LECTURE NOTES

ON

BUSINESS LAW AND ETHICS

MBA I Semester

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UNIT – I

LAW OF CONTRACT - 1872

Definition of Business

The term business is understood and explained in different ways by different people. For some, business is an activity, for some it is a method of transacting, for some others, it is a method of money making and some people argue that business is an organized activity to achieve certain pre- determined goals or objectives. Dictionary meaning of business is: the act of buying and selling of goods and services, commerce and trade. Based on all these meanings of business, we may define business as: gainful activity through which various elements of society conduct exchanges of the desirable things.

Nature of Business

Business may be understood as the organized efforts of enterprise to supply consumers with goods and services for a profit. Businesses vary in size, as measured by the number of employees or by sales volume. But, all businesses share the same purpose to earn profits.

The purpose of business goes beyond earning profit. There are:

- ✓ It is an important institution in society.
- ✓ Be it for the supply of goods and services
- ✓ Creation of job opportunities
- ✓ Offer of better quality of life
- ✓ Contributing to the economic growth of the country.

Hence, it is understood that the role of business is crucial. Society cannot do without business. It needs no emphasis that business needs society as much.

Business Goals

Profit - Making profit is the primary goal of any business enterprise.

Growth - Business should grow in all directions over a period of time.

Power - Business houses have vast resources at its command. These resources confer enormous economic and political power

Employee satisfaction and development - Business is people. Caring for employee satisfaction and providing for their development has been one of the objectives of enlightened business enterprises.

Quality products and services - Persistent quality of products earns brand loyalty, a vital ingredient of success.

Market leadership - To earn a niche for oneself in the market, innovation is the key factor.

Challenging - Business offers vast scope and poses formidable challenges.

Joy of creation - It is through business strategies new ideas and innovations are given a shape and are converted into useful products and services.

Service to society - Business is a part of society and has several obligations towards it.

Objectives:

The primary aim of this unit is to enable you to:

> Understand the role of Government in regulating the economic and business activities;

> Have adequate insights into the concept of law of contract and its various essential elements;

> Explain the performance, discharge and remedies of breach of contract;

> Know the principles of Partnership and Sale of Goods and their related provisions;

> Describe the legal provisions relating to Law of Insurance and Negotiable Instruments

Most of the business transactions are based on promises to be performed at a later date. These promises whether made by businessmen or by others create certain rights and obligations and if these rights and obligations are not enforceable, the business world would be paralyzed. It is with the enforcement of these promises that the law of contract is concerned. The contract Act does not lay down the list of obligations that would be enforceable by law but lays down the rules subject to which rights or duties created by the parties would be enforced. The parties to the contract can make whatever rules they want, if these rules are not inconsistent with the provisions of the Act, they would be enforced by courts of law.

Meaning: Sec.2 (h) "An agreement enforceable by law is a contract." Therefore, a contract has two important elements, one is the agreement, and the other is the obligation which is enforceable by law.

Agreement: Agreement is the outcome of the consensus between the parties who enter into a contract, i.e., the promise made between them, represents concurrence of their minds. (Sec.13). these would not be an agreement if the parties do agree but not on the same thing in the same sense, i.e., consensus is not sufficient. There has to be **consensus ad idem**. Sec.2 (e) defines an agreement as "Every promise or every set of promises forming consideration for each other". A proposal when accepted becomes a promise.

Example: A received Rs.10, 000 from B and promises to supply him 10 bags of rice after 10 days. It is a promise. It shall be a set of promises if a promises to supply 10 bags of rice after 10 days and B promises to pay him Rs.10, 000 after the rice is supplied. Thus, Agreement = Offer + Acceptance.

Offer (Proposal): Offer [(proposal) (Sec.2 (a)] "When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal".

Acceptance: Acceptance has been defined u/s (Sec.2 (b)) as "When the person to

whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise".

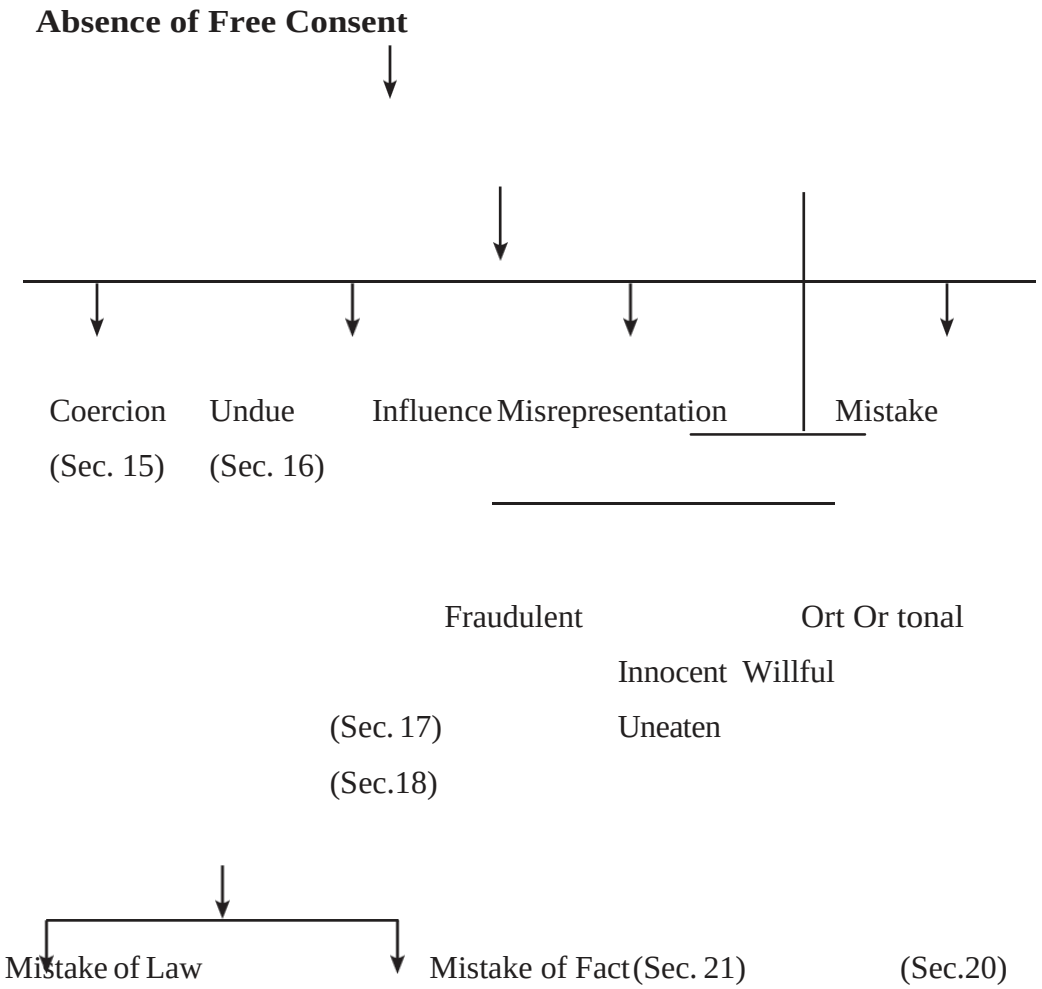
Example: A lost his Cell Phone and announced that anybody who brought his cell phone back home would receive Rs.500 as reward. B heard the announcement and brought the Cell Phone back home. He is said to have accepted the proposal by doing the act required by A and hence he can recover the reward.

Promissory: A person who makes the promise is called the **'Promissory**' or **'Offer or'**. And the person to whom the proposal is made is known as **'Promise'** or **'Offeree.**'In case an agreement is a set of promises, then a person becomes a **promissory** and **promise**. Thus if there is an offer, acceptance and consensus ad idem between the parties, there is an agreement. However, this agreement does not become a contract unless there is a corresponding obligation, i.e., enforceability at law.

Obligation (Sec.10): It is the legal duty of a person to carry out what he has promised to do or not to do. All agreements are contracts if they are made by the free consent of the parties competent to enter into contract, for a lawful consideration and with a lawful object and not hereby expressly declared to be void. Therefore, a person becomes legally bound to do what he has promised to do only if the following conditions are fulfilled.

Essential elements of Contract:

1. **Capacity of the Parties:** Only those persons who are competent to enter into a contract can create valid obligations. A minor, a lunatic, a drunkard etc., suffer from flaw in capacity to Contract and therefore the contract made with them can't be enforced against them.
2. **Free Consent:** Absence of consent does not create a legal obligation. For an agreement to become a contract the parties to an agreement should give their consent to the agreement out of their own free will. It should not be induced by coercion, undue influence, fraud, misrepresentation, etc.



3. Lawful Consideration and Object: Consideration means something in return, i.e., 'quid pro quo.' E.g. A promises to give his bike to B for no money, here, there is no consideration, hence no obligation. Without consideration a promise can't be enforceable by law. However, consideration need not be in money or in kind. It may be of an act, abstinence, a promise to do, or not to do something. But consideration should be lawful.
4. Example: A promises to pay a sum of money to B if B smuggles the object proposed by A. In this case, there is no lawful object.
5. Intention to create Legal Relationship: Social obligation can't bring legal relationship. For example: Father promised his son to pay Rs.100 per day for pocket expenses, however, later on, did not pay the said amount. Therefore, if the

parties do not intend to be bound by law at the time they make promises, nothing can bind them to their promises, later on.

6. Possibility of Performance: Example: A promised B that he would make The Sun rises in the West if B pays him Rs.1 laky. And B agreed to it, this agreement does not create any legal obligation as it would not be enforceable by law.
7. Meaning should be certain: Example: A agrees to sell B's horse. There is nothing whatever to show which horse is intended. The agreement is void for uncertainty.
8. Legal Formalities (If required): An agreement to make a gift for natural love and affection should not only be in writing but registered also (Sec. 25). In the absence of any such specific requirement an oral agreement is as enforceable as a written agreement.
9. Agreements not declared Void: Indian Contract Act has specifically declared some agreements to be not enforceable at law e.g. Agreements in restraint of trade, Agreements in restraint of marriage, wagering agreements etc. Thus the law of Contract is not the whole law of Agreements. It is the law of those agreements which create obligations.

Kinds of Contracts

1. **Valid Contract:** It is an agreement which fulfils all the essentials of enforceability and can be enforced by either of the parties at the courts of law.
2. **Voidable contract:** Sec 2(I) lays down that "An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a Voidable Contract." This arises where the consent of one of the parties to the contract is not free. Ex., A, at the point of pistol makes B agree to sell his bicycle for Rs.500. Here B's consent is not free.

Circumstances in which a contract is voidable are:

(A) At the conception

1. Consent caused by fraud (Sec.14, 17 and 19)
2. Consent caused by coercion (Sec. 14, 15 and 19)
3. Consent caused by misrepresentation (Sec. 14, 18 and 19)
4. Consent caused by undue influence (Sec. 14, 16 and 19A)
5. When one party induces another to enter into an agreement the object of which is

unlawful though it is not known to the other party.

(B) By Subsequent Default

1. Where offer of performance is not accepted (Sec. 38)
2. When one party prevents performance of reciprocal promise (Sec. 53)
3. When a party fails to perform at the time fixed, if time is the essence of the contract (Sec. 55) Consequences of Recession of Voidable Contract when a voidable contract is rescinded?

A. As regards the party at whose option the contract is voidable, if he has received any benefit from another party to such contract, he must restore such benefit so far as may be, to the person from whom it has been received. The benefit must have been received under the contract and not otherwise. Security for performance is not the benefit received under the contract.
B. As regards the other party, he need not perform his promise.

3. **Void Contract:** [Sec 2(j)] "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable" E.g. A agrees to sell his car to B for Rs. 10, 000. All essentials of a contract are fulfilled. If A refuses to sell his car, B can go to the court and the court would enforce A's promise. But if, before the delivery the car is destroyed by Tsunami, the court cannot enforce anything and hence this contract becomes unenforceable i.e. void. Thus, void contract is one which was a valid contract when it was made but becomes void later on.

   Those

   Agreements which are *void abs initio* (from the very beginning) are called Void Agreements and those which become void later on are called Void Contracts.

   Following circumstances will transform a valid contract into a void contract.

A. **Contingent contract:** A contingent contract to do or not to do something on the happening of an uncertain future event becomes void, when the event becomes impossible (Sec 32).
B. **Repudiation of a voidable contract:** When a voidable contract is rescinded by the party at whose option it is voidable, the contract becomes void.
C. **Subsequent impossibility (Sec. 56):** A contract which becomes impossible to

perform, after it is made, becomes void.

D. **Subsequent illegality (Sec. 56):** A contract becomes void if it becomes illegal after it is made.

Consequences of a Void Contract: Sec. 65 lays down that when a contract becomes void, the party who has received any advantage under such agreement should restore it or make compensation for it to the party from whom he received it.

4. Void Agreement: An agreement not enforceable by law is called a void agreement. If any of the essentials of obligations (enforceability), other than free consent, is missing the agreement cannot be enforced at Courts of Law.

Invalidating Causes

In the following circumstances an agreement is void abs initio.

i. If a party to the contract is incompetent to contract (Sec.10, 11 & 12)
ii. If the agreement is without consideration (Sec. 10, 25) barring certain exceptions.
iii. If the consideration or object is unlawful (Sec. 23)
iv. If the meaning of the contract is uncertain (Sec.29)
v. If the agreement is to do an impossible act (Sec. 56)
vi. If both the parties enter into an agreement under a mistake as to the essential matter of fact (Sec. 20). There is no consensus ad idem.
vii. If both the parties are under a mistake as to foreign law (Sec. 21) viii.If the agreement is in restraint of marriage of a person other than a Minor (Sec. 26)
ix. If the agreement is in restraint of trade (Sec. 27) barring certain exceptions.
x. If the agreements is in restraint of legal proceedings (Sec. 28)
xi. If the agreement is by way of wager (Sec. 30)

5. **Illegal Agreement:** An illegal agreement is one which is forbidden by law i.e. it is entered into with the intention of violating the law. Example: A agrees to steal furniture for B for a consideration of Rs. 1, 00,000. It is illegal and therefore it is void. It also attracts the penal provisions of the law it is violating.

While all illegal agreements are void, all void agreements are not illegal. Parties to an illegal agreement cannot get any help or protection from law courts.

6. **Unlawful Agreements:** (Sec. 23). In simple words an agreement may be unlawful because it is:

   a. **Immoral** – i.e. contrary to sound and positive morality as recognized by law, e.g. cohabitation.
   b. **Opposed Public Policy** – i.e. contrary to the welfare of the State as tending to interfere with the civil or judicial administration, or with individual liberty of citizens, e.g. bribing a public servant.
   c. **Illegal** – i.e. contrary to positive law, being forbidden either by statutes law or common law; hence a line of demarcation needs to be drawn between illegal and unlawful agreements.

7. **Unenforceable Contract:** Contracts which have all the essentials of enforceability but cannot be enforced due to certain technicalities like insufficiency of stamp, etc. are termed as unenforceable contracts.
8. **Express Contract:** It is one where the intention of parties is stated in words either written or spoken. Example: A goes to B's shop and asks him to supply 10 boxes @ Rs.20per box. B tells him that he is ready to supply the boxes at the mentioned rate. This is an Express Contract. The same intention of the parties may be expressed in writing signed by both the parties.
9. **Implied Contract:** The evidence of an implied contract is to be deduced from the acts or conduct of the parties. No exchange of words either written or spoken takes place, but the manifestation of their intentions is inferred from their respective acts or conduct.
10. **Quasi Contracts:** These are those obligations which are imposed by the Contract Act and do not arise from a consensus between the parties. Example: A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. B is bound to pay A for them; the obligation is imposed by law.
11. **An Executed Contract:** It is one where both the parties to a contract have discharged their respective responsibilities by performing them. All transactions of Cash sales are the examples of Executed Contracts.
12. **An Executor Contract:** It is one where one or both the parties are yet to perform their respective promises. It is partly Executed and partlyExecutory.

13. **Unilateral Contract:** It is one where at the time when the contract is made one party has already performed his obligation and the obligation on the part of the other party only, is outstanding. Example: A goes to a bus stand ticket counter and buys a ticket for journey. A has performed his duty under the contract i.e., to pay the scheduled fare. But the bus authority is yet to perform his promise i.e., of carrying him from one point to another. This is a Unilateral Contract.
14. **Bilateral Contract:** As against Unilateral Contract, a Bilateral Contract is one where at the time of entering into the contract both the parties to the contract are yet to perform their respective promises.

Offer and Acceptance

As seen earlier the first step in making a contract starts with making an offer. We shall, therefore, discuss as to what constitutes a 'lawful offer'.

Offer or Proposal

'Offer' and 'Proposal' are synonymous terms. According to sec. 2(a), "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal".

The person making the proposal is

Called the **"Promissory"** and the person to whom the offer is made is called the

"Promise" [Sec.2 (c)] Example: offers to pay Rs.100 to B if B washes his cloths. A is the promissory and B is the promise for the promise to pay Rs.100. A is the promise and B is the promissory for washing his clothes. It is important to note that the offer must be made with the object of obtaining the assent of the other party.

Rules Regarding a Lawful Offer

A valid offer must be in conformity with the following rules:

1. **Terms of an offer should be definite or should be capable of being made definite.**
2. **Offer should be made with an intention to create legal**

Relationship: In the absence of such intention no obligation can arise. Absence of such intention may be express or implied.

Example: Where A proposes to sell his 'Television' to B for Rs.10000 but tells him that the breach of promise by either party would not create legal rights, no binding contract would arise in that case even if the agreement is in writing.

3. **There is no valid offer where:**

i. **It is mere statement of intention:**

Example: A gives an advertisement in the television that he would dispose of his building by auction on 5th June at 8 a.m. in the lawns of his bungalow. B, who saw this advertisement, travels a distance of 200 kilometers and reaches A's bungalow at the given time and date and finds that auction has been cancelled. A cannot be held liable because his advertisement to hold auction did not constitute an offer; it was merely an intention to hold an auction where bids would be received.

ii. **It is an invitation to offer:**

Where A puts his building to public auction he is inviting offers from the bidders and he accepts the offer by falling the hammer or by any other customary method. The actual offer is the bid made at the auction and the auctioneer accepts it.

4. **Offer must be communicated:** The offer must be brought to the knowledge of the person to whom it is made. If an offer is not communicated to the offered, the latter cannot accept it.
5. **Offer should not contain a term the non-compliance of which would amount to acceptance.**

Example: A writes to B "I shall buy your furniture for Rs, 10,000, if you do not reply I shall assume that you have accepted my offer. This is not a valid offer.

6. **Offer may be express or implied:** An offer is express when it is stated in words,

written or spoken.

7. **An offer may be general or specific:** When an offer is made to a specific person it is called a specific offer and it can be accepted only by that person but when an offer is addressed to an uncertain body of individuals i.e. the world at large, it is a general offer and can be accepted by any member of the general public by fulfilling the condition laid down in the offer.

Lapse of an Offer

An offer once made cannot be continued for ever. Liability of the party making the proposal cannot be continued for all times to come. An offer becomes invalid i.e. comes to an end in the following circumstances.

1. **When the stipulated or reasonable time has expired: Example:** A offers to sell his modern table to B for Rs. 5000 and tells him that B must communicate his acceptance within three days. On fourth day B brings Rs.5000 to buy the table. A refuses. A is not bound because the offer has lapsed on the third day.
2. **Where the offer becomes illegal after it is made: Example:** X of Mumbai offers to buy Peanuts from Y of Chennai. Next day Central Government prohibits inter-state transfer of Peanuts. The offer lapses by subsequent illegality.
3. **Where the offered or offered dies or becomes insane before the**

Offer is accepted: Example: offers to sell his cow to B. Before B could accept the offer, A dies. B cannot accept the offer.

