CONTENTS

BLOCK-1 : LAW

Unit – I : The Law of Contract 03-31

Unit – II : The Laws Relating to Sale of Goods 32-73

Unit – III : The Laws Relating to Companies 74-107

SYLLABUS

BUSINESS LAWS

BLOCK 1: LAW

Unit 1: The Law of Contract

Agreement and Contract; Void and Voidable Contracts; Capacity of Parties; Free Consent; Legality of Object and Consideration; Performance and Discharge of Contracts; Indemnity and Guarantee; Bailment and Agency.

Unit 2: The Law Relating to Sale of Goods

Sale and Agreement to Sell, Conditions and Warranties, Transfer of Property Doctrine of Caveat Emptor, Auction Sale, unpaid Seller.

The Laws Relating to Carriage of Goods-

Introduction, Carriage of Goods by Land; Carriage by Sea; Carriage by air.

The Laws Relating to Partnership-

The Partnership Act; nature, Test and Types of Partnership; Partnership Deed, Right and Liabilities of Partners; Registration; Dissolution.

Unit 3: The Law Relating to Companies-

The Companies

BLOCK—1

LAW

NOTES

UNIT – I

THE LAW OF CONTRACT

STRUCTURE

1.1 Objectives
1.2 Introduction
1.3 Agreement and Contract
— Contract Formalities
1.4 Void and Voidable Contracts
1.5 Capacity of Parties
1.6 Legality of Object
1.7 Consideration
1.8 Performance and Discharge of Contracts
1.9 Indemnity and Guarantee
1.10 Bailment and Agency
• Summary, Glossary and Review Questions

1.1 OBJECTIVES

After going through this unit, students will be able to:

- state the fundamental concepts of contract and agreement;
- explain the void and voidable contarcts;
- explain the legality of object and consideration;
- discuss the meaning of performance and discharge of contracts;
- understand the concept of indemnity and guarantee.

1.2 INTRODUCTION

Most people in our society are involved in contractual agreements of some kind. In most, if not all, aspects of law contracts can be found. Contracts are involved in family law, corporate law, employment law, litigation and real estate.

1.3 AGREEMENT AND CONTRACT

A contract is an agreement reached after sufficient consideration to do, or refrain from doing, some legal action. A contract is considered valid when two or more parties with capacity make an agreement involving valid consideration to do or to refrain from doing some lawful act. If these elements exist, the contract is valid. If one or more or these necessary elements is missing, the contract is void or voidable. In other words, it is not considered to be a contract and therefore cannot be enforced.

A void contract is no contract at all. It is not binding and no action can be maintained if it is breached. A disaffirmance is not necessary to avoid a void contract.

NOTES

If a contract can be rejected by one of the parties on legal grounds, it is called a voidable contract. A voidable contract is valid and binding unless the entitled party (the party who has legal grounds to reject the contract) voids it. A defect exists. The defect may be cured by ratification of the entitled party.

The basic components of a contract are the offer, the consideration and the acceptance. The following are six elements that are to help to determine whether or not the basic components are present and meet legal criteria for a valid contract:—

- All parties must have capacity to enter the contract.
- An offer must be made.
- Consideration must be exchanged.
- The parties must be in mutual agreement.
- The contract's object and purpose must be legal.
- The form of the contract must meet the legal requirements.

The ability to know and understand the terms of contract is known as capacity. For a contract to be valid, all parties must have capacity. Corporations and most adults have capacity. Minors, mentally incompetent persons and those who are intoxicated do not have capacity.

Most states consider persons under the age of 18 to be minors. Minors lack capacity to enter into a contract. If they do enter into a contract, the contract is generally considered voidable. They have the right to cancel the contract at any time before and even after reaching the age of 18. If, however, a minor cancels the contract, the benefits that he or she received must be returned.

If a person is so mentally incompetent that he or she fails to understand that a contract is being made and further does not understand the terms of the contract, that person is said to lack capacity to enter into a contract. If such a person enters into a contract, the contract may be deemed voidable or possibly void.

In the same way, if persons are so intoxicate that they cannot understand that they're entering into a contract, and are so impaired that they fail to understand the terms, they too lack capacity. These contracts can also be considered voidable or void.

Mutual Agreement

When two parties have a "meeting of the minds," an agreement can said to have been made. Both parties must understand the agreement, and making sure no misunderstanding or mistakes exists between them. Such a situation usually occurs after an offer has been made by an offeror and then accepted by an offeree.

NOTES

A valid offer has been made when another party (or several parties) is asked to enter a defined contractual agreement.

In other words, an offeror makes a promise to the offeree, requesting from the offeree an act or the restraint of an act that the offeree has the right to perform, or a return promise.

The offer must be clear and definite. It also must be clearly communicated to the offeree. An invitation or statement may be made that appears to be an offer, but actually is not. Social invitations, offers made in excitement or offers made in jest are not considered valid offers. A social invitation, for example, usually carries no contractual intent.

Offers can be made to individuals or to the general public, such as with an advertisement. From that point, after the offer has been made, negotiations between the offeror and offeree can begin, conducted personally or through an agent.

Contract Formalities

All contract are subject to stationary formalities, such as the Statute of Frauds and the parol evidence rule. For a contract to be valid and enforceable, both of these statutory formalities must be followed.

The Statute of Frauds has been adopted in nearly every state of the country, requiring that certain classes of contracts be in writing to be enforceable. Contracts involving the sale of goods for $500 or more, contracts for real estate and contracts that cannot be perfomed within one year are some examples of contracts that are subject to the Statute of Frauds. Any contract that is subject to the Statute of Frauds must be in writing to be enforceable.

Complimenting the Statute of Frauds is the Parol Evidence Rule. This rule requires that when a written contract is in place between parties, the written contract must contain the entire agreement between the parties. Any amendments must be done in writing. This rule safeguards against any agreement that a party might make stating that the contract had been amended by a verbal agreement.

What is it exactly that you do when you sign a 'contract' . The term 'contract' means a promise or a set of promises made by one person to another, which the Courts will enforce. A contract can contain a number of promises or 'terms' to be performed by either party. The person who makes the promise is called the 'promissor' and the person who can enforce that promise is called the 'promissee'. If the contract contains several mutual promises, each party will be both a promissor and a promissee. Contracts of Purchase and Sale of land and interests in land usually have lots of mutual promises. Contracts are a crucial part of every business transaction, but not nearly as much as in Real Estate. For instance, some contracts are made verbally while others are made by simply exchanging letters

or even e-mails. This is not the case in Real Estate, where it is a requirement at Law that contracts be written down in usually lengthy legal forms to avoid uncertainty, ambiguity and to be binding .

NOTES

A contract has seven essential elements:—

- Offer.
- Acceptance.
- Consideration.
- Legal Intent.
- Capacity.
- Legal Object.
- Genuine Consent.

Each of these elements must be present for a contract to be binding and enforceable. Let's examine them individually.

OFFER

An offer is the promise made by one party to another. Save and except in Real Estate where the offer must be in writing, an offer can be made in any form. In all circumstances, however, an offer must be made in clear an unambigous terms.

If more than one interpretation can be given to an offer, neither interpretation will be followed by the Courts. There are 'unilateral' and 'bilateral' offers. Offers to purchase real property are bilateral, i.e. containing the exchange of mutual promises.

An offer is not made forever. Offers can either be finalized, when all mutual promises are fulfilled. Or they can expire, if not timely accepted. Or they can be released, if one of the parties does not - or cannot - deliver on the promise. Offers can also be revoked after acceptance, unless a term of the offer stipulates that revocation is not allowed.- as it is now the case in British Columbia for offers involving land. A 'counter-offer' is simply an offer from the offeree back to the offeror. The legal effect of a counter-offer is to terminate the original offer and substitute the offer of the offeree. What this means in practicality is that if the counter-offer is not accepted, the offeree cannot try to accept the first offer unless it is tendered again by the offeror. This is a point often times neglected in Real Estate, which has caused several tears to be spilled.

ACCEPTANCE

The acceptance, like the offer, must be given in clear terms. It must be a positive act. For instance, an offer cannot state "If I don't hear from you, I will assume you have accepted". Doing nothing will never be considered legal acceptance. The rule at Law is that where an offer is required by statute to be in writing, then also the acceptance must be in writing in order for the offer to

NOTES

become a contract binding on both parties. Such is the case in Real Estate. An acceptance has no effect until it is communicated to the offeror. Communication can be made by 'instantaneous means' as in the case of telephone or teletype or fax communications, or e-mail or hand-delivery and by 'non-instantaneous means' *such as postal mail. The Law gives the responsibility to the offeror to specify how* he wants the offer to be accepted. If the offeror chooses a method like slow mail, then he assumes the risks involved in that type of service (such as misdelivery).

CONSIDERATION

For an offer and acceptance to form a contract there must be consideration or the contract must be signed under seal. Consideration is defined as 'some right, benefit or profit accruing to the promissor or some forebearance, detriment, loss or otherwise responsibility suffered by the promissee' . What this means is that the party trying to enforce the contract must have 'paid' something in exchange for the promise of the other party. Consideration must be of real value, *but it does not have to be money. For example, a mutual exchange of promises is* consideration per se.

LEGAL INTENTION

For a person to be bound to a contract, he must seriously intend to create legal obligations. For example, inviting a guest for dinner would normally not be considered a contract intended to create legal obligations. The Law presumes that there is legal intention in a contract involving total strangers. On the other hand, if the contract is between family members the Law presumes that there is no intention to be so bound (non arm-length transaction). However, this presumption can be reversed if there is evidence to show otherwise.

CAPACITY

Even when all the foregoing essential elements exist, a contract can still be void, voidable or illegal. A void contract is one which is deemed at Law never to have existed. A voidable contract is slightly different: it exists until it is repudiated by one of the parties. An illegal contract is one which is made for an illegal purpose, and which is therefore always void. Examples of voidable contracts are the ones made when one of the parties is an infant, i.e. a minor or under the majority age. In this case the contract can be voided by the infant. Likewise, when one of the parties is legally insane, the contract is voidable. A special case is a contract stipulated when one of the parties is a limited company or corporation. Three questions must be first answered before the contract can be enforceable: (1) whether the corporation does in fact exist and (2) whether it has the capacity to enter into the contract and (3) whether the person signing on behalf of the corporation is, in fact, the authorized signatory.

NOTES

LEGAL OBJECT

The object and purpose must be legal for a contract to be legal. If its purpose is illegal by the virtue of common law, the contract may be void. If the formation or the performance of a contract is illegal, resulting in a crime and/or tort, or opposing public policy or interest, the contract is usually considered void. For example, any contract that involves purchasing a stolen item or an illegal drug, or involves fraud or harming someone would be considered void.

GENUINE CONSENT

If one of the parties makes a misrepresentation or if the contract contains an inherent mistake, the contract may still not be binding. A misrepresentation is, by definition, a statement which is false and which must have induced one of the parties to enter into the contract. A misrepresentation can be innocent, negligent or fraudulent and different remedies are available to the party suffering damages because of the nature of the misrepresentation. If the representation is innocent, the party can sue for rescission of the contract. In the case of negligent or fraudulent misrepresentation, the affected party can sue for damages as well. Although misrepresentation requires a statement to be made, in Real Estate silence too can result in some form of misrepresentation. Disclosure of latent defects is one such example: failure to disclose latent defects on the part of the Seller will not, by itself, affect the consent of the parties but will have similar consequences as misrepresentation.

In the case of inherent mistake, true consent of the parties does not exist. The logic behind this notion is that the parties were negotiating for a subject matter other than the one stipulated in the contract. A specific type of mistake is sometimes referred to as 'non est factum' , Latin for 'this is not my deed' . This occurs when a person executes one form of document thinking the document is something else. Duress and undue influence both affect the genuine consent element of a contract. Duress occurs when a person is forced to enter into the contract against his will. As a result, the Courts will find the contract voidable at his option. Undue influence, on the other hand, is more subtle. Like duress it results in one party losing his free will to contract out. However it occurs more frequently when a person is in a superior or dominant position in relation to another and uses this influential position to induce the other to enter into the contract. Again, if undue influence is found, the contract is voidable at the option of the innocent party.

Contractual Terms

A contractual term is "any provision forming part of a contract". Each term gives rise to a contractual obligation, breach of which can give rise to litigation. Not all terms are stated expressly and some terms carry less legal weight as they are peripheral to the objectives of the contract.

NOTES

Bilateral v. Unilateral Contracts

Contracts may be bilateral or unilateral. The more common of the two, a bilateral contract, is an agreement in which each of the parties to the contract makes a promise or promises to the other party. For example, in a contract for the sale of a home, the buyer promises to pay the seller $200,000 in exchange for the seller's promise to deliver title to the property.

In a unilateral contract, only one party to the contract makes a promise. A typical example is the reward contract: A promises to pay a reward to B if B finds A's dog. B is not obliged to find A's dog, but A is obliged to pay the reward to B if B finds the dog. In this example, the finding of the dog is a condition precedent to A's obligation to pay.

An offer of a unilateral contract may often be made to many people (or 'to the world') by means of an advertisement. In that situation, acceptance will only occur on satisfaction of the condition (such as the finding of the offeror's dog). If the condition is something that only one party can perform, both the offeror and offeree are protected – the offeror is protected because he will only ever be contractually obliged to one of the many offerees; and the offeree is protected, because if she does perform the condition, the offeror will be contractually obliged to pay her.

In unilateral contracts, the requirement that acceptance be communicated to the offeror is waived. The offeree accepts by performing the condition, and the offeree's performance is also treated as the price, or consideration, for the offeror's promise. The most common type of unilateral contract is the insurance contract. The insurance company promises to pay the insured a stated amount of money if a covered event occurs for which the insured pays premiums. Note that the insured does not make any promise to pay the premiums.

Courts generally favor bilateral contracts. The general rule in the United States is: "In case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses."

Uncertainty, Incompleteness and Severance

If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law. An agreement to agree does not constitute a contract, and an inability to agree on key issues, which may include such things as price or safety, may cause the entire contract to fail. However, a court will attempt to give effect to commercial contracts where possible, by construing a reasonable construction of the contract.

Courts may also look to external standards, which are either mentioned explicitly in the contract or implied by common practice in a certain field. In

addition, the court may also imply a term; if price is excluded, the court may imply a reasonable price, with the exception of land, and second-hand goods, which are unique.

NOTES

If there are uncertain or incomplete clauses in the contract, and all options in resolving its true meaning have failed, it may be possible to sever and void just those affected clauses if the contract includes a severability clause. The test of whether a clause is severable is an objective test—whether a reasonable person would see the contract standing even without the clauses.

Remedies for Breach of Contract

A breach of contract is failure to perform as stated in the contract. There are many ways to remedy a breached contract assuming it has not been waived. Typically, the remedy for breach of contract is an award of money damages. When dealing with unique subject matter, specific performance may be ordered.

DAMAGES

There are four different types of damages.

- **Compensatory damages:** which are given to the party which was detrimented by the breach of contract. With compensatory damages, there are two kinds of branches, consequential damages and direct damages.
- **Exemplary damages:** which are used to make an example of the party at fault to discourage similar crimes. Fines can be multiplied by factors of up to 50 for such damages.
- **Liquidation Damages:** which are damages paid for permission to breach the contract with no further obligations. Liquidation damages must be expressly stated in the contract, and must be reasonable (as determined by the courts), depending on the nature of the contract.
- **Nominal damages:** which include minimal dollar amounts (often sought to obtain a legal record of who was at fault).
- **Punitive damages:** which are used to punish the party at fault. These are not usually given regarding contracts but possible in a fraudulent situation.

Whenever you have a contract that requires completing something, and a person informs you before they begin your project that it will not be completed, this is referred to as anticipatory breach. When it is neither possible nor desirable to award damages measured in that way, a court may award money damages designed to restore the injured party to the economic position that he or she had occupied at the time the contract was entered (known as the "reliance measure"), or designed to prevent the breaching party from being unjustly enriched ("restitution").

1.4 VOID AND VOIDABLE CONTRACTS

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A void contract, also known as a void agreement, is not actually a contract. A void contract cannot be enforced by law. Void contracts are different from voidable contracts, which are contracts that may be (but not necessarily will be) nullified.

A void contract is one which is deemed at Law never to have existed. A voidable contract is slightly different: it exists until it is repudiated by one of the parties. An illegal contract is one which is made for an illegal purpose, and which is therefore always void. Examples of voidable contracts are the ones made when one of the parties is an infant, i.e. a minor or under the majority age. In this case the contract can be voided by the infant. Likewise, when one of the parties is legally insane, the contract is voidable.

An agreement to carry out an illegal act is an example of a void contract or void agreement. For example, a contract between drug dealers and buyers is a void contract simply because the terms of the contract are illegal. In such a case, neither party can go to court to enforce the contract. A void contract is void ab initio ie from the beginning while a voidable contract can be voidable by any of the parties to it.

In law, void means of no legal effect. The Latin phrase, void ab initio means "to be treated as invalid from the outset". An action, document or transaction which is void is of no legal effect whatsoever: an absolute nullity - the law treats it as if it had never existed or happened.

For example, in many jurisdictions where a person signs a contract under duress, that contract is treated as being void ab initio.

Black's Law Dictionary defines void as:—

" Void. Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. Hardison v Gledhill 72 Ga.App. 432, 33 S.E.2d 671"

The dictionary further goes on to define void ab initio as:—

"Void ab initio. A contract is null from the beginning if it seriously offends law or public policy in contrast to a contract which is merely voidable at the election of one of the parties to the contract."

In practical terms, void is usually used in contradistinction to voidable and unenforceable, the principal difference being that an action which is voidable remains valid until it is avoided. The significance of this usually lies in the possibility of third party rights being acquired. However, the right to avoid a voidable transaction can be lost (usually lost by delay). These are sometimes referred to as "bars to rescission". Such considerations do not apply to matters which are void ab initio.

NOTES

DEFINITION

Literally

Void means having no legal value and agreement means Arrangement, promise or contract made with somebody. So void agreement means an agreement that has no legal value.

Traditionally

"An agreement not enforceable by law is said to be void". [Sec 2(g)]

A void agreement has no legal effect. An agreement which does not satisfy the essential elements of contract is void. Void contract confers no rights on any person and creates no obligation..

Example of void agreement: An agreement made by a minor, agreement without consideration, certain agreements against public policy etc.

Agreement which become void—

An agreement, which was legal and enforceable when it was entered in to, may subsequently become void due to impossibility of performance, change of law or other reason. When it become void the agreement ceases to have legal effect.

EXPRESSLY DECLARED VOID AGREEMENT

There are certain agreements, which are expressly declared to be void.

They are as follows:

1. Agreement by a minor or a person of unsound mind;
2. Agreement of which the consideration or object is unlawful;
3. Agreement made under a bilateral mistake of fact material to the agreement;
4. Agreement of which the consideration or object is unlawful in part and the illegal part can not be separated from the legal part;
5. Agreement made. without consideration;
6. Agreement in restraint of marriage;
7. Agreement in restrain of trade;
8. Agreement in restrain of legal proceedings;
9. Agreements the meaning of which is uncertain;
10. Agreements by way of wager;
11. Agreements contingent on impossible events;
12. Agreements to do impossible acts.

Some discussions on void agreement are as follows:—

(1) Agreement by a Minor or a Person of Unsound Mind

A person who has not completed his or her 18 years of age signifies as minor. Law acts as the guardian of minors and protects their rights, because their mental facilities are not mature- they do not possess the capacity of judge what is good and what is bad for them. Accordingly, where is a minor charged with obligations and the other contracting party seeks to enforce those obligations against the minor, the agreement is deemed as void.

A person who does not possess a sound mind or whose mental powers are not arranged or whose mental condition is not under his or her own control. Any agreement by person of unsound mind is absolutely void because he has no capacity to judge, what is good and what is bad for him.

Illustration

(*a*) A, 15 years old boy, made an agreement with B to give him Rs.1000. This is a void agreement.

(*b*) A mentally disordered man made an agreement with X to marry her, but this is not a valid agreement.

(2) Agreement Made without Consideration

An agreement made without consideration is void, unless—

1. It is expressed in writing and registered under the law for the time being enforce for the registration of(documents), and is made on account of natural love and affection between parties standing in a near relation to each other; or unless.
2. It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promissory was legally compellable to do, or unless.
3. It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in the behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1-Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2- An agreement to which the consent of the promisor is freely given is not void merely because the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given.

