Agency by Estoppel

A person cannot be bound by a contract made on his behalf without his authority. However, if he by his words and conduct allows a third party to believe that that particular person is his agent even when he is not, and the third party relies on it to the detriment of the third party, he (principal) will be estopped or precluded from denying the existence of that person's authority to act on his behalf.

Agency by Holding out.

B is A`s servant and A has made B accustomed to bring good on credit from C. On one occasion A has given amount to B to bring goods from C on cash basis. B has misappropriated that amount and has brought goods on credit as usually, Here is agency by holding out and therefore A is liable to pay amount to C.

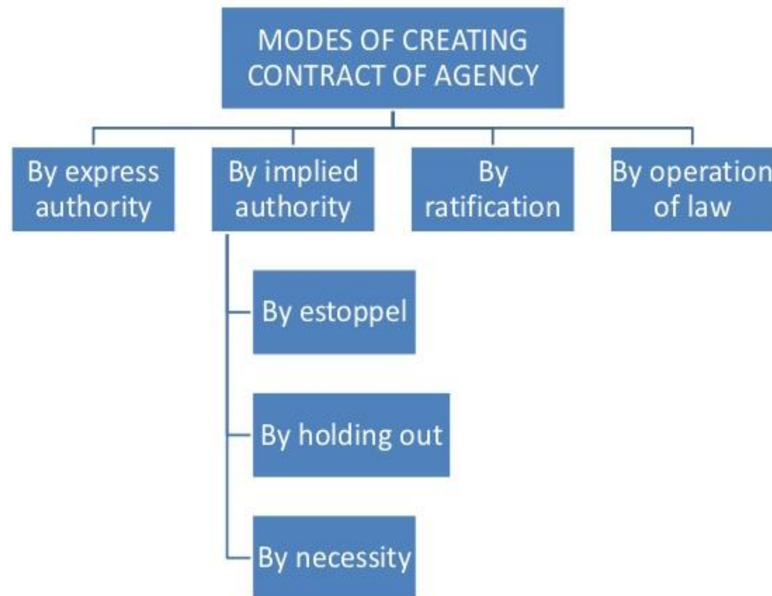
iii By ratification

Agency by ratification can arise in any one of the following situations:

- An agent who was duly appointed has exceeded his authority; or
- A person who has no authority to act acted as if he has the authority.
- When one of the above said situations arise, the principal can either reject the contract or accept the contract so made.
- When the principal accepts and confirms such a contract, the acceptance is called ratification. Ratification may be expressed or implied.

iv Agency by operation of law:

At times contract of agency comes into operation by virtue of law. For example: According to partnership act, every partner is agent of the firm as well as other parties. It is implied agency. On account of such implied agency only a partner can bind over firm as well as other partners, to his activities. In the same way according to companies act promoters are regarded as agents to the company.



Rights and duties of an agent

Rights

Right of Retainer:

Agent has right to deduct the amount which is due to him by principal, from amount payable to principal.

Right of stoppage in transit:

In case where agent is personally liable, he has right to stop the goods in transit. The good may be moving towards customer or principal.

Right to claim Remuneration:

As per the terms of agency contract, agent has rights to claim remuneration.

Right of Indemnity:

Principle of indemnity gets operated between principal and agent where principal is implied indemnifier and agent is implied indemnity holder. So agent can make principal answerable for all types of sufferings.

Right of lien:

Agent can exercise right of lien but contract act has not specified whether it is general lien or particular lien. Therefore the nature of agent's lien depends upon mutual understanding.

Duties of an agent

Duty of an agent is list down from s 164 to s 178 of the Contract Act 1950.

- To obey principal's instruction

- To exercise care and diligence in carrying out his work and use such skill as he possesses
- To render proper accounts when required
- To pay to his principal all sum received on hi behalf
- To communicate with the principal
- Not to let his own interest conflict wit his duty
- Not to make an secret profit out of the performance of his duty
- Not to disclose confidential information or documents
- Not to delegate his authority.

Liabilities of an agent

- Terms of contract of agency may create personal liability to agent.
- The tradition which is in operation in that particular type of business. May also create personal liability to agent.
- If agent does not behave in his capacity as agent and thus runs the transaction in his own way, personal liability arises.
- When agent acts for foreign principal, agent is personally liable.
- Pretending agent is personally liable.
- When agent acts for principal who has not come into existence, agent is personally liable.
- In case where principal cannot be sued, Customer sues agent and thus agent is personally liable.
- When agency is coupled with interest then also agent is personally liable.

The agent can be personally liable on a contract in the following special circumstances

I. Where the agent has contract personally

When entering into the contract, the agent has failed to make it clear that he is contracting as an agent. The status of the agency has not been mentioned to the third party who has been led to believe that the agent was contracting with him on his own behalf and not as an agent

II. Personal liability of agent when he contracts on behalf of a non-existent principal

A good example of such a situation is where persons who are in the process of incorporating a company enter into contract in connection with the company's establishment. Such persons are called 'promoters' of the company and they can incur personal liability

because the company (the principal) is not in existence at the time of the contract. Kelner v Baxter

III. Agent signing bill of exchange or cheque

Where an agent's name appears on any bill of exchange, promissory note or cheque, the agent will be personally liable unless he makes it clear that he is acting in a representative capacity. Several sections of the Sri Lanka Bills of Exchange Ordinance contain statutory provisions to this effect.

Duties of a principal

The duties of a principal to his agent are provided in sections 175 to 178.

The main duties are

- To pay the agent the commission or other agreed remuneration unless the agency relationship is gratuitous.
- Not to willfully prevent or hinder the agent from earning his commission.
- To indemnify and reimburse the agent for acts done in the exercise of his duties.

Doctrine of the Undisclosed Principal

Where the agent contracts with a third party on behalf of a principal but does not inform the third party that he is an agent, it may be possible for the principal to subsequently reveal his existence as the principal and enforce the contract. This rule is known as the doctrine of the undisclosed principal. Such a person is obviously not a party to the contract but he can yet sue and be sued in his own name (as principal) on a contract entered into on his behalf by his agent so long as the agent had acted within authority.

Kinds of agents

General agent.

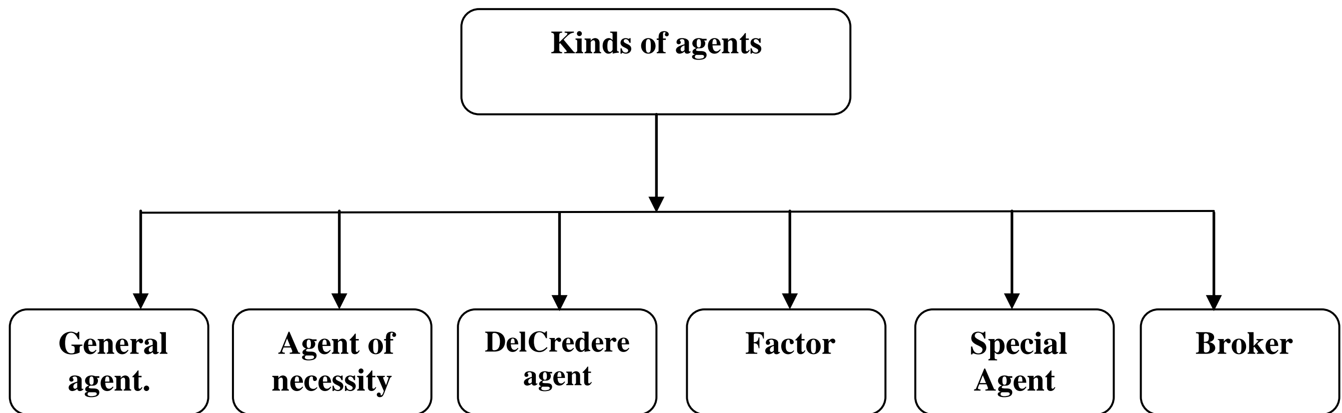
This is an agent who has the principal's unlimited authority to carry out contracts on behalf of the principal without recourse to the principal on each and every point in a transaction.

Agent of necessity.

Here, the agency comes into being as a result of circumstances. There is no formal appointment, express or otherwise. The agent steps into the agency with a view to minimise damages or loss to the goods of principal.

Del Credere agent.

This agent undertakes to guarantee the goods or indemnify the principal for any losses arising from the agency transaction. In return for this assurance, the agent receives an extra remuneration from the principal.



Factor.

The basic feature of the agent is that the agent has possession of the goods before sale. In this case, such an agent can sell in his/her own name and may even pledge the goods as security to raise money in the name of the principal.

Special Agent.

This is an agent who has been appointed to carry out only a designated task. On completion of the task, the agency terminates. Example, a polling agent.

Broker.

This is an agent who does not have possession of the goods at the time of sale. The transaction concluded by such an agent on behalf of the principal, nevertheless binds the principal.

Termination of Agency

I **By the act of Parties.**

a) Agreement.
b) Revocation by the principal.
c) Revocation by the agent.

II **By Operation of law.**

a) Performance of the contract.
b) Expiry of the time.

c) Death of either party.
d) Insanity of the either party.
e) Insolvency of the either party.
f) Destruction of the subject matter.
g) Principal becoming an alien enemy.
h) Dissolution of a company.
i) Termination of sub agency.

By the act of Parties.

Agreement.

At any time and any stage by the mutual agreement between agent and principal the agency can be terminated.

Revocation by the principal.

The principal may revoke the authority of the agents.

Revocation by the agent.

An agency may also be terminated by an express renunciation by the agent after giving a reasonable notice to the principal

Termination of Agency

- By the act of Parties.
  - Agreement
  - Revocation by the principal.
  - Revocation by the agent.
- By operation of law.
  - Performance of the contract
  - Expiry of the time
  - Death of either party
  - Insanity of the either party
  - Insolvency of the either party
  - Termination of sub agency
  - Destruction of the subject matter
  - Principal becoming an alien enemy
  - Dissolution of a company

By operation of law

a)Performance of the contract

The most common way of putting end to an agency is to do what the agent has undertaken to do.

b) Expiry of time

At times contract of agency may get formed for a particular period. In such a case after expiry of that agreed period, termination of agency takes place.

c)Death of either party

Whenever principal or agent come across death, agency contract gets terminated.

d)Insanity of either party.