4. **Where the offered does not accept the offer in the mode the**

Offered had prescribed: Example: A writes to B that he wants to sell his furniture to B for Rs.10, 000. He also writes to B that if B wants to buy the furniture, he (B) should send him

(A) A telegram accepting the offer. B writes a letter to A accepting the offer. If A keeps silence over it, this is a valid acceptance. But if A informs B that he is not treating this letter as acceptance because the offer has not been accepted by a telegram, then this letter would not result in acceptance.

5. **An offer lapses by counter offer by the offered: Example:** A tells B, "I want to buy your land for Rs. 10,000". B says, "I shall sell my land for Rs.15, 000." A refuses to

buy it for Rs. 15,000. Then B insists that a should buy it for Rs. 10,000. A refuses to do so. A is not bound by his offer because the statement of B that 'I shall sell my land for Rs. 15,000' is not acceptance of A's offer but a counter offer. When a counter offer is made the original offer lapses and there is nothing for the offered to accept. But an enquiry should not be mistaken for a counter offer.

6. **An offer comes to an end when the offered revokes his offer before it is accepted.**

Tender (standing offer): A tender is an offer made in response to an invitation to offer. The party inviting tenders may require a definite quantity of goods or services to be supplied, in that event the person who responds to that invitation is said to have made a definite offer and would become bound by it if it is accepted.

ACCEPTANCE: "When the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted. A proposal once accepted becomes a contract." Where two parties make offers to each other with identical terms, without knowing each other's offer. These offers are called 'CROSS OFFERS".

Who can accept? Where an offer is made to a specified person, only that specified person can accept it and nobody else. But where the offer is made to an uncertain body of persons, anybody can accept the offer.

Rules Regarding Acceptance

1. Acceptance must be absolute and unqualified: The offered must accept unconditionally all the terms of the offer without any change in any of them.
2. **The Acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes a manner in which it is to be accepted**
3. **Acceptance by performing conditions or receiving**

Consideration: Example: A offers to pay Rs. 100 to B, if B throws the ring ball into the basket in first attempt. B immediately throws the ball into the basket in first attempt. By the performance of this condition B is said to have accepted the offer."

4. **Acceptance must be communicated:** Unless acceptance is communicated it

would not turn the offer into a contract. However, if the offered posts the acceptance but it does not reach the offered, it would be deemed to be communicated. But the offered cannot frame his offer in such a way that the silence of the offered would become his acceptance.

5. **Acceptance should be given within stipulated time and before**

The offer is revoked: If the offer lapses before acceptance are given, the acceptance would not result into a contract. But where no time limit is stipulated the offer should be accepted within a reasonable time.

6. **Where an offered accepts an offer knowing that it has been made by the offer or under a mistake, the contract is not binding upon the offer or**.

Consensus Ad Idem

According to sec. 13, "Two or more persons are said to consent when they agree upon the same thing in the same sense". But where the circumstances lead one party to believe that the other would have understood the terms of the agreement, law may imply unenforceable agreement. Because it is not what a party thinks in his mind but what he expresses or does that binds him to the contract.

Communication of Offer and Acceptance

Problem of communication arises when the parties to the contract are not face to face with each other. It arises in the following cases:

(A) Contracts through Telephones: (B) Contracts through Post: Offer and acceptance are generally made through letters and telegrams, Advertisements, notices, circulars, etc., are also used to make an offer. The rules of communication regarding them are as follows:

(1) "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made…" (sec. 4)

(2)

(3) "….The communication of an acceptance is complete

i. as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of acceptor; and
ii. As against the acceptor, when it comes to the knowledge of the proposer…"(Sec.4)

From the above, it is clear that an offer may be revoked at any time before the acceptance is put in course of transmission to the proposer.

Revocation of Proposal and Acceptance

"A proposal may be revoked at any time before that communication of its acceptance is complete as against the proposer, but not afterwards."

Communication of Revocation

"The communication of a revocation is complete… As against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it as against the person to whom it is made, when it comes to his knowledge."

Agreement to Agree in Future

Agreement to enter into an agreement upon terms to be settled afterwards between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of agreement are settled; until those terms are settled, he is perfectly at liberty to retire from the bargain".

Consideration and Competence to Contract

Consideration is one of the elements of obligation. An agreement becomes enforceable only if it is supported by consideration. (Sec. 10) "All agreements are contracts if they are made… for a lawful consideration…" It clearly shows that consideration is an important pre-requisite of a valid contract. (Sec.25) "An agreement made without consideration is void…" Hence the rule is "No Consideration, No Contract."

Essentials of Consideration

(A) Based on Definition

An analysis of the above definition reveals the following essentials of consideration.

1. Consideration must move at the desire of the promissory
2. It may move from promise or from any other person on behalf of promise.

Stranger to Contract

It is a general rule that a person, who is not a party to a contract, cannot sue on the contract even though the contract is for his benefit i.e. unless there is privities of contract, the relationship is not enforceable.

3. Consideration may be past, present or future
4. Consideration must be real and not illusory
5. Consideration may consist of an act, abstinence or promise

(B) Based on other provisions

In addition to the above essentials of consideration that emerge from the definition, the others are as follows:

1. Consideration must be lawful: (Sec. 10) "All agreements are contracts, if they are made for a lawful consideration" The consideration of an agreement is unlawful, if (I) it is forbidden by law, or (ii) it is of such a nature that, if permitted, it would defeat the provisions of any law, or

(iii) it is fraudulent or (iv) it involves or implies injury to the person or property of another or (v) the court regards it as immoral or opposed to public policy (Sec. 23).

2. Consideration need not be adequate to the value of the promise: (Sec.

25) "An agreement to which the consent of the promissory is freely given is not void merely because the consideration is inadequate, but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promissory was freely given."

Exceptions to the Rule of Consideration

(Sec. 25) In the following cases the agreement would be enforceable even though they are made without consideration.

(1) Love and affection:

An agreement without consideration is enforceable, if

a. it is made out of love and affection;
b. the love and affection is natural because the parties are so related to each other;
c. the agreement is in writing;
d. The agreement is registered under law.

(2) Compensation for voluntary services: "If it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promissory, or something which the promissory was legally compellable to do."

(3) Promise to pay a time barred debt: If it is a promise, made in writing and signed by the debtor or his agent to pay wholly or in part a debt which is barred by the limitation.

(4) Contract of Agency: Sec. 185 provides "No consideration is necessary to create an agency."

(5) Gift already Made: (Sec. 25) "Nothing in this Section shall affect the validity, as between the donor and done, of any gift actually made."

Unlawful Agreements

According to the Indian Contract Act (Sec. 23), "The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy.

Let us see the provisions of Sec. 23 which make an agreement unlawful.

1. **Forbidden by law:** If the object of the agreement or the consideration of the agreement is the doing of an act which is forbidden by law, the agreement is void.

2. **If it is of such a nature that, if permitted, it would defeat the Provisions of any law:** i.e. it would indirectly lead to a violation of the law.
3. **If it is fraudulent:** Any agreement whose object is to defraud others is void.
4. **If it involves or implies injury to the person or property of another:**
5. **If the Court regards it as immoral.**
6. **f the Court regards it as opposed to public policy:** The following agreements have been held to be against public policy:

a. Trading with Enemy:
b. Agreements for stifling prosecution: An agreement to suppress criminal charge is void because if a person has committed a crime, public policy requires that he should be prosecuted.
c. Agreements interfering with the Course of Justice: An agreement entered into with the object of exercising improper influence on judges or officers of justice is bad in law as opposed to publicpolicy.
d. Agreements tending to an abuse of legal process: There may be two types of agreements under this head, one is Maintenance and the other is Champers.
e. Agreement to vary the period of limitation: An agreement that reduces or increases the period of limitation as laid down by the law of limitation is opposed to public policy.
f. Traffic in Public Offices: An agreement whereby an appointment to a public office is procured for monetary consideration is against public policy because it would cause corruption in administration of the State.
g. Agreement creating an interestopposedtoduty
h. Agreements restraining personal freedom
i. Agreements opposed to parental rights and duties: Father is supposed to be the guardian of his children and in the absence of the father their mother acquires this right as well as responsibility and this right cannot be bartered away.
j. Marriage Brokerage Agreements: Agreement to pay reward to a person for negotiating marriage is opposed to public policy.

The following agreements are also opposed to public policy.

i. Agreements in restraint of marriage.
ii. Agreements in restraint of trade.
iii. Agreements in restraint of legal proceedings.

Competence to Contract

Competence to contractis one of the essential elements of enforceability of an agreement. According to Sec. 10 'All agreements are contracts if they are made by… the parties competent to Contract…..As regards the meaning of competence, Sec.11 of the Contract Act states that "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

The following persons are incapable of entering into a contract:

1. A person who has not attained the age of majority i.e. a person who is still a **MINOR**.
2. A Person who is not of sound mind i.e. a person of **unsound mind.**
3. A Person who is **disqualified by any other law** to which he is subject (i.e., other disqualifications.)

Minor

A minor is a person who has not completed 18 years of age on the date of the contract. But in the following two cases the minority would continue up to the completion of 21 years of age:

- Where a guardian to the person or property of a minor is appointed by the court.
- When the minor is under the guardianship of the court of Wards, i.e. Minor's property is looked after by the Court of Wards.

Rules Relating To an Agreement with a Minor

1. **Agreement is void abs initio:** According to Sec. 10, an agreement made by a person incompetent to contract is void. Hence an agreement made by a minor is void. The agreement is void abs initio

I.e. void from the very beginning. However, Sec. 68 of the Contract Act lies down "if a person, incapable of entering into a contract or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the

property of such incapable person.

2. **Minor can be a promise:** An agreement is void as against a minor but a minor can derive benefit under a contract. The privilege of minority is available to the minor only. Other person cannot avoid the contract because the promise is a minor. Thus the minor can enforce the agreement against the other party.
3. **A Minor's Agreement cannot be ratified :** Since an agreement with a minor is void abs initio, i.e. It does not exist in the eyes of law, it cannot be ratified by a minor after completing the age of majority.
4. **No Compensation is payable by a minor:** Though an agreement with a minor is void, the minor would not be called upon to refund any benefit which he has received, under such an agreement (i.e. Sec. 64 and Sec. 65 would not apply to a minor).
5. **The rule of estoppels does not apply to a minor** i.e. A minor can misrepresent his age and enter into an agreement and can still plead infancy to avoid that agreement.
6. **No recovering back the money paid:** Where an infant has paid money under a void or voidable contract he cannot recover it, unless there has been a total failure of consideration.
7. **A minor can be sued in tort.** If what the infant has done lies right outside the terms of the contract, the infant can be made liable.
8. **Agency.** A minor acting as an agent cannot be held liable even for those acts for which other agents would incur personal liability.
9. **Negotiable Instrument:** A minor can also make and deliver negotiable instruments and can negotiate them making all other persons except him liable on them.
10. **Partnership:** An agreement with a minor is void. But a minor can be admitted into the benefits of partnership with the consent of all the partners (Partnership Act). This means that the losses of the firm can be recovered only from his share in the firm but unlike other partners his personal property would not be liable for firm's losses.
11. **Insolvency:** A minor cannot be adjudicated insolvent.
12. **Joint Agreement:** Where a minor and another person make a joint promise, the promise cannot enforce the agreement against the minor but he can enforce it against the other person.

13. **Guardianship:** Though an agreement made by a minor is void but an agreement made by the guardian of a minor is binding on the minor if it is for the benefit of the minor.
14. **Minor's Parents:** Agreements made by a minor are not enforceable against his parents, even though they are for the necessaries supplied to the minor.

Persons of Unsound Mind

According to Sec.11 only a person of sound mind can make a contract. Sec. 12 further defines the term sound mind in these words, "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest…" Thus two essentials of 'Sound Mind' emerge from this definition:

(1) Capacity to understand: and (2)Capacity to make a rational judgment

There must be free and full consent of the parties so as to bind them to the contract. Consent is an act of reason accompanied by deliberations. It is due to the absence of rational and deliberate consent that conveyance and contracts of persons of unsound mind are deemed to be invalid. A person of unsound mind may be divided into two broad categories:

1. Idiots: An Idiot is one who has lost mental powers completely, i.e., his brain has not developed enough to enable him, at all to understand the contract or of forming a rational judgment of its effects upon his interest. Hence an agreement with him is always void. However, he can be sued for necessaries of life supplied to him or to anybody dependent upon him.

2. Lunatic: Lunacy arises from the illness of the brain or mental or bodies distress. The essential element of lunacy is that the mental powers of the lunatic are so deranged that he cannot make a rational judgment of any subject the period of lunacy.

Effects of agreements made by persons of unsound mind

An agreement made with a person who is suffering from lunacy at the time of entering into the contract, is void (Sec. 10).

Other Disqualifications

1. **Alien Enemy:** A citizen of a foreign country is known as an alien.
2. **Foreign sovereigns and their Ambassadors.** Foreign sovereigns and their Ambassadors in India can enter into contracts with Indian citizens and can sue them in Indian courts but no suit can be filed against them in local courts unless the permission of the Central Government to this effect has been obtained.
3. **Corporation:** A corporation is an artificial person created by law. Being a legal person only, it cannot act by itself. It has to act through some agent. Its contractual capacity suffers from the following limitations:

   (a) Natural Limitation: (b) Legal Limitation:
4. **Insolvents:** When personas adjudged insolvent, he loses contractual powers over his property.
5. **Convicts:** A person against whom a sentence of imprisonment is passed loses the capacity to contract.
6. **Married women:** A married woman used to suffer from certain disabilities with regard to making of contracts under English Law before 1935. A woman, married or single, in Indian Law, is under no disability as regard, entering into contracts with regard to the property that belongs to her (e.g. Strachan of a married women). Her contracts can be enforced against her husband's property if he has Failed to provide necessaries of life to her and the contract relates to necessaries of life.

Free Consent

"The term free consent consists of two requirements viz.: (I) There should be consent: and (ii) Consent should be free.

Consent: The term consent is defined by Sec. 13 as "Two or more persons are said to consent when they agree upon the same thing in the same sense"

Free Consent: "Consents said tube free rhinitis notcausedby: (1) Coercion, as defined in section 15, or: (2) Undue influence as defined in section 16, or:

(3) Fraud, as defined in section 17, or: (4) Misrepresentation, as

defined in section 18, or: (5) Mistake subject to the provisions of sections 20, 21 and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake." (Sec.14)

Coercion

"Coercion is the 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 agreement."(Sec.15)

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

Effect of Coercion: Sec, 19 states "When consent to an agreement is caused by coercion… the agreement is a contract voidable at the option of the party whose consent was so caused"

I.e. The aggrieved party at its option may set aside the contract or may insist that the contract shall perform. Sec. 72 further states, "A person to whom money has been paid, or anything delivered… under coercion, must repay or return it."

Undue Influence [Sec. 16 (1)] "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." Three conditions should be fulfilled:

- The relation between the contracting parties should be such that one party is in a position to dominate the will of the other; and
- Such party has used that dominant position to enter into a contract with the latter; and
- Such party has obtained an unfair advantage over the other.

Effect of Undue Influence: [Sec. 19 (A)] "When consent to an agreement is caused by undue influence the agreement is a contract voidable at the option of the party whose consent was so caused.

Pardanashin Women: A pardanashin woman is susceptible to undue influence and therefore, the law throws around her a "Special cloak of protection" i.e. Where such a woman signs a sale, mortgage, gift or release, the person obtaining her signatures has to prove that the transaction was not only explained to her but also that she had understood the transaction and that no undue influence was exercised on her.

Difference between Coercion and Undue Influence

Sino.	Coercion	Undue Influence
1.	The consent is obtained under the threat of an offence.	The consent is obtained by a Person who is in a position to dominate the will of another.
2.	Coercion is mainly of a physical character. It involves mostly use of physical or Violent force.	Undue influence involves use of moral force or mental pressure to obtain the consent.
3.	There must be intention of causing physical harm to any person to enter into an Agreement.	Here the influencing party uses its position to obtain an unfair advantage over the other party.
4.	It involves a criminal act.	It involves unlawful act.

Fraud

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

- The suggestion, as a fact, of that which is not true by one who does not believe it to be true;
- The active concealment of a fact by one, having knowledge and belief of the fact;
- A promise made without any intention of performing it
- Any other act fitted to deceive;
- Any such act or omission as the law specially declares to be fraudulent (Sec. 17)

Can silence be Fraudulent? (Sec. 17) "silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that regard being had to them it is the duty of the person keeping silence to speak or unless his silence is in itself equivalent to speech."

Exception: Silence would amount to Fraud if

a. It is the duty of the person keeping silence to speak. These are called uberrimae fideism contracts;
b. His silence is, in itself, equivalent to speech:

Effect of Fraud

Where Fraud is the cause of the contract :(I) Voidable Contract :(ii) Damages

Where Fraud is not the cause of contract: An attempt at deceit, which does not deceive, is no fraud.

Misrepresentation

Misrepresentation, better known as 'Innocent misrepresentation' has been defined by Sec. 18 as: "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 any one 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".

Effect of Misrepresentation

"When consent to an agreement is caused by… misrepresentation, the agreement is a contract voidable at the option of the party whose consent is so caused.

Distinction between Fraud and Misrepresentation

Fraud: Intention to deceive that there is no intention to deceive, fraud to recover damages not available in case of misrepresentation.

Misrepresentation: the aggrieved party loses the right to rescind the contract if it could discover the truth with ordinary diligence. In Fraud, this exception does not apply.

Mistake

> Salmon has described these contracts as "error in Cause". As "error in consensus"

I.e. There is no 'consensus ad idem'; because of some misunderstanding, called **'Mistake',** parties do not agree upon the same thing in the same sense. According to Indian Contract Act, Mistake is of two types, (1) Mistake as to law and (2) Mistake as to fact.

Mistake Of Law (Sec. 21): "A contract is not voidable because it was caused by a mistake as to any law in force in India, but a mistake as to a law not in force in India has the same effect as mistake of fact." The reason of this rule lies in the legal maxim "Ignorance of law is no excuse".

Mistake of Fact: (Sec 20 :) "Where both the parties to an agreement are under a

mistake as to a matter of fact, essential to the agreement, the agreement is void".

Essentials:

(1) Mistake must be mutual;

(2) Mistake must relate to a fact:

(3) Fact should be essential:

Type of Mistakes: Mistake of fact can be divided into the following categories:

A. **Bilateral Mistakes:** (1) Mistake as to the subject Matter: (I) Mistake regarding existence of subject matter: (ii) Mistake regarding identity of the subject matter i.e. The two parties understand different things to be the subject matter: (iii)Mistake regarding quantity of subject matter:(iv) Mistake regarding title of the subject matter: Where both the parties believe that the seller has the right to sell the goods but unknown to both, the seller has no title to the goods.(v) Mistake regarding the price of the subject matter.(vi) Mistake regarding the quality of the subject matter.

(2) Mistake as to the possibility of performance of the agreement: if both the parties to the agreement believe that the agreement is capable of being performed though it is not, the agreement is void.

B. **Unilateral Mistake:** In the following circumstances, even unilateral mistake will make the contract voidable.

1. **Mistake as to the nature of transaction:** This is an exception to the rule that mistake must be mutual. When one of the parties to a contract, without any fault of his own, is made to commit a mistake as to the nature of transaction the agreement would be void.
2. **Mistake as to the person contracted with:** When the identity of the person is essential to the contract and a mistake is committed regarding that, the contract can be avoided.