Illustrations

(*a*) A promises for no consideration, to give to B Rs. 1000; this is a void agreement.

NOTES

(b) A, for natural, love and affection, promises to give his son, B Rs. 1000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds be B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(3) Agreements in Restraint of Marriage

Every individual enjoys the freedom to marry and so according to section 26 of the contract act "every agreement is restraint of the marriage of any person, other than a minor, is void." The restraint may be general or partial but the agreement is void, and therefore, an agreement agreeing not to marry at all, or a certain person or, a class of persons, or for a fixed period, is void. However, an agreement restraint of the marriage of a minor is valid under the section.

It is interesting to note that a promise to marry a particular person does not imply any restraint of marriage and is, therefore, a valid contract.

This section enact that agreement in restraint of the marriage of any person, other than a minor is void. In the interest of the society, contracts for marriage are scrutinized with a close and vigilant suspicion of undue influence, fraud or imposition. The law presumes constrictive fraud, on grounds of public policy, in agreements respecting marriages since marriages of a suitable nature are of the deepest importance of the wellbeing of the society, as upon the equality and mutual affection much of their happiness, sound morality, and mutual confidence, hence every temptation of the exercise often undue influence, or a seductive interest in procuring a marriage is suppressed, for there is infinite danger that it may, under the guises of friendship, confidence, flattery or falsehood, accomplish the ruin of person especially females. So the law—

(a) Prevents improvident, ill-advised, and often fraudulent matches;

(b) Avoid all such contracts as tend to the deceit and injury, or encourage artifices and improper attempts to control the exercise of free judgment;

(c) Discountenances secret contracts made with prevents and guardians, whereby on a marriage, they to receive a benefits

(d) Renders invalid certain agreements in restraint of marriage.

Illustrations

(a) A agrees with B for good consideration that she will not marry C. It is a void agreement.

(b) A agrees with B that she will marry him only; it is a valid contract of marriage.

1.5 CAPACITY OF PARTIES

NOTES

The capacity of both natural and artificial persons determines whether they may make binding amendments to their rights, duties and obligations, such as getting married or merging, entering into contracts, making gifts, or writing a valid will. Capacity is an aspect of status and both are defined by a person's personal law:—

- for natural persons, the law of domicile or lex domicilii in common law states, and either the law of nationality or lex patriae, or of habitual residence in civil law states;
- for artificial persons, the law of the place of incorporation, the lex incorporationis for companies while other forms of business entity derive their capacity either from the law of the place in which they were formed or the laws of the states in which they establish a presence for trading purposes depending on the nature of the entity and the transactions entered into.

When the law limits or bars a person from engaging in specified activities, any agreements or contracts to do so are either voidable or void for incapacity. Sometimes such legal incapacity is referred to as incompetence.

Discussion

As an aspect of the social contract between a state and its citizens, the state adopts a role of protector to the weaker and more vulnerable members of society. In public policy terms, this is the policy of parens patriae. Similarly, the state has a direct social and economic interest in promoting trade so, it will define the forms of business enterprise that may operate within its territory and lay down rules that will allow both the businesses and those that wish to contract with them a fair opportunity to gain value. This system worked well until social and commercial mobility increased. Now persons routinely trade and travel across state boundaries (both physically and electronically), so the need is to provide stability across state lines given that laws differ from one state to the next.

Thus, once defined by the personal law, persons take their capacity with them like a passport whether or however they may travel. In this way, a person will not gain or lose capacity depending on the accident of the local laws, e.g. if A does not have capacity to marry her cousin under her personal law (a rule of consanguinity), she cannot evade that law by travelling to a state that does permit such a marriage.

Natural Persons

Standardized classes of person have had their freedom restricted. These limitations are justified exceptions to the general policy of freedom of contract and the detailed human and civil rights that a person of ordinary capacity might enjoy. Hence, for example, freedom of movement may be modified, the right to

vote may be withdrawn, etc. As societies have developed more equal treatment based on gender, race and ethnicity, many of the older incapacities have been removed.

NOTES

Infancy

The definition of an infant or minor varies, each state reflecting local culture and prejudices in defining the age of majority, marriageable age, voting age, etc. In many jurisdictions, legal contracts, in which (at least) one of the contracting parties is a minor, are voidable by the minor. For a minor to undergo medical procedure, consent is determined by the minor's parent(s) or legal guardian(s). The right to vote in the India is set at 18 years, while the right to buy and consume alcohol is often set at 21 years by Indian law. Some laws, such as marriage laws, may differentiate between the sexes and allow women to marry younger. There are instances in which a person may be able to gain capacity earlier than the prescribed time through a process of emancipation. Conversely, many states allow the inexperience of childhood to be an excusing condition to criminal liability and set the age of criminal responsibility to match the local experience of emerging behavioral problems. For sexual crimes, the age of consent determines the potential liability of adult accused.

In contracts between an adult and an infant, adults are bound but infants may escape contracts at their option (i.e. the contract is voidable). Infants may ratify a contract on reaching age of majority.

In the case of executed contracts, when the infant has obtained some benefit under the contract, he/she cannot avoid obligations unless what was obtained was of no value. Upon repudiation of a contract, either party can apply to the court. The court may order restitution, damages, or discharge the contract. All contracts involving the transfer of real estate are considered valid until ruled otherwise.

Minors and Contractual Capacity

A minor (typically under 18) can disaffirm a contract made, no matter the case. However, the entire contract must be disaffirmed. The minor cannot keep any of the goods traded for. Also, barter transactions such as purchasing a retail item in exchange for a cash payment is generally recognized through a legal fiction to not be a contract due to the absence of promises of future action. A minor may not disavow such a trade.

Disaffirmance — it must be timely. For example, a contract that goes beyond two years of reaching the age of majority would be considered ratified. Minors are still allowed to disaffirm, even if their age is misrepresented. They will not face tort violations. Some states don't allow disaffirmance if the consideration cannot be returned.

Obligations — most states hold that a minor only must return the goods

(consideration) if the goods are still in the minor's possession. Many states are requiring that the minor restore the adult (other party) to the state they were in before the contract was made. Minors are beginning to be held responsible for damages, wear, tear, etc. of the good in question upon return. A suit for tort is considered by some states to be an enforcement of the contract and is not allowed.

Liability — for necessities, (1) the item contracted for must be necessary for minor's existence, (2) the value must be up to that of the current standard of living or financial/social status (not excessive in value), (3) the minor must not be under the care of a parent/guardian who is required to supply the item. A minor could be held liable for a contract for the purchase of luxury items (those that are not in the financial/social/standard of living range).

Ratification — accepting and giving legal force to an obligation. Express ratification (for a minor) is expressly stating, orally or in writing that he/she intends to be bound by the contract. Implied ratification is when the conduct of the minor is inconsistent with that of disaffirmance or when minor fails to disaffirm an executed contract within a reasonable period.

Minor

In law, the term minor (also infant or infancy) is used to refer to a person who is under the age in which one legally assumes adulthood and is legally granted rights afforded to adults in society. Depending on the jurisdiction and application, this age may vary, but is usually marked at either 18, 20, or 21. Specifically, the status of "minor" is defined by the age of majority.

In many countries, including Brazil, Croatia, India, the United Kingdom, Australia, Canada and New Zealand, a minor is presently defined as a person under the age of 18. In the India, where the age of majority is set by the Government, 'minor' usually refers to someone under the age of 18, but can be used in certain areas to define someone under the age of 21.

In the criminal justice system in some places, the term "minor" is not entirely synonymous, as a minor may be tried for a crime (and punished) as a juvenile or an adult (usually only for extremely serious crimes such as murder).

Generally, the courts base their determination on whether the minor, after reaching the age of majority, has had ample opportunity to consider the nature of the contractual obligations he or she entered into as a minor and the extent to which the adult party to the contract has performed.

Insanity, Mental Illness, or Mental/Medical Condition

Individuals may have an inherent physical condition which prevents them from achieving the normal levels of performance expected from persons of comparable age, or their ability to match current levels of performance may be caused by contracting an illness. Whatever the cause, if the resulting condition is such that individuals cannot care for themselves, or may act in ways that are

NOTES

against their interests, those persons are vulnerable through dependency and deserve the protection of the state against the risks of abuse or exploitation. Hence, any agreements that were made are voidable, and a court may declare that person a ward of the state and grant power of attorney to an appointed legal guardian (in England and Wales, this is a specific function of the Court of Protection).

This sort of problem sometimes arises when people suffer some form of medical problem such as unconsciousness, coma, extensive paralysis, or delirious states, from accidents or illnesses such as strokes, or often when older people become afflicted with some form of medical/mental disability such as Huntington's disease, Alzheimer's disease, Lewy body disease, or similar dementia. Such persons are often unable to consent to medical treatment and otherwise handle their financial and other personal matters.

If the afflicted person has prepared documents beforehand about what to do in such cases, often in a revocable living trust or related documents, then the named legal guardian may be able to take over their financial and other affairs. If the afflicted person owns his/her property jointly with a spouse or other able person, the able person may be able to take over many of the routine financial affairs. Otherwise, it is often necessary to petition a court, such as a probate court, that the afflicted person lacks legal capacity and allow a legal guardian to take over their financial and personal affairs. Procedures and court review have been established, dependent on the area of jurisdiction, to prevent exploitation of the incapacitated person by the guardian. The guardian periodically provides a financial accounting for court review.

Drunkenness/Drug Abuse

Although individuals may have consumed a sufficient quantity of intoxicant or drug to reduce or eliminate their ability to understand exactly what they are doing, such conditions are self-induced and so the law does not generally allow any defense or excuse to be raised to any actions taken while incapacitated. The most generous states do permit individuals to repudiate agreements as soon as sober, but the conditions to exercising this right are strict.

Bankruptcy

If individuals find themselves in a situation where they can no longer pay their debts, they lose their status as creditworthy and become bankrupt. States differ on the means whereby their outstanding liabilities can be treated as discharged and on the precise extent of the limits that are placed on their capacities during this time but, after discharge, they are returned to full capacity.

In the United States, some states have spendthrift laws under which an irresponsible spender may be deemed to lack capacity to enter into contracts (in Europe, these are termed prodigality laws) and both sets of laws may be denied

extraterritorial effect under public policy as imposing a potentially penal status on the individuals affected.

NOTES

Enemy Aliens and/or Terrorists

During times of war or civil strife, a state will limit the ability of its citizens to offer help or assistance in any form to those who are acting againsts the interests of the state. Hence, all commercial and other contracts with the "enemy", including terrorists, would be considered void or suspended until a cessation of hostilities is agreed.

Business Entities

Corporations

The extent of an artificial person's capacity depends on the law of the place of incorporation and the enabling provisions included in the constitutive documents of incorporation.

The general rule is that anything not included in the corporation's capacity, whether expressly or by implication, is ultra vires, i.e. "beyond the power" of the corporation, and so may be unenforceable by the corporation, but the rights and interests of innocent third parties dealing with the corporations are usually protected.

General and Limited Partnerships

There is a clear division between the approach of states to the definition of partnerships. One group of states treats general and limited partnerships as aggregate. In terms of capacity, this means that they are no more than the sum of the natural persons who conduct the business.

The other group of states allows partnerships to have a separate legal personality which changes the capacity of the "firm" and those who conduct its business and makes such partnerships more like corporations.

Unions

In some states, trade unions have limited capacity unless any contract made relates to union activities.

Insolvency

When a business entity becomes insolvent, an administrator, receiver, or other similar legal functionary may be appointed to determine whether the entity shall continue to trade or be sold so that the creditors may receive all or a proportion of the money owing to them. During this time, the capacity of the entity is limited so that its liabilities are not increased unreasonably and to the detriment of the existing creditors.

1.6 LEGALITY OF OBJECT

NOTES

An agreement to be an enforceable contract must contemplate the attainment of an object not expressly forbidden by law nor contrary to public policy. For example: An agreement for the sale of realty to be used expressly for the sale of alcoholic beverages is unenforceable as its object is contrary to law. So also an agreement by which A, a confirmed woman hater, promises B a house for B's promise never to marry, is against public policy, as discouraging marriage, and therefore unenforceable.

Unlawful Consideration and Object -1

Definition

Literally

The word 'Legality' means 'the state of being legal' 'Object' means 'purpose' and 'Consideration' means 'reason'.

So the meaning of legality of object and consideration is the state of being any reason or purpose legal.

Traditionally

An agreement will not be enforced by the court if its object or the consideration is unlawful. By the expression "Object of an Agreement" is meant its purpose on design. The object and the consideration must both be lawful, otherwise the agreement is void.

Unlawful Consideration and Objects -2

1. If it is forbidden by law

If the consideration or the object of a contract were forbidden by law, it would be unlawful and hence unenforceable.

Example

(*a*) A promises to pay B Rs.1000 at the end of six months, if C, who owes that sum of B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is a consideration for the promise of the other party, and they are lawful considerations.

(*b*) Promises for a certain sum paid to him by B, to make good to be the value of his ship wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is consideration for A's promise. These are lawful consideration.

2. If it is fraudulent

An agreement, whose object or consideration is to fraud others, is unlawful and hence void.

Example-

(*a*) A being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain from B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A on his principal to obtain for B a lease of land belonging to his principal.

Case-

(*a*) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(*b*) Where the object of an agreement between A and B was to obtain a contract from the commissariat department for the benefit of court , which could not be obtained for both of them without practicing fraud on the department, it was held that the object of the agreement was fraudulent, and that the agreement was therefore void.

Illegal Agreement

An illegal agreement, under the common law of contract, is one that the courts will not enforce because the purpose of the agreement is to achieve an illegal end. The illegal end must result from performance of the contract itself, however. A contract that requires only legal performance, such as the sale of packs of cards to a known gambler, where gambling is illegal, will nonetheless be enforceable. A contract directly linked to the gambling act itself, such as paying off gambling debts, however, will not meet the legal standards of enforceability. Therefore an employment contract between a blackjack dealer and a speakeasy manager, is an example of an illegal agreement and the employee has no valid claim to his anticipated wages if gambling is illegal under that jurisdiction.

Contracts in restraint of trade are a variety of illegal contracts and generally will not be enforced unless they are reasonable in the interests of the contracting parties and the public.

Contracts in restraint of trade if proved to be reasonable can be enforced. When restraint is placed on an ex-employee, the court will consider the geographical limits, what the employee knows and the extent of the duration. Restraint imposed on a vendor of business must be.reasonable and is binding if there is a genuine seal of goodwill. Under common law, contracts to fix prices are legal. Solus agreements are legal if reasonable. Contracts which contravene public policy are void.

Agreements Opposed to Public Policy

Any agreement which is contrary to the policy of the law, or public policy, because of its mischievous nature or tendency, is illegal and void, though the acts

contemplated may not be expressly prohibited either by the common law or by statute.

The test of public policy must be applied in each case as it arises, and therefore agreements which have been or may be declared contrary to public policy cannot be exactly classified. The most general are:

(a) Agreements tending to injure the public service.

(b) Agreements involving or tending to the corruption of private citizens with reference to public matters.

(c) Agreements *tending to pervert or obstruct public justice.*

(d) Agreements tending to encourage litigation.

(e) Agreements of immoral tendency.

(f) Gambling transactions.

(g) Agreements tending to induce fraud and breach of trust,

(h) Agreements affecting the freedom or security of marriage, or otherwise in derogation of the marriage relation.

(i) Agreements in derogation of the parental relation.

(j) Agreements in unreasonable restraint of trade, including combinations to prevent competition, control prices, and create monopolies.

(k) Agreements exempting a person or corporation from liability for negligence.

There are many things which the law does not prohibit in the sense of attaching penalties, but which are so mischievous in their nature and tendency *that, on grounds of public policy, they cannot be admitted as the subject of a* valid contract.

The phrase public policy "has no fixed legal significance. It varies, and must vary, with the changing conditions and laws of civilizations and peoples." The term is not to be understood in the sense of "political expedience," as meaning what, in the opinion of the courts, is for the advantage of the community. Some courts have been even more conservative in their statement of the rule, and have declared that "the public policy of a state or nation must be determined by its constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public." A tendency to *prejudice the public interest must clearly appear before a court is warranted in* pronouncing a contract void on that account. The mere fact that a contract is improvident or foolish as to one of the parties does not render it void as against public policy, but a contract is void if its effect would be to prevent a party from thereafter acquiring any property whatever.

The validity of a contract must be determined, not by the good faith of the parties, or by what has been done under it, but by its general tendency at the time it is made. "If this general tendency is opposed to the interests of the public,

such contracts are invalid, however good the intent of the parties to them, and even though no harm to any one resulted, or would result, in the particular case."

Among the agreements which are illegal as tending to injure the public service may be mentioned:—

(*a*) Agreements for the sale of, or other traffic in, a public office, or its emoluments.

(*b*) Agreements by public officers for greater pay than is fixed by law for performance of official duty; or for less pay where the services are yet to be performed.

(*c*) Assignment of his future salary, and, under some circumstances, of his pension, by a public officer.

(*d*) Agreements to influence legislation by personal solicitation of the legislators, or other objectionable means.

(*e*) Agreements to procure administrative action by public officers by corrupt means. Some, but not all, courts hold that any agreement by a third person, for a compensation, to procure such action, is illegal, because of its tendency to introduce corrupt means.

(*f*) Agreements by public or quasi public corporations which interfere with their performance of the duties which they owe to the public.

As the public has an interest in the proper performance of their duty by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency, or otherwise interfere with the due execution of the duties of the office, such agreements are contrary to public policy and void.

1.7 CONSIDERATION

Consideration is concept of legal value in contract law. It is a promised action, or omission of action, that the promisee did not already have a pre-existing duty to abide by. It can take the form of money, physical objects, services, or a *forbearance of action*. Both parties to a contract must pass consideration to the another party for there to be a valid contract.

However, even if a court decides there is no contract, there might be a possible recovery under quantum meruit (sometimes referred to as a Quasi-contract) or promissory estoppel.

Basic Examples of Consideration

If A signs a contract to buy a car from B for Rs. 5,00,000 A's consideration is the Rs. 5,00,000 and B's consideration is the car.

Additionally, if A signs a contract with B such that A will paint B's house for Rs. 5000 A's consideration is the service of painting— B's house, and B's consideration is Rs. 5000 paid to A.

NOTES

Further, if A signs a contract with B such that A will not repaint his own house in any other color than white, and B will pay A Rs. 5000 per year to keep this deal up, there is also consideration. Remember, A did not promise to affirmatively do anything, but because A promised not to do something that he was allowed to do, A did pass consideration. A's consideration to B is the forbearance in painting his own house in a color other than white, and B's consideration to A is Rs. 5000 per year.

Conversely, if A signs a contract to buy a car from B for Rs. 0, B's consideration is still the car, but A is giving no consideration, and so there is no valid contract.

There are a number of common sub-issues as to whether consideration exists in a contract.

VALUE OF CONSIDERATION

Generally, courts do not inquire whether the deal between two parties was monetarily fair — merely that each party passed some legal obligation or duty to the other party. The values between consideration passed by each party to a contract need not be comparable. For instance, if A offers B Rs. 2,00,00 to buy B's mansion, luxury sports car, and private jet, there is still consideration on both sides. A's consideration is Rs. 2,00,000 and B's consideration is the mansion, car, and jet. Courts generally leave parties to their own contracts, and do not intervene when parties knowingly make bad deals.

EXISTING LEGAL DUTIES

As stated above, a party which already has a legal duty to provide money, an object, a service, or a forbearance, does not provide consideration when promising merely to uphold that duty.

The prime example of this sub-issue is where an uncle gives his 17 year old nephew (a citizen of the India) the following offer: "if you do not smoke cigarettes or marijuana until your 18th birthday, then I will pay you Rs. 500" (it is a criminal offense in the India for people under the age of 18 to smoke cigarettes). On the nephew's 18th birthday, he tells the uncle to pay up, and the uncle says no. In the subsequent lawsuit, the uncle will win, because the nephew, by Indian law, already had a duty to refrain from smoking cigarettes.

PAST CONSIDERATION

Generally, past consideration has no legal value.