Whenever principal or agent come across lunacy, agency contract gets terminated.

e)Insolvency of either party.

Principal and agent should have capacity to contract. When principal and agent becomes insolvent, they lost capacity to contract and termination of agency takes place.

f)Destruction of the subject matter.

When subject matter of contract gets destructed, agency contract comes to an end.

g) Principal becoming an alien enemy.

When principal is alien and war breaks out between the countries, then principal becomes alien enemy and agency contract gets terminated.

h) Dissolution of a company.

Whether the principal or agent dissolved, the agency comes to an end.

i)Termination of agency.

When ever main agency gets terminated on account of any reason, sub-agency also goes off.

UNIT - III : INDIAN COMPANIES ACT

Indian Companies Act – Definition – Kinds – Incorporation of Companies – Memorandum of association articles of Association and Articles of Association – Certificate of Incorporation – Prospectus.

INDIAN COMPANIES ACT 1956

Introduction

Industrial has revolution led to the emergence of large scale business organizations. These organization require big investments and the risk involved is very high. Limited resources and unlimited liability of partners are two important limitations of partnerships of partnerships in undertaking big business. Joint Stock Company form of business organization has become extremely popular as it provides a solution to overcome the limitations of partnership business. The Multinational companies like Coca-Cola and, General Motors have their investors and customers spread throughout the world. The giant Indian Companies may include the names like Reliance, Talco Bajaj Auto, Infosys Technologies, Hindustan Lever Ltd., Ranbaxy Laboratories Ltd., and Larsen and Tubro etc

Meaning and definition

A company is a voluntary association of persons formed for some common purpose with capital divisible into parts known as shares .

Justice Lindlay defines company “as an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business and who share the profits arising there from”

According to companies act a company means a company formed and registered under companies act.

According to Haney, “Joint Stock Company is a voluntary association of individuals for profit, having a capital divided into transferable shares. The ownership of which is the condition of membership”.

Features of a Registered company

Voluntary Association

A company is voluntary association of persons who have come together for a common object which generally is to earn profit. The activities of this association are governed by the law and are limited by its memorandum of association

Incorporated association.

A company is created when it is registered under the Companies Act. It comes into being from the date mentioned in the certificate of incorporation.

Artificial legal person.

A company is an artificial person. Negatively speaking, it is not a natural person. It exists in the eyes of the law and cannot act on its own. It has to act through a board of directors elected by shareholders. It was rightly pointed out in Bates V Standard Land Co. that : "The board of directors are the brains and the only brains of the company, which is the body and the company can and does act only through them".

Common seal

As a company is an artificial person it cannot sign its name on a contract. So it function with the help of seal. All contract entered into by the members will be under the common seal of the company.

Limited Liability

In case of limited companies liability of members will be limited to the amount unpaid on the shares.

Legal restrictions

The formation, working and winding up of a company are strictly governed by laws, rules and regulations

Perpetual Existence.

A company is a stable form of business organization. Its life does not depend upon the death, insolvency or retirement of any or all shareholder (s) or director (s). Law creates it and law alone can dissolve it. Members may come and go but the company can go on for ever.

Transferable Shares.

In a public company, the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision in the articles.

Types of Companies

(A) On the basis of incorporation:

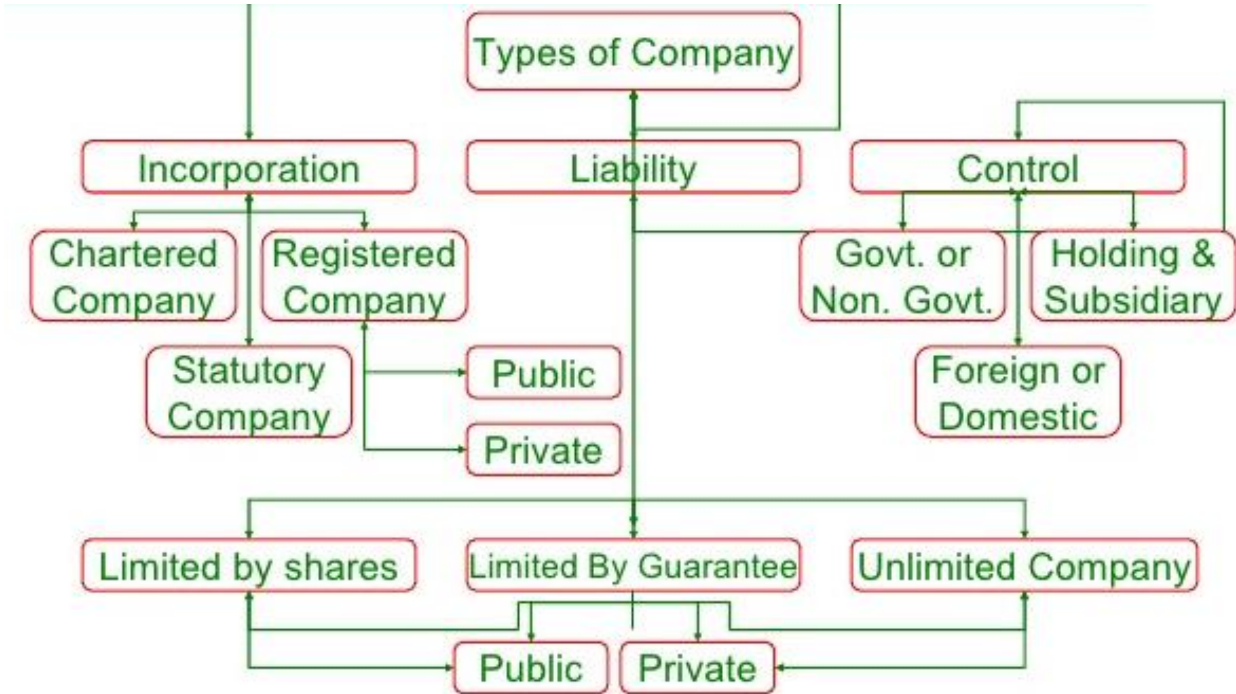
On the basis of incorporation, companies can be classified as:

(i) Chartered companies

Companies established as a result of a charter granted by the King or Queen of a country are known as chartered companies. The charter issued, governs their functioning.

(ii) Statutory companies

Companies established by Special Acts of Parliament or State Legislatures are called statutory companies. The special Acts under which they are established regulate their functioning. Reserve Bank of India, Life Insurance Corporation of India etc. are of this type



(iii) Registered companies

Companies registered under the Companies Act 1956, or earlier Companies Acts are called registered companies. Such companies come into existence when they are registered under the Companies Act and a certificate of incorporation is granted to them by the Registrar.

B) On the basis of liability:

On the basis of liability the company can be classified into:

(i) Companies limited by shares

When the liability of the members of a company is limited to the amount if any unpaid on the shares, such a company is known as a company limited by shares. In a company limited by shares the liability of the members is limited to the amount if any unpaid on the shares respectively held by them. The liability can be enforced during existence of the company as well as during the winding up. Where the shares are fully paid up, no further liability rests on them.

(ii) Companies limited by guarantee

In a company limited by guarantee the liability of a shareholder is limited to the amount he has voluntarily undertaken to contribute to meet any deficiency at the time of its winding up. Such a company may or may not have a share capital. If it has a share capital a member's liability is limited to the amount remaining unpaid on his shares plus the amount guaranteed by him. This type of company is started with the object of promoting science, arts, sports, charity, etc. It is clear that its objective is not profit earning. It gets subscription from its members and donations and endowments from philanthropists.

(iii) Unlimited companies.

An unlimited company or private unlimited company is a hybrid company (corporation) incorporated with or without a share capital (and similar to its limited company counterpart) but where the legal liability of the members or shareholders is not limited: that is, its members or shareholders have a joint, several and non-limited obligation to meet any insufficiency in the assets of the company to enable settlement of any outstanding financial liability in the event of the company's formal liquidation. The joint, several and non-limited liability of the members or shareholders of the company to meet any insufficiency in the assets of the company (to settle its outstanding liabilities if any exist) applies only upon the formal liquidation of the company.

On the basis of number of members

a. Public Limited Companies

The public is invited to subscribe to the shares of the company usually by issuing a prospectus. Shares are easily transferable. Minimum number of person is seven and there is no limit to the maximum number of shareholders. The name must end with the word 'limited'.

b. Private Limited Companies

A private limited company is a company which has a minimum paid up capital of rupees one lakh or such higher paid up capital, as may be prescribed. The Articles of Association may prescribe the following.

i. Restricts the right to transfer the shares, if any.

ii. limits the number of its members to 50 not including its present or past employee- members

iii. prohibits any invitation to the public to subscribe to any shares in or debentures of the company.

Characteristics or Features of a Private Company.

The main features of a private of a private company are as follows :

i) A private company restricts the right of transfer of its shares. The shares of a private company are not as freely transferable as those of public companies. The articles generally state that whenever a shareholder of a Private Company wants to transfer his shares, he must first offer them to the existing members of the existing members of the company. The price of the shares is determined by the directors. It is done so as to preserve the family nature of the company's shareholders.

ii) It limits the number of its members to fifty excluding members who are employees or ex-employees who were and continue to be the member. Where two or more persons hold share jointly they are treated as a single member. The minimum number of members to form a private company is two.

iii) A private company cannot invite the public to subscribe for its capital or shares of debentures. It has to make its own private arrangement.

When a Private company becomes a Public company

A private company shall become a public company in following cases

i) By default :

When it fails to comply with the essential requirements of a private company provided under Section 3 (1)

(i) Default in complying with the said three provisions shall disentitle a private company to enjoy certain privileges (Sec. 43).

(ii) ii) A private company which is a subsidiary of another public company shall be deemed to be a public company

(iii) By provisions of law - Section 43-A.