Void Agreements

Following are those contracts, which may not lack any of the essentials,

discussed so far, still the law has specifically declared them void, they are:

1. **Agreement in Restraint of Marriage**
2. **Agreement In Restraint Of Trade**

Following agreements are not in Restraint of Trade

i. Restraint during the term of service
ii. Agreements which promote business and do not restrain it
iii. Trade Combinations

3. **Agreement in Restraint of Legal Proceedings**

(Sec. 28) "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent".

Exceptions-Arbitration Agreements: An agreement to refer all future as well as present disputes in connection with a contract, to arbitration is valid.

> **Uncertain Agreements:** (Sec. 29) "Agreements the meaning of which is not certain or capable of being made certain, are void."

> **Agreement By Way Of Wager:**(Sec. 30) "Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made.

Agreements Collateral to Wagering Agreements

However transactions collateral or incidental to a wagering agreement are not void as per Sec. 30. **Lotteries:** A lottery is a game of chance and is a wagering agreement. **Cross- wards Puzzles:** Cross-word puzzles are of two types:

- One in which any person solving the puzzle would be awarded; therefore it is a game of skill and not of chance and is not a wagering agreement.
- The other type of cross-word puzzle is one in which the prize would be awarded to that competitor whose solution corresponds to the solution kept

with the editor of the newspaper.

Contingent Contracts

(Sec. 31) "A contingent contract is a contract to do or not to do something, if some event, collateral to such contract does or does not happen". Thus it is a contract, the performance of which is dependent upon, the happening or non-happening of an uncertain event, collateral to such contract.

Example: X contracts to pay Y Rs.30, 000, in consideration of Y paying Rs. 100 monthly premium, if Y's factory is burnt. This is a contingent contract.

Example: A agrees to pay B a sum of money if B marries C. Contracts of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

Rules Relating To Contingent Contracts

1. Contingent on the act of party to the contract: If the performance of the promise is contingent upon the pleasure and will of the promissory, it is not a contract at all.
2. Contingent upon the act of a third party: where the performance of a contract is conditional upon the act of a third party, it is a valid contract.
3. Contingent on the happening of an event: (Sec.32) "Contingent contracts to do or not to do anything, if an uncertain future event happens cannot be enforced by law unless and until that event has happened".
4. Contracts contingent on the non-happening of an event: (Sec.33) "Contingent contracts to do or not to do anything, if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before".
5. Contracts contingent on the happening or not happening of a specified Event within fixed time (Sec.35). "Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, becomes void if at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible".
6. Contracts contingent on impossible event: (Sec. 36-) "Contingent agreement to do or not to do anything if an impossible event happens, are void, whether the impossibility

is known or not to the parties to the agreement at the time when it is made."

Difference between a Contingent Contract and Wagering Agreement

The main points of distinction between the two are as under:

- A contingent contract is a valid contract but wagering agreement is absolutely void.
- Parties have real interest in the occurrence but non-occurrence of the event e.g., insurable interest in the property insured. Parties are not interested in the occurrence of the event except for the winning or losing the bet amount.
- Future uncertain event is merely collateral: uncertain event is the sole determining factor of the agreement.

Quasi Contracts

A quasi contract is an obligation or a right created by law. A quasi contract is based on the principle that no person can enrich himself unjustly, at the expense of another. If he obtains a benefit which under the circumstances he ought, equitably to pay for it, the law would compel him to make the payment even though there is no contract requiring payment.

Following relations created by law, resemble those created by contract:

- **Necessaries Supplied To A Person Incapable of Contracting:** Example: X supplies Y, a lunatic, with necessaries suitable to his conditions in life. X is entitled to be reimbursed from Y's property.
- **Payment Of Money Due By Another:** (Sec.69) "A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."
    - **Non-Gratuitous Act For Another's Benefit:** (Sec.70) "Where a person lawfully does anything for another person or delivers anything to him not to do so gratuitously and such other person enjoys the benefits, thereof the latter is bound to make compensation to the former in respect of or to restore the thing so due or delivered". Example: A Businessman leaves goods at B's house with the intention of persuading B to buy them. B treats the goods as his own. He is bound to pay A for them.

- **Finder of Lost Goods:** (Sec. 71) "A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailed."
- **Money Paid By Mistake Or Under Coercion:** (Sec.72) "A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it". Example: X and Y jointly owe Rs. 1000 to Z. X alone pays the amount to Z and Y, not knowing the fact pays Rs.1000 over again to Z. Z is bound to repay the amount to Y.
- **Suit upon Quantum Merit:** The phrase 'Quantum Merit' means as much as earned or 'in proportion to the work done'. This is a general rule, usually invoked where there is no agreement to pay for the work done.(Sec. 70)

Performance and Discharge of Contracts

'Performance of Contracts' refers to the fulfillment of their respective legal obligations, created under the contract, by both the parties. It is a natural and normal mode of discharging a contract. The various aspects relating to performance are discussed below:

A. Actual Performance

"The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act of any other law..."

Example: X bought goods from Y and promised to pay Rs.1000 to Y on 10th June. X went to Y on 10th June to give Rs.1000 in cash but Y did not accept it. Though X may not be discharged from the payment of Rs.1000, he would not be liable to pay interest thereon from 10th June onwards.

For a tender to become legally valid it must fulfill the following conditions:

i. **It should be unconditional** (Sec. 38): The promissory while offering to perform his promise must do it unconditionally.
ii. **Offer must not be of a part only** (Sec. 38): The offer must be of whole payment or performance. A creditor is not bound to accept less than what is actually due and would not lose his right to interest on that portion.

iii. **Proper time and place** (Sec. 38): The offer must be made at a proper time and place.

iv. **Able and willing** (Sec. 38): "It must be made… under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do."

v. **Reasonable opportunity** (Sec. 38): "…If the offer is an offer to deliver anything to the promise, the promise must have a reasonable opportunity of seeing that thing offered is the thing which the promissory is bound by this promise to deliver. Thus, buyer must have reasonable opportunity to ascertain that the goods offered are contracted for.

vi. **Tender of money:** A tender of money must be in legal tender money, and not in any foreign currency, promissory note or cherub'

vii. **Joint Promises: (Sec. 38)** "An offer to one of several joint promises has the same legal consequences as an offer to all of them."

B. Refusal to Perform (Sec.39)

"When a party to a contract has refused to perform, or disabled him from performing, his promise in it's entirely; the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

C. Who Can Demand Performance?

It is only the promise who can demand performance of the promise under a contract, for the general rule is that "a person cannot acquire rights under a contract to which he is not a party."

D. By Whom Contracts Must Be Performed

> By the promissory himself: (Sec. 40) "If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it, should be performed by the promissory himself, such promise must be performed by the promissory…" Generally where personal skill, taste etc. Are involved, it is presumed that the promissory would himself perform the contract.

> By promises representative: (Sec. 37) "…Promises bind the representatives of the

promissory in the case of death of such promissory before performance, unless a contrary intention appears from the contract".

Example: A promises to deliver goods to B on a certain day on payment of Rs.10, 000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs.10, 000 to A's representatives.

E. Offer to Perform (Tender) (Sec 37)

"A party who has not already performed his obligation must offer to perform the same. (Sec. 38) "Where a promissory has made an offer of performance to the promise and the offer has not been accepted, the promissory not responsible forenoon on performance nor does he thereby lose his rights under the contract". Example: A promises to paint a wall for B. A must perform this promise personally.

F. Devolution of Joint Rights and Joint Liabilities (Joint Promises)

When two or more persons make a joint promise to other or others, they are known as joint promissory e.g. A and B sign a promissory note, they are joint promissory. When a promise is made to two or more persons, they are Joint Promises. Following rules govern such promises:

(1)All promissory must jointly fulfill the promise: (2) Any one of the joint promissory may be compelled to perform: (3) Right of contribution between joint promissory: (4) Effect of release of one joint promissory Example A, B and C Jointly promise to pay D Rs. 5000. D may compel either A or B or C to pay him Rs. 5000.

Time and Place for Performance

- **Within a reasonable time:** (Sec 46) "Where a promissory is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time." "The question what is a reasonable time is, in each particular case, a question of fact."
- **During usual hours of business:** (Sec.47) "When a promise is to be performed on a certain day, and the promissory has undertaken to perform it without application by the promise, the promissory may perform it at any

time during the usual hours of business on such day and at the place at which the promise ought to be performed."

- **Promise's duty to apply for performance:** (Sec. 46) "When a promise is to be performed on a certain day, and the promissory has not undertaken to perform it without application by the promise, it is the duty of the promise to apply for performance at proper place and within the usual hours of business."
  - **Promissory should apply for fixing a reasonable place:** (Sec.49) "When a promise is to be performed with application by the promissory and no place is fixed for the performance of it, it is the duty of the promissory to apply to the promise to appoint a reasonable place for the performance of the promise, and to perform it at such place."
  - **In the manner prescribed by promise:** (Sec. 50) "The performance of any promise may be made in any manner, or at any time which the promise prescribes or sanctions."

Performance of Reciprocal Promises

- [Sec. 2 (f)] "Promises which form the consideration or part of the consideration for each other are called reciprocal promises." Rules regarding the performance of reciprocal promises are:
- **When promises are to be performed simultaneously:** "When a contract consists of reciprocal promises to be simultaneously performed no promissory need to perform his promise unless the promise is ready and willing to perform his reciprocal promise."
- **In the order, which the nature of transaction requires:** (Sec. 52) "Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires."
- **When the performance of a promise is dependent upon other:** (Sec. 54) "When the contract consists of reciprocal promises, such that one of them cannot be performed or that its performance cannot be claimed till the other has been performed and the promissory of the promise last mentioned fails to perform it, such promissory cannot claim the performance of the reciprocal promise, and must make compensation

to the other party for any loss which such other party may sustain by the non-performance of the contract." These are known as mutual and dependent promises.

- **Whenoneparty preventstheother fromperforminghispromise:** (Sec.53) "When a contract contains reciprocal promises, and one partytothecontractpreventstheotherfromperforminghispromise thecontractbecomesvoidableattheoptionofthepartysoprevented.
- **Where the promise is partly legal and partly illegal:** (Sec.57)

- "Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal the first set of promises is a contract, but the second is a void agreement."
- **Time of Performance**
- **When time is the essence of the contract:** (Sec.55) "When a party to a contract promises to do certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable to the option of the promise, if the intention of the parties was that time should be the essence of the contract."
- **When time is not the essence of the contract:** If it was not the intention of the parties that time should be the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time, but the promise is entitled to compensation from the promissory for any loss occasioned to him by such failure.
- **Condition for compensation when contract is voidable and goods are accepted:** "If in case of a contract voidable on account of the promise's failure to perform his promise at the time agreed, the promise accepts performance of such promise at any time other than that agreed, the promise cannot claim compensation for any loss occasioned by the non-performance of promise at the time agreed unless, at the time of such acceptance, he gives notice to the promissory of his intention to do so." (Sec.55)

Discharge of a Contract

A contract is discharged, terminated when the rights and obligations created by it come to an end. A contract is terminated in the following ways:

I. **By Performance (Sec. 37):** When the parties to a contract perform their respective promises, the contract comes to an end. Nothing remains to be performed.

II. **By Tender (Attempted Performance):** When a promissory makes an offer of performance tender and the offer is not accepted, the promissory is not responsible for non- performance, i.e. He is discharged from his obligations under the contract. But he does not lose his rights under the contract i.e. the promise is not discharged from his obligations.

III. **By Supervening Impossibility:** Impossibility is of two types:

i. **Impossibility at the Time of Contract:** (Sec.56) "An agreement to do an act impossible in itself is void." Example A agrees with B to discover gold by magic. The agreement is void.

ii. **Subsequent Or Supervening Impossibility** Where a contract originates as one capable of performance but later due to change of circumstances its performance becomes impossible, it becomes void by subsequent or supervening impossibility (section 56). In English law this is called "Doctrine of Frustration". Example: A and B contract to marry each other. Before the time fixed for marriage, B becomes mad. The contract becomes void.

Supervening impossibility may arise in any of the following ways:

1. Destruction of the subject matter:
2. When the foundation of the contract ceases to exist: If in a contract, it is deemed that the parties had assumed certain state of things to continue and that state of things ceases to exist, the contract would come to an end.
3. Change of Law: A contract which becomes illegal after it is made becomes void and the parties to the contract will be discharged from their respective obligations.
4. Death or personal incapacity: Where the contract is of personal nature the death or incapacity of the promissory would discharge the contract.
5. Declaration of war: A contract entered into with an alien enemy before the war breaks out is either suspended or discharged after the declaration of war if it does not aid the enemy in the pursuit of war, it is suspended and would be performed after the war is over, otherwise it is terminated and the parties to

the contract are discharged from their respective obligations.

Exceptions to the Principle of Supervening Impossibility As a Rule Is No Excuse for Non-Performance:

Following are some of the circumstances in which non- performance of a contract was held not to be excused.

iii. **Difficulty of performance:** If a contract becomes difficult to perform but not impossible the promissory would not be discharged on that account.

iv. **Commercial Impossibility** would not discharge of a contract. A contract would not be deemed to be impossible because it does not remain profitable to the promissory or would make the promissory to incur losses.

v. **Action of a third party:** If a man chooses to answer for the voluntary act of a third person, there is no reason in law or justice why he should not be held for his inability to procure that act.

vi. **Strikes, lock-outs, civil disturbances and riots do** not discharge a contract unless there is a clause in the contract to that effect.

vii. **Partial impossibility:** Where a contract is entered into for more than one purpose, the contract would not become impossible, if one of the objects has become impossible to achieve.

Consequences of Supervening Impossibility

Supervening impossibility makes a contract void. The parties are discharged from their respective obligations under the contract (Sec. 65). The party who has received any advantages under it should restore it to the other party.

IV. Mutual Agreement

A contract is created by the parties to it; therefore, it can also come to an end by their mutual agreement. Termination by mutual agreement may occur in any one of the following ways.

1. **Notation:** When a new contract is substituted for an existing contract, either between the same parties or between different parties, it is called notation.
2. **Alteration:** When one or more of the terms of a contract are changed, it is called

alteration. In case of alteration, parties to the contract do not change. Example: A agrees to supply to B 20 readymade pants, 10 of the size 32 and 10 of the size 34. Later on B requests A to supply all 20 pants of the size 32 only. A agrees to it. The old contract comes to an end.

3. **Rescission:** When both the parties to a contract agree to put an end to the contract, without performing it, the contract is said to be rescinded by mutual agreement. Example: A promises to supply to B 20 shirts on 15th January and B promises to pay Rs 5000 on the same day after delivery, on 10th January, both the parties agree that the contract would not be performed. Parties are said to have rescinded the contract.
4. **Remission**: When a party to a contract accepts, from the other party, a performance lesser than what he had contracted for, he is deemed to have remitted the remaining performance, and the contract is discharged. Example: A owes B Rs.500 rupees but pays on by Rs. 200, and B accepts at in satisfaction of the whole debt. The whole debt is discharged.
5. **Waiver:** When a party to a contract abandons his right under the contract, the other party is released from his obligations. Example: A pays Rs 1000 to B to paint a wall for him. Later on A forbids B to paint the picture. B is no longer bound to perform the promise.
6. **Merger:** When a superior right and an inferior right coincide and meet in one and the same person, the inferior right vanishes into the superior right. This is known as merger. Example: A has taken a house on lease from B for 10 years. After one year A buys the house from B. His rights of a lease vanish into his rights of ownership and the contract of lease comes to an end.

V. By Lapse of Time

The Limitation Act provides the time limit in which certain rights can be enforced. If that time limit expires, the promise cannot enforce the promissory and promissory is discharged. Example: A owes Rs 10,000 to B. The last date for the repayment of the loan has expired and B does not file a suit against A for two years. B loses the right to recover the money back.

I. By Operation of Law

This covers the following cases: **1. Death:** If a contract involves personal skill

or ability, death of the promissory would terminate the contract.

2. Insolvency: When a person is adjudged insolvent and hands over all his property to the official receiver/assignee, he is supposed to have the right to earn his livelihood in the ordinary way and therefore the courts, under certain circumstances and subject to certain conditions, discharge him from all debts which were payable in insolvency but remain unpaid. He does not remain liable to pay those debts. **3. Merger: 4. Material alteration:** A change which affects or alters, in a specific manner, the rights and liabilities of the parties is called material alteration. A material alteration made in a written document or contract by one party without the consent of the other, will make the contract void, e.g. An endorsee of a promissory note/ altering the amount of note.

II. By Breach of Contract

Breach is the non-performance of the promise by the promissory. It entitles the promise to rescind the contract. It, therefore, operates as a mode of discharging a contract.

Contract of Agency

Definition of Agent and Principal

(Sec. 182) "An agent is a person employed to do any act for another or to represent another in dealing with third persons. The person for whom such act is done or who is so represented is called the principal."

Test of Agency: The true test of agency is the authority that one person possesses to create contractual relationship between the person he is representing and the person to whom he represents. Where a person is in the habit of advising another in business dealings he does not become the agent of the other.

Agent and Servant

A servant is a person who acts under the direct control and supervision of his master while an agent does not. "A principal has the right to direct what the agent has to do; but a master has not only that

Right but also the right to say how it is to be done" An agent is, therefore, sometimes described as 'Superior Servant'. An agent binds the principal with the third parties but a servant does not create relations between his master and third persons.

Who may employ agent?

(Sec. 183), "Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent." "Whatever a person can do personally he can do through an agent." Thus a guardian of a minor can appoint an agent for the minor.

Who may be an agent?

A minor or even a person of unsound mind can act as agents but they would not be responsible to the principal or to the third parties in cases where a person competent to contract would have been responsible.

Consideration for the contract of agency: (Sec. 185) "No consideration is necessary to create an agency." Principal's agreement to be represented by the agent is deemed to be sufficient detriment to support the promise by the agent to act as such and be liable to the principal for negligence.

Creation of Agency

The relationship of principal and agent may be created in any of the following ways:

1. **By Express Agreement:** "The authority of an agent may be expressed or implied." (Sec.

186) "An authority is said to be expressed when it is given by words spoken or written." (Sec. 187): Example: A asks B to sell his cow for a commission of 10% on sales. B agrees to do so. Agency has been created... The agreement need not be in writing. But in certain cases, law requires the agreement to be in writing, e.g. For sale or purchase of land, the law requires the agent to be appointed by executing a formal power of attorney.

2. **By Implied Agreement Sec**. 187: "… An authority is said to be implied when it is to be inferred from the circumstances of the case, and things spoken or written, or the ordinary course of Dealing…" Example: A owns a shop. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

i. **Agency by estoppels** (Sec. 237): "When an agent has without authority done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has, by his words or conduct, induced such third persons to believe that such acts and obligations were within the scope of the agent's authority." Example: A starts manufacturing plastic products. A, B and C are sitting together. B in the present of A tells C that A has appointed him

(B) As selling agent of his product. A does not contradict this statement, though he had not appointed him as his agent. Later on C enters into a contract with B on the presumption that B is A's agent. A would be bound by this transaction. A would be precluded from denying that B is his agent.

ii. **Agency by holding out:** The principle of holding out is a part of the law of estoppels. But agency by holding out requires some positive or affirmative conduct by the principal. Example: A sends his servant to buy goods from B on credit. B gives the goods to A's servant and A pays for them. Later on A's servant, without A's asking for it, buys goods from B on A's credit and runs away. A would be liable to pay for the goods, thought a servant is not an agent, but by paying for the credit purchases made by his servant, A held out that his servant was his agent also and as such he would be liable for the purchases made by his servant.

I. cy of Necessity: If a person protects the property or interest of another where such property or interests are in imminent danger and the instructions of the owner cannot be obtained, the former would be deemed to be an agent of the latter so as to make the latter liable for whatever he has done provided the former has acted bonfire in the interests of the latter. The principle of necessity also extends to cases where an agent exceeds his authority if the following conditions are fulfilled

(I) agent was not in a position to communicate with thePrincipal.