Let's say that A is driving in his car on a sunny Sunday afternoon, and he sees smoke coming from a vehicle on the side of the road ahead. A pulls over, sees B injured in the vehicle, and pulls B out of the car to safety. B makes a full recovery, and the next day, says to A, "because you saved me, I will pay you Rs. 50,000 per year until you die." 5 years later, B dies of cancer and even though B paid A

Rs.50,000 each of those years, the executor of B's estate refuses to pay A any more money. In the subsequent lawsuit, A will lose, because no contract existed. At the time that B took up this Rs. 50,000 per year obligation, A did not offer any consideration. Applying the "value of consideration" rule, A might actually win if A had merely replied, "I will only accept, if you require that I do not walk backwards on Tuesdays between 4:00pm and 4:10pm EST while holding a red pen". Even though A's consideration has little monetary value to the pretty much anyone, it does have legal value, as it is a promise of forbearance.

Option Contracts and Conditional Consideration

Generally, conditional consideration is valid consideration.

Consider the following situation. A is a movie script writer. B runs a movie production company. A says to B, "buy my script." Instead, B says "How about this — I will pay you Rs. 50,000 so that you do not let anyone else produce your movie until one year from now. If I do produce your movie in that year, then I will give you another Rs. 5,00,000 and no one else can produce it. If I do not produce your movie in that year, then you're free to go." If the two subsequently get into a dispute, the issue of whether a contract exists is answered. B had an option contract — he could decide to produce the script, or not. B's consideration passed was the $5,000 down, and the possibility of Rs. 5,00,000. A's consideration passed was the exclusive rights to the movie script for at least one year.

1.8 PERFORMANCE AND DISCHARGE OF CONTRACTS

Discharge of a valid contract involves the process under which the primary (performance) obligations come to an end. Discharge by breach will generally give rise to secondary obligations to pay damages. Discharge by performance will not give rise to secondary obligations, as the contract will have been successfully completed. Discharge by frustration does not give rise to secondary obligations but rights to restitution under statute.

Discharge of a valid contract should be distinguished from termination of an invalid contract, as with Mistake & Restraint of Trade where the agreement is deemed to be void. In such instances no obligations can be said to have existed whereas in the case of a valid contract the primary obligations cease but the contract may remain in existence and give rise to the secondary obligations to pay damages.

Frustration (link to mistake) - rights to restitution. In other words, where a contract is deemed to be frustrated, both parties are discharged from the contract. If frustrated, but one / both parties have incurred expenditure, or there has been money transferred, does the beneficiary party now have to repay it? Restitution is not equal to compensation. Rather, one party unjustly unrich - put it right - equitable, etc.

NOTES

Performance

Most contractual obligations are "strict" in that they require absolute performance but some merely require the existence of "reasonable care". In commercial contracts "time clauses" are normally regarded as crucial to the performance obligation and as such are classified as conditions, breach of which entitle the non-breaching party to treat his obligations as repudiated, as in various cases.

Where there has been only partial or defective performance, the non-breaching party may be prevented form repudiating the contract under the doctrine of " substantial performance". This will only operate where the breach is trivial in the context of the overall performance obligation. The non-breaching party instead may claim damages, a set-off against the contract price.

Breach

The effect of a breach of contract (at least where the breach consists of nonperformance or defective performance by the agreed time of performance) depends upon the classification of the term which has been breached as either a condition, warranty or innominate. The right to repudiate and treat the primary obligations as discharged arise in the case of the conditions but not warranties, and may arise the case of innominate terms depending upon the seriousness of the breach.

In certain circumstances one party may indicate an intention not to perform *his obligations in advance of the time for performance.* This has become known as "anticipatory breach" although it is more accurately described as "breach by anticipatory repudiation". In this situation, the non-breaching party may elect either *(a)* to affirm the contract, await the performance and then sue for breach, *or (b) treat the contract as immediately repudiated and himself as being discharged* from his obligations.

Frustration

In a limited number of circumstances, "frustrating" events may be regarded by the courts as affecting the contract in such a fundamental manner as to render further performance of the contract " impossible". Subject matter did exist at the time of the contract, but subsequently, through no fault of either party, now it doesn't.

1.9 INDEMNITY AND GUARANTEE

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

Illustration - A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

CONTRACT OF GUARANTEE

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written. [section 126]. [Person giving guarantee is also called as 'guarantor'. However, Contract Act uses the word 'surety' which is same as 'guarantor']. Three parties are involved in contract of guarantee. Contract between any two of them is not a 'contract of guarantee'. It may be contract of indemnity. Primary liability is of the principal debtor. Liability of surety is secondary and arises when Principal Debtor fails to fulfill his commitments. However, this is so when surety gives guarantee at the request of principal debtor. If the surety gives guarantee on his own, then it will be contract of indemnity. In such case, surety has all primary liabilities.

Consideration for Guarantee

Anything done, or any promise made, for the benefit of the principal debtor, may be sufficient consideration to the surety for giving the guarantee. Illustrations— *(a)* B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise. *(b)* A selms and delivers goods to B. C afterwards requests A to gorbear to sue B for the debt for a year, and promises that if he does so,'C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise. *(c)* A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void. [section 127].

1.10 BAILMENT AND AGENCY

Bailment is another type of special contract. Since it is a 'contract', naturally all basic requirements of contract are applicable. Bailment means act of delivering goods for a specified purpose on trust. The goods are to be returned after the purpose is over. In bailment, possession of goods is transferred, but property i.e. ownership is not transferred. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

NOTES

Explanation: If a person already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment. [Thus, initial possession of goods may be for other purpose, and subsequently, it may be converted into a contract of bailment, e.g. seller of goods will become bailee if goods continue in his possession after sale is complete].

Bailment can be only of 'goods'. As per section 2(7) of Sale of Goods Act, 'goods' means every kind of movable property other than money and actionable claim. Thus, keeping money in bank account is not 'bailment'. Asking a person to look after your house or farm during your absence is not 'bailment', as house or farm is not a movable property.

Bailment of pledges - Pledge is special kind of bailment, where delivery of goods is for purpose of security for payment of a debt or performance of a promise. Pledge is bailment for security. Common example is keeping gold with bank/ money lender to obtain loan. Since pledge is bailment, all provisions applicable to bailment apply to pledge also. In addition, some specific provisions apply to pledge. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

AGENCY

Agency is a special type of contract. The concept of agency was developed as one man cannot possibly do every transaction himself. Hence, he should have opportunity or facility to transact business through others like an agent. The principles of contract of agency are – *(a)* Excepting matters of a personal nature, what a person can do himself, he can also do it through agent (e.g. a person cannot marry through an agent, as it is a matter of personal nature) *(b)* A person acting through an agent is acting himself, i.e. act of agent is act of Principal. Since agency is a contract, all usual requirements of a valid contract are applicable to agency contract also, except to the extent excluded in the Act. One important distinction is that as per section 185, no consideration is necessary to create an agency.

AGENT AND PRINCIPAL DEFINED - An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

WHO MAY EMPLOY AGENT - 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. Thus, any person competent to contract can appoint an agent.

WHO MAY BE AN AGENT - As between the principal and third persons any person may become an agent, but no person who is not of the age of majority

and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. [section 184]. The significance is that a Principal can appoint a minor or person of unsound mind as agent. In such case, the Principal will be responsible to third parties. However, the agent, who is a minor or of unsound mind, cannot be responsible to Principal. Thus, Principal will be liable to third parties for acts done by Agent, but agent will not be responsible to Principal for his (i.e. Agent's) acts.

CONSIDERATION NOT NECESSARY - No consideration is necessary to create an agency. [section 185]. Thus, payment of agency commission is not essential to hold appointment of Agent as valid.

Authority of agent – An agent can act on behalf of Principal and can bind the Principal.

AGENT'S DUTY TO PRINCIPAL - An agent has following duties towards principal.

- Conducting principal's business as per his directions.
- Carry out work with normal skill and diligence.
- Render proper accounts.
- Agent's duty to communicate with principal.
- Not to deal on his own account, in business of agency.
- Agent's duty to pay sums received for principal.

REMUNERATION TO AGENT - Consideration is not necessary for creation of agency. However, if there is an agreement, an agent is entitled to get remuneration as per contract.

RIGHTS OF PRINCIPAL -

- Recover damages from agent if he disregards directions of Principal.
- Obtain accounts from Agent.
- Recover moneys collected by Agent on behalf of Principal.
- Obtain details of secret profit made by agent and recover it from him.
- Forfeit remuneration of Agent if he misconducts the business.

DUTIES OF PRINCIPAL -

- Pay remuneration to agent as agreed.
- Indemnify agent for lawful acts done by him as agent.
- Indemnify Agent for all acts done by him in good faith.
- Indemnify agent if he suffers loss due to neglect or lack of skill of Principal.

TERMINATION OF AGENCY - An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the

NOTES

business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors. In following cases, an agency cannot be revoked–

- Agency coupled with interest.
- Agent has already exercised his authority.
- Agent has incurred personal liability.

SUMMARY

- A contract is an agreement reached after sufficient consideration to do, or refrain from doing, some legal action. A contract is considered valid when two or more parties with capacity make an agreement involving valid consideration to do or to refrain from doing some lawful act.
- A void contract, also known as a void agreement, is not actually a contract. A void contract cannot be enforced by law. Void contracts are different from voidable contracts, which are contracts that may be (but not necessarily will be) nullified.
- The capacity of both natural and artificial persons determines whether they may make binding amendments to their rights, duties and obligations, such as getting married or merging, entering into contracts, making gifts, or writing a valid will.
- An agreement to be an enforceable contract must contemplate the attainment of an object not expressly forbidden by law nor contrary to public policy. For example: An agreement for the sale of realty to be used expressly for the sale of alcoholic beverages is unenforceable as its object is contrary to law.
- Consideration is concept of legal value in contract law. It is a promised action, or omission of action, that the promisee did not already have a pre-existing duty to abide by. It can take the form of money, physical objects, services, or a forbearance of action. Both parties to a contract must pass consideration to the another party for there to be a valid contract.
- Discharge of a valid contract involves the process under which the primary (performance) obligations come to an end. Discharge by breach will generally give rise to secondary obligations to pay damages. Discharge by performance will not give rise to secondary obligations, as the contract will have been successfully completed.

GLOSSARY

- **Contract :** An agreement reached after sufficient consideration.
- **Offer :** The promise made by one party to another.
- **Consideration :** The concept of legal value in contract law.
- **Bailment :** A type of special contract.

NOTES

REVIEW QUESTIONS

1. What do you understand by contract?
2. Discuss the basic elements of a valid contract.
3. What is void and voidable agreement? Explain.
4. Write a short note on the contractual capacity of parties.
5. Discuss the importance of consideration in a contract with examples.
6. Distinguish between "contract of indemnity" and "contract of guarantee.

NOTES

UNIT– II

THE LAWS RELATING TO SALE OF GOODS

STRUCTURE

2.1 Objectives
2.2 Introduction
2.3 Sale and Agreement of Sale
2.4 Conditions and Warranties of Sale
2.5 Transfer of Property Doctrine
— Caveat Emptor
2.6 Auction Sale
2.7 The Laws Relating to Carriage of Goods
— Introduction
— Classification of Carriage
— Carriage by Land
— Carriage by Sea
— Carriage by Air
2.8 Partnership
2.9 Partnership Agreement/Deed
2.10 Nature, Test and Type of Partnership
2.11 Indian Partnership Act, 1932
• Summary, Glossary and Review Questions

2.1 OBJECTIVES

After going through this unit, students will be able to:

- state the law related to the sale of goods;
- understand the law related to the carriage of goods;
- discuss the laws relating to partnership.

2.2 INTRODUCTION

Sale of Goods Act is one of very old mercantile law. Sale of Goods is one of the special types of Contract. Initially, this was part of Indian Contract Act itself in chapter VII (sections 76 to 123). Later these sections in Contract Act were deleted, and separate Sale of Goods Act was passed in 1930.

The Sale of Goods Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of Sale of Goods also. Basic requirements of

contract i.e. offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc. apply to contract of Sale of Goods also.

2.3 SALE AND AGREEMENT OF SALE

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another. [section 4(1)]. A contract of sale may be absolute or conditional. [section 4(2)].

Thus, following are essentials of contract of sale -

- It is contract, i.e. all requirements of 'contract' must be fulfilled.
- It is of 'goods'.
- Transfer of property is required.
- Contract is between buyer and seller.
- Sale should be for 'price'.
- A part owner can sale his part to another part-owner.
- Contract may be absolute or conditional.

How Contract of Sale is Made ?

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. [section 5(1)]. Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. [section 5(2)]. Thus, credit sale is also a 'sale'. A verbal contract or contract by conduct of parties is valid. e.g. putting goods in basket in super market or taking food in a hotel.

2.4 CONDITIONS AND WARRANTIES OF SALE

Two parties are required for contract. "Buyer" means a person who buys or agrees to buy goods. [section 2(1)]. "Seller" means a person who sells or agrees to sell goods. [section 2(13)]. A part owner can sale his part to another part-owner. However, if joint owners distribute property among themselves as per mutual agreement, it is not 'sale' as there are no two parties.

Contract of Sale Includes Agreement to Sale

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of

NOTES

the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. [section 4(3)]. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. [section 4(4)]. The provision that contract of sale includes agreement to sale is only for the purposes of rights and liabilities under Sale of Goods Act and not to determine liability of sales tax, which arises only when actual sale takes place.

Conditions

Opening para of section 16 makes it clear that there is no implied warranty or condition as to quality of fitness of goods for any particular purpose, except those specified in Sale of Goods Act or any other law. This is the basic principle of caveat emptor' i.e. buyer be aware. However, there are certain stipulations which are essential for main purpose of the contract of sale of goods. These go the root of contract and non-fulfilment will mean loss of foundation of contract. These are termed as 'conditions'. Other stipulations, which are not essential are termed as 'warranty'. These are collateral to contract of sale of goods. Contract cannot be avoided for breach of warranty, but aggrieved party can claim damages. A breach of condition can be treated as breach of warranty, but vice versa is not permissible.

Warranties

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. [section 12(1)]. A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. [section 12(2)]. A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. [section 12(3)]. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. [section—12(4)].

Where a particular stipulation in contract is a condition or warranty depends on the interpretation of terms of contract. Mere stating 'Conditions of Contract' in agreement does not mean all stipulations mentioned are 'conditions' within meaning of section 12(2).

When condition to be treated as warranty

Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as

repudiated. [section 13(1)]. Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect. [section 13(2)]. Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise. [section 13(3)].

Time of payment is not essence of contract but time of delivery of goods is, unless specified otherwise - Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. [section 11]. As a general rule, time of payment is not essence of contract, unless there is specific different provision in contract. In other words, time of payment specified is 'warranty'. If payment is not made in time, the seller can claim damages but cannot repudiate the contract.

2.5 TRANSFER OF PROPERTY DOCTRINE

"Property" means the general property in goods, and not merely a special property. [section 2(11)]. In layman's terms 'property' means 'ownership'. 'General Property' means 'full ownership'. Thus, transfer of 'general property' is required to constitute a sale. If goods are given for hire, lease, hire purchase or pledge, 'general property' is not transferred and hence it is not a 'sale'.

Possession and Property

Note that 'property' and 'possession' are not synonymous. Transfer of possession does not mean transfer of property. e.g. - if goods are handed over to transporter or godown keeper, possession is transferred but 'property' remains with owner. Similarly, if goods remain in possession of seller after sale transaction is over, the 'possession' is with seller, but 'property' is with buyer.

Goods - "Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. [section 2(7)].

Price - "Price" means the money consideration for a sale of goods. [section 2(10)]. Consideration is required for any contract. However, in case of contract of sale of goods, the consideration should be 'price' i.e. money consideration.

Ascertainment of Price

The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing

NOTES

between the parties. [section 9(1)]. Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. [section 9(2)].

Caveat Emptor

The principle termed as 'caveat emptor' means 'buyer be aware'. Generally, buyer is expected to be careful while purchasing the goods and seller is not liable for any defects in goods sold by him. This principle in basic form is embodied in section 16 that subject to provisions of Sale of Goods Act and any other law, there is no implied condition or warranty as to quality or fitness of goods for any particular purpose. As per section 2(12), "Quality of goods" includes their state or condition.

Transfer of Property as Between Seller and Buyer

Transfer of general property is required in a sale. 'Property' means legal ownership. It is necessary to decide whether property in goods has transferred to buyer to determine rights and liabilities of buyer and seller. Generally, risk accompanies property in goods i.e. when property in goods passes, risk also passes. If property in goods has already passed on to buyer, seller cannot stop delivery of goods even if in the meanwhile buyer has become insolvent. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. [section 18].

Property passes when intended to pass

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. [section 19(1)]. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. [section 19(2)]. Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. [section 19(3)].

Specific goods in a deliverable state

Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. [section 20].

2.6 AUCTION SALE

Auction sale is special mode of sale. The sale is made in open after making public announcement. Buyers assemble and make offers on the spot. Person

offering to pay highest price gets the goods. Usually, auctioneer is appointed to conduct auction. Higher and higher bids are offered and sale is complete when auctioneer accepts a bid. In the case of a sale by auction— (1) where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale; (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid; (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction; (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer; (5) the sale may be notified to be subject to a reserved or upset price; (6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer. [section 64].

Delivery of goods to buyer

The Act makes elaborate provisions regarding delivery of goods to buyer. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. [section 31]. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods. [section 32]. Note that this is 'unless otherwise agreed', i.e. buyer and seller can agree to different provisions in respect of payment and delivery.

Acceptance of goods by buyer

Contract of Sale is completed not by mere delivery of goods but by acceptance of goods by buyer. 'Acceptance' does not mean mere receipt of goods. It means checking the goods to ascertain whether they are as per contract. Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conform-ity with the contract. [section 41(1)]. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. [section 41(2)].

Buyer's and Seller's duties

The Act casts various duties and grants certain rights on both buyer and seller.

NOTES

Rights of unpaid seller against the goods

After goods are sold and property is transferred to buyer, the only remedy with seller is to approach Court, if the buyer does not pay. Seller has no right to take forceful possession of goods from buyer, once property in goods is transferred to him. However, the Act gives some rights to seller if his dues are not paid.

SUITS FOR BREACH OF THE CONTRACT

Unpaid seller can exercise his rights to the extent explained above. In addition, seller can exercise following rights in case of breach of contract. Buyer has also rights in case of breach of contract.

Measure for compensation and damages

The Sale of Goods Act does not specify how to measure damages. However, since the Act is complimentary to Contract Act, measure of compensation and damages will be as provided in sections 73 and 74 of Contract Act.

2.7 THE LAWS RELATING TO THE CARRIAGE OF GOODS

INTRODUCTION

In the commercial life of any country, the need for carrying goods from one place to another cannot be overemphasised. Also, goods are to be moved from one country to another. For these purposes, a contract of carriage is to be entered into. The persons, organisations or associations which carry goods are known as carriers. Goods may be carried by land (including inland waterways), sea or air. Accordingly, the law relating to carrying of goods is contained in the following enactments:

1. In case of carriage of goods by land: *(i)* The Carriers Act, 1865. *(ii)* The Railways Act, 1989.
2. In case of carriage of goods by sea: *(i)* The (Indian) Bills of Landing Act, 1856. *(ii)* The Carriage of Goods by Sea Act, 1925. *(iii)* The Merchant Shipping Act, 1958. *(iv)* The Marine Insurance Act, 1963.
3. In the case of carriage of goods by air: The Carriage by Air Act, 1972.

Wherever there is no specific provision for a particular matter in these statutes, then the Indian Courts resort to English Common Law.

DEFINITION OF A CONTRACT OF CARRIAGE

A contract of carriage of goods is a contract of bailment for reward, or locatio operis faciends. However, the contract of bailment is modified by the different statutes mentioned above in the case of carriage of goods by land, sea or air.

NOTES

CLASSIFICATION OF CARRIERS

Generally speaking carriers are classified into *(i)* common carriers, *(ii)* private carriers and *(iii)* gratuitous carriers.

COMMON CARRIERS

The Carriers Act, 1865 defines a common carrier as any individual, firm or company (other than the government, who or which transports goods as a business, for money, from place to place, over land or inland waterways, for all persons (consignors) without any discrimination between them. A carrier must carry goods of the consignor for hire and not free of charge in order to be called a common carrier. Further, he must be engaged in the business of carrying goods for others for money from one place to another. A person who carries goods occasionally or free of charge is not a common carrier. Furthermore he is bound to carry goods for-all persons (consignors) without any discrimination provided:

(i) the freight chargeable by him is paid to him;

(ii) there is accommodation on his conveyance; and

(iii) there is nothing objectionable or illegal about the carrying of goods of a particular consignor.