Section 43-A

b) Where not less than 25% of the paid-up share capital of a private company is held by one or more bodies" corporate such a private company shall become a public company from the data in which such 25% is held by body corporate [Sec. 43-A (1)]

c) Where the average annual turnover of a private company is not less than Rs. 10 cores during the relevant period, such a private company shall become a public company after

the expiry of the period of three months from the last day of the relevant period when the accounts show the said average annual turnover [Sec. 43 A (1 A)].

d) When a private company holds not less than 25% of the paid up share capital of a public company the private company shall become a public company from the date on which the private company holds such 25% [Sec. 43A (IB)].

e) Where a private company accepts, after an invitation is made by an advertisement of receiving deposits from the public other than its members, directors or their relatives, such private company shall become a public company [Sec. 43A (IC)].

iv) By Conversion : When the private company converts itself into a public company by altering its Articles in such a manner that they no longer include essential requirements of a private company under Section 3 (1) (iii). On the data of such alternations, it shall cease to be private company. It shall comply with the procedure of converting itself into a public company [Sec. 44].

INCORPORATION OF COMPANIES

Company is an artificial person created by following a legal procedure. Before a company is formed, a lot of preliminary work is to be performed. The lengthy process of formation of a company can be divided into four distinct stages :

1. Promotion;
2. Incorporation or Registration;
3. Capital subscription; and
4. Commencement of business

1. Promotion

It is the first stage in the formation of a company. In this stage the idea of carrying on a business is conceived by a person or a group of persons called promoters. They make detailed investigation about the workability of the idea, amt of capital required, operating expense etc etc..Before a company an be formed, there must be some persons who have an intention to form a company and who take the necessary steps to carry that intention into operation. Such persons are called promoters. The promoter is the person who brings a company into existence.

2. Incorporation or Registration

This is the second stage of the company formation. It is the registration that brings a company into existence. A company is legally constituted on being duly registered under the Act and after the issue of Certificate of Incorporation by the Registrar of Companies.

Procedure for registration

The promoter has to first decide the proposed form of company as whether it is to be a public company or a private company. They may form the company with limited liability , unlimited liability or limited by guarantee. They have to decide the name of the company agreeable and desirable to all. For eg if the name proposed is identical with or closely resembles the name of an existing company , it is undesirable.

For getting registration an application has to be made to the registrar. The application shall be accompanied by the following documents

a. Memorandum of association
b. Articles of association
c. A statement of nominal capital
d. A notice of address of the registered office of the company.
e. A list of directors and their consent to a act signed by them
f. A declaration that all the requirements of the act have been complied with. Such declaration shall be signed by an advocate of high court or supreme court or a chartered accountant who is engaged in the formation of company

3. Capital subscription

After incorporation a company can raise capital by issuing shares. A private company cannot issue shares to public. In case of public company a copy of prospectus is filed with the registrar and it will be issued to the public. Those who are intended in purchasing share are required to send their application money to company's banker. On the last date fixed for the receipt of application if the company has received application equal to minimum subscription the directors will start with allotment of shares.

4. Commencement of business

A private company can commence business immediately after the grant of certificate of incorporation, but a public limited company will have to undergo some more formalities before it can start business. The certificate for commencement of business is issued by Registrar of Companies, is a conclusive evidence of the fact that the company has complied with all legal formalities and it is legally entitled to commence busi

MEMORANDUM OF ASSOCIATION

The memorandum of association of company, often simply called the memorandum (and then often capitalised as an abbreviation for the official name, which is a proper noun and usually includes other words) is one of the most important documents and must be

drafted with care. It has to be filed with the Registrar of Companies during the process of incorporation of a Company. It contains the fundamental conditions upon which the company is allowed to operate. It is the document that governs the relationship between the company and the outside. It is one of the documents required to incorporate a company in the United Kingdom, Ireland, India, Nepal, Bangladesh, Pakistan and Sri Lanka, Tanzania and is also used in many of the common law jurisdictions of the Commonwealth.

Form of Memorandum (Sec. 14)

Companies Act has given four forms of Memorandum of Association in Schedule

I. These are as follows :

Table B

Memorandum of a company limited by shares

Table C

Memorandum of a company limited by guarantee and not having a share capital

Table D

Memorandum of company limited by guarantee and having share capital.

Table E

Memorandum of an unlimited company Every company is required to adopt one of these forms or any other form as near there to as circumstances admit.

Printing and signing of Memorandum

The memorandum of Association of a company shall be

(a) Printed,

(b) divided into paragraphs numbered consecutively, and

(c) signed by prescribed number of subscribers (7 or more in the case of public company, two or more in the case of private company respectively). Each subscriber must sign for his/her name, address, description and occupation in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

Clause of memorandum

1. Name clause
2. Registered office clause
3. Object clause
4. Liability clause
5. Capital clause

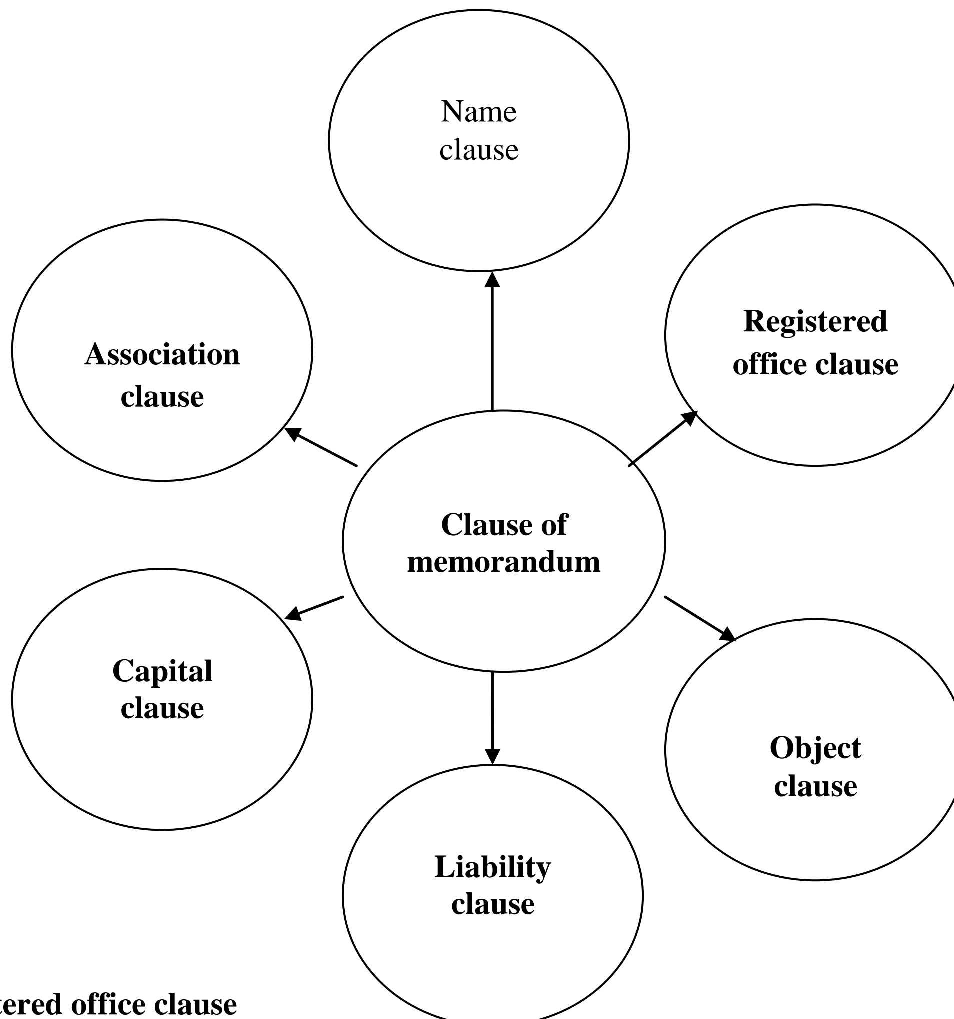
6. Association clause or subscription clause.

1. Name clause

The first clause of memorandum requires a company to state its name

Rules:

- Should not adopt identical with or resembles that of an existing company. Ltd for public company and Pvt Ltd for private company.
- Should not use a name prohibited by the Name and Emblems Act.



2. Registered office clause

Memorandum of Association must state the name of the State in which the registered office of the company is to be situated. It will fix up the domicile of the company. Further, every company must have a registered office either from the day it begins to carry on business or within 30 days of its incorporation, whichever is earlier, to which all communications and notices may be addressed

3. Object clause

This is the most important clause of the memorandum of association. It defines the object of the company and the extent of its powers. The object of the company must be state very clearly and a company cannot do anything beyond object clause. The objects of the company shall not be illegal or against public policy.

While drafting the objects clause of a company the following points should be kept in mind.

i. The objects of the company must not be illegal, e.g. to carry on lottery business.
ii. The objects of the company must not be against the provisions of the Companies Act such as buying its own shares (Sec. 77), declaring dividend out of capital etc.
iii. The objects must not be against public, e.g. to carry on trade with an enemy country.
iv. The objects must be stated clearly and definitely. An ambiguous statement like "Company may take up any work which it deems profitable" is meaningless.
v. The objects must be quite elaborate also. Note only the main objects but the subsidiary or incidental objects too should be stated.

The narrower the objects expressed in the memorandum, the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company.

4. Liability Clause

In the case of company limited by shares or by guarantee, Memorandum of Association must have a clause to the effect that the liability of the members is limited. It implies that a shareholder cannot be called upon to pay any time amount more then the unpaid portion on the shares held by him. He will no more be liable if once he has paid the full nominal value of the share.

5. Capital clause

This clause contains the total amount of capital with which the company is registered. This capital is known as authorized capital or nominal capital or registered capital.

6. Association Clause:

This clause states that the persons subscribing their signatures at the end of the Memorandum are desirous of forming themselves into an association in pursuance of the Memorandum. Memorandum of Association must be signed by seven or more persons in the case of a public company and by two or more persons in the case of a private company. Signatures shall be attested by witnesses. There may be one witness for all signatures but one

subscriber cannot be a witness to the signatures of another. Full description, address, occupation, etc. of the subscribers and witnesses must be written.