(ii) The agent takes reasonable and necessary course in the circumstances. (iii) The agent acts bonfire. Example: A sends some bananas to B with the instructions that B should send them to C. When B takes delivery of the bananas, he finds that the bananas are not in a condition to sustain the journey to C's place and would perish before reaching B, therefore, sells them at the best possible price. A would be bound by this sale under agency by necessity.

In cases of accident and emergency a master of a ship can sell or pledge the goods in order to save their value and such sale or pledge would be binding on the owners of the cargo.

Husband and Wife:

A wife can bind the husband for the contracts she enters into for the purchase of household necessities suiting to the couple's joint style of living provided. They are living together and the wife is the in-charge of domestic establishment and the husband has not made reasonable allowance to the wife for her needs. Example: H and W are husband and wife respectively. W chooses to live separately and buys goods on credit from A. On her failure to pay for the purchases A cannot recover the money from H because they are not living together.

However, a husband can escape the liability if he can prove that (I) he had warned the tradesman from supplying the goods on credit to his wife; (ii) he had already supplied sufficient articles in question to his wife

(iii) He had supplied sufficient means to his wife for the purchase of articles in question. But if the wife is deserted by her husband and thus forced to live separately, she may of necessity become agent of her husband and can pledge her husband's credit for necessaries to the extent a reasonable maintenance makes it necessary.

3. **Agency by Ratification:** A person may become another's agent after having done some work for the latter, if the latter ratifies the act. When a person adopts or accepts an act done on his behalf but without his authority he is said to have

ratified it. Example: A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A. Implications of Ratification: (I)

Ratification relates back to the date of the act. It is tantamount to prior authority. This means that the agency comes into existence not from the time when the act is ratified but from the time when the act was done. I.e. (Ratification is equivalent to an antecedent authority). (ii) No Authority for future: The ratification of an act done without authority does not confer authority to do similar acts in future.

Conditions of a Valid Ratification

- Ratification is enforceable only when the following conditions are fulfilled.

- > **Must contract as agent:** The agent must contract as agent for a principal in contemplation; or the agent should not make the contract for himself.
- > **Only named principal can ratify:** Only that principal who was named or was identifiable at the time of the contract, can ratify the contract. He can do so, even if the agent never intended that he should do so. Example: A makes a contract with B on behalf of his uncle, D. Later on C, A's elder brother want to have the benefit of the contract and wants to ratify the same. C cannot do so. D, when comes to know of the contract, wants to ratify the same; he can do so and enjoy the benefit of the contract even if A does not want it.
- **The principal should be in existence:** Mere contemplation at the time of the contract is not sufficient. If the principal was not in existence at the time of the contract, he cannot ratify such contract.
- **The Principal must be competent to contract** at the date of the contract as well as at the date of ratification. Thus, a minor cannot ratify a contract made on his behalf after becoming a major.
- **The principal must have full knowledge of the material facts** (Sec. 198): "No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective."
- **The principal must ratify the whole transaction (Sec. 199).**
- **The principal must ratify the contract within a reasonable time:** after the contract is made.

- **The act to be ratified should not be void or illegal,** though ratification can be made.
  - **Ratification of unauthorized act cannot injure third person.**
  - **Ratification by Got:** Acts done by public servant in the name of the Government may be ratified by subsequent approval in the same manner as private transaction.

Extent of Agents Authority

It is necessary to know all dimensions of his (agent) authority. They are as follows:

> **Actual Authority:** Actual authority is one which is conferred on the agent by the principal. It may be express or implied.

(1) Express Authority: An authority is said to be express when it is given by words spoken or written (Sec. 187). (2) Implied Authority: (I) an authority is said to be implied when it is inferred from the circumstances of the case. (Sec. 187) (ii) An agent having authority to do an act has authority to do every lawful thing which is necessary in order to do such act. (Sec. 188)

> **Ostensible or Apparent Authority**: Apparent or ostensible authority is that authority which an agent appears to be possessing, though, in fact, he may not have.

> **Authority in Emergency:** "An agent has authority, in an emergency; to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances." (Sec. 189).

Delegation of Authority by Agent

"An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally…" sub- agent may not enjoy the confidence of the principal ["A sub-agent is a person employed by, and acting under the control of, the original agent in the business of the agency" (Sec.191).

Exceptions: In the following circumstances delegation made by an agent to sub-agent would be proper:

(1) Nature of agency:

(2) Custom of Trade: Where it is a custom of trade that an agent appoints a sub-agent.

(3) **Ministerial Acts:** Where the acts to be done are purely ministerial ad do not involve the exercise of discretion, or personal or professional skill.

(4) **Express Delegation:** Where the principal has expressly permitted delegation.

(5) **Implied Permission:** Where the principal impliedly permits delegation i.e. from act or conduct it may be inferred that he has allowed delegation of authority.

(6) **In emergency:** In case of emergencies an agent can always delegate the authority to a sub-agent.

Duties of an Agent

1. **To follow principal's directions or customs:**
2. **Skill and diligence to work:**
3. **To render proper account:** (Sec. 213): "An agent is bound to render proper accounts to his principal on demand." He should always be ready to produce them to the principal.
4. **To communicate with the principal (Sec. 214)**
5. **Not to deal on his own account: (Sec. 215)**
6. **To pay sums received for principal**
7. **Not to delegate authority (Sec. 190)**
8. **On Principal's death or insanity (Sec. 209)**

Rights of an Agent

1. **Right to Remuneration:** Every agent is entitled to receive the remuneration agreed upon with the principal.
2. **Right of retainer (Sec. 217)**
3. **Right of Lien (Sec. 221)**

4. **Right of indemnity**

Rights and Duties of Principal towards Agent Rights of Principal

(1) He can enforce the various duties of an agent.

(2) He can recover compensation for any breach of duty by the agent.

(3) He can forfeit agent's remuneration where the agent is guilty of misconduct in the business of agency.

(4) Principal is entitled to any extra profit that the agent has made out of his agency. This includes illegal gratification, if any.

(5) Principal is entitled to receive all sums that the transactions, entered into, by the agent, on behalf of the principal were void or illegal.

Duties of Principal

1. To Pay Remuneration.
2. Duty to Indemnify.
3. Compensation for injuries.
4. Should not prevent the agent from earning remuneration.

Principal's Liabilities to Third Parties for the Acts of the Agent

1. Liability for acts done by agent within authority.
2. Ratification of acts beyond the scope of his authority.
3. When an agent commits fraud or misrepresentation.

Liability for tort: If an agent commits a tort in the course of and within the scope of his agency, the principal may in certain cases be liable for the same.

1. **Notice given to agent as notice to principal (Sec. 229)**
2. **Liability under the principle of estoppels**
3. **Liability when his name is not disclosed (Unnamed principal)**
4. **Liability when agent does not disclose his agency (undisclosed principal)**

Agent and Third Parties

"In the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal nor is he personally bound by them…'

If there is no contract providing for, or relieving the agent from, personal liability the agent would be liable in the following cases:

1. **Foreign Principal**
2. **Unnamed Principal**
3. **Undisclosed Principal**
4. **Incompetent Principal**
5. **Where the agent exceeds his authority**
6. **Where agent's authority is coupled with interest**
7. **Custom of Trade**
8. **Money received by mistake or fraud**

Termination of Agency

The contract of agency would come to an end in any of the following circumstances:

1. **By Agreement**
2. **By Revocation by the principal:**
3. **Renunciation by the Agent**
4. **Completion of business**
5. **Death or Insanity**
6. **Insolvency of the principal**
7. **Expiration of Time**
8. **Destruction of the subject matter**
9. **Dissolution of a company**
10. **Principal or agent becoming alien enemy**

Partnership Act 1932

The law relating to partnership is contained in the Indian partnership Act, 1932. The Act came into force with effect from October 1, 1932. Prior to enactment of the aforesaid Act, partnership business used to be governed by the Indian Contract

Act, 1872.

Section 4 of the Indian Partnership Act, 1932 defines 'partnership' as follows: "a business carried on by all or any of them acting for all."

Essential elements of partnership:

1. Association of two or more persons,
2. Existence of a contract,
3. Carrying on a business,
4. Sharing of profits and
5. Prevalence of mutual agency.

But a partnership firm cannot create another partnership as it does not enjoy the status of the artificial legal person. There must exist a contract between persons who have agreed to form partnership. Such a contract may, however, be expressed or implied, written or oral.

Partnership Deed: Partnership Deed is the document that defines the rights and obligations of partners. Besides names, address and occupation of partners, it lays down the duration of partnership, nature of business, profit sharing ratio, right to interest, salary, commission etc.

Registration of Firms

The registration of partnership firm is discretionary. The provisions relating to registration of partnership firm are contained in Chapter 7, Sections 56 to 71 of the partnership Act.

Effect of Non-registration (Sec. 69)

An unregistered firm and its partners suffer from the following disabilities:

1. No Suit against other partners and firms
2. No suit against third parties
3. No claim of set off

Duration of Partnership

Partnership may, from the point of view of its duration, be categorized into the following two classes: (1) Partnership for a fixed term or particular partnership (2) Partnership at will.

Kinds of Partners

There may be different kinds of partners in a partnership firm. The important classification of partners is given below:

1. Actual or active partners,
2. Dormant or sleeping partner,
3. Nominal partner,
4. Partner in profits only,
5. Sub-partner,
6. Partner by estoppels or by holding out.

1. **Actual or active partners:** Partners actively engaged in the conduct of the business are known as 'active' or 'actual' or ostensible partners.
2. **Dormant or sleeping partner:** The nominal partner is one who lends his name to the partnership firm without any real interest in terms of investing money in the firm or sharing in profits.
3. **Nominal partner:** The nominal partner is known to the outsiders and does not share the profits of the firm.
4. **Partner in profits only:** A person who does not want to take risk of loss may agree to become a partner in profits only.
5. **Sub-partner:** When a partner agrees to share his share of profit in a partnership firm with the outsiders, such an outsider is called a 'Sub-partner'.
6. **Partner by estoppels or by holding out:** If a partner, by his words or conduct holds out to another that he is a partner, he will be stopped from denying that he is not a partner. Such a partner neither contributes any capital nor participates in the management. He is only liable to third parties.

Minor as A Partner

According to Indian Contract Act an agreement of a minor is void, as void; as

such he cannot enter into an agreement of partnership. Section 30 of the Partnership Act provides that a minor may be admitted to the benefits of partnership with the consent of all the partners.

Rights of Minor Partner

A minor admitted to the benefits of a Partnership has the following rights:

- Right to share the profits.
- Right to have the access to do the inspection
- Right to file a suit for accounts or demand his share of property or profits.
- Right to exercise option on attaining the age of majority, whether or not to continue in the firm.

Liabilities of Minor Partner

> The liability of a minor is limited to the extent of his share in the firm and therefore, unlike other partners, he is not personally liable.

> If the firm is declared insolvent, his share in the firm vests in the official receiver or assignee but a minor cannot be declared insolvent.

Rights, Duties and Liabilities of Partners Rights

- Right to take part in the conduct of business
- Right to be consulted
- Right of access to the books
- Right to share profits
- Right to interest on capital
- Right to interest on advances
- Right to indemnity
- Right to act prudently in emergency
- Right to give consent for admission of a new partner
- Right to retire
- Right to carry on competing business after r e t me r e m e n t.

Duties

A. Qualifying

1. To attend his duties diligently
2. To work without remuneration
3. To contribute to losses
4. To indemnify for willful neglect
5. To use firm's a property exclusively for the firm
6. To account for private profits [Sec.16(a)]

B. Others

1. Duty to carry on business for the common advantage
2. To indemnify for loss caused by fraud
3. To give full information
4. To render true accounts
5. To be just and faithful

Liabilities

1. **Liability of partner for acts of the firm:** Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner
2. **Liability of the firm for wrongful acts of the partner:** Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefore to the same extent as the partner (Section 26).
3. **Liability of the firm for misapplication by partners:** (I) When a partner acting within his apparent authority receives money or property from a third party and misapplies it, or (ii) A firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss (Sec. 27).
4. **Liability for the loss caused by his own fraud**
5. **Liability for the loss caused by his own willful neglect.**

Authority of a Partner

A. **Express Authority**
B. **Implied Authority** "The act of partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm". Thus the authority of a partner to bind the firm is called 'Implied authority".
C. **Authority in an Emergency:** A partner has authority in an emergency to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

Reconstitution of a Firm

A change in the constitution of the firm occurs when a new partner is admitted or an old partner retires or dies. The partnership is reconstituted on:

1. Admission
2. Retirement
3. Expulsion
4. Insolvency
5. Death of a partner
6. Transfer of interests by a partner.

Dissolution of a Firm

Dissolution of a firm means an end of the firm. The Indian Partnership Act distinguishes between:

- Dissolution of firm, and
- Dissolution of partnership.

Section 39 provides that the dissolution of partnership between all the partners of a firm is called the "dissolution of the firm".

Modes of Dissolution

A firm may be dissolved in any of the following modes

I. **By Agreement (Sec. 40)**

II. **By Notice (Sec. 43)**

III. **On The Happening Of Certain Contingencies (Sec. 42)**

1. Expiry of fixed term

2. Completion of adventure or undertaking

3. Death of a partner

4. Insolvency of a partner

IV. **Compulsory (Sec 41):** A firm is dissolved in the following circumstances:

1. Insolvency of all partners or all except one

2. Business becoming unlawful

V. **Dissolution By The Court (Sec 44):** Section 44 provides that the Dissolution of a firm may take place on a suit filed by a partner on any of the following grounds, namely:

1. *Insanity of a partner [Section 44(a)]*
2. *Permanent incapacity [Section 44(b)]*
3. *Misconduct [Section 44(c)]*
4. *Persistent breach of agreement [Section 44(d)]*
5. *Transfer of interest [Sec.44(e)]*
6. *Continuous losses[Section 44(f)]*
7. *Just and equitable causes [Sec.44(g)]*

Consequences of Dissolution

The consequences of dissolution are as follows:

1. **Continuous liability if fails to give a public notice [Sec. 45]**
2. **Continuous authority of partners for purposes of winding up [Sec. 47]**
3. **Right to have the business wound up [Sec. 46]**
4. **Right to return of premium [Sec. 51]**
5. **Rights where partnership contract is rescinded for fraud or misrepresentations [Sec. 52]**
6. **Rights to impose restrictions [Sec. 53]**
7. **Liability to share personal profits [Sec. 50]**

Settlement of Accounts upon Dissolution

1. Treatment of goodwill
2. Meeting losses [Sec.48 (a)]
3. Order of applications of assets [Sec.58(a)]
4. Losses arising from insolvency of a partner
5. Payment of firm's debts and separate debts [Sec. 49]

Public Notice

The Partnership Act requires that a public notice must be given in each of the following cases:

- ❖ On Minor Attaining Majority: Retirement of a partner:
- ❖ Expulsion of a partner: Dissolution of the firm.

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UNIT – II

COMPANIES ACT

Nature of Company and Formation

A Company, in common parlance, means a group of persons associated together for the attainment of a common end, social or economic.

The Companies Act, 1956 defines the word 'company' as a company formed and registered under the Act or an existing company formed and registered under any of the previous company laws (Section 3). Section 12 permits the formation of different types of companies. These may be (I) companies limited by shares, (ii) companies limited by guarantee, and (iii) unlimited companies. The vast majority of companies in India are with limited liability by shares.

Definition of Company:

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

The common stock so contributed is denoted in money and is "the capital" of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his "share". Shares in a company are transferable.

Characteristics of a Company:

The following are the characteristic features of company:

1. **Incorporated Association:** A company must be incorporated or registered under the Companies Act. Minimum number required for the purpose is 7 in case of a public company, and 2, in case of a private company (Sec. 12). As per Section 11, an association of more than 10 persons, in case of banking business, and 20 in case of any other business, if not registered as a company under the Companies Act, or under any other law for the time being in force, becomes an illegal association.

2. **Artificial Person:** A company is created with the sanction of law and is not itself a human being, it is, therefore, called artificial; and since it is clothed with certain rights and obligations, it is called a person. A company is accordingly an artificial person.
3. **Separate Legal Entity:** Unlike partnership, company is distinct from the persons who constitute it. Section 34(2) says that on registration, the association of persons becomes a body corporate by the name contained in the Memorandum. [**Salomon v. Salomon & Colt.(1877)**]
4. **Limited Liability:** The Company being a separate person, its members are not as such liable for its debts. Hence, in the case of a company limited by shares, the liability of members is limited to the nominal value of shares held by them. Thus, if the shares are fully paid up, their liability will be nil. However, companies may be formed with unlimited liability of members or members may guarantee a particular amount. In such cases, liability of the members shall not be limited to the nominal or face value of the shares held by them. In case of unlimited liability companies, members shall continue to be liable till each praise has been paid off. In case of companies limited by guarantee, the liability of each member shall be determined by the guarantee amount, i.e., he shall be liable to contribute up to the amount guaranteed by him.
5. **Separate Property:** Shareholders are not, in the eyes of the law, part owners of the undertaking. In India, this principle of separate property was best laid down by the Supreme Court in Bache F.Guzdar V. The Commissioner of Income Tax, Bombay (Super). The Supreme Court held that a shareholder is not the part owner Of the company or its property, he is only given certain rights by law, e.g., to vote or attend meetings, to receive dividends.
6. **Transferability of Shares:** Since business is separate from its members in a company form of organization, it facilitates the transfer of members' interests. The shares of a company are transferable in the manner provided in the Articles of the company (Sec. 82). However, in a private company, certain restrictions are placed on such transfer of shares but the right to transfer is not taken away absolutely.
7. **Perpetual Existence:** A company being an artificial person cannot be incapacitated by illness and it does not have an allotted span of life. The death, insolvency or retirement of its members leaves the company unaffected. Members may come and go but the company can go for ever.

8. **Common Seal:** A company being an artificial person is not bestowed with a body of natural being. Therefore, it has to work through its directors, officers and other employees. But, it can be held bound by only those documents which bear its signatures. Common seal is the official signature of a company.
9. **Capacity to sue:** Another fall-out of separate legal entity is that the company, if aggrieved by some wrong done to it may sue or be sued in its own name.

Lifting Of the Corporate Veil:

In case of a dishonest and fraudulent use of the facility of incorporation, the law lifts the corporate veil and identifies the persons (members) who are behind the scene and are responsible forth perpetration of fraud. The concept of lifting the corporate veil is a changing concept. The veil of corporate personality, even though not lifted sometimes, is becoming more and more transparent in modern jurisprudence.

The following are some such cases:

- For the protection of revenue.
- Where the company is acting as agent of the shareholders,
- Where a company has been formed by certain persons to avoid their own valid contractual obligation,
  - **Where a company has been formed for some fraudulent purpose or is a "sham",**
  - Where a company formed is against public interest or public policy,
  - Where the holding company holds 100 per cent shares in a subsidiary company and the latter is created only for purposes of holding company Where the number of members falls below statutory minimum (Section 45)
  - Where prospectus includes a fraudulent misrepresentation.
  - Where a negotiable instrument is signed by an officer of a company

    [Section 147(4) (c)].

  - Holding and Subsidiary Companies (Sacs. 212 – 213).
  - Investigation into related companies (Section 239).
  - For investigation of ownership of a company. (Sec 247).

- Where in the course of winding of a company (Section 542).
- Where breach of economic offence is involved.
- Where company is used as medium to avoid welfare legislation.
- Where device of incorporation is used for some illegal or improper purpose.
- To Punish for contempt of Court
- For determination of technical competence of company.
- Where company is a mere sham or cloak.