If, in spite of the above conditions being satisfied, a carrier reserves to himself the right to accept or reject an offer, he is not a common carrier. It is worth noting that the Carriers Act, 1865 covers only common carriers of goods and not passengers.

PRIVATE CARRIERS

A private carrier is one who does not transport goods from one place to another regularly; he may engage in some casual jobs of carrying goods for certain selected persons between certain terminals. In fact, he carries his own goods and that's why he is known as a private carrier and not a common carrier. Also, he does not make a general offer to carry goods for any one from one place to another for hire. However, he may enter into a contract with someone to carry goods on the terms agreed upon between them. In such a situation, it is a contract of bailment. Therefore, such transactions are not covered by the Common Carriers Act, 1865.

GRATUITOUS CARRIER

When a person carries goods of another free of charge, he is a gratuitous carrier. Similarly a person may give lift in his transport to another person voluntarily without any compensation. Thus a gratuitous carrier may carry not only goods but persons also free of charge.

Responsibility of Common Carrier and Bailee

We know that a bailee is responsible only when the goods entrusted to him are lost or damaged due to his fault or negligence. But the responsibility of a common carrier is more onerous; he is to deliver the goods safely. Therefore, in the case of a common carrier, it is immaterial whether the loss or damage to the goods is due to his or someone else's negligence.

Distinction between a Common Carrier and a Private Carrier

The distinction between the two is as follows:

(i) A common carrier publicly undertakes to carry from place to place the goods of any person who chooses to employ him. A private carrier does not carry regularly from place to place but is an occasional carrier.

(ii) A common carrier is bound to carry the goods of any person provided certain conditions are satisfied. A private carrier is free to accept or reject the goods for carriage.

(iii) The liabilities of a common carrier are determined by the Common Carriers Act, 1865. A private carrier's liability is not determined by the Common Carriers Act, 1865. He is liable as a bailee as given in the Indian Contract Act, 1872.

Carriage of Goods by Land

As mentioned above, the following two statutes govern the carriage of goods by land: *(i)* The Carriers Act, 1865. *(ii)* The Railways Act, 1989.

The Carriers Act, 1865

This Act defines the term "common carrier" and provides for his rights, duties and liabilities. As regards matters not covered by this Act, the rules of English Common Law will apply.

Rights of a Common Carrier

His rights are:

(i) He is entitled to the settled remuneration and in case no remuneration was settled, to a reasonable remuneration.

(ii) He has a right to refuse to carry goods under certain circumstances (as enumerated under the duties of a common carrier).

(iii) He has a lien on the goods for his remuneration. He can refuse to deliver them until his charges are paid.

(iv) If the consignee refuses to take delivery of the goods, when tendered, the common carrier has a right, to deal with the goods as he thinks reasonable and prudent under the circumstances.

(v) He has a right to recover reasonable expenses incurred by him as a result of the consignee's refusal to take delivery. After giving notice to the consignee, the common carrier may even sell perishable goods.

(vi) He can recover damages from the consignor if the goods are dangerous or are loosely packed and the carrier suffers injury therefrom.

(vii) He can limit his liability subject to the provisions of the Carriers Act.

Duties of a Common Carrier

His duties are:

1. A common carrier is bound to carry goods of all persons who choose to employ him. He can, however, refuse to carry goods under the following circumstances:

(a) if there is no accommodation in the carriage;

(b) if the person employing him is not willing to pay reasonable charges for the carriage of goods;

(c) if the goods are such which he is not accustomed to cany;

(d) if the goods are to be carried over a route which is not his regular route;

(e) if the goods are-dangerous and as such subjecting him to extraordinary risk;

(f) if the consignor refuses to disclose the nature of the goods to be carried; and

(g) if the goods are not properly packed.

If a carrier refuses to carry the goods of a person for any reason other than those mentioned above, he may be held liable for damages.

2. He must carry the goods over the usual and customary route and take all reasonable precautions for their safe carriage. He must not deviate from the usual route unless rendered necessary by exceptional circumstances.

3. He must deliver the goods at the agreed time and if no time had been fixed, within a reasonable time.

4. At Common Law, he is an insurer of the goods in the sense that he warrants to carry the goods safely and securely.

Liabilities of a Common Carrier

The liability of a common carrier of goods is laid down in the Carriers Act, 1865. For this purpose, the Act has classified the goods into two categories:

(i) Scheduled goods and

(ii) Non-scheduled goods.

The scheduled goods are those which are enumerated in a Schedule to the Act. They are valuable articles like gold, silver, precious stones and pearls, bills

and hundis, currency and bank notes, glass, china silk, articles of ivory, time pieces, musical and scientific instruments, etc. All other goods are non-scheduled.

NOTES

For scheduled articles exceeding Rs. 100 in value, the carrier is liable for loss and damage only:

(i) if the value and the description of the goods are disclosed by the consignor to the carrier; or

(ii) if the loss or damage is due to a criminal act of the carrier, his agent or servant.

The carrier can charge extra for carrying scheduled articles, but he cannot limit his statutory liability by any special agreement.

As regards non-scheduled articles, a common carrier can limit his liability by special agreement with the consignor. But even in this Section case he will be liable under 8 of the Act (explained below).

In case of loss or damage, the claimant must notify the carrier within six months of the date of knowledge of the loss or damage.

Carriage of Goods by Rail

The carriage of goods by rail is regulated by the Railways Act, 1989. Some of the more important provisions contained in the Act are summarised below:

1. Maintenance of rate books, etc., for carriage of goods (Section 61). Every railway administration shall maintain, at each station and to such other places where goods are received for carriage, the rate books or other documents which shall contain the rate authorised for the carriage of goods from one station to another and make them available for the reference of any person during all reasonable hours without payment of any fee.
2. Provision of rate risks (Section 63). Where any goods are entrusted to a railway administration for carriage, such carriage shall, except where owner's risk rate is applicable in respect of such goods, be at railway risk rate.

Any goods, for which owner's risk rate and railway risk rate are in force, may be entrusted for carriage at either of the rates and if no rate is opted, the goods shall be deemed to have been entrusted at owner's risk rate.

3. Forwarding note (Section 64). Every person entrusting any goods to a railway administration for carriage shall execute a forwarding note in such form as may be specified by the Central Government.

The consignor shall be responsible for the correctness of the particulars furnished by him in the forwarding note. He shall indemnify the railway administration against any damage suffered by it by reason of the incorrectness or incompleteness of the particulars in the forwarding note.

4. Railway receipt (Section 65). A railway administration shall issue a railway receipt in such form as may be specified by the Central Government:

(a) in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it.

A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein.

5. Carriage of dangerous or offensive goods (Section 67). No person shall take with him on a railway or require a railway administration to carry such dangerous or offensive goods, unless *(i)* he gives a notice in writing of their dangerous or offensive nature to the railway servant authorised in this behalf; and *(ii)* he distinctly marks on the outside of the package containing such goods their dangerous or offensive nature.

6. Liability of railway administration for wrong delivery (Section 80). Where a railway administration delivers the consignment to the person who produces the railway receipt, it shall not be responsible for any wrong delivery on the ground that such person is not entitled thereto or that endorsement on the railway receipt is forged or otherwise defective.

Responsibility of a Railway Administration as a Carrier of Goods

Sections 93 to 112 of the Railways Act, 1989 contain provisions on this subject. These provisions are summarised below.

1. General responsibility of a railway administration as carrier of goods (Section 93). A railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment (goods entrusted to a railway administration for carriage), arising from any cause except the following, namely:

(i) an act of God;

(ii) an act of war;

(iii) an act of public enemies;

(iv) arrest, restraint or seizure under legal process;

(v) orders of restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf;

(vi) act of omission or negligence of the consignor or consignee endorsee or the agent or servant of the consignor or the consignee or the endorsee;

(vii) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;

(viii) latent defects;

(ix) fire, explosion or any unforeseen risks.

NOTES

Liability of a common carrier vis-a-vis the liability of a railway administration. The liability of a railway administration is the same as that of a common carrier. In other words, even where any loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid nine cases, a railway administration shall not be relieved of its responsibility unless it further proves that it has used reasonable foresight and care in the carriage of the goods [Union of India v Orissa Textile Mills, AIR (1979) Ori. 165].

A railway administration, like a common carrier, is bound to carry the goods of every person who is willing to pay the freight and comply with other requirements.

2. Delay or retention in transit (Section 95). A railway administration shall be responsible for the loss, destruction, damage or deterioration of any consignment proved by the owner to have been caused by the delay or detention in their carriage. The railway administration can, however, avoid liability if it proves that the delay or detention arose for reasons beyond its control or without negligence or misconduct on its part or on the part of any of its servants.
3. Owner's risk rate or railway risk rate (Section 97). A consignment may be carried by a railway administration either at owner's risk rate or railway risk rate. Owner's risk rate is a special reduced rate whereas railway risk rate is an ordinary tariff rate. Owner's risk rate is lower than the railway risk rate for the simple reason that the goods in this case are carried at the owner's risk. In case of owner's risk rate, the railway administration is not responsible unless it is proved that any loss, destruction, damage or deterioration or non-delivery of goods arose from negligence or misconduct on the part of the railway administration or its servants.
4. Liability for damage to goods in defective condition or defectively packed (Section 98). Goods tendered to a railway administration to be carried by railway may be *(a)* in a defective condition or *(b)* defectively packed. As a result of these, goods are liable to damage, deterioration, leakage or wastage. If the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration is not responsible for any damage, deterioration, leakage or wastage unless negligence or misconduct on the part of the railway administration or of its servants is proved.
5. Liability after termination of transit (Section 99). Whether the goods are carried at owner's risk rate or railway risk rate, the liability of the railway administration for any loss of goods within a period of seven days after the termination of transit is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. But where the goods are carried at owner's risk rate the railway administration is not liable for such loss,

destruction, damage, deterioration or non-delivery of goods except on proof of negligence or misconduct on the part of the railway administration or any of its servants.

After seven days from the date of termination of transit the railway administration is not liable in any case for any loss of such goods. Notwithstanding this provision, the railway administration is not responsible after the termination of transit for the loss, destruction, damage, deterioration or non-delivery of articles of perishable goods, animals, explosives and other dangerous goods.

6. Responsibility as carrier of luggage (Section 100). A railway administration shall not be responsible for the loss, destruction, damage, deterioration or non-delivery of any luggage unless a railway servant has booked the luggage and given a receipt therefor. Also it is to be proved that the loss, etc., was due to the negligence or misconduct on the part of the railway administration or on the part of any of its servants.

In the case of luggage which is carried by the passenger in his own charge, the railway administration shall not be responsible for the loss, etc., unless it is proved that the loss, etc., was due to the negligence or misconduct on the part of the railway administration or on the part of any of its servants.

7. Responsibility as a carrier of animals (Section 101). A railway administration shall not be responsible for any loss or destruction of, or injuries to, any animal carried by railway arising from fright or restiveness of the animal or from overloading of wagons by the consignor.

8. Exoneration from liability in certain cases (Section 102). A railway administration shall not be responsible for the loss, destruction, damage or deterioration or nondelivery of any consignment —

(i) when such loss, etc., is due to the fact that a materially false description of the consignment is given; or

(ii) where a fraud has been practised by the consignor or the endorsee, or by an agent of the consignor, consignee or the endorsee; or

(iii) where it is proved by the railway administration to have been caused by, or to have arisen from -

(a) improper loading or unloading by the consignor, or the consignee or the endorsee, or by an agent of the consignor, consignee or the endorsee;

(b) riot, civil commotion, strike, lock-out, stoppage or restraint of labour from whatever cause arising whether partial or general; or

(iv) for any indirect or consequential loss or damage or for loss of particular market.

Carriage of Goods by Rail

Contract of Affreightment

NOTES

A contract to carry goods by sea is called the "contract of affreightment" and the consideration or charges paid for the carriage is called the "freight". A contract of affreightment may take either of the two forms, namely—

(i) a charter party, where an entire ship, or a principal part of a ship is placed at the disposal of merchant (known as a charterer); or

(ii) a bill of lading where the goods are to be carried in a general ship and the person consigning the goods is known as a shipper.

In both these contracts, the ship owner (the carrier) undertakes the responsibility of carrying the goods of a consignor (i.e., either the charterer or the shipper) safely and securely to the destination.

A Contract of Affreightment

Ehether in the form of a charter party or a bill of lading — is governed by the (Indian) Bills of Lading Act, 1856 and the Carriage of Goods by Sea Act, 1925.

Conditions Contained in a Contract of Carriage by Sea

The terms included in a contract of carriage by sea are of two kinds. These are: *(i)* Express terms, and *(ii)* Implied terms.

Express terms are those which the parties have specifically agreed to and embodied in the contract.

Implied terms are those which law implies in every contract of carriage by sea unless excluded specifically. There are four implied terms:

(i) Implied warranty of seaworthiness. The ship owner, when he enters into a charter — party for a voyage impliedly warrants that the ship is seaworthy. This is an assurance by the ship owner, at the time of entering into the charter party, that *(a)* the ship is fit to encounter the ordinary perils of navigation during voyage and *(b)* to carry the specific cargo.

This warranty of seaworthiness extends only to *(a)* seaworthiness at the time of sailing and *(b)* 'fitness at the time of loading the cargo. Once the ship has sailed or the goods are on board, this warranty ceases to operate. But in case the voyage is divided into stages, the ship must be seaworthy at the commencement of each voyage.

(ii) Implied warranty of commencement of voyage. Another implied warranty is that the ship shall be ready to commence the voyage and shall carry out the same with all reasonable dispatch and diligence.

(iii) Non-deviation of voyage. Also there is an implied condition that there shall be no unnecessary deviation. Deviation means the going off from

the settled or the usual or customary course of voyage between the two termini.

(iv) Shipper not to ship dangerous goods. The shipper (i.e., the consignor of goods in case the charterer undertakes to carry goods of others under bills of lading) shall not ship dangerous goods. If the shipper ships dangerous goods and if on account of it the charterer suffers any damage, he can recover it from the shipper.

Bill of Lading

A bill of lading is a document acknowledging the shipment of goods, signed by or on behalf of the carrier and containing the terms and conditions on which it has been agreed to carry the goods. It is a quasi-negotiable instrument. It is a document of title and can be transferred by endorsement and delivery. It is generally used for the carriage of goods on a general ship, i.e., a ship which is used for the carriage of the goods of several merchants who wish to have them conveyed by her and which is not employed for the carriage of a charterer's goods only. Lord Blackburn says, "a bill of lading is a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading. It is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns, sometimes to order of assigns, not naming any person which is apparently the same thing and sometimes to a consignee by name or assigns, but in all its usual forms it contains the word assigns".

A bill of lading may be issued even where the ship is chartered. In such a case charter party will be the document evidencing the contract of affreightment, while the bill of lading would only operate as a mere acknowledgement of the receipt of the goods.

CARRIAGE OF GOODS BY SEA

DEFINITIONS

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say-

(a) " Carrier " includes the owner or the chartered who enters into a contract of carriage with a shipper :

(b) "Contract of carriage " applies only or contract of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same:

NOTES

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried:

(d) "Ship" means any vessel used for the carriage of goods by sea :

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

RISKS

Subject to the provisions of rights and immunities, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

RESPONSIBILITIES AND LIABILITIES

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to -

   (a) Make the ship seaworthy :

   (b) Properly man, equip, and supply the ship :

   (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things-

   (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading for such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage :

   (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper :

   (c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which

he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 *(a)*, *(b)* and *(c)*

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him bad the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the good should have been delivered.

In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that, if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier, such document of title may be noted at the port of shipment by the carrier; master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped " bill of lading.

NOTES

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carriers to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception carriage and preservation in accordance with the provisions of paragraph 1 of responsibilities and liabilities.

   Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-

   (a) Act, neglect, or default of the master, mariner, pilot, or the servant of the carrier in the navigation or in the management of the ship :

   (b) Fire, unless caused by the actual fault or privity of the carrier :

   (c) Perils, dangers and accidents of the sea or other navigable waters :

   (d) Act of God :

   (e) Act of war:

   (f) Act of public enemies:

   (g) Arrest or restraint of princes, rulers or people, or seizure under legal process:

   (h) Quarantine restriction:

   (i) Act or omission of the shipper or owner of the goods, his agent, or representative:

   (j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general:

   (k) Riots and civil commotions :

   (l) Saving or attempting to save life or property at sea :

   (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods :

   (n) Insufficiency of packing :

(o) Insufficiency or inadequacy of marks :

(p) Latent defects not discoverable by due diligence :

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier; but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents, or his servants.

4. Any deviation in saving or attempting to save lie or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100l, per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable , explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

NOTES

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issue to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Special Conditions

Notwithstanding the provisions of the preceding Articles a carrier, master or agent of the carrier, and a shipping shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect :

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the charter or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

Limitations on the Application of the Rules

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Limitation of Liability

The provision of these Rules shall not affect the rights and obligations of the carrier under any Statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

CARRIAGE BY AIR

The International Air Transport Association is an international industry trade group of airlines headquartered in Montreal, Quebec, Canada, where the International Civil Aviation Organization is also headquartered. The main objective of the organization is to assist airline companies to achieve lawful competition and uniformity in prices. The Director General is Giovanni Bisignani.

IATA was formed in April 1945, in Havana, Cuba. It is the successor to the International Air Traffic Association, founded in The Hague in 1919, the year of the world's first international scheduled services. At its founding, IATA had 57 members from 31 nations, mostly in Europe and North America. Today it has over 240 members from more than 140 nations in every part of the globe.

For fare calculations IATA has divided the world in three regions:

1. South, Central and North America.
2. Europe, Middle East and Africa. IATA Europe includes the geographical Europe and Turkey, Israel, Morocco, Algeria and Tunisia.
3. Asia, Australia, New Zealand and the islands of the Pacific Ocean.

To this end, airlines have been granted a special exemption by each of the main regulatory authorities in the world to consult prices with each other through this body. However, the organisation has been accused of acting as a cartel, and many low cost carriers are not full IATA members. The European Union's competition authorities are currently investigating the body. In 2005, Neelie Kroes, the European Commissioner for Competition, made a proposal to lift the exception to consult prices. In July 2006, the United States Department of Transportation also proposed to withdraw antitrust immunity. IATA teamed with SITA for an electronic ticketing solution.

IATA assigns 3-letter IATA Airport Codes and 2-letter IATA airline designators, which are commonly used worldwide. ICAO also assigns airport and airline codes. For Rail&Fly systems, IATA also assigns IATA train station codes. For delay codes, IATA assigns IATA Delay Codes.

IATA is pivotal in the worldwide accreditation of travel agents with exception of the U.S., where this is done by the Airlines Reporting Corporation. Permission to sell airline tickets from the participating carriers is achieved through national member organizations.

IATA regulates the shipping of dangerous goods and publishes the IATA Dangerous Goods Regulations manual, a globally accepted field source reference for airlines' shipping of hazardous materials.

IATA maintains the Timatic database containing cross border passenger documentation requirements. It is used by airlines to determine whether a passenger can be carried, as well as by airlines and travel agents to provide this information to travellers at the time of booking.

NOTES

The IATA 'DG Center of Expertise' strives to lead industry efforts to ensure the safe handling of dangerous goods in air transport, by providing a broad array of technical knowledge, products, services and training solutions tailored to meet industry needs.

Setting the Standards Leads to Safety

Ensuring that undeclared dangerous goods do not get on board an aircraft is one of many key objectives of IATA's dangerous goods programme. By defining standards for documentation, handling and training, and by actively promoting the adoption and use of those standards by the air cargo industry, a very high degree of safety has been achieved in dangerous goods transport.

Effectiveness and Efficiency

Working closely with governments in the development of the regulations, including ICAO and other national authorities, IATA ensures that the rules and regulations governing dangerous goods transport are both effective and efficient. The goal is to make it just as easy to ship dangerous goods by air as any other product so it removes any incentive to by-pass the regulations.

Types of Dangerous Goods

(1) Explosive Dangerous Goods

- Explosives with a mass explosion hazard

  Ex: TNT, dynamite, nitroglycerine.