Alteration of Memorandum of Association

Alteration of Memorandum of association involves compliance with detailed formalities and prescribed procedure. Alternations to the extent necessary for simple and fair orking of the company would be permitted. Alterations should not be prejudicial to the members or creditors of the company and should not have the effect of increasing the liability of the members and the creditors. Contents of the Memorandum of association can be altered as under :

1. Change of name

A company may change its name by special resolution and with the approval of the Central Government signified in writing . However, no such approval shall be required where the only change in the name of the company is the addition there to or the deletion there from, of the word “Private”, consequent on the conversion of a public company into a private company or of a private company into a public company. (Sec. 21) By ordinary resolution. If through inadvertence or otherwise, a company is registered by a name which, in the opinion of the Central Government, is identical with or too nearly resembles the name of an existing comapany, it may change its name by an ordinary resolution and with the previous approval of the Central Government signified in writing. [Sec. 22(1) (a)]. Registration of change of name. Within 30 days passing of the resolution, a copy of the order of the Central Government’s approval shall also be field with the Registrar within 3 months of the order. The Registrar shall enter the new name in the Register of Companies in place of the former name and shall issue a fresh certificate of incorporation with the necessary alterations. The change of name shall be complete and effective only on the issue of such certificate. The Registrar shall also make the necessary alteration in the company’s memorandum of association (Sec. 23) The change of name shall not affect any right or obligations of the company or render defective any legal proceeding by or against it. (Sec. 23).

2. Change of Registered Office

This may involve :

a) Change of registered office from one place to another place in the same city, town or village. In this case, a notices is to be give within 30 days after the date of change to the Registrar who shall record the same.

b) Change of registered office from one town to another town in the same State. In this case, a special resolution is required to be passed at a general meeting of the shareholders and a copy of it is to be filed with the Registrar within 30 days. The within 30 days of the removal of the office. A notice has to be given to the Registrar of the new location of the office.

c) Change of Registered Office from one State to another State to another State.

Special Resolution

For effecting this change a special resolution must be passed and a copy there of must be filed with the Registrar within thirty days. Special resolution must be passed in a duly convened meeting.

Confirmation by Central Government

The alteration shall not take effect unless the resolution is confirmed by the Central Government. The Central Government before confirming or refusing to confirm the change will consider primarily the interests of the company and its shareholders and also whether the change is bonafide and not against the public interest. The Central Government may then issue the confirmation order on such terms and conditions as it may think fit.

3. Alteration of the Object Clause

The Company may alter its objects on any of the grounds (I) to (vii) mentioned in Section 17 of the Act. The alteration shall be effective only after it is approved by special resolution of the members in general meeting with the Companies Amendment Act, 1996, for alteration of the objects clause in Memorandum of Associations sanction of Central Government is dispensed with.

Limits of alteration of the Object Clause

The limits imposed upon the power of alteration are substantive and procedural. Substantive limits are provided by Section 17 which provides that a company may change its objects only in so far as the alteration is necessary for any of the following purposes:

i. to enable the company to carry on its business more economically or more effectively.
ii. to enable the company to attain its main purpose by new or improved means;
iii. to enlarge or change the local area of the company's operation;
iv. to carry on some business which under existing circumstances may conveniently
v. or advantageously be combined with the business of the company;
vi. to restrict or abandon any of the objects specified in the memorandum
vii. to sell or dispose of the whole, or any part of the undertaking of the company;

viii. to amalgamate with any other company or body of persons.

4. Alteration of Capital Clause

The procedure for the alteration of share capital and the power to make such alteration are generally provided in the Articles of Association If the procedure and power are not given in the Articles of Associational, the company must change the articles of association by passing a special resolution. If the alteration is authorized by the Articles, the following changes in share capital may take place.

1. Alteration of share capital [Section 94-95]
2. Reduction of capital [Section 100-105]
3. Reserve share capital or reserve liability [Section 99]
4. Variation of the rights of shareholders [Section 106-107]
5. Reorganization of capital [Section 390-391]

Ordinarily the liability clause cannot be altered so as to make the liability of members unlimited. Section 38 states that the liability of the members cannot be increased without their consent. It lays down that a member cannot by changing the memorandum or articles, be made to take more shares or to pay more the shares already taken unless he agrees to do so in writing either before or after the change.

Company, if authorized by its Articles, may alter its memorandum to make the liability of its directors or manager unlimited by passing a special resolution. This rule applies to future appointees only. Such alteration will not effect the existing directors and manager unless they have accorded their consent in writing.

ARTICLES OF ASSOCIATION

It is another important document as it contains the rules and regulations for its internal functioning of the company.

Contents of the Articles

The more important contents to be contained in the Articles are listed below

1. The extent to which the regulations in Table A are to be excluded.
2. Adoption or execution of preliminary contracts if any.
3. Share capital, different classes of shares, rights attached thereto,etc.
4. Allotment of shares, calls on shares.
5. Procedure relating to forfeiture of shares and their re-issue.
6. Issue of share certificates and share warrants.

7. Rules regarding transfer of shares and transmission of shares.
8. Conversion of shares into stock.
9. Payment of under writing commission on shares and debentures.
10. Alteration of share capital.
11. Qualification and remuneration of directors.
12. Borrowing powers of directors.
13. Appointment, qualifications, powers, duties, remuneration, etc of managing director, manager and secretary.
14. Appointment of directors.
15. Rules regarding use of common seal of company, Board meetings and voting rights of members, proxies and polls.
16. Procedure for conducting different kinds of general meetings.
17. Payment of dividends, creation of reserve, etc.
18. Issue of redeemable preference shares, if any.
19. Winding up.

Major Differences between Memorandum of Association and Articles of Association

Memorandum of Association:

1. It is the fundamental document
2. It is the Charter of the company.
3. It dictates external and internal affairs of the company.
4. It has effects on the members as well as the outsiders.
5. Ratification: No act can be ratified which is done beyond the memorandum: This is called as "Doctrine of Ultra Vires". 100% members of the company also cannot ratify such ultra virus acts.
6. The memorandum of association is bound to observe.

Articles of Association:

1. It is the subsidiary document.
2. These are me regulations of the company.
3. It dictates only internal affairs and management of the company.
4. It has effects on the members and employees of company.
5. Ratification: An act covered by articles of association can be ratified by majority principle. It is called 'Indoor Management'.
6. The Articles of Association are bound to observe,

(a) The provisions of the Companies Act, 1956 and Rules;

(b) Any other law in force; and

(c) The memorandum of association of the company.

CERTIFICATE OF INCORPORATION

A certificate of incorporation is a legal document relating to the formation of a company or corporation. It is a license to form a corporation issued by state government. Its precise meaning depends upon the legal system in which it is used.

The certificate must include

- The name of the corporation (this name must contain a corporate ending such as “Company,” “Corporation,” “Incorporated,” or an abbreviation thereof);
- A statement of business purpose;
- The address of the corporation’s registered office in the State of Delaware and the name of the registered agent at such address;
- A statement of the total number of shares of stock authorized to be issued and a description of the different classes of stock (if there is more than one class); and
- The name and address of the corporation’s incorporator(s).

PROSPECTUS

Any document issued by a company inviting the public to buy shares or debentures comes under the definition of prospectus. It serves as a “window through which a prospective investor can look into the soundness of a company’s venture” By going through the information and other particulars, the prospective investors are encouraged to invest in the shares of the company. A private limited company is prohibited from issuing a prospectus.

REQUIREMENTS REGARDING ISSUE OF PROSPECTUS

The relevant requirements regarding issue of prospectus are given below:

1. Issue after Incorporation

Section 55 of the Act permits the issue of prospectus in relation to an intended company. A prospectus may be issued by or on behalf of the company.

a) by a person interested or engaged in the formation company or

b) through an offer for sale by a person to whom the company has allotted shares.

2. Dating of Prospectus

A prospectus issued by a company shall be dated and that date shall be taken as the date of publication of the prospectus (Section 55). Date of issue of the prospectus may be different from the date of publication.

3. Registration of Prospectus

A copy of every prospectus must be delivered to the Registrar for registration before it is issued to the public. Registration must be made on or before the date of its publication. The copy sent for registration must be signed by every person who is named in the prospectus as a director or proposed director of the company or by his agent authorized in writing. Where the prospectus is issued in more than one language, a copy of its as issued in each language should be delivered to the registrar. This copy must be accompanied with the following documents:

a) If the report of an expert is to be published, his written consent to such publication;
b) a copy of every contract relating to the appointment and remuneration of managerial personnel;
c) a copy of every material contract unless it is entered in the ordinary course of business or two years before the date of the issue of prospectus;
d) a written statement relating to adjustments; if any, made by the auditors or accountants in their reports relating to profits and losses, assets and liabilities or the rates of dividends, etc.; and
e) written consent of auditors, legal advisers, attorney, solicitor, banker or broker of the company to act in that capacity.

A copy of the prospectus along with specific documents must been field with the Registrar. The prospectus must be issued within ninety days of its registration.A prospectus issued after the said period shall be deemed to be a prospectus, a copy of which has not been delivered to the Registrar for registration. The company and every person who is knowingly a party to the issue of prospectus without registration shall be punishable with fine which may extend to five thousand rupees (Section 60).

4. Expert to be unconnected with the Formation of the Company

A prospectus must not include a statement purporting to be made by an expert such as an engineer, valuer, accountant etc. unless the expert is a person who has never been engaged or interested in the formation or promotion as in the management of the company (Section 57).A statement of an expert cannot be include in the prospectus without his written consent

and this fact should be mentioned in the prospectus. Further, this consent should not be withdrawn before delivery of the prospectus for registration Section (58).

5. Terms of the contract not to be varied

The terms of any contract stated in the prospectus or statement in lieu of prospectus cannot be varied after registration of the prospectus except with the approval of the members in the general meeting (Section 61).

6. Application Forms to be Accompanied with the Copy of Prospectus

Every from of application for subscribing the shares or debentures of a company shall not be issued unless it is accompanied by a copy of prospectus except when it is issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to shares or debentures or in relation to shares or debentures which were not offered to the public [(Section 56(3)].

7. Personation for Acquisition etc. of Shares

The provision, consequences of applying for shares in fictitious names to be prominently displayed must be reproduced in every prospectus and every application form issued by the company to any person. A person who makes in a fictitious name to a company for acquiring shares or subscribing any shares or subscribing any shares shall be liable to imprisonment which may extend to five years similarly, a person who induces a company to allot any shares or to register any transfer of shares in a fictitious name is also liable to the same punishment. [Section 68(a)].

8. Contents as per Schedule II

Every prospectus must disclose the matters as required in Schedule II of the Act. It is to be noted that if any condition binding on the applicant for shares or debentures in a company to waive compliance with any requirements of the Act as to disclosure in the prospectus or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus shall be void [Section 56(2)].