Illegal Association: (Section 11) No company, association or partnership consisting of more than 10 persons for the purpose of carrying on the business of banking and more than 20 persons for the purpose of carrying on any other business can be formed, unless it is registered under the Companies Act or is formed in pursuance of some other Indian Law. Thus, if such an association is formed and not registered under the Companies Act, it will be regarded as an 'Illegal association' although none of the objects for which it may have been formed is illegal. However, Section 11 does not apply in the following cases: Stock Exchange, Association 'Not for Profit-making', and Joint Hindu Family.

Effects of an Illegal Association: Following are the effects of an illegal association:

1. Every member is personally liable for all liabilities incurred in the business.
2. Members are punishable with fine which may extend up to Rs.10, 000.
3. Such an association cannot enter into any contract.
4. Such an association cannot sue any of its members or any outsider, not even if the association is subsequently registered as a company.
5. It cannot be sued by a member or an outsider for any debts due to it because it cannot contract any debt.
6. It cannot be wound up even under the provisions relating to winding up of un-registered companies.
7. While an unregistered firm can be dissolved, an illegal association cannot be dissolved because law does not recognize its very existence.
8. The illegality of an illegal association cannot be cured by subsequent reduction in the

number of its members.

9. The profits made by an illegal association are, however, liable to assessment to income- tax.

Classification of Companies:

I. On the Basis of Incorporation

1. **Chartered Companies:** Companies set up as a result of a royal charter granted by a king or queen of a country are known as chartered companies. Example: East India Company, the Bank of England etc.
2. **Statutory Companies:** Companies set up by Special Acts of Parliament or State Legislatures are called Statutory Companies. Example: Reserve Bank of India, Life Insurance Corporation of India, Unit Trust of India etc.
3. **Registered Companies:** Companies registered under the Indian Companies Act, 1956 or under any of the previous Companies Acts are called registered companies. Most of the companies in India belong to this category.
4. **Licensed Companies:** Companies established for the promotion of arts, science, religion, charity or any other similar objects can obtain license under Sec.25 from the Central Government and enjoy certain privileges.
5. **Foreign Companies:** A company incorporated outside India under the law of the country of incorporation but having established its business in India is called a foreign company.

II. On the Basis of Liability

1. **Companies with Limited Liability:** It is a company where the liability of the shareholder remains limited to the nominal value of the shares held by him.
2. **Companies Limited by Guarantee:** In a guarantee company the liability of a shareholder is limited to the amount he has voluntarily undertaken to contribute towards the assets of the company to meet out any deficiency at the time of it winding up. Such a company may or may not have a share capital.
3. Unlimited Companies: Here the liability of its members is unlimited. In other words, their liability extends to their private properties also. Unlimited companies are almost non- existent these days.

III. On the Basis of Number of Members

1. **Private Company:** As per Section 3(1) (iii), a private company means a company which by its Articles restricts the right to transfer its shares if any, and limits the

number of its members to fifty and prohibits invitation of shares from the public.

2. **Public Company:** According to Section 3(1) (IV), a public company means a company which is not a private company.

IV. On the Basis of Control

1. **Holding Companies:** A company exercising control over another company is called a holding company. [Sec.4 (4)].
2. **Subsidiary Companies:** The Company so controlled is called a subsidiary company. [Sec.4 (1)].

V. On the Basis of Ownership

1. **Government Company:** Definition (Sec.617): A Government company means any company in which not less than 51% of the paid up share capital is held by the Central Government or by any State Government or Governments, or partly by one or more State Governments and includes a company which is a subsidiary of a Government company.
2. **Foreign Companies (591 to 602):** A foreign company is a company which is incorporated in a country outside India under the law of that foreign country and has a place of business in India. They are of two types: (1) Companies incorporated outside India, establish a place of business in India after April 1, 1956; and (2) Companies incorporated outside India, which established a place of business in India before that date and continue to have an established place of business in India.
3. **Deemed Public Company:** The Companies (Amendment) Act. 2000 has, by introducing a sub-section (11) to Section 43A, made that a private company will not automatically become a public company on account of shareholding or turnover.
4. **One Man Company:** A member may hold virtually the entire share capital of a company. Such a company is known as a "one-man company". This can happen both in a private company and a public company. The other member/ members of the company may be holding just one share each. Such other members may be just dummies for the purpose of fulfilling the requirements of law as regards minimum membership [**Salomon v. Salomon & Colt.]**.
5. **Non-Trading Company/Non-Profit Association:** Such a company must have the objects of promoting of commerce, arts, science, religion, charity or any other useful object and must apply its profit, if any or other income in promoting its object and must prohibit payment of any dividend to its members. As soon as it

obtains a license and is registered accordingly, it will have the same privileges and obligations that a limited company has under the Companies Act, 1956.

6. **Investment Companies:** An investment company is a company the principal business of which consists in acquiring, holding and dealing in shares and securities. It involves only the acquisition and holding of shares and securities and thereby earning income by way of interest, dividend, etc.
7. **FERA Companies:** The FERA companies are those companies which are incorporated in India in which the non-resident interest (viz., foreign equity share capital)

   Was more than 40%. After the Amendment of FERA 1973 in the year 1993, the erstwhile FERA companies would not in future be subjected to obtain the prior approval of the RBI in respect of certain matters.

8. **Finance Companies:** A finance company means a non- banking company which is a financial institution within the meaning of clause (c) of sec.45 of the RBI Act, 1934.
9. **Public Financial Institutions (Sec. 4-A):** The following financial institutions shall be regarded, for the purposes of the Companies Act, as public financial institutions, namely:-

i. The Industrial Credit and Investment Corporation of India Limited (ICICI)
ii. The Industrial Finance Corporation of India (IFCI)
iii. The Industrial Development Bank of India (IDBI)
iv. The Life Insurance Corporation of India (LIC)
v. The Unit Trust of India (UTI)
vi. The Infrastructure Development Finance Company Ltd. Sub-section (2) of Sec. 4-A empowers the Central Government to specify any other institution, as it may think fit, to be a public financial institution by issuing a notification in the Official Gazette.

Formation of a Company

We shall discuss the formation in three heads:

- Promotion

- Registration
- Floatation

Promotion:

Promotion is a term of wide import denoting the preliminary steps taken for the purpose of registration and floatation of the company.

Duties and Liabilities of Promoters:

Duties: The promoters to make a full disclosure of all material facts relating to the formation of the company. He should not make any secret profit at the expense of the company he promotes, without the knowledge and consent of the company and if he does so, the company can compel him to account for it.

Liabilities:

For Non-disclosure: In case a promoter fails to make full disclosure at the time the contract was made, the company may either:

- Rescind the contract and recover the purchase price where he sold his own property to the company, or
- Recover the profit made, even though rescission is not claimed or is impossible, or
- Claim damages for breach of his fiduciary duty. The measure of damages will be the difference between the market value of the property and the contract price.

Registration (Sec 12, 33):

Availability of Name: Section 20 states that a company cannot be registered by a name, which in the opinion of the Central Government is undesirable. Therefore, it is advisable that promoters find out the availability of the proposed name of the company from the Registrar of companies.

Procedure:

The promoters will have to get together at least seven person in the case of public company, or two persons in the case of a private company to subscribe to the Memorandum of association.

Documents to Be Delivered:

Section 33 states that the following three documents are required to be presented for the purpose of registration of a company:

- The Memorandum of the company;
- The articles, if any;
- The agreement, if any, which the company proposes to, enter into with any individual for appointment as its managing or whole time director or manager.

Statutory Declaration of Compliance:

Section 33 also requires a declaration to be filed with the registrar of companies along with the Memorandum and the articles. This is known as "Statutory Declaration of Compliance."

Consent of Directors:

In case of a public company, if the first directors are appointed by the articles, then the following must be complied with before the registration of articles with the Registrar of Companies:

- Written consent of those directors to act, signed by themselves, or by an agent duly authorized in writing, and
- An undertaking in writing signed by each such director to take from the company and pay for his qualification shares (if any).

Other documents are usually delivered along with the aforesaid documents:

- The address of the registered office of the company (Sec. 146).
- Particulars regarding directors, manager and secretary, if any (Sec 303).

These two documents are required to be submitted within 30 days of

registration of the company:

Certificate of Incorporation/Consequences of Incorporation:

This certificate serves the same purpose in the case of a company which a birth certificate does in the case of a natural person.

Effect of Certificate of Incorporation:

The certificate of incorporation is conclusive evidence that all the requirements of the Companies Act in respect of registration and of matters precedent and incidental thereto have been complied with.

Floatation/Capital Subscription:

When a company has been registered and has received its certificate of incorporation, it is ready for "floatation", i.e., it can go ahead with raising capital sufficient to commence business and to carry it on satisfactorily.

Section 70 makes it obligatory for every public company to take either of the following two steps:

i. Issue a prospectus in case public is to be invited to subscribe to its capital, or
ii. File a 'statement-in-lieu of prospectuses with the registrar, in case capital has been arranged privately. It must be done at least 3 days before allotment.

Certificate to Commence Business:

Where the company has issued a prospectus – Section 149(1), it shall not commence business or exercise any borrowing powers unless:

a. Minimum subscription
b. Every director of the company has paid to the company.
c. No money is, or may become, liable to be repaid to the applicants.
d. Filed with the registrar a duly verified declaration by one of the directors or the secretary.

Where the company has not issued a prospectus Section 149(2) requires, that it shall not commence business or exercise its borrowing powers unless:-

a. It has filed with the registrar a statement in lieu of prospectus;
b. Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him.
c. Filed with the registrar duly verified declaration by one of the directors or the secretary.

Penalty: every person at fault is liable to a fine up to Rs.5, 000 for every day of default.

Memorandum and Articles of Association

The Memorandum of Association of a company is its charter which contains the fundamental conditions upon which alone the company can be incorporated. It tells us the objects of the company's formation and the utmost possible scope of its operations beyond which its actions cannot go. If anything is done beyond the powers that will be ultra virus (beyond powers of) of the company and so void. It enables shareholders, creditors and all those who deal with the company to know what its powers are and what is the range of its activities.

Form and Contents:

Shall be in such one of the Forms in Tables B, C, D and E in Schedule I to the Companies Act, 1956 as may be applicable in the case of the company, or in Forms as near thereto as circumstances admit. Section 13 requires the Memorandum of a limited company to contain: (I) the name of the company, with "limited" and "private limited" the name of the State, the objects of the company, the declaration that the liability of the members is limited; and the amount of the authorized share capital, divided into shares of fixed amounts.

The Name Clause (Sec. 13(1(a)] :

The last word in the name of the company, if limited by shares or guarantee is 'limited', unless the company is registered under Sec.25 as an 'association not for profit' (Sec. 13(1)(a) and 25)].

The Registered Office Clause (Sec. 13(1) (b)] :

This clause states the name of the State in which the registered office of the

company will be situated. Every company must have registered office which establishes its domicile, and it is also the address at which company's statutory books must normally be kept and to which notices, and all other communication can be sent.

The Objects Clause (Sec. 13(1) (d)] :

The objects clause defines the objects of the company and indicates the sphere of its activities. A company cannot do anything beyond or outside its objects and any act done beyond them will be ultra virus and void, and cannot be ratified even by the assent of the whole body of shareholders.

Section 13, read along with Tables "B', 'C', 'D' and E', requires the company to divide its objects clause into two parts:

- Main objects of the company to be pursued by the company on its incorporation and object incidental or ancillary to the attainment of the main objects; and
- Other objects of the company not included in (a) above.

Liability Clause [Sec. 13(2)]:

This clause states the nature of liability of the members. In case of a company with limited liability, it must state that liability of members is limited, whether it is made by shares or by guarantee. In case of companies limited by guarantee, this clause will state the amount which every member undertakes to contribute to the assets of the company in the event of its winding-up. In fact, the absence of this clause in the Memorandum means that the liability of its members is unlimited.

The Capital Clause [Sec. 13(4) (c)]:

This clause states the amount of share capital with which the company is registered and the mode of its division into shares of fixed value, i.e., the number of shares into which the capital is divided and the amount of each share.

The Association Clause [Sec. 13(4) (c)]:

The names, addresses, descriptions, occupations of the subscribers, and the

number of shares each subscriber has taken and his signature attested by a witness.

Doctrine of Ultra Virus (Beyond Powers)

The company's activities are confined strictly to the objects mentioned in its Memorandum, and if they go beyond these objects, then such acts will be ultra virus. The object of declaring such acts as ultra virus is to protect the interests of shareholders and all others who deal with the company.

1. Ultra virus the directors (Not Void)
2. Ultra virus the Articles of Association (Not Void)
3. Ultra virus the Memorandum of Association/Company (Void)

Effects of Ultra Virus:

- Injunction against the company
- Personal liability of directors to the company
- Personal liability of directors to third party
- Ultra virus contracts are void.

Exceptions to Doctrine of Ultra Virus:

1. Acquires some property
2. Property can be recovered, existed and is traceable
3. Ultra virus loan to pay its own debts – can recover the money from the company
4. Any person borrows money from the company – the company has right to sue and recover the money from him
5. The company may compel the director to refund the money
6. The company is held liable for the ultra virus torts (civil wrongs) of its employees when it is proved.

a. A company exists only for the objects which are expressly stated in its objects clause
b. Any act done outside the express or implied objects is ultra virus.
c. The ultra virus acts are null and void abs initio.
d. The members of a company (even a single member) can get an order of injunction from the court restraining the company from going ahead with the ultra virus act.
e. If the directors have exceeded their authority, such matter can be ratified by the general body of the shareholders, provided company has the capacity to do by its

Memorandum of association.

f. Any property acquired by a company under an ultra virus transaction may be protected by the company against damage by third persons.
g. Directors and other officers can be held liable to compensate the company for any loss occasioned to it by an Ultra Virus Act.
h. Directors and other officers shall be personally accountable to the third parties.
i. Money or property gained through an ultra-virus transaction available in specie or capable of being identified shall be restituted (restored) to the other party.
j. In case, an ultra-virus loan, taken by a company is used for payment of its intra-virus debts, the lender of the ultra loan is substituted in place of the creditor who has been paid off and as such can recover the money.

Alteration of Memorandum

Section 16 provides that the company cannot alter the conditions contained in Memorandum except in the cases and in the mode and to the extent express provision has been made in the Act.

Change of Name:

The name of a company may be changed at any time by passing a special resolution at a general meeting of the company and with the written approval of the Central Government.

Change of Registered Office:

(a) Change of registered office from one premises to another premises in the same city, town or village. A resolution passed by the Board of Directors shall be sufficient. (b)Change of registered office from one town or city or village to another town or city or village in the same state procedure.

- Special resolution
- Confirmation of regional director
- Copy of special resolution and confirmation by regional directors to be filed with ROC.
- Notice of new location. Within 30 days the notice of the new location has to be given to the registrar who shall record the same. (c)Change of registered office

from one State to another State can be done by a special resolution which is required to be confirmed by the Company Law Board (CLB).

Alteration of Objects Clause (Section 17):

Empowers a company to change the place of its registered office from one State to another or to alter its objects by passing a special resolution, if alteration is sought on any of the following grounds:

- To carry on its business more economically and more efficiently
- To attain its main purpose by new or improved means
- To enlarge or change the local area of its operation
- To carry on some business which under existing circumstances may be conveniently or advantageously combined with the business of the company
- To restrict or abandon any of the objects specified in the Memorandum.
- To sell or dispose of the whole or any part of the undertaking.
- To amalgamate with any other company or body of persons.

Alteration of Liability Clause (Sec. 38):

The liability of a member of a company cannot be increased unless the member agrees in writing. Increase in liability may be by way of subscribing for more shares than the number held by him at the date on which the alteration is made or in any other manner.

Alteration of Capital Clause (Section 94):

It provides that, if the articles authorize a company limited by share capital, by an ordinary resolution passed in general meeting, may alter the conditions of its Memorandum in regard to capital so as –

1. To increase its authorized share capital, 2. To consolidate and divide all or any of its share capital into shares of larger amount than its existing shares, 3. To convert all or any of its fully paid-up shares into stock, and reconvert the stock into fully paid-up shares of any denomination, 4. To sub-divide its shares, or any

of them, into shares of smaller amount. 5. To cancel shares which have not been taken or agreed to be taken by any person?

Articles of Association

The articles of association of a company and its bye laws are regulations which govern the management of its internal affairs and the conductor its business. They define the duties, rights, powers and authorities of the shareholders and the directors in their respective capacities and of the company and the mode and form in which the business of the company is to be carried out.

Registration of Articles:

Section 26 states that a public company limited by shares may register articles of association signed by the subscribers to the Memorandum. There are actually three possible alternatives in which such company may adopt articles: (I) it may adopt Table A in full or, (ii) it may wholly exclude Table A and set out its own regulations in full, or (iii) it may set out its own articles and adopt part of Table A.

No Article Company (Sec. 28):

A company limited by shares may either frame its own set of articles or may adopt all or any of the regulations contained in Table 'A' [Section 28(1)]. But if it does not register any Articles, Table 'A' applies.

Subject Matter of Articles/Contents

The articles of a company usually deal with the following matters:

1. The business of the company;
2. The amount of capital issued and the classes of shares, and the increase and reduction of share capital;
3. The rights of each class of shareholders and the procedure for variation of their rights;
4. The execution or adoption of a preliminary agreement, if any; the allotment of shares; calls and forfeiture of shares for non-payment of calls;
5. The allotment of shares; calls and forfeiture of shares for non- payment of calls;
6. Transfer and transmission of shares;

7. Company's lien on shares;
8. Exercise of borrowing powers including issue of debentures;
9. General meetings, notices, quorum, proxy, poll, voting resolution, minutes;
10. Number, appointment and powers of directors;
11. Dividends – interim and final – and general reserves;
12. Accounts and audit;
13. Keeping of books – both statutory and others.

Form and Signature of Articles [Sections 29 & 30]:

The articles of association of any company not being a company limited by shares, shall be in one such form in Tables 'C', 'D', and 'E' in Schedule I as may be applicable. Section 30 requires that articles shall be –

1. Printed; 2. Divided into paragraphs numbered consecutively;

3. Signed by each subscriber of the Memorandum of association.

Inspection and Copies of the Articles:

A company shall, on being so required by a member, send to him within seven days of the requirement, on payment of one rupee, a copy of the articles.

Alteration of Articles

A company may, by special resolution alter or add to its articles. A printed or type written copy of every special resolution altering the articles must be filed with the registrar within 30 days of the passing of the special resolution.

Effect of Memorandum and Articles/ Binding Force of Memorandum and Articles

Members Bound To Company:

Each member must observe the provisions of the articles and Memorandum.

Company Bound To Members:

A company is bound to members by whatever is contained in its Memorandum and articles of association.

Member Bound To Member:

The articles bind the member inter se, i.e., one to another so far as rights and duties arising from the articles are concerned.

Whether company or members bound to outsiders?

No, the Memorandum or articles do not confer any contractual rights to outsiders against the company or its members, even though the name of the outsiders is mentioned in the articles.

Whether directors are bound by whatever is contained in the Articles?

Yes, the directors of the company derive their powers from the articles and are subjected to limitations, if any, placed on their powers by the articles.

Constructive Notice of Articles and Memorandum:

The Memorandum and articles when registered become public documents and then they can be inspected by anyone on payment of a nominal fee. Every person dealing with the company is presumed to have read these documents and understood them in their true perspective. This is known as 'Doctrine of Constructive Notice'.

Doctrine of Indoor Management:

The doctrine of indoor management allows all those who deal with the company to assume that the provisions of the articles have been observed by the officers of the company. In other words, they are not bound to enquire into the regularity of internal proceedings. An outsider is not expected to see that the company carries out its internal regulations.