- Explosives with a severe projection hazard.
- Explosives with a fire, blast or projection hazard but not a mass explosion hazard.
- Minor fire or projection hazard (includes ammunition and most consumer fireworks).
- An insensitive substance with a mass explosion hazard.
- Extremely insensitive articles.

(2) Gaseous Dangerous Goods

- Gases which are compressed, liquefied or dissolved under pressure as detailed below. Some gases have subsidiary risk classes; poisonous or corrosive.
- Flammable Gas: Gases which ignite on contact with an ignition source, such as acetylene and hydrogen.
- Non-Flammable Gases: Gases which are neither flammable nor poisonous. Includes the cryogenic gases/liquids (temperatures of below —100°C) used for cryopreservation and rocket fuels, such as nitrogen and neon.

- Poisonous Gases: Gases liable to cause death or serious injury to human health if inhaled; examples are fluorine, chlorine, and hydrogen cyanide.

(3) Solid Substances

- Flammable Solids:— Solid substances that are easily ignited and readily combustible (nitrocellulose, magnesium, safety or strike-anywhere matches).
- Spontaneously Combustible:— Solid substances that ignite spontaneously (aluminium alkyls, white phosphorus).
- Dangerous when Wet:— Solid substances that emit a flammable gas when wet or react violently with water (sodium, calcium, potassium, calcium carbide).
- Oxidizing agents other than organic peroxides (calcium hypochlorite, ammonium nitrate, hydrogen peroxide, potassium permanganate).
- Toxic substances which are liable to cause death or serious injury to human health if inhaled, swallowed or by skin absorption (potassium cyanide, mercuric chloride).
- Toxic substances which are harmful to human health (N.B this symbol is no longer authorized by the United Nations) (pesticides, methylene chloride).

(4)Biohazardous Substances

The World Health Organization (WHO) divides this class into two categories: Category A: Infectious; and Category B: Samples (virus cultures, pathology specimens, used intravenous needles).

(5) Radioactive substances comprise substances or a combination of substances which emit ionizing radiation (uranium, plutonium).

(6) Corrosive substances are substances that can dissolve organic tissue or severely corrode certain metals:

- Acids: sulphuric acid, hydrochloric acid
- Alkalis: potassium hydroxide, sodium hydroxide

(7) Hazardous substances that do not fall into the other categories (asbestos, air-bag inflators, self inflating life rafts, dry ice).

Dangerous Goods Regulations (DGR)

Information is key to any safety programme, no less for dangerous goods in air transport. Through its Dangerous Goods Regulations and a comprehensive and effective training programme, IATA ensures that shippers, forwarders and carriers have the tools and resources to ship dangerous goods safely.

Through our network of IATA-accredited training schools we provide training worldwide by local partners. These warrant that the high IATA training standards are maintained and that local regulations are complied with.

NOTES

COMPLIANCE WITH THE REGULATIONS REQUIRES SPECIFIC TRAINING

The successful application of regulations concerning the transport of dangerous goods and the achievement of their objectives are greatly dependent on the appreciation by all individuals concerned of the risks involved and on a detailed understanding of the Regulations. This can only be achieved by properly planned and maintained initial and recurrent training programmes for all persons concerned in the transport of dangerous goods.

IATA Airline Dangerous Goods Training Validation Programme

Newly launched in 2006, this programme has been designed to provide airlines with the opportunity to acquire certification from IATA, attesting that their DG acceptance training is benchmarked against and meets IATA's high quality safety training standards.

Supporting the Industry

IATA Supports the air transport industry through a broad range of activities. The recent DG Awareness Seminar In Johannesburg, South Africa adressed safety relevant issues and aimed at raising the awareness in regard to the transport of dangerous goods by air. For those interested the presentations can be downloaded here.

SAFETY MATCHES OR A CIGARETTE LIGHTER

This substance does not contain unabsorbed liquid fuel, other than liquefied gas, intended for use by an individual when carried on the person. Lighter fuel and lighter refills are not permitted on one's person nor in checked or carry-on baggage.

Note: "Strike anywhere" matches are forbidden for air transport.

PENALTIES FOR BREACHES OF REGULATIONS

If the respective authority of the country, after giving an opportunity of being heard, is satisfied that any person has contravened or failed to comply with the provisions of the dangerous goods, the authority may, for reasons to be recorded in writing, cancel or suspend any licence, certificate or approval issued under prescribed rules or under the Aircraft Rules, discussed above.

Every person who contravenes or fails to comply with a provision of the Dangerous Goods Act is guilty of

(*a*) an offence punishable on summary conviction and liable to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence; or

(*b*) an indictable offence and liable to imprisonment for a term not exceeding two years.

Incidents—Cargo

"Dangerous goods incident" means an occurrence, other than a dangerous goods accident, associated with and related to the transport of dangerous goods by air, not necessarily occurring on board an aircraft, which results in injury to a person, damage to property, fire, breakage, spillage, leakage of fluid or radiation or other evidence that the integrity of the packaging has not been maintained and also includes any occurrence relating to the transport of dangerous goods which seriously jeopardizes the aircraft or its occupants.

The Indian Legal Position

(A) Carriage of Dangerous Goods

1. No operator shall engage in the carriage of dangerous goods unless it has been certified by the aeronautical authority of the State of the operator to carry the dangerous goods.
2. No operator shall carry and no person shall cause or permit to be carried in any aircraft to, from, within or over India or deliver or cause to be delivered for loading on such aircraft any dangerous goods, except in accordance with and subject to the requirements specified in the Technical Instructions:—

Provided that dangerous goods classified as explosives shall not be carried in any aircraft to, from, within or over India except in accordance with and subject to the terms and conditions of a permission in writing granted by the Central Government under rule 8 of the Aircraft Rules, 1937.

Provided further that where dangerous goods classified as radioactive material are to be carried in any aircraft to, from or within India, the operator shall ensure that the consignor or the consignee, as the case may be, has written consent of the Central Government to carry such goods under section 16 of the Atomic Energy Act, 1962 (33 of 1962).

Provided also that where there is extreme emergency such as national or international crisis or natural calamities or otherwise necessitating transportation by air of such goods and full compliance with the requirements specified in the Technical Instructions may adversely affect the public interest, the Director-General or any other officer authorised in this behalf by the Central Government may, by general or special order in writing, grant exemption from complying with-these requirements provided that he is satisfied that every effort has been made to achieve an overall level of safety in the transportation of such goods which is equivalent to the level of safety specified in the Technical Instructions.

NOTES

3. Notwithstanding anything contained in sub-rule (2), the articles and substances that are specifically identified by name or by generic description in the Technical Instructions as being forbidden for transport by air under any circumstances, shall not be carried on any aircraft.

4. The provisions of sub-rules (1) and (2) shall not apply to—

(a) the articles and substances classified as dangerous goods but otherwise required to be on board the aircraft in accordance with the pertinent airworthiness requirements and the operating regulations, or for such specialised purposes as are identified in the Technical Instructions.

(b) specific articles and substances carried by passengers or crew members to the extent specified in the Technical Instructions.

5. Where dangerous goods are carried under sub-rule (2), it shall be the duty of the shipper, the operator and every person concerned with packing, marking, labelling, acceptance, handling, loading, unloading, storage, transportation or any other process connected directly or indirectly with carriage of such dangerous goods, to take all precautions to avoid danger to the aircraft or to the persons on board or to any other person or property.

(B) Custody of Unauthorised Dangerous Goods

Where any officer authorised in this behalf by the Central Government has reason to believe that the provisions of this rule are, or are about to be, contravened; he may cause the dangerous goods in question to be placed under his custody pending detailed examination of the nature of the goods or pending a decision regarding the action, if any, to be taken in the matter.

Classification of Dangerous goods – The dangerous goods shall be classified in accordance with the provisions of the Technical Instructions.

(C) Packing

1. Dangerous goods shall be packed in accordance with the requirements specified in the Technical Instructions in addition to the provisions of this rule.
2. It shall be ensured that no harmful quantity of a dangerous substance adheres to the outside of the packagings used for the transport of the dangerous goods.
3. Packagings used for the transport of dangerous goods by air shall be of good quality and shall be constructed and securely closed so as to prevent leakage which might be caused in normal conditions of transport by changes in temperature, humidity or pressure, or by vibration.
4. The packagings shall be suitable for the contents and the packagings in direct contact with dangerous goods shall be resistant to any chemical or other action of such goods.

- Packagings shall meet the material and construction specifications contained in the Technical Instructions.
- Packagings shall be tested in accordance with the provisions of the Technical Instructions.
- Packagings for which retention of a liquid is a basic function, shall be capable of withstanding, without leaking, the pressure specified in the Technical Instructions.

5. Inner packagings used for the transport of the dangerous goods shall be packed, secured or cushioned in such a manner that no breakage or leakage shall be caused and these shall also control the movement of the dangerous goods within the outer packaging(s) during normal conditions of air transport and also the cushioning and absorbent materials shall not react dangerously with the contents of the receptacles.
6. No packaging used for the transport of the dangerous goods shall be re-used unless,

(a) it has been inspected and found free from corrosion or other damage; and

(b) all necessary precautions have been taken to prevent contamination of subsequent contents:— Provided that where it is not possible to properly clean a packaging already used for the transport of dangerous goods, then such an uncleaned empty packaging shall be transported by air following the same procedure as laid down for the transport of the dangerous goods for which such packagings has been used earlier.

(D) Labeling

Unless otherwise provided in the Technical Instructions, each package of dangerous goods shall be labeled in accordance with the requirements specified in the Technical Instructions.

(E) Marking

1. Save as otherwise provided in the Technical Instructions, each package of dangerous goods shall be marked with the proper shipping name of its contents and, when assigned, the UN number and such other markings as may be specified in those Instructions.
2. Save as otherwise provided in the Technical Instructions, each packaging manufactured to the specifications of the Technical Instructions shall be marked in accordance with the provisions of the Technical Instructions and no other packagings shall be so marked.
3. In addition to the languages required by the State of origin, English shall also be used for the markings related to dangerous goods.

(F) Shipper's Responsibilities

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1. No shipper or his agent shall offer any package or overpack of dangerous goods for transport by air unless he has ensured that such dangerous goods are not forbidden for transport by air and are properly classified, packed, marked and labeled in accordance with the requirements specified in the Technical Instructions.
2. Unless otherwise provided in these rules, no shipper or his agent shall offer dangerous goods for transport by air unless he has completed, signed and provided to the operator a dangerous goods transport document, as specified in the Technical Instructions.
3. The dangerous goods transport document shall bear a declaration signed by the shipper or his agent indicating that the dangerous goods are fully and accurately described by their proper shipping names and that they are classified, packed, marked, labeled and in proper condition for transport by air as per requirements of the Technical Instructions.
4. In addition to the languages required by the State of origin, English shall also be used in the dangerous goods transport document.

(G) Operator's Responsibilities

1. No operator shall accept dangerous goods for transport by air unless, —
   - (a) the dangerous goods are accompanied by a completed dangerous goods transport document, except where the Technical Instructions specify that such a document is not required; and
   - (b) the package, overpack or freight container containing the dangerous goods has been inspected in accordance with the acceptance procedures specified in the Technical Instructions.
2. The operator shall ensure that an acceptance check-list as required by the Technical Instructions has been developed and is being used by his acceptance staff.
3. Packages and overpacks containing dangerous goods and freight containers containing radioactive materials shall be inspected for evidence of leakage or damage before loading on an aircraft or into a unit load device and such packages, overpacks or freight containers shall be loaded and stowed on an aircraft in accordance with the requirements specified in the Technical Instructions.
4. The operator shall ensure that no leaking or damaged packages, overpacks or freight containers containing dangerous goods shall be loaded on an aircraft.
5. A unit load device shall not be loaded aboard an aircraft unless the device has been inspected and found free from any evidence of leakage from, or damage to, any dangerous goods contained therein.

6. Where any package of dangerous goods loaded on an aircraft appears to be damaged or leaking, the operator shall remove such package from the aircraft, or arrange for its removal by an appropriate authority or organisation, as the case may be, and thereafter shall ensure that the remainder of the consignment is in a proper condition for transport by air and that no other package has been contaminated.
7. Packages or overpacks containing dangerous goods and freight containers containing radioactive materials shall be inspected for signs of damage or leakage upon unloading from the aircraft or unit load device and if evidence of damage or leakage is found, the area where the dangerous goods or unit load device were stowed on the aircraft shall be inspected for damage or contamination.
8. No dangerous goods shall be carried in an aircraft cabin occupied by passengers or on the flight deck of an aircraft, except those specified in sub-rule (4) of rule 3.
9. Any hazardous contamination found on an aircraft as a result of leakage / damage to dangerous goods shall be removed without delay.
10. An aircraft which has been contaminated by radioactive materials shall immediately be taken out of service and not returned to service until the radiation level at any accessible surface and the non-fixed contamination are not more than the values specified in the Technical Instructions.
11. Packages containing dangerous goods which might react dangerously with one another shall not be stowed on an aircraft next to each other or in a position that would allow interaction between them in the event of leakage.
12. Packages of toxic and infectious substances shall be stowed on an aircraft in accordance with the requirements specified in the Technical Instructions.
13. Packages of radioactive materials shall be stowed on an aircraft so that they are separated from persons, live animals and undeveloped film, in accordance with the requirements specified in the Technical Instructions.
14. Subject to the provisions of these rules, when dangerous goods are loaded in an aircraft, the operator shall protect the dangerous goods from being damaged, and shall secure such goods in the aircraft in such a manner that will prevent any movement in flight which would change the orientation of the packages. For packages containing radioactive materials, the securing shall be adequate to ensure that the separation requirements of sub-rule (13) are met at all times.
15. Except as otherwise provided in the Technical Instructions, packages of dangerous goods bearing the "Cargo aircraft only" label shall be loaded in such a manner that a crew member or other authorised person can see,

handle and, where size and weight permit, separate such packages from other cargo in flight.

NOTES

(H) Provision of Information

1. The operator of the aircraft in which dangerous goods are to be carried shall provide information in writing to the pilot-in-command as early as practicable before departure of the aircraft as required by the Technical Instructions.
2. The operator shall provide such information in the Operations Manual so as to enable the flight crew member to carry out their responsibilities with regard to the transport of dangerous goods and shall also provide instructions as to the action to be taken in the event of emergencies arising involving dangerous goods.
3. Operators shall ensure that information is promulgated in such a manner that passengers are warned as to the types of goods which they are forbidden from transporting aboard an aircraft as provided in the Technical Instructions.
4. Operators, shippers or other organisations involved in the transport of dangerous goods by air shall provide such information to their personnel so as to enable them to carry out their responsibilities with regard to the transport of dangerous goods and shall also provide instructions as to the action to be taken in the event of emergencies arising involving dangerous goods.
5. If an in-flight emergency occurs, the pilot-in-command shall, as soon as the situation permits, inform the appropriate air traffic services unit, for the information of aerodrome authorities, of any dangerous goods on board the aircraft, as provided in the Technical Instructions.
6. In the event of an aircraft accident or a serious incident where dangerous goods carried as cargo are involved, the operator of the aircraft shall provide information, without delay, to the emergency services responding to the accident or serious incident, and, as soon as possible, to the appropriate authorities of the State of the operator and the State in which the accident or serious incident occurred, about the dangerous goods on board, as shown on the written information to the pilot-in-command.
7. In the event of an aircraft incident, the operator of an aircraft carrying dangerous goods as cargo shall, upon request, provide information, without delay, to the emergency services responding to the incident and also to the appropriate authority of the State in which the incident occurred, about the dangerous goods on board, as shown on the written information to the pilot-in-command.

(I) Dangerous Goods Accidents and Incidents

1. In the event of a dangerous goods accident or dangerous goods incident, as the case may be, the pilot-in-command of the aircraft and the operator of the aircraft or of the aerodrome, as the case may be, shall submit a report in writing to the Director- General on such accident or incident.
2. The report under sub-rule (1) shall, in addition to any other relevant information, contain the following information, namely:-

(a) the type, nationality and registration marks of aircraft;

(b) the name of the owner, operator and hirer of the aircraft;

(c) the name of the pilot-in-command of the aircraft;

(d) the nature and purpose of the flight;

(e) the date and time of the dangerous goods accident or incident;

(f) the place where the accident occurred:

(g) the last point of departure and the next point of intended landing of the aircraft;

(h) the details of the dangerous goods on board the aircraft viz. their proper shipping name, UN number, quantity etc.

(i) the known cause of the dangerous goods accident or incident;

(j) details of other cargo on-board the aircraft;

(k) the extent of known damage to the aircraft, other property and persons on board the aircraft;

(l) any other information required to be included by the Director-General.

3. On receipt of the report under sub? rule (1), the Director-General may, if considered necessary, order an investigation to determine the causes of such accident or incident and take preventive measures to avoid re-occurrence of such accident or incident.

2.8 PARTNERSHIP

A Partnership is a legal relationship formed by the agreement between two or more individuals to carry on a business as co-owners. There is no requirement to register a partnership with a state, but most partnerships use a partnership agreement to clarify the relationship. The partners are taxed from the income (or loss) of the partnership on their personal income tax return, and the partnership files an information return with the IRS.

Multiple-member limited liability companies (LLCs) file income taxes as a partnership.

DEFINITION IN CIVIL LAW

NOTES

For a country-by-country listing of types of partnerships, companies, etc., see Types of business entity.

In civil law systems, a partnership is a nominate contract between individuals who, in a spirit of cooperation, agree to carry on an enterprise; contribute to it by combining property, knowledge or activities; and share its profit. Partners may have a partnership agreement, or declaration of partnership and in some jurisdictions such agreements may be registered and available for public inspection. In many countries, a partnership is also considered to be a legal entity, although different legal systems reach different conclusions on this point.

2.9 PARTNERSHIP AGREEMENT/DEED

Partnership deed is a document which is signed by all the partners and which contains all the matters determining and governing the mutual rights, duties and liabilities of the partners in the conduct and management of the affairs of the partnership. It may also be referred to as articles of partnership" containing the name, nature of business, capital, duration of the firm, etc.

NEED AND IMPORTANCE OF PARTNERSHIP DEED

It has been observed that partners start bickering and quarrelling after (he firm has worked for some time. It is, therefore, advisable that the articles of partnership should be drawn up through the lawyer. A partnership deed on stamp paper is considered to be valid in the court against any dispute. The importance of partnership deed can be judged from the following facts.

1. It forms the basis of formation of the partnership.
2. It defines the mutual rights, duties and liabilities of the partners.
3. It helps in minimizing the areas of disputes among the partners.
4. It serves as guidepost for the conduct of firm business.

CLAUSES OR CONTENTS OF PARTNERSHIP DEED

The partnership deed usually contains the following clauses.

1. Name and location of business.
2. The nature of the business.
3. The amount of capital to be contributed by each partner.
4. Provisions or reinvestment in business.
5. The duties, powers and obligations of all the partners.
6. Length or life of business.
7. The method of distribution of profit and sharing of the losses.
8. Method of admitting a new partner.

9. Procedure for withdrawal of a partner.
10. The method of valuation of goodwill on and or retirement or death of a partner.
11. Method of revaluation of assets or liabilities on admission, retirement or death of a partner.
12. Procedure to be followed for expulsion of a partner.
13. Arrangements to be followed in case a partner becomes insolvent.
14. Salary, if any, payable to the partners for managing the firm.
15. The method of preparing accounts and arrangement for audit.
16. Procedure for the dissolution of the firm and settlement of accounts.
17. Arbitration in case of disputes among partners.
18. Operation of bank account.

The above items are not the final list of clauses. Any clause mutually agreed to by the partners can be Included in the agreement. If the deed is silent on any point, then the provisions of Partnership Act of 1932, will apply.

2.10 NATURE, TEST AND TYPE OF PARTNERSHIP

The term "partnership" has changed over the years, as business people have come to add new features to the old business form. These new partnership types are intended to help mitigate the liability issues with partnerships. The three most used partnership types are listed here, with their features, to help you decide which type you might want to use.

A general partnership is a partnership with only general partners. Each general partner takes part in the management of the business, and also takes responsibility for the liabilities of the business. If one partner is sued, all partners are held liable. General partnerships are the least desirable for this reason.