Contents of a prospectus.

- The prospectus contains the main objectives of the company, the name and addresses of the signatories of the memorandum of association and the number of shares held by them.
- The name, addresses and occupation of directors and managing directors.
- The number and classes of shares and debentures issued.
- The qualification share of directors and the interest of directors for the promotion of company.

- The number, description and the document of shares or debentures which within the two preceding years have been agreed to be issued other than cash.
- The name and addresses of the vendors of any property acquired by the company and the amount paid or to be paid.
- particulars about the directors, secretaries and the treasures and their remuneration.
- The amount for the minimum subscription.
- If the company carrying on business, the length of time of such businesses.
- The estimated amount of preliminary expenses.
- Name and address of the auditors, bankers and solicitors of the company.
- Time and place where copies of balance sheets, profits and loss account and the auditors report may be inspected.
- The auditor’s report so submitted must deal with the profit and loss of the company for each year of five financial years immediately preceding the issue of prospectus.

Differences Between a Company and a Partnership

Structure

Corporations and partnerships differ in their structures, with corporations being more complex and including more people in the decision-making process. A corporation is an independent legal entity owned by shareholders, in which the shareholders decide on how the company is run and who manages it. A partnership is a business in which two or more individuals share ownership. In general partnerships, all management duties, expenses, liability and profits are shared between two or more owners. In limited partnerships, general partners share ownership responsibilities and limited partners serve only as investors.

Startup Costs

Corporations are more expensive and complicated to form than partnerships. Forming a corporation includes a lot of administrative fees, and complex tax and legal requirements. Corporations must file articles of incorporation, and obtain state and local licenses and permits. Corporations often hire lawyers for help with the process. The U.S. Small Business Administration advises only established, large companies with multiple employees start corporations. Partnerships are less costly and simpler to form. Partners must register the business with the state and obtain local or state business licenses and permits.

Liability

In partnerships, the general partners are held liable for all company debts and legal responsibilities. General partners' assets may be taken to pay company debts. Partnerships

often include partnership agreements stating exactly what percent of the company each general partner is responsible for, and the percent can vary from partner to partner. Corporations, on the other hand, do not hold individuals liable for the company's debt or legal obligations. The corporation is considered a separate entity and therefore the corporation itself is responsible for assuming all debts and legal fees, and the shareholders are not at risk of losing personal assets.

Taxation

Partnerships do not have to pay business taxes but instead the profits and losses are "passed through" to the individual general partners, according to the U.S. Small Business Administration. Partnerships must file a tax return to report losses and profits to the Internal Revenue Service, and general partners include their share of profits and loss in the return. Corporations are required to pay state and national taxes, and shareholders must also pay taxes on their salaries, bonuses and dividends. The corporate tax rate is usually lower than the individual income tax rate, according to the SBA.

Management

Partnerships have simpler management structures than corporations. In a partnership, all general partners decide how the company is run. General partners often assume management responsibilities or share in the decision of hiring and monitoring managers. Corporations are governed by shareholders, who conduct regular meetings to determine company management and policies. Shareholders often do not have as much day-to-day involvement in the management of the company but instead oversee managers who run the company.

Difference between a Public Company and a Private Company

1. Minimum number of members:

The minimum number of persons required to form a ‘ public company is seven whereas in a private company it is only two.

2. Maximum number of members:

There is no maximum limit on the members of a public company but a private company cannot have more than 50 members excluding employees and ex-employees of the company.

3. Restriction on name:

The name of a public company must end with the word, “limited” But in the case of a private company the word private limited must be used at the end of the name.

4. Commencement of business:

A public company can commence its business only after getting the certificate of commencement of business. But a private company can commence its business as soon as it is incorporated.

5. Invitation to the public:

A public company must issue a prospectus or statement in lieu of prospectus for inviting public to subscribe to its shares or debentures. A private company on the other hand cannot issue such invitation to the public.

6. Transferability of shares:

There is no restriction on the transfer of shares in the case of a public company whereas the articles of a private company must restrict its right to transfer its shares.

7. Number of its directors:

A public company must have at least three directors whereas a private company must have at least two directors.

8. Restrictions on the appointment of directors:

A director of a public company shall file with the Registrar consent to act as a director or sign the memorandum of association or enter into a contract for their qualification shares. The directors of a private company need not do so.

9. Statutory meeting:

A public company must hold a statutory meeting and file with the Registrar a statutory report. But a private company has no such obligations.

10. Quorum:

If the articles of a company do not otherwise provide five members personally present in the case of a public company are quorum for a meeting of the company. It is two in the case of a private company.

11. Issue of share warrants:

A public company can issue share warrants but such a right is denied to a private company.

12. Further issue of capital:

A public company proposing further issue of shares must offer them to the existing members. A private company is free to allot new issue to outsiders.

13. Managerial remuneration:

Total managerial remuneration in the case of a public company cannot exceed 11% of the net profits but in the case of inadequacy of profits a minimum of 50,000 can be paid. These restrictions do not apply to a private company.

COMPANY MANAGEMENT

Management of the affairs of the company is entrusted to Board of directors who are elected by the shareholders. Though shareholders are the real owners of the company, they cannot take part directly in its management. However, there is indirect participation as it is in the hands of the elected representatives called directors.

Position of Directors

1. Directors as agents

When the directors enter into contract with third parties, sign documents for and on behalf of the company etc. they act as the agent of the company. They bind the company by their acts.

2. Directors as Trustees

They are in the position of trustees, when they manage the assets and properties of the company. Similarly when they exercise the powers entrusted to them they are in the same position. It means that they should safeguard the interest of the company and should never abuse the powers for promoting their personal ends.

3. Directors as Officers

Directors also act as officers of the company. When they have to manage the affairs of the company, they are in the position of Chief Executive Officers. Thus the directors combine in themselves the roles of agents, trustees and officers.

Qualifications of Directors

1. Only individuals can be appointed as directors of the company.
2. They must have contractual capacity.
3. They must possess qualification shares, if laid down in the Articles. In such a case the qualification must be acquired within two months of their appointment as directors. The nominal value of qualification share should not exceed Rs.5000 or one share where its nominal value exceeds Rs.5000.

Disqualifications of Directors

The following persons are disqualified for appointment as directors of a company.

1. A person of unsound mind

2. An insolvent.
3. Any person who has applied for being adjudged an insolvent
4. Any person who had been sentenced with imprisonment for an offence involving moral turpitude for a period exceeding 6 months and a period of 5 years has not elapsed since the date of expiry of the sentence
5. A person who has not paid the call money and the calls in arrear are outstanding for more than six months
6. Any person disqualified by a court for appointment as director for having committed fraud in management

APPOINTMENT OF DIRECTORS

First directors are usually named in the Articles. If the Articles are silent, the signatories to the memorandum shall be deemed to be the first directors of the company.

a. Appointment of Directors by the Company

Subsequent directors are elected by shareholders at the Annual General Meetings. If a company adopts the principle of retirement by rotation, one-third of the directors must retire by rotation. The retiring directors are eligible for reappointment.

b. Appointment by Board of directors

The Board can appoint additional directors. They can fill up casual vacancy caused by death, resignation, etc. They can also appoint alternate director. If empowered by Articles, the Board may appoint an alternate director during his absence for a period of not less than 3 months from the date in which meetings of the Board are ordinarily held.

c. Appointment by Third Parties

If authorised by the Articles, third parties such as vendor of the business, banking or financial institutions which have advanced loans to the companies, can appoint their nominees on the Board.

d. Appointment by Central Government

The Central Government can also appoint directors on an order passed by the Company Law Board or on the application of not less than 100 members of the company or of members holding 10% of the total voting power.

Powers of Directors

1. General Powers

The Board of directors of a company is entitled to exercise all such powers and to do all such acts and things as the company is authorised to do. However the Board shall not do any act which is to be done by the company in general meeting.

2. Statutory Powers

By means of resolutions passed at the Board meetings, the following powers can be exercised by the directors:

i. To make calls

ii. To issue debentures

iii. To borrow money otherwise than on debentures

v. To invest the funds of the company

vi. To make loans

3. Other Powers to be exercised at Board Meetings

i. To fill up casual vacancy in the office of directors

ii. To appoint additional directors, if authorised by the articles

iii. To appoint an alternate director if authorised by the articles

iv. To accord sanction to contracts in which any director or his relative is interested

v. To recommend a certain rate of dividend to be declared at the annual general meeting

vi. To make investments in the companies in the same group

vii. To appoint the first auditors of the company

ix. To fill up the casual vacancy in the office of an auditor not caused by resignation.

4. Restrictions on the powers of directors

The following powers cannot be exercised by the Board without the consent of the shareholders in the general meeting.

i. To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company

ii. To extend time for repayment of any debt due by a director

iii. To borrow money where the money to be borrowed together with that already borrowed is in excess of the aggregate of the paid up capital and free reserves

iv. To contribute to charitable funds in excess of the prescribed limit

DUTIES

1. General Duties

1. Duty of good faith: They must act bona fide in the interest of the company. They should not make any secret profits.
2. Duty of reasonable care: They must discharge their duties with care and diligence.
3. They must attend the Board meeting regularly.
4. Duty not to delegate: They must perform the duties personally. They can delegate only certain functions as permitted by the articles.

2. Statutory Duties

Some of the important duties laid down in the Companies Act are listed below.

1. To sign a prospectus and deliver it to the Registrar before its issue to the public.
2. To see that all moneys received from applicants for shares are kept in a scheduled bank.
3. Not to allot shares before receiving minimum subscription.
4. To forward a statutory report to all its members at least 21 days before the date of the meeting.
5. To hold the meetings at least once in three months.
6. If a director is interested in a contract, to disclose the nature of his interest.
7. To call for annual general meeting every year.
8. To file all statutory returns with prescribed authorities.
9. To take steps for filing declaration of solvency in the case of voluntary winding up.

LIABILITIES OF DIRECTORS

A. Civil Liabilities

1. Liabilities to Third Parties:

They are liable to third parties,

1. when they enter into contracts which are beyond the powers of memorandum.
2. for misstatement in the prospectus.
3. when they enter into contract in their own names.