Exceptions: The doctrine of indoor management is subject to the following exceptions:

- Knowledge of irregularity.

- No knowledge of Articles: The rule cannot be invoked in favor of a person who did not consult the Memorandum and articles and, thus did not rely on them.
- Void or illegal transaction. The rule does not apply to transactions which are void or illegal abs initio, egg. forgery.
- Negligence: If an officer of a company does something which would not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make inquiry he cannot rely on the rule.

- Doctrine does not apply where question is in regard to very existence of agency.

Prospectus and Statement In Lieu Of Prospectus Definition of Prospectus:

Sec 2 (36) A prospectus means any document described or issued

as prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in or debentures of a body corporate. Thus, a prospectus is not merely an advertisement; it may be a circular or even a notice.

A document shall be called a prospectus it satisfies two things:

1. It invites subscriptions to shares or debentures or invites deposits.

The aforesaid invitation is made to the public. The Board attends to the following matters:

1. Appointment of various expert agencies such as bankers, auditors, secretary, etc.
2. Entering into underwriting contract, brokerage contracts.
3. Making arrangements for the listing of shares on stock exchanges.
4. Drafting a prospectus for the purpose of issue to the public.

Underwriting

Underwriting, in its simplest form, consists of an undertaking by some person or persons that if the public fails to take up the issue, he or they will do so. In return

for this undertaking, the company agrees to pay the underwriter a commission on all shares or debentures, whether taken up by the public or by the underwriters.

Sub-Underwriting

The underwriters usually choose to spread their risk by using sub- underwriters who agree to take a certain number of shares for which they accept responsibility and for which they receive a commission out of the commission received by the underwriters. The difference between the commissions paid by the company to the principal underwriters and the commission paid by them to the sub - underwriters is known as overriding commission.

Brokerage Contracts

There must be authority in the articles to pay brokerage, and the brokerage must be disclosed in the prospectus, or statement in lieu of prospectus, as the case may be, and it should pay a reasonable brokerage (Sec. 76).

Listing Of Shares on a Stock Exchange

The eligibility criteria for listing of securities of a company are:

> Minimum issued equity capital of a company should be Rs.5 cores [Rs. 3 cores where trading is screen-based], and

> The minimum public offer of equity capital shall be not less than 25 per cent.

Time of Floatation:

The Board of Directors will decide about the time of issue of prospectus. It is advisable to consider the condition of the capital market, the investors' mood, fiscal and monetary policies of the Government and the state of business conditions before issuing a prospectus.

Dating Of Prospectus:

Sec. 55 states that every prospectus must be dated and the date is deemed to be the date of publication of the prospectus. Section 56 of the Companies Act lays down that the matters and reports stated in Schedule II to the Companies Act

must be included in a prospectus.

Abridged Form Of Prospectus:

Instead of appending full prospectus, now 'abridged prospectus' need only be appended to the application form. Form 2-A has been prescribed as a format of abridged prospectus.

When 'Abridged Prospectus' not necessary?

In the following circumstances, an 'abridged prospectus' need not accompany the application forms:

- A bonfire invitation to a person [Sec. 56(3)(a)]
- When shares or debentures are not offered to the public [Sec.56 (3) (b)].
- Where offer is made only to existing members/debenture holders of the company by way of rights, whether with or without the right of renunciation [Sec.56(5) (a)].
- In the case of issue of shares or debentures which are in all respects similar to those previously issued and dealt in and quoted on a recognized stock exchange [Sec.56(5) (b)].

Registration of the Prospectus (Section 60):

A copy of the prospectus duly signed by every director or proposed directors must be delivered to the registrar before its publication.

Is the issue of prospectus compulsory? when prospectus is not required to be issued?

The following are the circumstances: > A private company

- If the promoters or directors feel that they can mobilize resources through personal relationship and contacts.
- A Memorandum containing the prescribed salient features of a prospectus.
- A bonfire invitation to a person to enter into an underwriting agreement Sec.56(3)
- Application form is issued in relation to shares or debentures not offered to the

public [Sec. 56(3)]

- Offered to existing holders of shares or debentures[Sec.56(5)]
- The issue relates to shares or debentures previously issued [Sec. 56(5)]
- Where invitation is made in the form of an advertisement, ordinarily called as "prospectus announcement' [Sec. 66].

Shelf Prospectus and Information Memorandum [Section 60A and 60 B]:

The Companies (Amendment) Act, 2000 has introduced two new sections, viz., Sections 60A and 60B relating to 'Shelf Prospectus' and 'Information Memorandum' respectively. 'Shelf prospectus' means a prospectus issued by any financial institution or bank for one or more issues of the securities or class of securities specified in that prospectus.

Information Memorandum (Section 60B):

'Information Memorandum' means a process undertaken prior to the filing of a prospectus by which a demand for the securities proposed to be issued by a company is elicited, and the price and the terms of issue for such securities is assessed by means of a notice, circular, advertisement or document [Section 2(19B)].

Statement In Lieu Of Prospectus (Section 70):

If a public company makes a private arrangement for raising its capital then it must file a statement in lieu of prospectus with the registrar at least three days before any allotment of shares or debentures can be made.

If allotment of shares or debentures is made without filing the Statement in lieu of prospectus, the allotted may avoid it within two months after the statutory meeting, or where no such meeting is to be held, within two months of the allotment. Contravention also renders the company and every director liable to a fine up to Rs. 10,000.

Misleading Prospectus (Sections 62-63):

The prospective shareholders are entitled to all true disclosures in the prospectus. The persons issuing the prospectus are bound to state everything accurately and not to omit material facts, which contain untrue statements in it.

> Which does not contain particulars which ought to have been there i.e? Suppression of facts which if they had been there i.e. suppression of facts which if they would not have induced the purchaser to invest money.

What is an untrue statement?

According to Section 65(1), if the statement is misleading in the form and context in which it is included; and where the omission form a prospectus of any matter is calculated to mislead, to be a prospectus in which an untrue statement is included.

Remedies against the Company:

- Any person who, takes shares from the company may, Rescind the contract
- He must, however, take action to rescind the contract: within a reasonable time, before proceedings to wind up the company have commenced, and before he does anything which is inconsistent with the right to repudiate, e.g., to accept dividends.
- **Remedies against Directors or Promoters:**
- A shareholder who had been induced to take shares may claim : > Damages for fraudulent misrepresentation
- Compensation under Section 62; Damages for non-compliance with the requirements of Section 56 regarding contents of the prospectus.

The liability of a promoter or a director or any other person who has authorized the issue of misleading prospectus is two-fold, viz.

- Civil liability and
- Criminal liability

I. **Civil Liability** (Section 62):

The following persons shall be liable to pay compensation to every subscriber for loss or damage (1) director of the company at the time of the issue

of the prospectus; (2) person who has authorized himself to be named and is named in the prospectus as a director, (3) every promoter of the company; and (4) who has authorized the issue of the prospectus.

Damages for Fraudulent Misrepresentation:

An allotted of shares may bring an action for deceit, i.e., fraudulent misrepresentation.

Compensation for Untrue Statement [Sec. 62]:

File a suit for compensation under Section 62. A claim can be made, whether the statements are fraudulent or innocent.

Remedies against Experts:

The allotted of the shares is entitled to claim from the expert: (I) damages, (ii) compensation under Section 62.

Liability under Section 56:

An omission from a prospectus of a matter required to be stated under Section 56(i.e., as per Sch. II) may give rise to an action for damages at the instance of a subscriber for shares, who has suffered loss.

II. Criminal Liability for Misstatement in Prospectus

(Section 63):

Every person authorizing its issue is punishable:

i. With imprisonment for a term up to two years, or
ii. Fine up to Rs. 50.000, or
iii. With both imprisonment and fine.

Liability under Section 68:

Every person authorizing its issue. Shall be punishable with imprisonment for a term which may extend to 5 years or with fine which may extend to Rs. 1, 00,000 or with both.

Golden Rule for Framing of Prospectus:

The 'Golden Rule' for framing of a prospectus was laid down by Justice Kindersley in New Brunswick & Canada Rely. & Land Co. V. Muggeridge (1860).

Briefly, the rule is: Those who issue a prospectus hold out to the public great advantages which will accrue to the persons who will take shares in the proposed undertaking. Thus, the persons issuing the prospectus must not include in the prospectus all the relevant particulars specified in Parts I & II of Schedule II of the Act, which are required to be stated compulsorily but should also voluntarily disclose any other information within their knowledge which might in any way affect the decision of the prospective investor to invest in the company.

UNIT – III

NEGOTIABLE INSTRUMENT ACT, 1881

The law relating to negotiable instruments is primarily contained in the Negotiable Instruments Act, 1881. The word 'negotiable' means transferable from one person to another and the term 'instrument' means 'any written document by which a right is created in favor off some person.' Thus, the negotiable instrument is a document by which rights vested in person can be transferred to another person in accordance with the provisions of the Negotiable Instruments Act, 1881. The Negotiable Instruments Act does not affect the provisions of Sections 31 and 32 of the Reserve Bank of India Act, 1934. But, the following are Not Promissory Notes. Ex. "I promise to pay B Rs. 500 and all other sums which shall be due to him."

Essentials or Characteristics of a Promissory Note:

1. In writing.
2. Promise to pay.
3. Unconditional.
4. Signed by the Maker.
5. Certain Parties.
6. Certain sum of money.
7. Promise to pay money only.
8. Number, place, date etc.
9. It may be payable in installments
10. It may be payable on demand or after a definite period
11. It cannot be made payable to bearer on demand or even payable to bearer after a certain period (Sec. 31 of RBI Act).
12. It must be duly stamped under the Indian Stamp Act

Bill of exchange:

A 'bill of exchange' is defined by Section 5 as "'an instrument' in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or the order of, a certain person, or to the bearer of the instrument."

Characteristic features of a bill of exchange:

- It must be in writing.
- It must contain an order to pay and not a promise or request. Words, like 'Please pay Rs. 10,000 to an on demand and oblige, do not constitute the instrument a bill of exchange.
- The order must be unconditional.
- There must be three parties, viz., drawer, drawer and payee. The parties must be certain.
- It must be signed by the drawer.
- The sum payable must be certain or capable of being made certain. The order must be to pay money and money alone.
- It must be duly stamped as per the Indian Stamp Act.
- Number, date and place are not essential. Oral evidence may be obtained as to date and place of execution.

Cheque:

A cheque is defined as 'a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand' (Section 6). Thus, a cherub is a bill of exchange with two added features, viz.: (I) it is always drawn on a specified banker;

(ii) And it is always payable on demand and not otherwise.

Distinction between Promissory Note and bill of exchange

Promissory note differs from a bill of exchange in the following respects:

	Promissory Note		**Bill of Exchange**
1.	There are only two parties – The maker (debtor) and the payee (creditor).	1.	There are three parties – the drawer, the drawer and the payee.
2.	Contains an unconditional Promise by the maker to pay	2.	Contains an unconditional order To the drawer to pay according

	the payee.		to the drawer's directions.
3.	No prior acceptance is needed.	3.	A bill payable 'after sight' must be accepted by the drawer or his agent before it is presented for payment.
4.	The liability of the maker or drawer is primary and Absolute.	4.	The liability of the drawer is secondary and conditional upon Non-payment by the drawer.
5.	No notice of dishonor need be given.	5.	Notice of dishonor must be given by the holder to the drawer and the intermediate endorsers to hold Them liable thereon.

Difference between bill of exchange And Cheque:

	Cheque		Bill of Exchange
1.	Must be drawn only on a Banker.	1.	Can be drawn on any person Including a banker.
2.	The amount is always Payable on demand.	2.	The amount may be payable on Demand or after a specified time.
3.	The cherub is not entitled to Days of grace.	3.	A since (time) bill is entitled to Three days of grace.
4.	Acceptance is not needed.	4.	A bill payable after sight must be Accepted.
5.	A cherub can be crossed	5.	Crossing of a bill of exchange is Not possible.

6.	Notice of dishonor is not necessary. (The parties thereon remain liable, even if no notice of dishonor is Given.)	6.	Notice of dishonor is necessary to hold the parties liable thereon. (A party who does not receive a notice of dishonor can generally escape Its liability thereon.)
7.	Not to be noted or protested In case of dishonor.	7.	Noted or protested to establish Dishonor.
8.	The protection given to the paying banker in respect of crossed cherubs is peculiar to This instrument.	8.	No such protection is available in the case of bills.

Holder and Holder-In-Due-Course:

According to section 8, a **holder** of a negotiable instrument is "a person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto." Thus, a person who has obtained the possession of an instrument by theft or under a forged endorsement is not a holder as is not entitled to recover the amount of the instrument.

A 'holder in-due-course': Is "a person who for consideration became the possessor of a promissory note, bill of exchange or cherub, if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it becomes payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title (Section 9)."

Ambiguous Instrument (Sec.17): An ambiguous instrument is one which may be construed either as a promissory note or as a bill exchange. The holder may at his option treat it as either and the instrument shall be treated accordingly.

Where Amount is stated differently in Figures and Words (Sec. 18): If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

Inchoate Instruments (Sec.20): An inchoate instrument means an instrument that is incomplete in certain respects. The person so signing shall be liable upon the instrument, in the capacity in which he signed the same, to any holder-in-due-course for such amount. But, a person other than a holder-in-due-course cannot recover from the person delivering the instrument anything in excess of the amount intended by him to be paid there under.

Minor (Sec. 26): A minor may draw, indorse, deliver and negotiate negotiable instruments so as to bind all parties except himself.

Agency (Sec. 27): Every person capable of binding himself or of being bound may so bind himself or be bound by a duly authorized agent acting in his name.

Liability of Agent Signing (Sec. 28): An agent who signs his name to a P/N, B/E or Cheju without indicating thereon that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

Liability of Legal Representative (Sec.29): A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cherub is liable thereon, unless he expressly limits his liability to the extent of the assets received by him as such.

Negotiable Instruments Made, etc.: Without Consideration (Sec.43): A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction.

Partial Absence or Failure of Money Consideration (Sec.44): When the consideration for which a person signed a promissory note, bill of exchange or cherub consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.

Partial Failure of Consideration not Consisting of Money (Sec. 45): When a part of the consideration for which a person signed a promissory note, bill of exchange or cherub, though not consisting of money, is ascertainable in money

without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

Lost or Stolen Instruments [Sec. 58]: When a negotiable instrument has been lost, or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorse who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder. However, if such possessor or indorse is a holder, in due course, he shall be entitled to receive the payment thereof.

Lost Instruments: When a bill or note is lost, the finder acquires no title to it as against the rightful owner. He is also not entitled to sue the acceptor or maker in order to enforce payment on it. If the finder obtains payment, the person who pays it in due course may be able to get a valid discharge for it. But the true owner can recover the money due on the instrument from the finder.

Stolen Instruments: (1) A person cannot enforce payment of it against any party thereto nor can he retain it against the party from whom he had stolen it. (2) If the thief negotiates the instrument to a purchaser for value who has notice of the theft, the transferee cannot acquire a better title than the thief and thus cannot enforce payment. (3) If a person who has stolen a bill or note payable to bearer transfers it to a holder in due course, he confers a good title on him or any person deriving title from such holder.

Instruments Obtained For Unlawful Consideration

A holder, in due course, however, obtains a good title to an instrument which was originally made or drawn or subsequently negotiated for an unlawful consideration.

Forged Instruments: The most common species of forgery is fraudulently writing the name of an existing person. It is also a forgery to sign the name of a fictitious person or non-existing person. Even a man's signature of his

own name may amount to forgery, if it is put with the intention that the signature should pass for the signature of another person of the same name.

Cheque

A cherub is the usual method of withdrawing money from an account with a banker. A cherub, in essence, is an order by the customer of the bank directing his banker to pay on demand, the specified amount, or to the order of the person named therein or to the bearer. Section 6 defines a cherub as "bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

Requisites of A Cheque:

- Written Instrument. A cheque must be an instrument in writing.
- Unconditional Order. A cheque must contain an unconditional order.
- On a Specified Banker Only. A cheque must be drawn on a specified banker.
- A Certain Sum of Money. The order must be only for the payment of money and that too must be specified.
- Payee to be certain. A cheque to be valid must be payable to a certain person.
- Payable on Demand. A cheque to be valid must be payable on demand and not otherwise.
- Amount of the Cheque. Amount of the cheque must be clearly mentioned.
- Dating of Cheques. The drawer of a cherub is expected to date it before it leaves his hands.

A cherub hearing an earlier date is **ante-dated** and the one bearing the later date is called **post-dated**. In India, a cherub that bears a date earlier than six months is a **stale cherub and** cannot be claimed for. In England, cherub can remain in circulation for a period of twelve months.

Crossing Of Cherubs:

Crossing of a cherub is a direction to the paying banker by the drawer that payment should not be made across the counter. The payment on a crossed cherub can be collected only through a banker.

Section 123, defines crossing as, "Where a cherub bears across its face an addition of the words 'and company' or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words 'not negotiable', that addition shall be deemed a crossing and the cherub shall be deemed to be crossed generally. A cherub having the cross marks such as 'X' is not generally regarded as a crossed cherub. A cherub that is not crossed is called an open cherub.

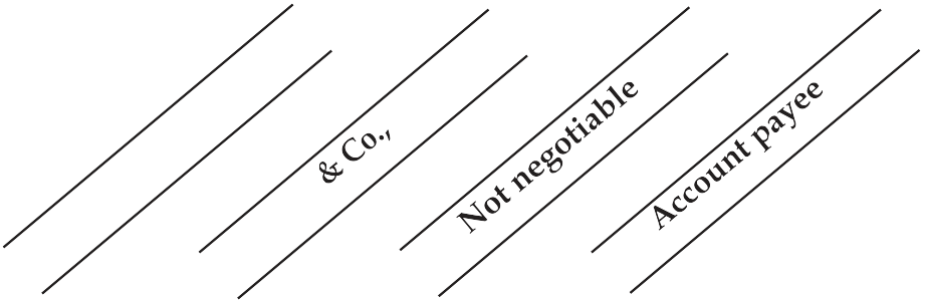
Significance of Crossing:

Payment cannot be claimed across the counter on a crossed cherub, crossing of cherubs serves as a measure of safety against theft or loss of cherubs in transit. By crossing a cherub, a person, who is not entitled to receive its payment, is prevented from getting the cherub encased at the counter of the paying banker.

Types of Crossing:

Crossing may be either (1) General or (2) Special.

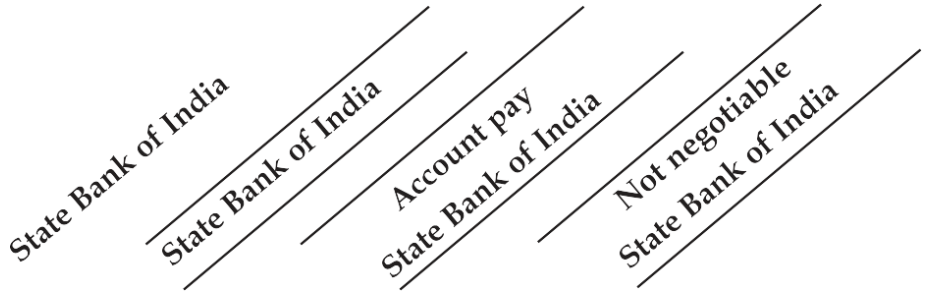
General Crossing: The term general crossing implies the addition of two parallel transverse lines.



Special Crossing: 'Special Crossing' implies the specification of the name

of the banker on the face of the cherub. Section 124 in this regard, reads: Where a cherub bears across its face, an addition of the name of a bank, either with or without the words ‘not negotiable’, that addition shall be deemed a crossing, and the cherub shall be deemed to be crossed to that banker.” The object of special crossing is to direct the drawer banker to pay the cherub, only if it is presented through the particular bank mentioned therein. Thus, it makes the cherub system still safer.