Limited Partnerships: A limited partnership includes both general partners and limited partners. A limited partner does not participate in the day-to-day management of the partnership and his/her liability is limited. In many cases, the limited partners are merely investors who do not with to participate in the partnership other than to provide an investment and to receive a share of the profits.

Types of Partnerships

Types of partnerships include:

- General Partnership
- Limited Partnership
- Limited Liability Partnership

A partnership should have a partnership agreement signed by all partners at the time the partnership is formed.

NOTES

A partnership is a type of business entity in which partners (owners) share with each other the profits or losses of the business. Partnerships are often favored over corporations for taxation purposes, as the partnership structure does not generally incur a tax on profits before it is distributed to the partners (i.e. there is no dividend tax levied). However, depending on the partnership structure and the jurisdiction in which it operates, owners of a partnership may be exposed to greater personal liability than they would as shareholders of a corporation.

LIMITED LIABILITY PARTNERSHIPS

A limited liability partnership (LLP) is different from a limited partnership or a general partnership, but is closer to a limited liability company (LLC). In the LLP, all partners have limited liability.

An LLP combines characteristics of partnerships and corporations. As in a corporation, all partners in an LLP have limited liability, from errors, omissions, negligence, incompetence, or malpractice committed by other partners or by employees. Of course, any partners involved in wrongful or negligent acts are still personally liable, but other partners are protected from liability for those acts.

In recent years, the limited liability company has supplanted the general partnership and the limited partnership, because of the limits of liability. But there are still cases in professional practices in which some partners want to be limited in scope of duties and they just want to invest, having the liability protection.

This is a general overview of these partnership types; if you are considering forming a partnership, consult with your attorney or legal adviser.

2.11 INDIAN PARTNERSHIP ACT, 1932

The Indian Partnership Act was passed in 1932 to define and amend the law relating to partnership. Indian Partnership Act is one of very old mercantile law. Partnership is one of the special types of Contract. Initially, this was part of Indian Contract Act itself (Chapter IX - sections 239 to 266), but later converted into separate Act in 1932.

The Indian Partnership Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of partnership also. Basic requirements of contract i.e. legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc. apply to partnership contract also.

Partnership Contract is a 'concurrent subject' - 'Contract, including partnership contract' is a 'concurrent subject, covered in Entry 7 of List III (Seventh Schedule to Constitution). Indian Partnership Act is a Central Act, but State Government can also pass legislation on this issue. Though Partnership Act is a

Central Act, it is administered by State Governments, i.e. work of registration of firms and related matters is looked after by each State Government. The Act is not applicable to Jammu and Kashmir.

NOTES

Unlimited Liability is Major Disadvantage

The major disadvantage of partnership is the unlimited liability of partners for the debts and liabilities of the firm. Any partner can bind the firm and the firm is liable for all liabilities incurred by any firm on behalf of the firm. If property of partnership firm is insufficient to meet liabilities, personal property of any partner can be attached to pay the debts of the firm.

Partnership Firm is not a legal entity - It may be surprising but true that a Partnership Firm is not a legal entity. It has limited identity for purpose of tax law. As per section 4 of Indian Partnership Act, 1932, 'partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. - - Under partnership law, a partnership firm is not a legal entity, but only consists of individual partners for the time being. It is not a distinct legal entity apart from the partners constituting it - Malabar Fisheries Co. v. CIT (1979) 120 ITR 49 = 2 Taxman 409 (SC).

Firm Legal Entity for Purpose of Taxation

For tax law, income-tax as well as sales tax, partnership firm is a legal entity - State of Punjab v. Jullender Vegetables Syndicate - 1966 (17) STC 326 (SC) * CIT v. A W Figgies - AIR 1953 SC 455 * CIT v. G Parthasarthy Naidu (1999) 236 ITR 350 = 104 Taxman 197 (SC). Though a partnership firm is not a juristic person, Civil Procedure Code enables the partners of a partnership firm to sue or to be sued in the name of the firm. - Ashok Transport Agency v. Awadhesh Kumar 1998(5) SCALE 730 (SC). [A partnership firm can sue only if it is registered].

Partnership, partner, firm and firm name - "Partnership" is the relation between persons who have agreed to share the profits of business carried on by all or any to them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". [section4].

"Business" includes every trade, occupation and profession. [section 2(b)]. Thus, a 'partnership' can be formed only with intention to share profits of business. People coming together for some social or philanthropic or religious purposes do not constitute 'partnership'.

Partners are Mutual Agents

The business of firm can be carried on by all or any of them for all. Any partner has authority to bind the firm. Act of any one partner is binding on all

the partners. Thus, each partner is 'agent' of all the remaining partners. Hence, partners are 'mutual agents'.

Oral or Written Agreement

As per normal provision of contract, a 'partnership' agreement can be either oral or written. Agreement in writing is necessary to get the firm registered. Similarly, written agreement is required, if the firm wants to be assessed as 'partnership firm' under Income Tax Act. A written agreement is advisable to establish existence of partnership and to prove rights and liabilities of each partner, as it is difficult to prove an oral agreement. However, written agreement is not essential under Indian Partnership Act.

Sharing of Profit Necessary

The partners must come together to share profits. Thus, if one member gets only fixed remuneration (irrespective of profits) or one who gets only interest and no profit share at all, is not a 'partner'. Similarly, sharing of receipts or collections (without any relation to profits earned) is not 'sharing of profit' and the association is not 'partnership'. For example, agreement to share rents collected or percentage of tickets sold is not 'partnership', as sharing of profits is not involved. The share need not be in proportion to funds contributed by each partner. Interestingly, though sharing of profit is essential, sharing of losses is not an essential condition for partnership . Similarly, contribution of capital is not essential to become partner of a firm.

Number of Partners

Since partnership is 'agreement' there must be minimum two partners. The Partnership Act does not put any restrictions on maximum number of partners. However, section 11 of Companies Act prohibits partnership consisting of more than 20 members, unless it is registered as a company or formed in pursuance of some other law.

Mode of determining existence of partnership - In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. [section 6].

Mutual Agency is the Real Test

The real test of 'partnership firm' is 'mutual agency', i.e. whether a partner can bind the firm by his act, i.e. whether he can act as agent of all other partners.

Partnership at will - Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will". [section 7]. Partnership 'at

will' means any partner can dissolve a firm by giving notice to other partners (or he may express his intention to retire from partnership). Partnership deed may provide about duration of partnership (say 10 years) or how partnership will be brought to end. In absence of any such term, the partnership is 'at will'. In case of 'particular partnership', the partnership comes to end when the venture for which it was formed comes to end.

Determination of rights and duties of partners by contract between the partners — Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing. Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing. [section 11(1)]. Thus, partners are free to determine the mutual rights and duties by contract. Such contract may be in writing or it may be implied by their actions.

Duties and mutual rights of partners - Subject to contract to contrary, partners have duties and mutual rights as specified in Partnership Act-

Every Partner has Right to Take Part in Business

Subject to contract between partners (to the contrary), every partner has right to take part in the conduct of the business. [section 12(a)]. Thus, every partner has equal right to take active part in business, unless there is specific contract to the contrary. Even if authority of a partner is restricted by contract, outside party is not likely to be aware of such restriction. In such case, if such partner acts within the apparent authority, the firm will be liable for his acts.

The property of the firm— Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm [section 14].

Partner to be agent of the firm — Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm. [section 18].

Implied authority of partner as agent of the firm - Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his "implied authority". [section 19(1)].

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Partners Jointly and Severally Liable 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 part-ner. [section 25]. 'An act of a firm' means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm [section 2(a)]. 'Joint and several' means each partner is liable for all acts: Thus, if amount due cannot be recovered from other partners, any one partner will be liable for payment of entire dues of the firm.

Partner by Holding out - 'Holding out' means giving impression that a person is partner though he is not. This is principle of 'estoppel'. If a person gives an impression to outsiders that he is partner of firm though he is not partner, he will he held liable as partner, if third party deals with the firm on the impression that he is a partner. Similarly, if a person retires from the firm but does not give notice of retirement, he will be liable as a partner, if some third party deals with the firm on the assumption that he is still partner.

Minors admitted to the benefits of partnership - A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership. [section 30(1)].

Rights of Minor

Minor (who is admitted to benefit of partnership) has a right to such share of the property and of the profits of the firm as may be agreed upon and he may have access to and inspect and copy any of the accounts of the firm. [section 30(2)]. [Since the word used is 'may', it seems that right of minor to inspect accounts can be restricted by agreement among partners].

Minor's Share Liable but not Minor Himself

Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such Act. [section 30(3)].

Reconstitution of a Partnership Firm— A partnership firm is not a legal entity. It has no perpetual existence as in case of a company incorporated under Companies Act. However, the Act gives the partnership limited rights of continuity of business despite change of partners. In absence of specific provision in partnership deed, death or insolvency of a partner means dissolution of the firm. However, partnership can provide that the firm will not dissolve in such case.

Change in partners may occur due to various reasons like death, retirement, admission of new member, expulsion, insolvency, transfer of interest by partner etc. After such change, the rights and liabilities of each partner are determined afresh. This is termed as reconstitution of a firm.

Dissolution of a Firm— A partnership firm is an 'organisation' and like every 'organ' it has to either grow or perish. Thus, dissolution of a firm is inevitable part in the life of partnership firm some time or the other.

Dissolution of a firm without intervention of Court can be *(a)* By agreement (section 40) *(b)* Compulsory dissolution in case of insolvency (section 41) *(c)* Dissolution on happening of certain contingency (section 42) *(d)* By notice if partnership is at will (section 43).

A firm can also be dissolved by Court u/s 44.

Dissolution of Partnership and Dissolution of Firm

The dissolution of partnership between all the partners of a firm is called the dissolution of the firm. [section 39]. As per section 4, Partnership is the relation between persons who have agreed to share profits of business carried on by all or any of them acting for all. Thus, if some partner is changed/added/ goes out, the 'relation' between them changes and hence 'partnership' is dissolved, but the 'firm' continues. Hence, the change is termed as 'reconstitution of firm'. However, complete breakage between relations of all partners is termed as 'dissolution of firm'. After such dissolution, the firm no more exists. Thus, 'Dissolution of partnership' is different from 'dissolution of firm'. 'Dissolution of partnership' is only reconstruction of firm, while 'dissolution of firm' means the firm no more exists after dissolution.

Mode of dissolution of firm - Following are various modes of dissolution of firm.

- Dissolution by agreement - [section 40].
- Compulsory dissolution in case of insolvency - [section 41].
- Dissolution on the happening on certain contingencies [section 42].
- Dissolution by notice of partnership at will [section 43(2)].
- Dissolution by the court.

Consequences of dissolution of firm - After firm is dissolved, business is wound up and proceeds are distributed among partners. The Act specifies what are the consequences of dissolution of a firm.

Sale of goodwill of firm after dissolution - Business is attracted due to reputation of a firm. It creates a 'brand image' which is valuable though not tangible. 'Goodwill' is the value of reputation of the business of the firm. Goodwill of a firm is sold after dissolution either separately or along with property of firm. As per section 14, property of partnership firm includes goodwill of the firm. Goodwill is the reputation and connections which the firm establishes over time, together with circumstances which make the connections durable. This reputation enable to earn profits more than normal profits which a similar business would have earned. Goodwill is an intangible asset of the firm.

In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm. [section 55(1)].

NOTES

Settlement of accounts after dissolution - Accounts are settled after a firm is dissolved as provided in the Act. A firm is said to be 'wound up' only after accounts are fully settled.

Registration of Firms - Registration of firm is not compulsory, though usually done as registration brings many advantages to the firm. Since 'partnership contract' is a 'Concurrent Subject' as per Constitution of India, registration of firms and related work is handled by State Government in each State. Section 71 authorises State Government to make rules for * prescribing fees for filing documents with registrar * prescribing forms of various statements and intimations are to be made to registrar and * regulating procedures in the office of Registrar.

Partner cannot Sue if Firm is Unregistered

No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or an{ person alleged to be or to'have been a partner in the firm} unless the firm is registered and the person suing!is or has been shown in the Register of Firms as a partner in the firm. [section 69(1)]. Thus, a partner cannot sue the firm or any other partner if firm is unregistered. If third party files suit against a partner, he cannot claim of set off or institute other proceeding to enforce a right arising from a contract. Suit or claim or set off upto Rs. 100 can be made as per section 69(4)(b), but it is negligible in today's standards. Criminal proceedings can be filed, but civil suit is not permissible.

Unregistered Firm cannot Sue Third Party

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. [section 69(2)]. If third party files suit against the unregistered firm, the firm cannot claim set off or institute other proceeding to enforce a right arising from a contract. Suit or claim or set off upto Rs. 100 can be made as per section 69(4)(b), but it is negligible in today's standards. Criminal proceedings can be filed, but civil suit is not permissible.

Summary

- A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

- Two parties are required for contract. "Buyer" means a person who buys or agrees to buy goods. [section 2(1)]. "Seller" means a person who sells or agrees to sell goods. [section 2(13)].
- "Property" means the general property in goods, and not merely a special property. [section 2(11)]. In layman's terms 'property' means 'ownership'. 'General Property' means 'full ownership'. Thus, transfer of 'general property' is required to constitute a sale. If goods are given for hire, lease, hire purchase or pledge, 'general property' is not transferred and hence it is not a 'sale'.
- The principle termed as 'caveat emptor' means 'buyer be aware'. Generally, buyer is expected to be careful while purchasing the goods and seller is not liable for any defects in goods sold by him.
- Auction sale is special mode of sale. The sale is made in open after making public announcement. Buyers assemble and make offers on the spot. Person offering to pay highest price gets the goods. Usually, auctioneer is appointed to conduct auction.
- A Partnership is a legal relationship formed by the agreement between two or more individuals to carry on a business as co-owners. There is no requirement to register a partnership with a state, but most partnerships use a partnership agreement to clarify the relationship.

GLOSSARY

- **Auction sale :** The special mode of sale which is made in open after making public announcement.
- **Partnership :** A legal relationship formed by the agreement between two or more individuals to carry on a business as co-owners.
- **Partnership deed :** A document which is signed by all the partners.

REVIEW QUESTIONS

1. How is contract of sale made?
2. Discuss the warranties given under the contract of sale.
3. What do you understand by auction sale?
4. Point out the main legal provisions implemented in India as far as carriage of goods by air is concerned.
5. What is partnership?
6. What do you understand by partnership deed?
7. Discuss any two types of partnership.

UNIT– III

NOTES

THE LAWS RELATING TO COMPANIES

STRUCTURE

3.1 Objectives
3.2 Introduction
3.3 Definition and Types of Companies
3.4 Promotion and Formation of a Company
3.5 Memorandum of Association of a Company
3.6 Articles of Association
3.7 Registration of the Company
3.8 Commencement of the Business
3.9 Capital of a Company
— Shares
— Debentures
• Summary, Glossary and Review Questions

3.1 OBJECTIVES

After going through this unit, students will be able to:

- state the fundamental concepts of companies;
- classify and explain companies and their nature;
- explain concept of memorandum of articles of association;
- discuss the concept of shares and debentures.

3.2 INTRODUCTION

Companies law (or the law of business associations) is the field of law concerning companies and other business organizations. It is an establishment formed to carry on commercial enterprises. This includes corporations, partnerships and other associations which usually carry on some form of economic or charitable activity. The most prominent kind of company, usually referred to as a "corporation", is a "juristic person", i.e. it has separate legal personality, and those who invest money into the business have limited liability for any losses the

company makes, governed by corporate law. The largest companies are usually publicly listed on stock exchanges around the world. Even single individuals, also known as sole traders may incorporate themselves and limit their liability in order to carry on a business. All different forms of companies depend on the particular law of the particular country in which they reside.

3.3 DEFINITION AND TYPES OF COMPANIES

The word 'Company' is an amalgamation of the Latin word 'Com' meaning "with or together" and 'Pains' meaning "bread". Originally, it referred to a group of persons who took their meals together. A company is nothing but a group of persons who have come together or who have contributed money for some common purpose and who have incorporated themselves into a distinct legal entity in the form of a company for that purpose. Under Halsbury's Laws of England, the term "company" has been defined as a collection of many individuals united into one body under special domination, having perpetual succession under an artificial form and vested by the policies of law with the capacity of acting in several respect as an individual, particularly for taking and granting of property, for contracting obligation and for suing and being sued, for enjoying privileges and immunities in common and exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers upon it, either at the time of its creation or at any subsequent period of its existence. However, the Supreme Court of India has held in the case of State Trading Corporation of India v/s CTO that a company cannot have the status of a citizen under the Constitution of India.

The law of business organizations originally derived from the common law of England, but has evolved significantly in the Twentieth century. In common law countries today, the most commonly addressed forms are:

- Corporation
- Limited company
- Unlimited company
- Limited liability partnership
- Limited partnership
- Not-for-profit corporation
- Partnership
- Sole proprietorship

1. Public company means a company which not a private company:

2. Private company means a company which by its articles of association :-

(*a*) Restricts the right of members to transfer its shares

(*b*) Limits the number of its members to fifty. In determining this number of 50, employee-members and ex-employee members are not to be considered.

NOTES

(c) Prohibits an invitation to the public to subscribe to any shares in or the debentures of the company.

If a private company contravenes any of the aforesaid three provisions, it ceases to be private company and loses all the exemptions and privileges which a private company is entitled.

Following are some of the privileges and exemptions of a private limited company:-

1. Mimimum number is members is 2 (7 in case of public companies).
2. Prohibition of allotment of the shares or debentures in certain cases unless statement in lieu of prospectus has been delivered to the Registrar of Companies does not apply.
3. Restriction contained in Section 81 related to the rights issues of share capital does not apply. A special resolution to issue shares to non-members is not required in case of a private company.
4. Restriction contained in Section 149 on commencement of business by a company does not apply. A private company does not need a separate certificate of commencement of business.
5. Provisions of Section 165 relating to statutory meeting and submission of statutory report does not apply.
6. One (if 7 or less members are present) or two members (if more than 7 members are present) present in person at a meeting of the company can demand a poll.
7. In case of a private company which not a subsidiary of a public limited company or in the case of a private company of which the entire paid up share capital is held by the one or more body corporates incorporated outside India, no person other than the member of the company concerned shall be entiled to inspect or obtain the copies of profit and loss account of that company.
8. Minimum number of directors is only two. (3 in case of a public company)

The Company Law Board on being satisfied that the infringement of the aforesaid 3 conditions was accidental or due to inadvertence or that on other grounds, it just an equitable to grant relief, may grant relief to the company from the consequences of such infringement. The infringement of the aforesaid 3 conditions does not automatically convert a private company into a public

company. It continues to remain a private company; it merely ceases to be entitled to the privileges and exemptions available to a private company.

3. Companies deemed to be public limited company:

A private company will be treated as a deemed public limited company in any of the following circumstances:-

(a) Where at least 25% of the paid up share capital of a private company is held by one or more bodies corporate, the private company shall automatically become the public company on and from the date on which the aforesaid percentage is so held.

(b) Where the annual average turnover of the private company during the period of three consecutive financial years is not less than Rs 25 crores, the private company shall be, irrespective of its paid up share capital, become a deemed public company.

(c) Where not less than 25% of the paid up capital of a public company limited is held by the private company, then the private company shall become a public company on and from the date on which the aforesaid percentage is so held.

(d) Where a private company accepts deposits after the invitation is made by advertisement or renews deposits from the public (other than from its members or directors or their relatives), such companies shall become public company on and from date such acceptance or renewal is first made.

4. Limited and unlimited companies:

Companies may be limited or unlimited companies. Company may be limited by shares or limited by guarantee.

(a) Company limited by shares In this case, the liability of members is limited to the amount of uncalled share capital. No member of company limited by the shares can be called upon to pay more than the face value of shares or so much of it as is remaining unpaid. Members have no liability in case of fully paid up shares.

(b) Company limited by the guarantee A company limited by guarantee is a registered company having the liability of its members limited by its memorandum of association to such amount as the members may respectively thereby undertake to pay if necessary on liquidation of the company. The liability of the members to pay the guaranteed amount arises only when the company has gone into liquidation and not when it is a going concern. A guarantee company may be a company with share capital or without share capital.

Unlimited Company: The liability of members of an unlimited company is unlimited. Therefore their liability is similar to that of the liability of the partners of a partnership firm.