2. Liability to the company: They are liable to the company,

1. for gross negligence in the performance of their duties.
2. for breach of trust.
3. when they fail to act honestly in the interest of the company
4. for misfeasance.

5. for fraudulent conduct of the business.

B. Criminal Liability

Directors may incur criminal liability for the following activities.

1. Misstatement in the prospectus.
2. Failure to file Return of Allotment.
3. Failure to issue share certificates within the prescribed period.
4. Failure to pay dividend within 42 days from the date of declaration.
5. Failure to lay before the Annual General Meeting audited profit and loss account and balance sheet.
6. Failure to furnish the necessary information to the company's auditors.
7. Failure to file copies of special resolutions with the Registrar within 30 days of passing the resolution.
8. Destruction of important documents.
9. Holding the office of directors in more than 15 companies excluding private companies.

MANAGING DIRECTOR

Meaning

Managing Director is a director who is entrusted with substantial powers of management, which would not be otherwise available to him. Routine administrative work is not included in the term "Substantial Powers of Management". A managing director is appointed

a) as result of an agreement entered into with the company or
b) as a result of a provision contained in the memorandum or articles or
c) in pursuance of a resolution passed either by the Board or by the company in general meeting

Some of the important points worth regarding managing director are given below.

1. Without the approval of Central Government no change can be effected in the terms of appointment of a managing director.
2. A managing director cannot be appointed for a period exceeding 5 years at a time.
3. A person cannot act as a managing director of more than 2 companies at a time.
4. The remuneration should not exceed 5% of the annual net profits if there is one managing director. If there is more than one such director, 10% for all of them

together. This can be paid by way of monthly payment or at a specified percentage of net profits or by both ways.

ROLE AND DUTIES OF A COMPANY SECRETARY

A Company Secretary is a senior position in a private sector company or public sector organisation, normally in the form of a managerial position or above. In large American and Canadian publicly listed corporations, a company secretary is typically named a Corporate Secretary or Secretary.

Despite the name, the role is not a clerical or secretarial one in the usual sense. The company secretary ensures that an organisation complies with relevant legislation and regulation, and keeps board members informed of their legal responsibilities. Company secretaries are the company's named representative on legal documents, and it is their responsibility to ensure that the company and its directors operate within the law. It is also their responsibility to register and communicate with shareholders, to ensure that dividends are paid and to maintain company records, such as lists of directors and shareholders, and annual accounts.

In many countries, private companies have traditionally been required by law to appoint one person as a company secretary, and this person will also usually be a senior board member.

Companies law requires only a listed company to have a whole time secretary and a single member company (any company that is not a public company) to have a secretary.

The secretary to be appointed by a listed company shall be a member of a recognized body of professional accountants, or a member of a recognized body of corporate / chartered secretaries or a person holding a masters degree in Business Administration or Commerce or is a Law graduate from a university recognized and having relevant experience. However, the company secretary of a single member company shall be a person holding a bachelor degree from a university recognized.

The duties of a company secretary are usually contained in an "employment contract". However, the company secretary generally performs the following functions:

Functions of secretary:

1. Secretarial functions:

- To ensure compliance of the provisions of Companies Law and rules made there-under and other statutes and bye-laws of the company.

- To ensure that business of the company is conducted in accordance with its objects as contained in its memorandum of association.
- To ensure that affairs of the company are managed in accordance with its objects contained in the articles of association and the provisions of the Companies Law.
- To prepare the agenda in consultation with the Chairman and the other documents for all the meetings of the board of directors.
- To arrange with and to call and hold meetings of the board and to prepare a correct record of proceedings.
- To attend the broad meetings in order to ensure that the legal requirements are fulfilled, and provide such information as are necessary.
- To prepare, in consultation with the chairman, the agenda and other documents for the general meetings.
- To arrange with the consultation of chairman the annual and extraordinary general meetings of the company and to attend such meetings in order to ensure compliance with the legal requirements and to make correct record thereof.
- To carry out all matters concerned with the allotment of shares, and issuance of share certificates including maintenance of statutory Share Register and conducting the appropriate activities connected with share transfers.
- To prepare, approve, sign and seal agreements leases, legal forms, and other official documents on the company's behalf, when authorised by the broad of the directors or the executive responsible.
- To advise, in conjunctions with the company's solicitors, the chief executive or other executive, in respect of the legal matters, as required.
- To engage legal advisors and defend the rights of the company in Courts of Law.
- To have custody of the seal of the company.

2. Legal obligations of secretary:

- Filling of various documents/returns as required under the provisions of the Companies Law.
- Proper maintenance of books and registers of the company as required under the provisions of the Companies Law.
- To see whether legal requirements of the allotment, issuance and transfer of share certificates, mortgages and charges, have been complied with.
- To convene/arrange the meetings of directors, on their advise.

- To issue notice and agenda of board meetings to every director of the company.
- To carry on correspondence with the directors of the company on various matters.
- To record the minutes of the proceedings of the meetings of the directors.
- To implement the policies formulated by the directors.
- To deal with all correspondence between the company and the shareholders.
- To issues notice and agenda of the general meetings to the shareholders.
- To keep the record of the proceedings of all general meetings.
- To make arrangement for the payment of the dividend within prescribed period as provided under the provisions of the Companies Law.

3. To maintain the following statutory books:

- the register of transfer of shares;
- the register of buy-backed shares by a company;
- the register of mortgages, charges etc.;
- the register of members and index thereof;
- the register of debenture-holders;
- the register of directors and other officers;
- the register of contracts;
- the register of directors' shareholdings and debentures;
- the register of local members, directors and officers, in case of a foreign company;
- Minute books;
- Proxy register;
- Register of beneficial ownership;
- Register of deposits;
- Register of director’s share holding; and
- Register of contracts, arrangements and appointments in which directors etc are interested.

(4). Other duties:

The company secretary usually undertakes the following duties:

(a) Ensuring that statutory forms are filed promptly.

(b) Providing members and auditors with notice of meeting.

(c) Filing of copy of special resolutions on prescribed form within the specified time period.

(5). Supplying a copy of the accounts to every member of the company, every debenture holder and every person who is entitled to receive notice of general meetings. You must send annual audited accounts.

(6). Keeping or arranging for the having of minutes of directors' meetings and general meetings. Apart from monitoring the Directors and Members minutes books, copies of the minutes of board meetings should also be provided to every director.

(7). Ensuring that people entitled to do so, can inspect company records. For example, members of the company are entitled to a copy of the company's register of members, and to inspect the minutes of its general meetings and to have copies of these minutes.

(8). Custody and use of the common seal. Companies are required to have a common seal and the secretary is usually responsible for its custody and use. (Common seals can be bought from seal makers)

UNIT – IV : MONOPOLIES AND TRADE RESTRICTIVE PRACTICES ACT

Monopolies and Trade restrictive practices Act – Securities Exchange Board of India Act – Custom and Central Excise Act – Central and States Sales Tax Act.

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

The Monopolies and Restrictive Trade Practices Act, 1969 had its genesis in the Directive Principles of State Policy embodied in the Constitution of India. It received the assent of the President of India on 27 December, 1969.[2] The Monopolies and Restrictive Trade Practices Act was intended to curb the rise of concentration of wealth in a few hands and of monopolistic practices. It was repealed on September 2009. The Act has been succeeded by The Competition Act, 2002.

Monopolistic Trade Practice

Such practice indicates misuse of one's power to abuse the market in terms of production and sales of goods and services. Firms involved in monopolistic trade practice tries to eliminate competition from the market. Then they take advantage of their monopoly and charge unreasonably high prices. They also deteriorate the product quality, limit technical development, prevent competition and adopt unfair trade practices.

Unfair Trade Practice

The following may result in an unfair trade practice:

- False representation and misleading advertisement of goods and services.
- Falsely representing second-hand goods as new.
- Misleading representation regarding usefulness, need, quality, standard, style etc of goods and services.
- False claims or representation regarding price of goods and services.
- Giving false facts regarding sponsorship, affiliation etc. of goods and services.
- Giving false guarantee or warranty on goods and services without adequate tests.

Restrictive Trade Practice

The traders, in order to maximize their profits and to gain power in the market, often indulge in activities that tend to block the flow of capital into production. Such traders also bring in conditions of delivery to affect the flow of supplies leading to unjustified costs.

Purpose of MRTP Act

The purpose of Monopolistic and Restrictive Trade Practices Act, 1969,

- ➢ To ensure that the operation of the economic system does not result in the concentration of economic power in hands of few,

- To provide for the control of monopolies, and
- To prohibit monopolistic and restrictive trade practices.

Applicability

The MRTP Act extends to the whole of India except Jammu and Kashmir.

Unless the Central Government otherwise directs, this act shall not apply to:

a. Any undertaking owned or controlled by the Government Company,
b. Any undertaking owned or controlled by the Government,
c. Any undertaking owned or controlled by a corporation (not being a company established by or under any Central, Provincial or State Act,
d. Any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees,
e. Any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons under powers by the Central Government,
f. Any undertaking owned by a co-operative society formed and registered under any Central, Provincial or state Act,
g. Any financial institution.

MRTP Commission and Filing of Complaint

For the purpose of this Act, the Central Government has established a commission to be known as the Monopolies and Restrictive Trade Practices Commission. This commission shall consist of a Chairman and minimum 2 and maximum 8 other members, all to be appointed by the Central Government. Every member shall hold the office for a period specified by the Central Government. This period shall not exceed 5 years. However, the member will be eligible for re-appointment.

In case of any unfair trade practice, monopolistic trade practice and/or restrictive trade practice, a complaint can be filed against such practices to the MRTP commission. The procedure for filing a complaint is as follows:

- Complaint is filed either by the individual consumer or through a registered consumer organization.
- The Director General of the MRTP commission would carry on the investigation for finding facts of the case.
- If the prima facie case is not made, the complaint is dismissed. If the compliant is true, an order is passed to its effect.

- The commission restricts and restrains the concerned party from carrying on such practices by granting temporary injunction.
- Then the final order is passed. The complainant may be compensated for his loss.