Specimens of Special Crossing



Not Negotiable Crossing: By including the words 'not negotiable', the cherub is deprived of its special feature of negotiability. Such a cherub is like any other goods where the title of the transferee is always subject to the title of the transferor. A bank, therefore, should be extra careful in paying such cherubs.

Account Payee Crossing (A/c Payee crossing): An A/c payee crossing signifies that the drawer intends the payment to be credited only to the payee's account and in none else. The addition of 'A/c payee' to a crossing has no legal sanctity and the paying banker may ignore such a direction without being liable for any damages.

Not Negotiable, A/c Payee Crossing: The instrument is rendered not negotiable, plus A/c payee crossing directs the collecting banker to collect it for the payee only and warns that if the amount is collected for someone else, he may be held liable for damages.

Endorsement/Endorsement

- It must be written on the instrument itself and be signed by the endorser.
- The endorsement must be of the entire instrument.
- Where in a negotiable instrument payable to order, the payee or endorsee is wrongly designated or his name is miss-spelt, he should sign the instrument in the same manner as given in the instrument.
- Where there are two or more endorsements on an instrument, each endorsement is deemed to have been made in the order in which it appears on the instrument, until contrary is proved.
- An endorsement may be blank or full. It may also be restrictive.

Bill of exchange And Promissory Note Kinds of Bills

1. **Inland Bill:** "a promissory note, bill of exchange or cherub drawn or made in India and payable in or drawn upon any person resident in India". (Section 11).
2. **Foreign Bills:** According to Section 12, a foreign bill is negotiable instrument which is noted as an inland instrument.
3. **Trade and Accommodation Bills:** A trade bill is a bill of exchange issued in respect of a genuine trade transaction. Such bills are drawn by the seller on the

buyer in respect of payment of the price of the goods sold and purchased.

4. **Time Bills (Since Bills):** Time bills, also called as since bills, are bills payable at a fixed period after date or sight of the bills.
5. **Demands Bills:** A bill of exchange or a promissory note is payable on demand when –

i. It is made payable **'on demand** 'or **'at sight'**or**'on presentation'** (Section 21)
ii. No time for payment is mentioned therein (Section 19)

6. **Clean and Documentary Bill:** Where the banker is instructed to deliver to the drawer of the bill, the documents of title against acceptance of the bill, the bill is called as Documents against Acceptance of Bill **(D/A Bill)** and where the documents are to be released only against payment, it is called as Documents against Payment of Bill (**D/P Bill)**.

Parties to a bill of exchange

- The Drawer
- The Drawer
- The Payee
- The Holder
- The Endorser
- The Indorse

7. **Drawer in Case of Need:** Such a person whose name is mentioned as an alternative drawer is called a drawer in case of need'.
8. **Acceptor for Honor:** An acceptor for honor is a person who, on the refuse by the original drawer to accept the bill or to furnish better security when demanded by the notary, accepts the bill in order to safeguard the honor of the drawer or any endorser.

Parties to a Promissory Note

The Maker > the Payee >the Holder

- ❖ The Endorser
- ❖ The Indorse

9. **Capacity of Parties:** The capacity of a party to draw, accept, make or endorse a bill or note is co-extensive with his capacity to enter into contract.

Acceptance:

The acceptance of a bill is the indication by the drawer of his assent to the order of the drawer. An acceptance of a bill may be **general** or **qualified.**

Presentment:

Presentment of a negotiable instrument is made for two purposes.

- ❖ For acceptance, and for payment.

Dishonor:

A bill of exchange may be dishonored either by non-acceptance or by non-payment.

Dishonor by Non-Acceptance: Section 91 enumerates the circumstances when a bill will be considered as dishonored by non-acceptance.

Dishonor by Non-Payment: A negotiable instrument is said to be dishonored by non-payment when the maker, acceptor or drawer, as the case may default in payment upon being duly required to pay the same (Section 92

Self Assessment Questions:

1. "Every contract is an agreement but every agreement is not a contract". Do you agree with this statement?
2. "Performance of the conditions of a proposal is an acceptance of the proposal" – Comment.
3. "A Promise against a promise is a good consideration" – Comment.

4. What is the nature and extent of partner's authority to bind the firm by his acts? Are third parties affected by restrictions placed on the implied authority?
5. What are the legal consequences, if the goods are not delivered in time and the payment is not made in time?
6. What are the fundamental principles of Insurance? Explain the losses in life Insurance.
7. What do you mean by crossing a cherub? What are the circumstances in which a banker is entitled to dishonor a cherub?
8. What is Agency by 'Ratification'? What are the essential conditions to make a valid ratification?
9. Enumerate the rights and obligations of finder of lost goods.
10. Explain and illustrate the circumstances under which contracts need not be performed.

Key Words

- **Agreement:** A pact, convention, or treaty between nations, sub- national entities, organizations, corporations.
- **Contingent Contract** is a Contract which has to do or not to do something.
- **A quasi-contract (or implied-in-law contract)** is a fictional contract created by courts for equitable, not contractual purposes
- **A partnership** is an arrangement where parties agree to cooperate to advance their mutual interests.
- **Insurance law** is the name given to practices of law surrounding insurance, including insurance policies and claims.
- **The Holder in Due Course** (HDC) doctrine is a rule in commercial law that protects a purchaser of debt.
- **Drawer** - the person (or bank) who is expected to pay a check or draft when it is presented for payment.

Further Reading

1. Robert W. Emerson, Paperback, ***Business Law***, Barron's Educational Series, 2009.
2. David P. Toomey and Marianne M. Jennings, ***Anderson's Business Law and the Legal Environment, Standard Volume,*** Thomas Higher Education, 2011

Company Management & Remuneration

Directors:

A company in the eyes of the law is an artificial person. The persons who are in charge of the management of the affairs of a company are termed as directors. They are collectively known as Board of Directors or the Board.

Definition of Director:

The Companies Act defines a 'director' as "any person occupying the position of a director by whatever name called" [Sec.2 (13)]. This is however, an inadequate definition.

Only Individuals Can Be Directors (Sec. 253):

Nobody corporate, association or firm can be appointed as director of a company.

Number of Directors: Minimum Number (Sec.252):

Every public company (other than a deemed public company) shall have at least 3 directors and every other company (e.g., a private company, a deemed public company) at least 2 directors.

Share Qualification of Directors

The Articles of a company usually require its directors to hold a certain number of shares. Such shares are called qualification shares. The nominal value of the qualification shares should not exceed Rs.5, 000. He should obtain his qualification shares within 2 months after his appointment as director.

Appointment of Directors

1. **First Directors** (Sec. 254 and Clause 64 of Table A)

> The Articles of a company usually name the first directors by their respective names or prescribe the method of appointing them.

> If the first directors are not named in the Articles, the number of directors and the name of the directors shall be determined in writing by the subscribers of the Memorandum or a majority of them (Clause 64 of Table A).

> If the first directors are not appointed in the above manner, the subscribers of the Memorandum who are individuals become directors of the company.

2. Appointment of directors by the company (Sacs. 255 to 257, 263 and 264)

Directors must be appointed by shareholders in general meeting. At least 2/3rds of the total number of directors shall be liable to retire by rotation. Such directors are called rotation directors.

Appointment of a new director (Sec. 257): (1) Fourteen days' notice and deposit of Rs.500. (2) Consent in writing to act as director (Sec. 264). (3) Separate ordinary resolution for each appointment (Sec. 263).

Retirement of directors where annual general meeting is not held: A director who is to retire by rotation at the annual general meeting shall not continue in office after the last day on which the annual general meeting in each year should have been held.

3. Appointment of director by directors (Sacs. 260, 262 and 313)

The directors of a company may appoint directors: (1) as additional directors (Sec.

260), (2) in a casual vacancy (Sec. 262) and (3) as alternate director (Sec. 313).

4. Appointment of directors by third parties:

The number of directors so appointed shall not exceed 1/3rd of the total number of directors, and they are not liable to retire by rotation.

5. Appointment by proportional representation (Sec. 265):

The system of proportional representation ensures representation of the minority shareholders on the Board of Directors.

6. **Appointment of directors by the Central Government** (Sec. 408):

Any director appointed by the Central Government shall not be required to hold any qualification shares

Roles of a Director:

Directors as Agents:

A company, as an artificial person, acts through directors who are elected representatives of the shareholders.

Directors as Employees:

Although the directors of a company are its agents, they are not employees or servants of the company for being entitled to privileges and benefits which are granted under the Companies Act to the employees.

Directors as Officers:

For certain matters under the Companies Act, the directors are treated as officers of the company [sec.2 (30)].

Directors as Trustees:

Directors are treated as trustees Of the Company's money and property; and of the powers entrusted to them.

Disqualifications of Directors

Disqualification of Directors (Sec. 274)

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

1. A person of unsound mind.
2. An undercharged insolvent.

3. A person who has applied to be adjudicated as an insolvent and his application is pending.
4. A person who has been convicted by a court of any offence involving moral turpitude and a period of 5 years has not elapsed from the date of expiry of the sentence.
5. A person whose calls in respect of shares of the company held for more than 6 months have been in arrears.
6. A person who is disqualified for appointment as director by an order of the court under Sec. 203.
7. Such person is already a director of a public company which

Managerial Remuneration

Managerial Personnel:

The expression 'managerial personnel' refers to the (a) managing director. (b) Whole-time / part-time directors, or (c) Manager.

Overall Maximum Managerial Remuneration (Sec. 198):

Remuneration not to exceed 11 per cent: The total managerial remuneration of the directors and the manager in respect of any financial year shall not exceed 11 per cent of the net profit of the company for that financial year computed in the manner laid down in Sec. 349 and 350.

Meetings of Directors (Sec. 285 To 288)

- Number of meetings – once in every 3 months (Sec. 285).
- Notice of meetings (Sec. 286): Every officer of the company whose duty is to give notice and who fails to do so shall be punishable with fine which may extend to Rs.1,000.
- Quorum for meetings (Sec.287): The quorum shall be 1/3rd of its strength or 2 directors, whichever is higher.

Powers of Directors

General Powers of the Board (Sec. 291):

The Board of directors of company is entitled to exercise all such powers and to do all such acts and things as the company is authorized to exercise and do.

Powers To Be Exercised At Board Meetings (Sec. 292): The following powers, on behalf of the company,

- To make calls on shareholders in respect of money unpaid on their shares
- The power to authorize the buy-back of shares
- To issue debentures
- To borrow moneys otherwise than on debentures
- To invest the funds of the company; and make loans.

Other powers: These powers are:

- To fill vacancies in the Board (Sec. 262)
- To sanction or give consent for certain contracts in which particular directors, their relatives and firms are interested (Sec. 297)
- To receive notice of disclosure of directors' interest in any contract or arrangement with the company (Sec. 299)
- To receive notice of disclosure of shareholdings of directors (Sec.
- 308)
- To appoint as managing director or manager a person who has already been the managing director or manager of another company (Sacs. 316 and 386)
- To make investments in companies in the same group (Sec. 372).

Exceptions:

- Directors acting malaise.
- Directors themselves wrong-doers.
- Incompetency of Board.
- Deadlock in management.
- Residuary powers. I.e., powers not expressly conferred on the directors or shareholders, in a general meeting.

Powers to be exercised with the approval of company in general meeting

(Sec. 293):

- To sell, lease or otherwise dispose of.
- To remit or give time for repayment of any debt.
- To invest (excluding trust securities) the amount of compensation received.
- To borrow moneys where the moneys to be borrowed (together with the moneys already borrowed by the company) are more than the paid-up capital.
- To contribute to charitable and other funds not directly relating to the business.

Audit Committee [Sec. 292-A as introduced by the Companies (Amendment) Act, 2000]:

The Audit Committee shall act in accordance with terms of reference to be specified in writing by the Board.

Duties of Directors

1. Fiduciary duties and
2. Duties of care, skill and diligence.
3. Fiduciary Duties: As fiduciaries

Other Duties of Directors:

- To attend board meetings,
- Not to delegate his functions except to the extent authorized by the Act or the constitution of the company, and
- To disclose hisinterest.

Liabilities of Directors

Liability to third parties: (1) Material misrepresentations. (2) Independently of the Act: Directors, as agents of a company, are not personally liable on contracts entered into agents on behalf of the company. (3) Liability for acts ultra virus the company:

Where a director enters into a contract, which is ultra virus the company, the director is personally liable for breach of implied warranty of authority. (4)Liability for frauds and torts.

1. Liability to the company

The liability of directors towards the company may arise from

- Ultra virus acts,
- Negligence,
- Breach of trust, and Misfeasance.

Vacation of Office, Removal and Resignation of Directors

Vacation of office by directors (Sec. 283):

(1) Statutory Vacation.
(2)Additional grounds in case of private companies.
(3) Acceptance of officer of profit.

Removal of Directors

Directors may be removed by:

1.The Central Government

2.The shareholders,

3.The Company Law Board.

(1) Removal by Share holders:

In certain circumstances, the shareholders may remove the directors**.**

(2) Removal by Central Government: (Sec. 388-B to 388-E): The Central Government may, in certain circumstances, remove managerial personnel from office on the recommendation of the Company Law Board.

(3) Removal by Company Law Board (Sec. 402): Where, on an application to the

Company Law Board for prevention of oppression (under Sec. 397) or mismanagement (under Sec. 398).

Resignation of Directors:

There is no provision in the Companies Act, 1956 relating to the resignation of office of a director. Overall maximum managerial remuneration:The total managerial remuneration to the managing / whole-time directors and / or manager of a public company or a private company which is a subsidiary of a public company in respect of any financial year must not exceed 11 per cent of the net profits of the company for that financial year. The percentage aforesaid shall be exclusive of any fees payable to directors for attending meetings of the Board of Directors or any committee thereof.

Removal of Directors

Directors may be removed by

1. **Shareholders** (Sec.284)

The shareholders may, by passing an ordinary resolution at their general meeting, remove a director before the expiry of his period of office.

2. **Central Government** (Secs.388-B to 388-E)

The Central Government may exercise this power where in its opinion there are circumstances suggesting –

> That the director concerned in the conduct and management of the affairs of the company is or has been guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law, or breach of trust; or

> That the business of the company is not or has not been conducted and managed by the director in accordance with sound business principles or prudent commercial practices; or

> That the company is or has been conducted and managed by the director in a manner

which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or

> That the business of the company is or has been conducted and managed by the director with intent to defraud its creditors, members or any other person or against public interest.

3. Company Law Board (Sec.402)

Where, on an application to the Company Law Board for prevention of oppression or miss-management, the Company Law Board finds that the relief ought to be granted, it may by an order provide for the termination, setting aside or modification of any agreement between the company and the director. When the appointment of a director is so terminated or set aside he cannot sue the company for damages or compensation for loss of office.

Other Managerial Personnel

Managing Director:

The term 'managing director' includes a director occupying the position of a managing director, by whatever name called.

MANAGER: 'Manager', according to Sec. 2 (24), means an individual who has the management of the whole or substantially the whole of the affairs of a company.

Sole Selling Agents:

The term 'sole selling agent' is not defined in the Act, it means an individual, firm or company who or which is given exclusive rights to sell in a particular area the goods of the company concerned.

Secretary:

A company secretary means "a person who is a member of the Institute of ompany Secretaries of India". According to Sec. 2 (45) of the Companies Act as amended

in 1988 ‘secretary’ means a company secretary within the meaning of Sec. 2 (1) (c) of the Company Secretaries Act, 1980, and includes any individual possessing the prescribed qualifications appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties.

Distinction between Managing Director & Manager

Managing Director	Manager
1. A managing director is entrusted with the substantial powers of the Management.	1. A manager has the management of the whole, or substantially the whole Of the affairs of a company.
2. A company may have two managing directors.	2. A company can have only one manager as he is vested with the management of the whole or substantially of the whole or substantially the whole of the affairs Of the company.
3. A managing director must be a Director.	3. A manager may or may not be a Director.
4. A managing director is appointed by the directors from among themselves and appointed either resolution of the Board or General Meeting.	4. A manager is usually appointed by the Board of Directors.

Meetings and Resolutions

General Meetings of Shareholders:

Kinds of Company Meetings:

Broadly speaking, company meetings may be classified as follows:

Meetings of Shareholders or Members: This again may be of four types:

- Statutory Meeting
- Annual General Meeting
- Extraordinary General Meeting
- Class Meetings

1. Meetings of Directors

- Meetings of Board of Directors
- Meetings of Committees of Directors
- Meetings of Creditors, Debenture holders and Contributories.

1. Statutory Meeting (Sec. 165):

Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company. This meeting is called the 'statutory meeting'. This is the first meeting of the shareholders of a public company and is held only once in the lifetime of a company.

Statutory report:

The Board of Directors shall, at least 21 days before the day on which the meeting is to be held, forward a report, called the 'statutory report', to every member of the company.

Procedure at the meeting:

- List of members.
- Discussion of matters relating to formational aspect.
- Adjournment.

Objects of the meeting and report

- To put the members of the company in possession of all the important facts relating to the company.
- To provide the members an opportunity of meeting and discussing the management, methods and prospects of the company.
- To approve the modification of the terms of any contract named in the prospectus.

2. Annual General Meeting (Sacs. 166 and 167):

Company to hold annual general meeting every year (Sec. 166) Every company shall in each year hold, in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notice calling it. There shall not be an interval of more than 15 months between one annual general meeting and the. But the first annual general meeting should be held within a period of 18 months from the date of its incorporation.

The Registrar may, for any special reason, extend the time for holding any annual general meeting by a period not exceeding 3 months. But no extension of time is granted for holding the first annual general meeting. Every annual general meeting shall be called during business hours on a day that is not a public holiday. It shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated. As regards holding of the annual general meeting, no distinction is made between a public company and a private company.21 days' notice (Sec.171): A general meeting of a company may be called by giving not less than 21 days' notice in writing. Annual general meeting is a statutory requirement: The annual general

meeting of a company is a statutory requirement. It has to be called even where theCompany did not function during the year. Canceling or postponing of convened meeting: Where an annual general meeting is convened for a particular date and notice is issued to the members, the Board of Directors can cancel or postpone the holding of the meeting on that date provided power is exercised for bona fide and proper reason

Canceling of failure to hold annual general meeting: If a company fails to hold an annual general meeting;

Any member can apply, under Sec. 167, to the Company Law Board for calling the meeting.

The company and every officer who is in default shall be punishable with fine.

PowersOfCompanyLawBoardToCallAnnualGeneralMeeting (Sec. 167):

If default is made by a company in holding an annual general meeting in accordance with Sec. 166, any member of the company may apply to the Company Law Board for calling such a meeting.

Penalty for Default (Sec. 168):

If default is made by a company in holding a meeting in accordance with Sec. 166 or in complying with any direction of the Company Law Board in calling a meeting under Sec. 167, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 2,500 for every day after the first during which such default continues.

3. Extraordinary General Meeting (Sec. 169):

A statutory meeting and an annual general meeting of a company are called ordinary meetings. Any meeting other than these meetings is called an extraordinary general meeting. It is called for transacting some urgent or special business which cannot be postponed till the next annual general meeting. It may be convened. (1) By the Board of Directors on its own or on the requisition of the members; or (2) by the requisitionists themselves on the failure of the Board of directors to call the meeting.

(1) Extraordinary meeting convened by the Board of Directors.

The Board of Directors may call an extraordinary general meeting:

On its own.

On requisition of the members.

(2) Extraordinary meeting convened by the requisition.