NOTES

5. Section 25 companies:

Under the Companies Act, 1956, the name of a public limited company must end with the word 'Limited' and the name of a private limited company must end with the word 'Private Limited'. However, under Section 25, the Central Government may allow comapnies to remove the word "Limited / Private Limited" from the name if the following conditions are satisfied :-

1. The company is formed for promoting commerce, science, art, religion, charity or other socially useful objects
2. The company does not intend to pay dividend to its members but apply its profits and other income in promotion of its objects.

6. Holding and subsidiary companies:

A company shall be deemed to be subsidiary of another company if :-

1. That other company controls the composition of its board of directors ; or
2. That other company holds more than half in face value of its equity share capital
3. Where the first mentioned company is subsidiary company of any company which that other's subsidiary. e.g., Company B is subsidiary of the Company A and Company C is subsidiary of Company B, therefore Company C is subsidiary of Company A.

The control of the composition of the Board of Directors of the company means that the holding company has the power at its discretion to appoint or remove all or majority of directors of the subsidiary company without consent or concurrence of any other person.

7. Government companies:

Means any company in which not less than 51% of the paid up share capital is held by the Central Government or any State Government or partly by the Central Government and partly by the one or more State Governments and includes a company which is a subsidiary of a government company. Government Companies are also governed by the provisions of the Companies Act. However, the Central Government may direct that certain provisions of the Companies Act shall not apply or shall apply only with such exceptions, modifications and adaptions as may be specified to such government companies.

8. Foreign companies:

Means a company incorporated in a country outside India under the law of that other country and has established the place of business in India.

The proprietary limited company is a statutory business form in several countries, including Australia.

Many countries have forms of business entity unique to that country, although there are equivalents elsewhere. Examples are the Limited-liability company (LLC) and the limited liability limited partnership (LLLP) in the United States.

Other types of business organisations, such as cooperatives, credit unions and publicly owned enterprises, can be established with purposes that parallel, supersede, or even replace the profit maximization mandate of business corporations.

For a country-by-country listing of officially recognized forms of business organization, see Types of business entity.

There are various types of company that can be formed in different jurisdictions, but the most common forms of company are:

- **a company limited by guarantee.** Commonly used where companies are formed for non-commercial purposes, such as clubs or charities. The members guarantee the payment of certain (usually nominal) amounts if the company goes into insolvent liquidation, but otherwise they have no economic rights in relation to the company.
- **a company limited by guarantee with a share capital.** A hybrid entity, usually used where the company is formed for non-commercial purposes, but the activities of the company are partly funded by investors who expect a return.
- **a company limited by shares.** The most common form of company used for business ventures.
- **an unlimited company either with or without a share capital.** This is a hybrid company, a company similar to its limited company (Ltd.) counterpart but where the members or shareholders do not benefit from limited liability should the company ever go into formal liquidation.

There are, however, many specific categories of corporations and other business organizations which may be formed in various countries and jurisdictions throughout the world.

A company as an entity has several distinct features which together make it a unique organization. The following are the defining characteristics of a company:-

Separate Legal Entity :

On incorporation under law, a company becomes a separate legal entity as compared to its members. The company is different and distinct from its members

in law. It has its own name and its own seal, its assets and liabilities are separate and distinct from those of its members. It is capable of owning property, incurring debt, borrowing money, having a bank account, employing people, entering into contracts and suing and being sued separately.

Limited Liability:

The liability of the members of the company is limited to contribution to the assets of the company upto the face value of shares held by him. A member is liable to pay only the uncalled money due on shares held by him when called upon to pay and nothing more, even if liabilities of the company far exceeds its assets. On the other hand, partners of a partnership firm have unlimited liability i.e. if the assets of the firm are not adequate to pay the liabilities of the firm, the creditors can force the partners to make good the deficit from their personal assets. This cannot be done in case of a company once the members have paid all their dues towards the shares held by them in the company.

Perpetual Succession:

A company does not die or cease to exist unless it is specifically wound up or the task for which it was formed has been completed. Membership of a company may keep on changing from time to time but that does not affect life of the company. Death or insolvency of member does not affect the existence of the company.

Separate Property:

A company is a distinct legal entity. The company's property is its own. A member cannot claim to be owner of the company's property during the existence of the company.

Transferability of Shares:

Shares in a company are freely transferable, subject to certain conditions, such that no share-holder is permanently or necessarily wedded to a company. When a member transfers his shares to another person, the transferee steps into the shoes of the transferor and acquires all the rights of the transferor in respect of those shares.

Common Seal:

A company is a artificial person and does not have a physical presence. Therefore, it acts through its Board of Directors for carrying out its activities and entering into various agreements. Such contracts must be under the seal of the company. The common seal is the official signature of the company. The name of the company must be engraved on the common seal. Any document not bearing the seal of the company may not be accepted as authentic and may not have any legal force.

Capacity to sue and being sued:

A company can sue or be sued in its own name as distinct from its members.

Separate Management:

A company is administered and managed by its managerial personnel i.e. the Board of Directors. The shareholders are simply the holders of the shares in the company and need not be necessarily the managers of the company.

One Share-One Vote:

The principle of voting in a company is one share-one vote. I.e. if a person has 10 shares, he has 10 votes in the company. This is in direct contrast to the voting principle of a co-operative society where the "One Member - One Vote" principle applies i.e. irrespective of the number of shares held, one member has only one vote.

Distinction between Company and Partnership

1. A Partnership firm is sum total of persons who have come together to share the profits of the business carried on by them or any of them. It does not have a separate legal entity. A Company is association of persons who have come together for a specific purpose. The company has a separate legal entity as soon as it is incorporated under law.

2. Liability of the partners is unlimited. However, the liability of shareholders of a limited company is limited to the extent of unpaid share or to the tune of the unpaid amount guaranteed by the shareholder.

3. Property of the firm belongs to the partners and they are collectively entitled to it. In case of a company, the property belongs to the company and not to its members.

4. A partner cannot transfer his shares in the partnership firm without the consent of all other partners. In case of a company, shares may be transferred without the permission of the other members, in absence of provision to contrary in articles of association of the company.

5. In case of partnership, the number of members must not exceed 20 in case of banking business and 10 in other businesses. A Public company may have as many members as it desires subject to a minimum of 7 members. A Private company cannot have more than 50 members.

6. There must be at least 2 members in order to form a partnership firm. The minimum number of members necessary for a public limited company is seven and two for a private limited company.

NOTES

7. In case of a partnership, 100 % consensus is required for any decision. In case of a company, decision of the majority prevails.
8. On the death of any partner, the partnership is dissolved unless there is provision to the contrary. On the death of the shareholder the company' existence does not get terminated.

Illegal Association

Under the Companies Act, 1956, not more than 10 persons can come together for carrying on any banking business and not more than 20 persons can come together for carrying on any other of business, unless the association is registered under the Companies Act or any other Indian law. Any association which does not comply with the above norms is an illegal association. Therefore, a partnership of more 10 or 20 members, as the case may be, is an illegal association unless the registered under the Companies Act or any other Indian law.

However, this provision does not apply in the following cases:-

1. A Joint Hindu Family business comprising of family members only. But where two or more Joint Hindu families come together for business through partnership, the total number of members cannot exceed 10 or 20 as the case may be, but in computing the number of persons, minor members of such family will be excluded.
2. Any association of charitable, religious, scientific trust or organisation which is not formed with a profit motive
3. Foreign companies.

When the number of members exceed the prescribed maximum, members must register it under Companies Act or any other Indian law.

Consequences of Non-Registration

An illegal association is not recognised by law. An illegal association cannot enter into any contract, cannot sue any members or any outsider, cannot be sued by any members or outsiders for any of its debts. The members of the illegal association are personally for the obligations of the illegal association. A member may be liable to a fine of Rs. 1000. Any member of an illegal association cannot sue another member in respect of any matter connected with the association.

Minimum Number of Members

A public company must have at least 7 members whereas a private company may have only 2 members. If the number of members fall below the statutory minimum and the company carries on its business beyond a period of six months

after the number has so fallen, the reduction of number of members below the legal minimum is a ground for the winding up of the company.

3.4 PROMOTION AND FORMATION OF A COMPANY

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It refers to the entire process by which a company is brought into existence. It starts with the conceptualisation of the birth a a company and determination of the purpose for which it is to be formed. The persons who conceive the company and invest the initial funds are known as the promoters of the company. The promoters enter into preliminary contracts with vendors and make arrangements for the preparation, advertisement and the circulation of prospectus and placement of capital. However, a person who merely acts in his professional capacity on behalf of the promoter (e.g., lawyer, CA, etc.) for drawing up the agreement or other documents or prepares the figures on behalf of the promoter and who is paid by the promoter is not a promoter.

The promoters have certain basic duties towards the company formed:-

1. He must not make any secret profit out of the promotion of the company. Secret profit is made by entering into a transaction on his own behalf and then sell to concerned property to the company at a profit without making disclosure of the profit to the company or its members. The promoter can make profits in his dealings with the company provided he discloses these profits to the company and its members. What is not permitted is making secret profits i.e. making profits without disclosing them to the company and its members.
2. He must make full disclosure to the company of all relevant facts including to any profit made by him in transaction with the company.

In case of default on the part of the promoter in fulfilling the above duties, the company may:-

1. Rescind or cancel the contract made and if he has made profit on any related transaction, that profit also may be recovered
2. Retain the property paying no more for it then what the promoter has paid for it depriving him of the secret profit.
3. If these are not appropriate (e.g., cases where the property has altered in such a manner that it is not possible to cancel the contract or where the promoter has already received his secret profit), the company can sue him to for breach of trust. Damages upto the difference between the market value of the property and the contract price can be recovered from him.

A promoter may be rewarded by the company for efforts undertaken by him in forming the company in several ways. The more common ones are :-

NOTES

1. The company may to pay some remuneration for the services rendered.
2. The promoter may make profits on transactions entered by him with the company after making full disclosure to the company and its members.
3. The promoter may sell his property for fully paid shares in the company after making full disclosures.
4. The promoter may be given an option to buy further shares in the company.
5. The promoter may be given commission on shares sold.
6. The articles of the Company may provide for fixed sum to be paid by the company to him. However, such provision has no legal effect and the promoter cannot sue to enforce it but if the company makes such payment, it cannot recover it back.

If the promoter fails to disclose the profit made by him in course of promotion or knowingly makes a false statement in the prospectus whereby the person relying on that statement makes a loss, he will be liable to make good the loss suffered by that other person. The promoter is liable for untrue statements made in the prospectus. A person who subscribes for any shares or debenture in the company on the faith of the untrue statement contained in the prospectus can sue the promoter for the loss or damages sustained by him as the result of such untrue statement.

INCORPORATION BY REGISTRATION

The promoters must make a decision regarding the type of company i.e a pulic company or a private company or an unlimited company, etc and accordingly prepare the documents for incorporation of the company. In this connection the Memorandum and Articles of Association (MA & AA) are crucial documents to be prepared.

3.5 MEMORANDUM OF ASSOCIATION OF A COMPANY

It is the constitution or charter of the company and contains the powers of the company. No company can be registered under the Companies Act, 1956 without the memorandum of association. Under Section 2(28) of the Companies Act, 1956 the memorandum means the memorandum of association of the company as originally framed or as altered from time to time in pursuance with any of the previous companies law or the Companies Act, 1956.

The memorandum of association should be in any of the one form specified in the tables B,C,D and E of Schedule 1 to the Companies Act, 1956. Form in Table B is applicable in case of companies limited by the shares , form in Table C is applicable to the companies limited by guarantee and not having share capital, form in Table D is applicable to company limited by guarantee and having a share capital whereas form in table E is applicable to unlimited companies.

CONTENTS OF MEMORANDUM

The memorandum of association of every company must contain the following clauses:-

Name Clause

The name of the company is mentioned in the name clause. A public limited company must end with the word 'Limited' and a private limited company must end with the words 'Private Limited'. The company cannot have a name which in the opinion of the Central Government is undesirable. A name which is identical with or the nearly resembles the name of another company in existence will not be allowed. A company cannot use a name which is prohibited under the Names and Emblems (Prevntion of Misuse Act, 1950 or use a name suggestive of connection to government or State patronage.

Domicile Clause

The state in which the registered office of company is to be situated is mentioned in this clause. If it is not possible to state the exact location of the registered office, the company must state it provide the exact address either on the day on which commences to carry on its business or within 30 days from the date of incorporation of the company, whichever is earlier. Notice in form no 18 must be given to the Registrar of Comapnies within 30 days of the date of incorporation of the company. Similarly, any change in the registered office must also be intimated in form no 18 to the Registrar of Companies within 30 days. The registered office of the company is the official address of the company where the statutory books and records must be normally be kept. Every company must affix or paint its name and address of its registered office on the outside of the every office or place at which its activities are carried on in. The name must be written in one of the local languages and in English.

Objects Clause

This clause is the most important clause of the company. It specifies the activities which a company can carry on and which activities it cannot carry on. The company cannot carry on any activity which is not authorised by its MA. This clause must specify:-

(i) Main objects of the company to be pursued by the company on its incorporation

(ii) Objects incidental or ancillary to the attainment of the main objects

(iii) Other objects of the company not included in *(i)* and *(ii)* above.

In case of the companies other than trading corporations whose objects are not confined to one state, the states to whose territories the objects of the company extend must be specified.

NOTES

Doctrine of the Ultra-vire: Any transaction which is outside the scope of the powers specified in the objects clause of the MA and are not reasonable incidentally or necessary to the attainment of objects is ultra-vires the company and therefore void. No rights and liabilities on the part of the company arise out of such transactions and it is a nullity even if every member agrees to it.

Consequences of an ultravires transaction:-

1. The company cannot sue any person for enforcement of any of its rights.
2. No person can sue the company for enforcement of its rights.
3. The directors of the company may be held personally liable to outsiders for an ultra vires.

However, the doctrine of ultra-vires does not apply in the following cases :-

1. If an act is ultra-vires of powers the directors but intra-vires of company, the company is liable.
2. If an act is ultra-vires the articles of the company but it is intra-vires of the memorandum, the articles can be altered to rectify the error.
3. If an act is within the powers of the company but is irregualarly done, consent of the shareholders will validate it.
4. Where there is ultra-vires borrowing by the company or it obtains deliver of the property under an ultra-vires contract, then the third party has no claim against the company on the basis of the loan but he has right to follow his money or property if it exist as it is and obtain an injunction from the Court restraining the company from parting with it provided that he intervenes before is money spent on or the identity of the property is lost.
5. The lender of the money to a company under the ultra-vires contract has a right to make director personally liable.

Liability clause A declaration that the liability of the members is limited in case of the company limited by the shares or guarantee must be given. The MA of a company limited by guarantee must also state that each member undertakes to contribute to the assets of the company such amount not exceeding specified amounts as may be required in the event of the liquidation of the company. A declaration that the liability of the members is unlimited in case of the unlimted companies must be given. The effect of this clause is that in a company limited by shares, no member can be called upon to pay more than the uncalled amount on his shares. If his shares are already fully paid up, he has no liabilty towards the company.

The following are exceptions to the rule of limited liability of members:-

1. If a member agrees in writing to be bound by the alteration of MA / AA requiring him to take more shares or increasing his liability, he shall be liable upto the amount agreed to by him.

2. If every member agrees in writing to re-register the company as an unlimited company and the company is re-registered as such, such members will have unlimited liability.
3. If to the knowledge of a member, the number of shareholders has fallen below the legal minimum, (seven in the case of a public limited company and two in case of a private limited company) and the company has carried on business for more than 6 months, while the number is so reduced, the members for the time being constituting the company would be personally liable for the debts of the company contracted during that time.

Capital clause: The amount of share capital with which the company is to be registered divided into shares must be specified giving details of the number of shares and types of shares. A company cannot issue share capital greater than the maximum amount of share capital mentioned in this clause without altering the memorandum.

Association clause: A declaration by the persons for subscribing to the Memorandum that they desire to form into a company and agree to take the shares place against their respective name must be given by the promoters.

3.6 ARTICLES OF ASSOCIATION

The Articles of Association (AA) contain the rules and regulations of the internal management of the company. The AA is nothing but a contract between the company and its members and also between the members themselves that they shall abide by the rules and regulations of internal management of the company specified in the AA. It specifies the rights and duties of the members and directors.

The provisions of the AA must not be in conflict with the provisions of the MA. In case such a conflict arises, the MA will prevail.

Normally, every company has its own AA. However, if a company does not have its own AA, the model AA specified in Schedule I - Table A will apply. A company may adopt any of the model forms of AA, with or without modifications. The articles of association should be in any of the one form specified in the tables B,C,D and E of Schedule 1 to the Companies Act, 1956. Form in Table B is applicable in case of companies limited by the shares , form in Table C is applicable to the companies limited by guarantee and not having share capital, form in Table D is applicable to company limited by guarantee and having a share capital whereas form in table E is applicable to unlimited companies. However, a private company must have its own AA.

NOTES

The important items covered by the AA include:-

1. Powers, duties, rights and liabilities of Directors
2. Powers, duties, rights and liabilities of members
3. Rules for Meetings of the Company
4. Dividends
5. Borrowing powers of the company
6. Calls on shares
7. Transfer & transmission of shares
8. Forfeiture of shares
9. Voting powers of members, etc.

Alteration of articles of association : A company can alter any of the provisions of its AA, subject.to provisions of the Companies Act and subject to the conditions contained in the Memorandum of association of the company. A company, by special resolution at a general meeting of members, alter its articles provided that such alteration does not have the effect of converting a public limited company into a private company unless it has been approved by the Central Government.

The articles must be printed, divided into paragraphs and numbered consequently and must be signed by each subscriber to the Memorandum of Association who shall add his address, description and occupation in presence of at least one witness who must attest the signature and likewise add his address, description and occupation. The articles of association of the company when registered bind the company and the members thereof to the same extent as if it was signed by the company and by each member.

3.7 REGISTRATION OF THE COMPANY

Once the documents have been prepared, vetted, stamped and signed, they must be filed with the Registrar of Companies for incorporating the Company. The following documents must be filed in this connection :-

1. The MA & AA
2. An agreement, if any, which the company proposes to enter into with any individual for appointment as its managing director or whole-time director or manager.
3. A statutory declaration in Form 1 by an advocate, attorney or pleader entitled to appear before the High Courty or a company secretary or Chartered Accountant in whole - time practice in India who is engaged in the formation of the company or by a person who is named as a director or manager or secretary of the company that the requirements of the Companies Act have been complied with in respect of the registration of the company and matters precedent and incidental thereto.

4. In addition to the above, in case of a public company, the following documents must also be filed:-
   (i) Written consent of directors in Form 29 to agree to act as directors
   (ii) The complete address of the registered office of the company in Form 18
   (iii) Details of the directors, managing director and manager of the company in Form 32.

Certificate of Incorporation

Once all the above documents have been filed and they are found to be in order, the Registrar of Companies will issue Certificate of Incorporation of the Company. This document is the birth certificate of the company and is proof of the existence of the company. Once, this certificate is issued, the company cannot cease its existence unless it is dissolved by order of the Court.

3.8 COMMENCEMENT OF BUSINESS

A private company or a company having no share capital can commence its business immediately after it has been incorporated. However, other companies can commence their activities only after they have obtained Certificate of Commencement of Business. For this purpose, the following additional formalities have to be complied with :-

1. If a company has share capital and has issued a prospectus, then :-
   (a) Shares upto the amount of minimum subcription must be alloted
   (b) Every director has paid to the company on each of the shares which he has taken the same amount as the public have paid on such shares
   (c) No money is or may become payable to the applicants of shares or debentures for failure to apply for or to obtain permission to deal in those shares or debentures in any recognised stock exchange.
   (d) A statutory declaration in Form 19 signed by one director or the employee - company secretary or a Company secretary in whole time practice that the above provisions have been complied with must be filed
2. If a company has share capital but has not issued a prospectus, then :-
   (a) It must file a statement in lieu of prospectus with the Registrar of Companies
   (b) Every director has paid to the company on each of the shares which he has taken the same amount as the other members have paid on such shares
   (c) A statutory declaration in Form 20 signed by one director or the employee - company secretary or a Company secretary in whole time practice that the above provisions have been complied with must be filed

Once the above provisions have been complied with, the Registrar of Companies grants "Certificate of Commencement of Business" after which the company can commence its activities.