SECURITIES AND EXCHANGE BOARD OF INDIA ACT 1992

The Securities and Exchange Board of India (SEBI) is the regulator for the securities market in India. It was established in the year 1992 and given statutory powers on 12 April 1992 through the SEBI Act, 1992. It was established by The Government of India on 12 April 1992 and given statutory powers in 1992 with SEBI Act 1992 being passed by the Indian Parliament. SEBI has its headquarters at the business district of Bandra Kurla Complex in Mumbai, and has Northern, Eastern, Southern and Western Regional Offices in New Delhi, Kolkata, Chennaiand Ahmedabad respectively. It has opened local offices at Jaipur and Bangalore.

Definitions.

In this Act, unless the context otherwise requires,

(a) **Board** means the Securities and Exchange Board of India established under section

(b) **Chairman** means the Chairman of the Board;

(c) **collective investment scheme** means any scheme or arrangement which satisfies the conditions specified in section 11AA;]

(d) **Existing Securities and Exchange Board‖** means the Securities and Exchange Board of India constituted under the Resolution of the Government of India in the Department of Economic Affairs No. 1(44) SE/86, dated the 12th day of April, 1988;

(e) **Fund** means the Fund constituted under section 14; (e) ―member‖ means a member of the Board and includes the Chairman;

(f) **Notification** means a notification published in the Official Gazette; (g) -prescribed means prescribed by rules made under this Act;

(g) **Regulations** means the regulations made by the Board under this Act;

(h) **Reserve Bank** means the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934.

Objectives of SEBI:

The overall objectives of SEBI are to protect the interest of investors and to promote the development of stock exchange and to regulate the activities of stock market. The objectives of SEBI are:

1. To regulate the activities of stock exchange.

2. To protect the rights of investors and ensuring safety to their investment.

Management of the Board

The Board shall consist of the following members, namely:-

- A chairman.
- Two members from amongst the officials of the Ministries of the Central Government dealing with finance and law.
- One member from amongst the officials of the Reserve Bank of India.
- Two other members.

Functions

To provide the development of, and to regulate the securities market SEBI undertakes the following function

1. Regulating the business in stock exchanges.
2. Registering and regulating the working of stock brokers, sub brokers, issue bankers, underwriters and such other intermediaries who may be associated with securities markets in any manner.
3. Registering and regulating the working of collective investment schemes including mutual funds.
4. Promoting and regulating self-regulatory organisations.
5. Prohibiting fraudulent and unfair trade practice relating to securities market.
6. Promoting investor's education and training of intermediaries of securities market.
7. Prohibiting insider trading in securities.
8. Regulating substantial acquisition of shares and take-over of companies
9. Calling for information from, undertaking inspection, conducting inquires and audits of the stock exchanges
10. Performing such functions as may be delegated to it by the central government.

SEBI's powers in relation to stock exchanges

The SEBI ordinance has given it the following powers:

i. It may call periodical returns from stock exchanges.
ii. It has the power to prescribe maintenance of certain documents by the stock exchanges.
iii. SEBI may call upon the exchange or any member to furnish explanation or information relating to the affairs of the stock exchange or any members.

iv. It has the power to approve bye-law of the stock exchange for regulation and control of the contracts.
v. It can amend bye-laws of stock exchange.
vi. In certain areas it can grant to license the dealers in securities.
vii. It can compel a public company to list its shares.

Working of SEBI

SEBI has been carrying on its duties successfully. It has issued and clarified guidelines on disclosure and investor protection. It has also issued guideline for merchant bankers, advertising code for mutual funds. To safeguard the interests of investors, it has registered a number of investors associations. A series of advertisement are also being issued by SEBI to educate investors. Also, it has recognised many self-regulatory organisations.

CUSTOM AND CENTRAL EXCISE ACT

Section 1. Short title, extent and commencement. -

(1) This Act may be called the Central Excise Act, 1944.
(2) It extends to the whole of India.
(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

Definitions

In this Act, unless there is anything repugnant in the subject or context

- "adjudicating authority" means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act.
- Commissioner of Central Excise (Appeals) or Appellate Tribunal"Appellate Tribunal" means the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act.
- "broker" or "commission agent" means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others.
- "Central Excise Officer" means the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise,.
- Joint Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by

the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963.

- Curing includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture.
- excisable goods" means goods specified in 8[the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985.
- "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on
- "fund" means the Consumer Welfare Fund established under section
- "manufacture" includes any process —incidental or ancillary to the completion of a manufactured product
- "prescribed" means prescribed by rules made under this Act;
- "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consider-ation
- "wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale.

Features

- ✓ It calculates assessment values, Central Excise Duties and different set-offs for both ECC registered manufacturers and ECC registered traders.
- ✓ It has a clear framework for classification of goods It complies to all compliance procedures under Central Excise Based on Government notifications, it is updated on regular intervals
- ✓ It calculates Excise Duty on the basis of MRP / Abatement / Pro-rata / Deemed Credit
- ✓ It generates statutory reports such as ER-I, ER-III, ER-V and ER-VI.
- ✓ It generates reports for Labour Job units such as Annexure II, Annexure IV , Annexure V, Annexure VI

- ✓ It generates reports and registers for Exporters such as B1, ARE 1, ARE 3, CT3, Annexure 18 and Annexure 19
- ✓ It helps maintaining registers such as PLA, RG 23 A Part I, Part II, Service Tax Credit Register, RG 1, Form IV, Form V
- ✓ It allows direct posting of invoice to RG 23 D and Form -2 Registers , Annexure II for Excise Trading units.
- ✓ It enables e-filing as per Government requirements.

CENTRAL AND STATES SALES TAX ACT

Certain amendments were made in the Constitution through the Constitution (Sixth Amendment) Act, 1956 whereby-

a) Taxes on sales or purchases of goods in the course of inter-State trade or commerce were brought expressly within the purview of the legislative jurisdiction of Parliament.

b) Restrictions could be imposed on the powers of State legislatures with respect to the levy of taxes on the sale or purchase of goods within the State where the goods are of special importance in inter-State trade or commerce.

This amendment also authorized Parliament to formulate principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce or in the course of export or import or outside a State.

Accordingly the Central Sales Tax (CST) Act, 1956 was enacted which came into force on 05.01.1957. Originally, the rate of CST was 1%, which was increased first to 2%, then to 3% and w.e.f. 1st July, 1975 to 4%. The CST Act, 1956 Act provides for declaration of certain goods to be of special importance in inter-State trade or commerce and lay down restrictions on the taxation of such items. The entire revenue accruing under levy of CST is collected and kept by the State in which the sale originates. The Act excludes taxation of imports and exports.

CST being an origin based tax, is inconsistent with Value Added Tax which is a destination based tax with inherent input tax credit refund. An amendment to the Central Sales Tax Act to provide for reduction of the rate of Central Sales Tax for inter-State sales between registered dealers from 4% to 3% w.e.f. 1st April, 2007 was effected in. Through this amendment, facility of inter-State purchases by Government Departments at concessional CST rate, against Form-D has been withdrawn. After this amendment, the rate of CST on inter-State sales to Government will be same as VAT/ State sales tax rate. Central Sales Tax rate has been further reduced from 3% to 2% with effect from 1st June,

2008. Reduction of CST rate first from 4% to 3% & then from 3% to 2% has been done as a precursor to the introduction of Goods & Services Tax (GST), as CST would be inconsistent with the concept & design of GST.

What is Central Sales Tax?

The sixth amendment in the Constitution of India changed the scenario of taxation in India by introducing the Central Sales Tax (hereinafter referred as CST). The amendment brought the taxes on purchases or sales of goods in the course of inter-State trade or commerce expressly within the purview of the legislative jurisdiction of Parliament and restrictions could be imposed on the powers of State legislatures with respect to the levy of taxes on the sale or purchase of goods within the State where the goods are of special importance in inter-State trade or commerce. According to Article 266 of the Constitution of India no tax can be levied on a person until or unless it is backed by a law. Hence in pursuance of this the Central and Sales Tax, 1956 was enacted which governs the current Central Sales Tax system.

Central Sales Tax is levied by the Central Government of India under Entry 92A of List I (Union List) of the Seventh Schedule to the Constitution on India but, it is collected by that state government from where the goods were sold. Hence the tax revenue collected is given to the same State Government which collected the tax. The current Central Sales Tax rate in India is 3 per cent.

Central Sales Tax is charged only on the inter-state transactions and not on the transactions occurred within the state or import/export of sales. Section 3(a)/ (b) defines the interstate nature of transaction. When any transaction between two parties from different states records the movement of goods then it is called interstate transaction. A sale, effected by transfer of documents of title to goods when goods are in inter-state movement, is also an interstate sale. However, consignments to agents or transfer of goods to branch or other offices are not considered as interstate sale. In addition to this goods that are sold within a state, but while transporting travel through another state is not considered inter-state sales. Moreover,there is no exemption limit of turnover for the levy of central sales tax.

Central Sales Tax Act has also provided special importance to certain goods in order to increase their circulation. Section 2(d) of the Act classifies good into two categories: declared goods and other goods. Declared goods are those goods which have been given special importance by the virtue of Section 14. Examples of such goods are cereals, coal,

cotton, crude oil, jute, oilseeds, pulses, sugar, etc. The rates of tax on declared goods are lower as compared to the rate of tax on goods in the second category.

CST Transaction Forms

Manufacturers/Traders /Exporters/Dealers, during the course of transaction, have to issue certain proclamations in the prescribed form to the sellers/buyers. The forms are printed and supplied by sales tax authorities and these forms are to be prepared in triplicate.

Some important forms are mentioned below:

Form D: Any sale to Government is taxable @ 4 per cent or applicable sales tax rate for the particular sale within that State whichever is lower. To avail this concession on CST, Form D is issued by the Govt. Department which purchase the goods.

Form I: This form is issued by a dealer/buyer located in a Special Economic Zone. This form gives concession on the central sales tax because no tax is levied when sales s made to a dealer located in SEZ.