Power of Company Law Board to order meeting (Sec. 186): If for any reason, it is impracticable for a company to call, hold or conduct an extraordinary general meeting, the Company Law Board may call an extraordinary meeting.

II. Class Meetings:

Under the Companies Act, class meetings of various kinds of shareholders and creditors are required to be held under different circumstances. Under Sec. 106, class meetings of the holders of different classes of shares are to be held, if the rights attaching to these shares are to be varied.

Requisites of a Valid Meeting:

A meeting can validly transact any business, if the following requirements are satisfied:

1. The meeting must be duly convened by a proper authority.
2. A proper notice must be served in the prescribed manner.
3. A quorum must be present.
4. A chairman must preside.
5. Minutes of the proceedings must be kept by Proper Authority .

Proper Authority to Convene Meeting

A meeting must be convened or called by a proper authority. Otherwise it will not be a valid meeting. The proper authority to convene general meetings of a company is the Board of Directors. The decision to convene a general meeting and issue notice for the same must be taken by a resolution passed at a validly held board meeting.

1. Notice of Meetings

A meeting in order to be valid must be convened by a proper notice issued by the proper authority. It means that the notice convening the meeting be properly drafted according to the Act and the rules, and must be served on all members who are entitled to attend and vote at the meeting.

Length of Notice:

For general meeting of any kind at least 21days notice must be given to members. A shorter notice for Annual General Meeting will be valid, if all members entitled to vote giving their consent.

The number of days in each case shall be **clear days**, i.e. the days must be calculated excluding the day on which the notice is issued, a day or so for postal transit, and the day on which the meeting is to be held.

Contents of Notice:

Every notice of meeting of a company must specify the place, the day and hour of the meeting, and shall contain a statement of the business to be transacted thereat.

- Place of Meeting: Every annual general meeting of a company must be held either at the registered office of the company or at some other place within the same city, town or village in which the registered office of the company is situated.
- Day of Meeting: Every annual general meeting of a company must be held on a day that is not a public holiday.
- Time of the Meeting: Every annual general meeting shall be called for a time during the business hours of the company.

2. Quorum:

Quorum is the minimum number of members who must be present at a meeting as required by the rules. Any business transacted at a meeting without a quorum is invalid. The main purpose of having a quorum is to avoid decisions being taken at a meeting by a small minority which may be found to be unacceptable to the vast

majority of members. The number constituting a quorum at any company meeting is usually laid down in the Articles of Association. In the absence of any provision in the Articles, the provisions as to quorum laid down in the Companies Act, 1956 (under Sec.174) will apply. The Articles may provide for a larger quorum, but it cannot provide for a smaller quorum than that laid down in the Act. Sec.174 of Companies Act provides that the quorum for general meetings of shareholders shall be *five members* personally

Present in case of a public company; and two *members* personally present

For any other company.

Agenda

The word 'agenda' literally means 'things to be done'. It refers to the programmed of business to be transacted at a meeting. Agenda is essential for the systematic transaction of the business of a meeting in the proper order of importance. It is customary for all organizations to send an agenda along with the notice of a meeting to all members. The business of the meeting must be conducted in the same order in which the items are placed in the agenda and the order can be varied only with the consent of the meeting.

Proxy

The term 'proxy' is used to refer to the person who is nominated by a shareholder to represent him at a general meeting of the company. It also refers to the instrument through which such a nominee is named and authorized to attend the meeting.

3. Chairman of a Meeting

'Chairman' is the person who has been designated or elected to preside over and conduct the proceedings of a meeting. He is the chief authority in the conduct and control of the meeting.

A chairman is usually a member of the body over which he is to preside. He may be either appointed or designated before hand as chairman by the rules or elected at the meeting itself according to rules. In the case of a company, the Articles

usually designate the Chairman of the Board of Directors to preside over the general meetings of the company. Where the Rules do not designate a chairman or the designated chairman is absent at the commencement of the meeting, the meeting itself elects a *pro tem (*temporary) chairman to preside over the meeting.

Powers and Duties of the Chairman Powers:

1. To maintain order and decorum.
2. To decide points of order.
3. To decide priority of speakers.
4. To maintain relevancy and order in debate.
5. To adjourn a meeting.
6. To exercise a casting vote.
7. To ascertain the sense of a meeting and declare the result of voting.
8. Duties**:** To see that the meeting is properly convened and duly constituted.

1. To see that the proceedings of the meeting are conducted according to rules.
2. To see that no discussion is allowed unless there is a specific motion.
3. To maintain order and decorum in the meeting.
4. To see that all members, including the minority, get equal opportunity to express their views.
5. To see that the sense of the meeting is properly ascertained on each and every motion.
6. He should see that the poll is taken properly according to the provisions of the Act.
7. He must exercise his casting vote bona fide in the interest of the company.
8. He must exercise correctly his power of adjournment.

5. Minutes of the Board Meeting

Every company is required to have the minutes of all board meetings. The pages of the minute's book must be consecutively numbered and each page must be signed and the last page of the book must be signed by the Chairman of the meeting.

Resolution & Motion:

Motion

A 'motion' is a definite proposal put before a meeting for its consideration and

adoption.

Resolution

A ‘resolution’ on the other hand is the formal expression of the decision of meeting. When a motion has been duly voted upon and passed by a majority, with or without amendment, it is called a ‘resolution’.

A resolution once adopted and recorded in the minutes becomes the official decision of the meeting and cannot be rescinded or revoked except by the consent of two- thirds majority in a meeting specially called for the purpose.

Kinds of Resolutions:

There are three kinds of resolutions under the Companies Act, 1956. They are: Ordinary resolutions;

1. Special resolutions; and
2. Resolutions requiring special notice.

1. **Ordinary resolution [(Sec. 189 (1)]:** An ordinary resolution is a resolution passed at a general meeting of a company by a simple majority of votes (i.e., votes cast in favor of the resolution exceed votes cast against it) including the casting vote of the chairman, if any).

When is an ordinary resolution required? Ordinary resolution is necessary for the following among other purposes:

a. Rectification of name or adoption of new name by a company where it resembles the name of an existing company with the previous approval of the Central Government [Sec. 22 (1) (a)].
b. Issue of shares at a discount [Sec. 79 (2)]

c. Alteration of share capital [Sec. 94 (2)].
d. Re-issue of redeemed debentures (Sec.121).
e. Adoption of statutory report (Sec. 165).
f. Passing of annual accounts and balance sheet, along with reports of Board of Directors and Auditors (Sec. 210).
g. Appointment of auditors and fixation of their remuneration [Sec. 224 (1)].
h. Appointment of first directors who are liable to retire by rotation [Sec. 255 (1)].
i. Increase or reduction in the number of directors within the limit fixed by the Articles (Sec. 258).
j. Appointment of managing / whole-time director (Sec. 269).
k. Removal of a director and appointment of a new director in his place [Sec. 284(1)].
l. Approval of appointment of sole-selling agents (Sec. 294).
m. Winding up a company voluntarily in certain events [Sec. 484 (1) (a)].
n. Appointment and fixation of remuneration of liquidators in a member's voluntary winding up [Sec. 490 (1)].
o. Nomination of a liquidator in a creditors' voluntary winding up [Sec. 502 (1)].

2. Special resolution [Sec. 189 (2)]:

A special resolution is one which satisfies the following conditions:

a. The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting.
b. The notice has been duly given of the general meeting.
c. The votes cast in favor of the resolution by members entitled to vote are not less than 3 times the number of votes cast against the resolution by members so entitled and voting.
d. An explanatory statement setting out all material facts concerning the subject-matter of the special resolution including, in particular, the nature of the concern or interest of every director and the manager, if any, shall be annexed to the notice of the meeting.

When is a special resolution required?

Special resolution is necessary for the following among other purposes:

Alteration of Memorandum for changing the place of registered office from one state to another with the leave of the Company Law[Sec. 17(1) and (2)]. Special resolution is also required for changing the 'objects clause' of the Memorandum.

a. Changes of name of a company with the consent of the Central Government (Sec. 21).
b. Omission or addition of the word 'Private' from or to the name of a company (Sec. 21).
c. Change of name of a charitable or other non-profit company by omitting the word or words 'Limited' or 'Private Limited' [Sec. 25 (3)].
d. Alteration of the Articles of a company [Sec. 31(1)].
e. Conversion of any portion of the uncalled capital into reserve capital (Sec. 99).
f. Reduction of share capital [Sec. 100 (1)].
g. Variation of shareholder's rights (Sec. 106).
h. Removal of a company's registered office outside the local limits of any city, town or village [Sec. 146 (2)].
i. Keeping registers and returns at a place other than the registered office [Sec. 163(1)].
j. Payment of interest out of capital [Sec. 208 (2) and (3)].
k. Applying to the Central Government for appointing an Inspector for investigating a company's affairs in some cases [Sec. 237 (a)].
l. Appointment of sole selling or buying agent in the case of companies having paid-up share capital of Rs. 50 laths or more [Sec. 294-AA(3)].
m. Fixing the remuneration of directors where the Articles require such resolution [Sec. 309 (1)].
n. Allowing a director to hold an office of profit under a company [Sec. 314(1) (1-B)].
o. Alteration of Memorandum to render the liability of director's unlimited [Sec.323 (1)].
p. Applying to the court to wind up a company [Sec. 433 (a)].
q. Winding up a company voluntarily [Sec. 484 (1) (b)].
r. Authorizing the liquidator of a company to accept shares as consideration for the transfer of its assets [Sacs. 494 (1)] and
s. Disposal of books and papers of a company in voluntary winding up when its 'affairs'

have been completely wound up [Sec. 550 (1) (b)].

t. Resolutions requiring a special notice (Sec. 190)

A resolution requiring a special notice is not an independent class of resolutions. It i s only a different kind of an ordinary resolution of which notice of the intention to move a resolution has to be given to the company. The notice shall be given not less than 14 days before the meeting at which the resolution is to be served and the day of the meeting.

Winding Up

Winding Up By Court

A winding up by the court, or compulsory winding up, as it is often called, is initiated by an application by way of petition presented to the appropriate court for winding up order.

Grounds for Compulsory Winding Up:

Resolved to be wound up by the court**.**

a. If default is made in delivering the statutory report to the registrar or in holding the statutory meeting.
b. If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year.
c. If the number of members falls below seven (or in case of a private company, below two).
d. If the company is unable to pay its debts.
e. If the court is of opinion that it is just and equitable that the company should be wound up.
f. Just & equitable: (a) Main object failed (b) Deadlock in management (c) Cannot carry on business except losses. (d) Mere bubble – and does not carry any business or does not have any property. (e) Majority of shareholder have adapted an aggressive policy towards the minority.
g. Who May Petition?

The following persons may file petition: (1) the company; (2) creditor; (3)

contributory; (4) all or any of the above parties; (5) the registrar; (6) any person authorized by the Central Government (7) by virtue of Sec. 440, when a company is already being wound up voluntarily, the court may order winding up by it.

voluntary Winding Up:

A company may be wound up voluntarily: (I) when the period (if any) fixed for its duration has expired or an event on the happening of which the company is to be wound up has happened and the company in general meeting has passed an ordinary resolution to wind up; or (ii) if the company passes a special resolution to wind up voluntarily (Sec. 484). There are two kinds of voluntary winding up, namely: **Member's** or **Creditors'.**

Winding Up Under Supervision:

Where a company is being wound up voluntarily by the court may order the continuation of voluntary winding up subject to its supervision with any terms or conditions. The liquidator will continue to exercise all powers subject to any restrictions laid down by the court.

Consequences of Winding Up as To Shareholders:

A shareholder is liable to pay full amount of shares held by him.

As To Creditors:

A secured creditor may either (I) rely on the security and ignore the liquidation, or

(ii) Value his security and prove for the balance of his debt, or (iii) give up his security and prove for the whole amount. Unsecured creditors of an insolvent company are paid in this order: (I) preferential payment under Sec.530, (ii) other debts pair passé.

As To Servants and Officers:

A winding up order operates as a notice of discharge to the employees and officers of the company except when the business of the company is being continued (Sec.

444). A voluntary winding up also operates as a notice of discharge.

As To Proceedings:

After a winding up petition is presented the court may stay all proceedings against the company.

As To Costs:

If the company, while in liquidation, brings or defends any action and is ordered to pay costs, they are paid first out of the assets of the company.

Offences Antecedent To Or In Course Of Winding up Offences of Officers:

Every past and present officer of a company which is being wound up must assist the liquidator and if he fails to do so he is liable to be punished. He is liable to be imprisoned up to 5 years, or fined or given both punishments.

Misfeasance Proceedings:

In the course of winding up a company it appears that any person who has been guilty of any misfeasance or breach of trust in relation to the company, the court may, examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation, notwithstanding that offence is one for which the offender may be criminally liable.

Liquidators

Compulsory Winding Up:

The official Liquidator attached to each High Court will become the liquidator on a winding up order being passed.

Powers of Liquidator:

institute or defend any suit, prosecution, or the legal proceeding in the name of the company, (ii) carry on the business of the company for its beneficial winding up, (iii) sell company's property, (iv) raise money on the security of the company's assets, and (v) do all other things necessary for the winding up.

Duties of Liquidator:

Summon meetings of creditors or contributories get in the property and pay the debts and distribute the balance among contributories. Keep the proper books of account, minutes books, and allow inspection thereof. Keep all the funds of the company in "the public account of India" in the Reserve Bank of India**.**

Voluntary Liquidator:

The voluntary liquidator is appointed by resolution in general meeting of the company and or of the creditors and his remuneration fixed. A voluntary liquidator is a paid agent of the company and is liable in damages, if he neglects his duties as such.

Disclaimer by a Liquidator:

Section 535(1) empowers the liquidator, with the leave of the court to disclaim any onerous property of the company**.**

Indian Sale of Goods Act 1930

Indian Sale of Goods Act 1930 is a Mercantile Law. 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 title (ownership) in the goods to the buyer for consideration. 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 name Indian is removed from the act with effect from 23 September 1963 hence the act name is now Sale of Goods act 1930

Definition

"" According to section 6 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.

Unpaid seller

A seller of goods is an unpaid seller within the meaning of the Sale of Goods Act 1979 when thewh ole price has not been paid or tendered or when a bill of exchange or other negotiable instrument ha s been received asconditional payment and the condition on which it was received has not been fulfi lled by reason of the dishonour of theinstrument or otherwise. Such a seller is entitled to the remedi es provided in the Act: LIEN, a right of RETENTION and if thebuyer is insolvent the right of STO PPAGE IN TRANSIT

UNIT IV

BUSINESS ETHICS

Wayne Norman "Business ethics" is a concise, but in many ways misleading, label for an interdisciplinary field covering a vast range of normative issues in the world of commerce. The label lends itself most directly to a core set of questions about how individuals in the business world ought to behave, or what principles they might appeal to in order to negotiate moral dilemmas at work. But if we consider the array of topics covered in the leading business ethics journals or textbooks, we see that these core issues about individual virtues and ethical decision-making are surrounded by layers of issues involving organizations and institutions.

Business ethics (also known as corporate ethics) is a form of applied ethics or professional ethics, that examines ethical principles and moral or ethical problems that can arise in a business environment. It applies to all aspects of business conduct and is relevant to the conduct of individuals and entire organizations. These ethics originate from individuals, organizational statements or from the legal system. These norms, values, ethical, and unethical practices are what is used to guide business. They help those businesses maintain a better connection with their stakeholders.

Business ethics refers to contemporary organizational standards, principles, sets of values and norms that govern the actions and behavior of an individual in the business organization. Business ethics have two dimensions, normative business ethics or descriptive business ethics. As a corporate practice and a career specialization, the field is primarily normative. Academics attempting to understand business behavior employ descriptive methods. The range and quantity of business ethical issues reflects the interaction of profit-maximizing behavior with non-economic concerns.

Interest in business ethics accelerated dramatically during the 1980s and 1990s, both within major corporations and within academia. For example, most major corporations today promote their commitment to non-economic values under headings such as ethics codes and social responsibility charters.

Definition

Adam Smith said, "People of the same trade seldom meet together, even for merriment

and diversion, but the conversation ends in a conspiracy against the public, or in some

contrivance to raise prices." Governments use laws and regulations to point business

behavior in what they perceive to be beneficial directions. Ethics implicitly regulates areas

and details of behavior that lie beyond governmental control. The emergence of large

corporations with limited relationships and sensitivity to the communities in which they

operate accelerated the development of formal ethics regimes.

Business Ethics and the Changing Environment

- Businesses & governments operate in changing *technological, legal, economic, social & political environments* with competing stakeholders & power claims.
- Stakeholders are *individuals, companies, groups & nations* that cause and respond to external issues, opportunities, and threats.
- The rate of change and uncertainty in which stake- holders & society must make & manage business & moral decisions have accelerated due to the impact of:
- Internet and information technologies
- Globalization
- Deregulation
- Mergers
- Wars

What is Business Ethics? Why Does It Matter?

Ethical solutions to business and organizational problems may have more than one right alternative and sometimes, no right solution may seem available.

- We can learn from *case studies, role playing, and discussions* about how our actions affect others in different situations.
- Laura Nash has defined business ethics as *"the study of how personal moral norms apply to the activities and goals of commercial enterprise,*" as dealing with three basic areas of managerial decision making:
  - ces about what the laws should be and whether to follow them
  - Choices about economic and social issues outside the domain of law
  - Choices about the priority of self-interest over the company's interests

Why Does Ethics Matter In Business?

- **"**Doing the right thing" matters to employers, employees, stakeholders, and the public.
  - For companies, it means saving billions of dollars each year in lawsuits, settlements, and theft
    - Tobacco industry
    - Dow Corning
  - Costs to businesses include:
    - Deterioration of relationships
    - Damage to reputation
    - Declining employee productivity, creativity, and loyalty
    - Ineffective information flow throughout the organization

Absenteeism

Levels of Business Ethics:

- Because ethical problems are not only an individual or personal matter, it is helpful to see the different levels at which issues originate and how they move to other levels.
- Five levels are:
  - Individual
  - Organizational
  - Association
  - Societal
  - International
- Examination of the *RU 486* story

Five myths of business ethics:

- A *myth* is "a belief given uncritical acceptance by the members of a group, especially in support of existing or traditional practices and institutions."
  - Myth 1: Ethics is a personal, individual affair, not a public or debatable matter
  - Myth 2: Business and ethics do not mix
  - Myth 3: Ethics in business is relative
  - Myth 4: Good business means good ethics
  - Myth 5: Information and computing are amoral

Can business ethics can be taught or trained :

- Ethic courses should not:
- Advocate a set of rules from a single perspective
- Not offer only one best solution to specific ethical problems
- Not promise superior or absolute ways of thinking and behaving in situations
- Ethic courses and training can do the following:
- Provide people with rationales, ideas, and vocabulary
- Help people make sense of their environments
- Provide intellectual weapons
- Enable employees to act as alarm systems for company practices
- Enhance conscientiousness and sensitivity
- Enhance moral reflectiveness and strengthen moral courage
- Increase people's ability to become morally autonomous ethical dissenters
- Improve the firm's moral climate
- Other scholars argue that ethical training can add value to the moral environment of a firm and to relationships in the workplace by:
- Finding a match between employer's and employee's values
- Managing the push-back point
- Handling an unethical directive
- Coping with a performance system that encourages unethical means

Stages of moral development :

- Kohlberg's 3 levels of moral development: Level 1: Preconventional level (self-orientation)
  - Stage 1: Punishment

- Stage 2: Reward seeking

- Level 2: Conventional level (others orientation)
  - Stage 3: Good person
  - Stage 4: Law and order
- Level 3: Post conventional level (universal, humankind orientation)
  - Stage 5: Social contact
  - Stage 6: Universal ethical principles

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