Procedure to get CST registration

The registration for central sales tax is done in the same manner that of VAT. To register for CST Manufacturers/Traders /Exporters/Dealers has to first acquire his TIN registration number. TIN is an acronym for Tax-Payer Identification Number, which is unique number allotted by Commercial tax department of the respective States. It is an 11-digit number to be mentioned in all VAT transactions and correspondence. TIN number is used to identify dealers registered under VAT. It is a single number which is allotted to the dealers for the registration of all three taxes i.e. VAT, CST and Service tax. First two digits of TIN indicate the issued state code. However, the creation of other nine digits of the TIN number may differ from state to state. It is applied for both sales done within a state or between two or more states. TIN is also being used to identify dealers in the same way like PAN, to identification of assesses under income tax act. Manufacturers/Traders /Exporters/Dealers can apply for the

Mandatory documents required to apply for a TIN registration are: ID Proof / Address proof / PAN card of proprietor with 4 to 6 number of photographs, Address proof of Business premises, 1st Sale / Purchase Invoice, copy of LR/GR & payment/collection proof with bank statement, Surety/Security/Reference. However, the requirements of certain documents may differ from State to State. This is due to the reason that even though the central sales tax has been framed by the central government but, the state governments are allowed to frame such rules, subject to such notification and alteration as it deem fit.

UNIT - V : FOREIGN EXCHANGE MANAGEMENT ACT

Foreign Exchange Management Act – Patent Act. Intelligent Property Right – Consumer Protection Act.

THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999

The Foreign Exchange Management Act, 1999 (FEMA) is an Act of the Parliament of India "to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India". It was passed in the winter session of Parliament in 1999, replacing the Foreign Exchange Regulation Act (FERA). This act makes offences related to foreign exchange civil offenses. It extends to the whole of India., replacing FERA, which had become incompatible with the pro-liberalisation policies of the Government of India. It enabled a new foreign exchange management regime consistent with the emerging framework of the World Trade Organisation (WTO). It also paved the way for the introduction of the Prevention of Money Laundering Act, 2002, which came into effect from 1 July 2005.

The Main Features of the FEMA:

The following are some of the important features of Foreign Exchange Management Act:

i. It is consistent with full current account convertibility and contains provisions for progressive liberalisation of capital account transactions.
ii. It is more transparent in its application as it lays down the areas requiring specific permissions of the Reserve Bank/Government of India on acquisition/holding of foreign exchange.
iii. It classified the foreign exchange transactions in two categories, viz. capital account and current account transactions.
iv. It provides power to the Reserve Bank for specifying, in , consultation with the central government, the classes of capital account transactions and limits to which exchange is admissible for such transactions.
v. It gives full freedom to a person resident in India, who was earlier resident outside India, to hold/own/transfer any foreign security/immovable property situated outside India and acquired when s/he was resident.
vi. This act is a civil law and the contraventions of the Act provide for arrest only in exceptional cases.

vii. FEMA does not apply to Indian citizen's resident outside India.

Purpose of the Act

The preamble to FEMA lays down the purpose of the Act is to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.Rationale for strict regulations under FERA 1973. After Independence India was left with little forex reserves and during the oil Crisis of seventies ballooning oil import bills further drained foreign exchange reserves.

Broadly, the objectives of FEMA are to facilitate external trade and payments and to promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the Reserve Bank of India (RBI) in the administration of FEMA. The rules, regulations and norms pertaining to several sections of the Act are laid down by the Reserve Bank of India, in consultation with the Central Government. The Act requires the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities for holding inquiries pertaining to contravention of the Act. There is also a provision for appointing one or more Special Directors (Appeals) to hear appeals against the order of the Adjudicating authorities. The Central Government also establishes an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals). The FEMA provides for the establishment, by the Central Government, of a Director of Enforcement with a Director and such other officers or class of officers as it thinks fit for taking up for investigation of the contraventions under this Act.

Benefits of the Act

FERA was to control everything that was specified, relating to foreign exchange whereas FEMA lay down that 'everything other than what is expressly covered is not controlled'. The overriding objective of FERA was to regulate and minimize dealings in foreign exchange and foreign securities while FEMA on the other hand aims to aid in creation of a liberal foreign exchange market in India.

This difference in terminology reflects seriousness of government towards deregulation of foreign exchange and promotion of free flow of international trade. To facilitate external trade is concerned; section 5 of the Act removes restrictions on withdrawal of foreign exchange for the purpose of current account transactions. As external trade i.e. imports / export of goods & services involve transactions on current account, there

is no need for seeking RBI permissions in connection with remittances involving external trade.

Conclusion

FEMA permits only authorized person to deal in foreign exchange or foreign security. Such an authorized person, under the Act, means authorized dealer, money changer, off-shore banking unit or any other person for the time being authorized by Reserve Bank. The Act thus prohibits any person who deal in or transfer any foreign exchange or foreign security to any person not being an authorized person. Make any payment to or for the credit of any person resident outside India in any manner. Receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner.

PATENT ACT

The history of Patent law in India starts from 1911 when the Indian Patents and Designs Act, 1911 was enacted. The present Patents Act, 1970 came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The Patents Act, 1970 was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all fields of technology including food, drugs, chemicals and micro organisms. After the amendment, the provisions relating to Exclusive Marketing Rights (EMRs) have been repealed, and a provision for enabling grant of compulsory license has been introduced. The provisions relating to pre-grant and post-grant opposition have been also introduced. An invention relating to a product or a process that is new, involving inventive step and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Section 3 and 4 of the (Indian) Patents Act, 1970. In India, a patent application can be filed, either alone or jointly, by true and first inventor or his assignee.

Procedure for patent registration 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

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 4: 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

Step 4: 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 specification. 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 form request form 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 examinees 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

Majority of patent applicants will receive some type of objections based on examination report. The best thing to do it analyze 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.

Compulsory Licensing

One of the most important aspects of Indian Patents Act, 1970, is compulsory licensing of the patent subject to the fulfillment of certain conditions. At any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller of Patents for grant of compulsory license of the patent, subject to the fulfillment of following conditions, i.e.

- The reasonable requirements of the public with respect to the patented invention have not been satisfied; or
- That the patented invention is not available to the public at a reasonable price; or
- That the patented invention is not worked in the territory of India.

However, before the grant of a compulsory license, the Controller of Patents shall take into account following factors:

- The nature of invention.
- The time elapsed, since the sealing of the patent.
- The measures already taken by the patentee or the licensee to make full use of the invention.
- The ability of the applicant to work the invention to the public advantage.
- The capacity of the applicant to undertake the risk in providing capital and working the invention, if the application for compulsory license is granted.
- As to the fact whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions.
- National emergency or other circumstances of extreme urgency.
- Public non commercial use.

- Establishment of a ground of anti competitive practices adopted by the patentee.

Intellectual Property Rights

Intellectual Property (IP) refers to the creations of the human minds for which exclusive rights are recognised. Innovators, artistes and business owners are granted certain exclusive rights to a variety of intangible assets for a specified duration.

For example:

- Business owners are granted exclusive rights on the use of their trade marks and geographical indications which were established by them;
- Creative artistes are granted copyrights on musical, literary, dramatic and artistic works for their creations; while
- Innovators are granted protection for their patents, industrial designs, trade secrets, confidential information, and layout-designs of integrated circuits for their innovations.

- Copyrights are creative works that have been fixed in a tangible form.
- Patents are grants from the government that give you exclusive rights over your invention for a specific amount of time, in exchange for full disclosure.
- Trademarks are words, symbols, colors, sounds, or smells that someone is using in conjunction with a product or service.
- Trade secrets are secret information used by a business that derives its value from being secret, and where the business is invested in protecting that secrecy.
- Right of publicity is defined as your right to control how your name, likeness, and persona are used by others

Consumer Protection Act, 1986

Consumer Protection Act, 1986 is an Act of the Parliament of India enacted in 1986 to protect the interests of consumers in India. It makes provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

Consumer Protection Councils

Consumer Protection Councils are established at the national, state and district level to increase consumer awareness.

Objectives of Central Council

The objectives of the Central Council is to promote and protect the rights of the consumers such as:-

1. The right to be protected against the marketing of goods and services which are hazardous to life and property.
2. The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services,
3. The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
4. The right to consumer education.
5. The right against consumer exploitation
6. The right to choose

Rights of consumer

The right to safety

The assertion of this right is aimed at the defense of consumers against injuries caused by products other than automobile vehicles, and implies that products should cause no harm to their users if such use is executed as prescribed. The right was further formalized in 1972 by the US federal government through the Consumer Product Safety Commission (CPSC). This organization has jurisdiction over thousands of commercial products, and powers that allow it to establish performance standards and require product testing and warning labels.

The right to be informed

This right states that businesses should always provide consumers with enough appropriate information to make intelligent and informed product choices. Product information provided by a business should always be complete and truthful. Aiming to achieve protection against misleading information in the areas of financing, advertising, labeling, and packaging, the right to be informed is protected by several pieces of legislation passed between 1960 and 1980.

The right to choose

The right to free choice among product offerings states that consumers should have a variety of options provided by different companies from which to choose. The federal government has taken many steps to ensure the availability of a healthy environment open to competition through legislation including limits on concept ownership through patent law, prevention of monopolistic business practices through anti-trust legislation, and the outlaw of price cutting and gouging.

The right to be heard

This right has the ability of consumers to voice complaints and concerns about a product in order to have the issue handled efficiently and responsively. While no federal agency is tasked with the specific duty of providing a forum for this interaction between consumer and producer, certain outlets exist to aid consumers if difficulty occurs in communication with an aggrieving party. State and federal attorney generals are equipped to aid their constituents in dealing with parties who have provided a product or service in a manner unsatisfactory to the consumer in violation of an applicable law.

The right to satisfaction of basic needs

This right demands that people have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water, and sanitation

The right to redress

The right to redress provides for consumers to receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods, or unsatisfactory services. For example, a consumer should be able to go to consumer court against mobile phone companies that put hidden charges on the bill that were not previously explained, or activate ringtones without the consumer's permission.

The right to consumer education

The right to consumer education states that consumers should be able to acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.

The right to a healthy environment

This is the right to live and work in a work space or home that is non-threatening to the well-being of present and future generations.

Conclusion

Very few consumers are fully aware about the rights, responsibilities and Consumer Protection Act. Hence, it is necessary to educate them on their rights and responsibilities as consumers.The government has been fruitful in providingprotection to the consumers in the real sense of the term and served the purpose of the Act. It is hoped that further improvement in the act would aim at even more efficiency and render the position of the consumers much stronger in this era of globalization and privatization.

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