NOTES

3.9 CAPITAL OF A COMPANY

Capital refers to the amount invested in the company so that it can carry on its activities. In a company capital refers to "share capital". The capital clause in Memorandum of Association must state the amount of capital with which company is registered giving details of number of shares and the type of shares of the company. A company cannot issue share capital in excess of the limit specified in the Capital clause without altering the capital clause of the MA.

The following different terms are used to denote different aspects of share capital:-

1. Nominal, authorised or registered capital means the sum mentioned in the capital clause of Memorandum of Association. It is the maximum amount which the company raise by issuing the shares and on which the registration fee is paid. This limit is cannot be exceeded unless the Memorandum of Association is altered.
2. Issued capital means that part of the authorised capital which has been offered for subscription to members and includes shares alloted to members for consideration in kind also.
3. Subscribed capital means that part of the issued capital at nominal or face value which has been subscribed or taken up by purchaser of shares in the company and which has been alloted.
4. Called-up capital means the total amount of called up capital on the shares issued and subscribed by the shareholders on capital account. I.e if the face value of a share is Rs. 10/- but the company requires only Rs. 2/- at present, it may call only Rs. 2/- now and the balance Rs. 8/- at a later date. Rs. 2/- is the called up share capital and Rs. 8/- is the uncalled share capital.
5. Paid-up capital means the total amount of called up share capital which is actually paid to the company by the members.

In India, there is the concept of par value of shares. Par value of shares means the face value of the shares. A share under the Companies act, can either of Rs. 10 or Rs. 100 or any other value which may be the fixed by the Memorandum of Association of the company. When the shares are issued at the price which is higher than the par value say, for example Par value is Rs. 10 and it is issued at Rs. 15 then Rs. 5 is the premium amount i.e, Rs. 10 is the par value of the shares and Rs. 5 is the premium. Similarily when a share is issued at an amount lower than the par value, say Rs. 8, in that case Rs. 2 is discount on shares and Rs. 10 will be par value.

TYPES OF SHARES

Shares in the company may be similar i.e they may carry the same rights and liabilities and confer on their holders the same rights, liabilities and duties. There are two types of shares under Indian Company Law:-

1. Equity shares means that part of the share capital of the company which are not preference shares.
2. Preference Shares means shares which fulfill the following 2 conditions. Therefore, a share which is does not fulfill both these conditions is an equity share.
   (a) It carries Preferential rights in respect of Dividend at fixed amount or at fixed rate i.e. dividend payable is payable on fixed figure or percent and this dividend must paid before the holders of the equity shares can be paid dividend.
   (b) It also carries preferential right in regard to payment of capital on winding up or otherwise. It means the amount paid on preference share must be paid back to preference shareholders before anything in paid to the equity shareholders. In other words, preference share capital has priority both in repayment of dividend as well as capital.

Types of Preference Shares

1. Cumulative or Non-cumulative: A non-cumulative or simple preference shares gives right to fixed percentage dividend of profit of each year. In case no dividend thereon is declared in any year because of absence of profit, the holders of preference shares get nothing nor can they claim unpaid dividend in the subsequent year or years in respect of that year. Cumulative preference shares however give the right to the preference shareholders to demand the unpaid dividend in any year during the subsequent year or years when the profits are available for distribution . In this case dividends which are not paid in any year are accumulated and are paid out when the profits are available.

2. Redeemable and Non-redeemable: Redeemable Preference shares are preference shares which have to be repaid by the company after the term of which for which the preference shares have been issued. Irredeemable Preference shares means preference shares need not repaid by the company except on winding up of the company. However, under the Indian Companies Act, a company cannot issue irredeemable preference shares. In fact, a company limited by shares cannot issue preference shares which are redeemable after more than 10 years from the date of issue. In other words the maximum tenure of preference shares is 10 years. If a company is unable to redeem any preference shares within the specified period, it may, with consent of the Company Law Board, issue further redeemable

NOTES

preference shares equal to redeem the old preference shares including dividend thereon. A company can issue the preference shares which from the very beginning are redeemable on a fixed date or after certain period of time not exceeding 10 years provided it comprises of following conditions:-

1. It must be authorised by the articles of association to make such an issue.
2. The shares will be only redeemable if they are fully paid up.
3. The shares may be redeemed out of profits of the company which otherwise would be available for dividends or out of proceeds of new issue of shares made for the purpose of redeem shares.
4. If there is premium payable on redemption it must have provided out of profits or out of shares premium account before the shares are redeemed.
5. When shares are redeemed out of profits a sum equal to nominal amount of shares redeemed is to be transferred out of profits to the capital redemption reserve account. This amount should then be utilised for the purpose of redemption of redeemable preference shares. This reserve can be used to issue of fully paid bonus shares to the members of the company.

3. Participating Preference Share or non-participating preference shares: Participating Preference shares are entitled to a preferential dividend at a fixed rate with the right to participate further in the profits either along with or after payment of certain rate of dividend on equity shares. A non-participating share is one which does not such right to participate in the profits of the company after the dividend and capital have been paid to the preference shareholders.

Alternation of Capital

A company limited by shares can alter the capital clause of its Memorandum in any of the following ways provided that such alteration is authorised by the articles of association of the company:-

1. Increase in share capital by such amount as it thinks expedient by issuing new shares.
2. Consolidate and divide all or any of its share capital into shares of larger amount than its existing shares. eg, if the company has 100 shares of Rs.10 each (aggregating to Rs. 1000/-) it may consolidate those shares into 10 shares of Rs. 100 each.
3. Convert all or any of its fully paid shares into stock and re-convert stock into fully paid shares of any denomination.
4. Subdivide shares or any of shares into smaller amounts fixed by the Memorandum so that in subdivision the proportion between the amount paid and the amount if any unpaid on each reduced shares shall be same as it was in case of from which the reduced share is derived.

5. Cancel shares which have been not been taken or agreed to be taken by any person and diminish the amount of share capital by the amount of the shares so cancelled.

The alteration of the capital of the company in any of the manner specified above can be done by passing a resolution at the general meeting of the company and does not require any confirmation by the court.

Reduction of the share capital can be effected only in the manners specified in Section 100—104 of the Act or by way of buy back under Section 77A and 77B of the Act. Notice of alteration to share capital is required to be filed with the registrar of the company in Form no 5 within 30 days of the alteration of the capital clause of the MA. The Registrar shall record the notice and make necessary alteration in Memorandum and Articles of Association of the company. Any default in giving notice to the registrar renders company and its officers in default liable to punishment with fine which may extend to the Rs. 50 for each day of default.

Conversion of Shares into Stocks

Conversion of fully paid shares into stock may likewise be affected by the ordinary resolution of the company in the general meeting. Notice of the conversion must be given to the Registrar within 30 days of the conversion, the stock may be converted into fully paid shares following the same procedure and notice given to the Registrar in Form no 5. In this connection, the following provisions are important:-

1. Only fully paid shares can be converted into stocks
2. Direct issue of stock to members is not lawful and cannot be done.
3. The difference between shares and stock is that shares are transferable only in complete units so that transfer of half or any portion of share is not possible whereas stock is expressed in terms of any amount money and is transferable in any money fractions.
4. Articles may be give the Board of Directors authority to fix minimum amount of stock transferable.
5. Since stock is not divided into different units it is not required to be numbered. Shares on the other hand must be numbered.

Reduction of Share Capital with Sanction of The Court

A company limited by the shares or a company limited by guarantee and having share capital can if authorised by its articles, by special resolution and subject to confirmation by the court on petition reduce its share capital. It may effect reduction of its share capital in any of following circumstances:-

NOTES

1. Where the company is overcapitalised:-

(a) It may extinguish or reduce the liability of member in respect of uncalled or unpaid capital. For example, where shares are of Rs. 100 each with Rs60 paid up, the company may reduce them to Rs. 60 fully paid and thus release the shareholder from the liability on uncalled capital of Rs. 40/-.

(b) Pay off or return part of the unpaid capital not wanted for the purpose of the company. For example, where the shares are fully paid of Rs. 100 they may be reduced Rs. 40 each and Rs. 60 may be paid back to the shareholders.

(c) Pay off part of the paid up share capital on the footing that it may be called up again. If shares are of Rs. 100 each the company may pay off Rs. 25 per share on condition that when desired the company may call it again without extinguishing the liability of shareholders to pay the uncalled share capital.

(d) Reduce by a combination of the aforesaid methods.

2. Where has suffered loss of capital, in such situation the company can write off or cancel the share capital which has been lost or is unrepresented by available assets.

Where the company has passed the resolution for reducing the share capital, it must, by petition, apply to the court in the prescribed form to the court for an order confirming the reduction. Where the proposed reduction of share capital involves the either diminution of liabilities in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital or in any other case if the court so directs the following provisions shall have effect:-

1. Every creditor of the company who on the date fixed by the court is entitled to debt from or any claim against the company shall be entitled to object to the reduction.
2. The Court shall settle a list of creditors so entitled to object and for that purpose shall ascertain as far as possible without requiring an application from any of the creditors, the names of creditors and the nature and amount of debt or claims and publish notices fixing the day or days within which creditors not entered in the list are to be entered if they so desire.
3. Where a creditor entered on the list whose debt or claim is not discharged or has not been determined does not consent to the reduction, the court may, if it thinks fit, dispense with the consent of the creditors if the company secures payment of this debt or claim by appropriating the following amounts as the court may direct:-

(a) The company admits the full amount claim or debt or though not admitting it is willing to provide for it, then the full amount of debt or claim.

(*b*) If the company does not admit and is not willing to provide for the full amount of debt or claim or if the amount is contingent or not ascertained, then amount fixed by the court after due enquiry.

4. Where the proposed reduction of share capital involves either diminution of any liability in respect of the unpaid share capital or payment of any shareholder of any paid share capital, the Court may, having regard to any special circumstances of the case as it thinks proper so to do, direct that the above provisions shall not apply to any class or classes of creditors.
5. If the court is satisfied with respect to every creditor of the company entitled to object to reduction that either his consent to the reduction has been obtained or his that debt or claim has been discharged or has been determined or has been secured, make an order confirming the reduction on such terms and conditions as it thinks fit.
6. Where the court makes such an order, it may, if for any special reasons thinks fit and proper to do so, make an order directing that the company shall shall during such period commencing on and any time after the date of the order as is specified in the order add to its name as the last words the words "& Reduced" and make an order requiring the company to publish the same along with the reasons for the reduction or such other information in regard thereto as the court may think expedient with view to giving proper information to the public and if the court thinks fit the causes which led to reduction.
7. Where the company is ordered to add to its name the words "& Reduced" those words shall until the expiry of period specified in the order shall be deemed to be part of the name of the company.
8. The registrar, on the production to him, of an order of the court contirming the reduction of the share capital of the company and on delivering to him the certified copy of the order and of minutes approved by the court showing with respect to the share capital of the company as altered by the order register the reduction of share capital. On registration of order and minutes, the reduction of share capital shall take effect.
9. Notice of the registration shall be published in such manner as the court may direct.

Reduction of Capital Without the Sanction of The Court

Reduction of capital can take place without the sanction of the court in the following cases

1. Buy back of shares in accordance to the provisions of Section 77A and 77B

NOTES

2. Forfeiture of shares - A company may if authorised by its articles forfeit shares for non-payment of calls by the shareholders. Such proceedings amount to reduction of capital but the act does not require court sanction for this purpose.
3. Valid surrender of the shares - A company may accept the surrender of shares
4. Cancellation of capital - A company may cancel the shares which has not been taken up or agreed to be taken by the person and diminish the amount of its share capital.
5. Purchase of shares of member by the company under Section 402B. The Company Law Board may, on application made under Section 397 or Section 398, order the purchase of shares or interest of any member of the company by the company. These provisions come in force when a prescribed number of members make a complaint to the CLB for mis-management or oppression of the minority shareholders in the company.
6. Redemption of redeemable preference shares. Where redeemable preference shares are redeemed, it actually amounts to reduction of the capital. However, this does not require the sanction of the court.

Buy-back of shares

Buy-back of its own shares by a company is nothing but reduction of share capital. After the recent amendments in the Companies Act, 1956 buy back of its own shares by a company is allowed without sanction of the Court. It is nothing but a process which enables a company to go back to the holders of its shares and offer to purchase from them the shares that they hold.

There are three main reasons why a company would opt for buy back:-

1. To improve shareholder value, since with fewer shares earning per share of the remaining shares will increase.
2. As a defense mechanism against hostile take-overs since there are fewer shares available for the hostile acquirer to acquire.
3. Public Signaling of the Management's Policy.

A company may purchase its own shares or other specified securities out of:-

(i) its free reserves; or

(ii) the securities premium account; or

(iii) the proceeds of any shares or other specified securities:

No buy-back of any kind of shares or other specified securities can be made out of the earlier proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

No company can purchase its own shares or other specified securities unless:-

(a) the buy-back is authorized by its articles;

(b) a special resolution has been passed in general meeting of the company authorizing the buy-back;

(c) the buy-back is of less than twenty five per cent of the total paid-up capital and free reserves of the company:

(d) the buy-back of equity shares in any financial year shall not exceed twenty five per cent of its total paid-up equity capital in that financial year

(e) the ratio of the debt owned by the company is not more than twice the capital and its free reserves after such buy-back. However, the Central Government may prescribe a higher ratio of the debt than that specified under this clause for a class or classes of companies.

(f) all the shares or other specified securities for buy-back are fully paid-up;

(g) the buy-back of the shares or other specified securities listed on any recognized stock exchange is in accordance with the regulations made by the Securities and Exchange Board of India in this behalf;

(h) the buy-back in respect of shares or other specified securities other than those specified in clause (g) is in accordance with the guidelines as may be prescribed.

The notice of the meeting at which special resolution is proposed to be passed shall be accompanied by an explanatory statement stating

(a) a full and complete disclosure of all material facts

(b) the necessity for the buy-back

(c) the class of security intended to be purchased under the buy-back

(d) the amount to be invested under the buy-back and

(e) the time limit for completion of buy-back.

Every buy-back must be completed within twelve months from the date of passing the special resolution.

The buy-back may be:-

(a) from the existing security holders on a proportionate basis;

(b) from the open market or

(c) from odd lots, that is to say, where the lot of securities of a listed public company whose shares are listed on a recognized stock exchange is smaller than such marketable lot as may be specified by the stock exchange;

(d) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

NOTES

Where a company has passed a special resolution to buy-back its own shares or other securities under this section, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year of the date of declaration adopted by the Board, and signed by at least two directors of the company, one of whom shall be the managing director, if any:

Such a declaration of solvency need not be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognized stock exchange.

Where a company buys back its own securities, it shall extinguish and physically destroy the securities so bought back within seven days of the last date of completion of buy-back.

Where a company completes a buy-back of its shares or, other specified securities under this section, it shall not make further issue of the same kind of shares or other specified securities within a period of twenty four months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

Where a company buys back its securities under this section it shall maintain a register of the securities so bought, the consideration paid for the securities bought-back, the date of cancellation of securities, the date of extinguishing and physically destroying of securities and such other particulars as may be prescribed.

A company shall, after the completion of the buy-back under this section, file with the Registrar and the Securities and Exchange Board of India, a return containing such particulars relating to the buy-back within thirty days of such completion as may be prescribed. However such return need not be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognized stock exchange.

If a company makes default in complying with the provisions of this section or any rules or any regulations, the company or any officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both.

For the purposes of buy back, "specified securities" includes employees' stock option or other securities as may be notified by the Central Government from time to time;

Where a company purchases its own shares out of free reserves, then a sum equal to the nominal value of the share so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet."

No company shall directly or indirectly purchase its own shares or other specified securities-

(a) through any subsidiary company including its own subsidiary companies; or

(b) through any investment company or group of investment companies; or

(c) if a default, by the company, in repayment of deposit or interest payable thereon, redemption of debentures, or preference shares or payment of dividend to any shareholder or repayment of any term loan or interest payable thereon to any financial institution or bank, is subsisting.

No Company can, directly or indirectly, purchase its own shares or other specified securities in case such company has not filed its annual returns with the Registrar of Companies, or has not paid the dividends declared by it within 42 days from the date of declaration or has not prepared its annual accounts in the prescribed manner.

Variation of Shareholders Rights

The rights, duties and liabilities of all shareholders are clearly defined at the time of issue of the shares. Once the rights of shareholders are fixed, they cannot be altered unless the provisions of the Companies Act for this purpose are complied with. The rights attached to the shares of any class can be varied only with the consent in writing of shareholders holding not less than 75 % of the issued shares of that class or with the sanction of special resolution passed at a separate meeting of the holders of issued shares of that class. However, the following conditions also must be complied with:-

1. The variation of rights are allowed by the Memorandum or Articles of Association of the Company.
2. In absence of such provision in the Memorandum or Articles of company, such variation must not be prohibited by the terms of issue of shares of that class.

Rights of Dissenting Shareholders : The rights of the shareholders who did not consent to or vote for variation of their rights are protected by the Companies Act. If the rights of any class of the shareholders are varied, the holders of not less than 10 per cent of the shares of that class, being persons who did not consent to or vote in favour of resolution for variation of their rights can apply to the court to have the variation cancelled. Where such application is made to the court,

such variation will not be given effect unless and until it is confirmed by the court.

NOTES

VOTING RIGHTS OF THE MEMBERS

Every member of a public company limited by shares holding equity shares will have votes in proportion to his share in paid up equity capital of the company.

Generally, preference shareholders do not have any voting rights. However, they can vote on matters directly relating to the rights attached to the preference share capital. Any resolution for winding up of the company or for the reduction or repayment of the share capital shall be deemed to affect directly the rights attached to preference shares. Where the preference shares are cumulative (in respect of dividend) and the dividend thereon has remained unpaid for an aggregate period of two years before date of any meeting of the company, the preference shareholders will have right to vote on any resolution. In case of non-cumulative preference shares, preference shareholders have right to vote on every resolution if dividend due on their capital remains unpaid, either in respect of period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of aggregate period of not less than three years comprised in six years ending with the expiry of concerned financial year.

Every equity shareholder has a right to vote at a general meeting. No company can prohibit any member from exercising his voting right any ground including the ground that he has not held his shares for a minimum period before he becomes eligible to vote. However, a member's voting rights can be revoked if that member does not make payment of calls or other sums due against him or where the company has exercised the right of lien on his shares.

FURTHER ISSUE OF THE CAPITAL

Rights Issue of Shares

If, at any time after the expiry of 2 Years from the date of incorporation of the company or after one year from the date of first allotment of shares, whichever is earlier, a public company limited by shares issues further shares within the limit of authorised capital, its directors must first offer such shares to the existing holders of equity shares in proportion to the capital paid up on their shares at the time of further issue. This is commonly known as "Rights Issue of shares". The company must give notice each of the equity shareholders giving him the option to buy the shares offered to him. The shareholders must be informed of the number of shares he has the option to buy. He must be given at least 15 days to decide for exercising his option. The directors must state in the notice of the offer

the fact that the shareholders also has the right to renounce the offer in whole or part in favour of some other person. This is commonly known as "Renunciation of Rights".

If the shareholder does not inform the company of his decision to take the shares, it is deemed that he has declined the offer. In case where the rights shares are not taken by the shareholders, the directors of the company may dispose of the shares in the manner they think fit.

A company may by special resolution in the general meeting decide that the directors need not offer the shares to the existing shareholders of the equity shares and that they may dispose them off in a manner thought fit by them. This is known as "preferential offer of shares" where third parties or only certain shareholders are given shares in priority over the other shareholders.

However, if a special resolution for preferential issue of shares is not passed but merely an ordinary resolution is passed, preferential issue of shares may be done provided sanction of the Central Government is obtained. The price at which the preferential shares are to be offered are governed by the SEBI guidelines in case of listed companies. Such shares cannot be issued at a price which is less than the higher of the following:-

1. The average of the weekly highs and lows of the closing prices of the shares on the stock exchange during 6 months preceding the date of issue; or
2. The average of the weekly highs and lows of the closing prices of the shares on the stock exchange during 2 weeks preceding the date of issue

The above provisions of preferential allotment do not apply to conversion of loans or debentures in equity shares provided the terms of the loan or terms of issue of debentures give an option to convert such loans or debentures into shares of the company. Such terms and conditions must be approved before the issue of debenture or raising of the loan by the Central Government or must be in confirmity with the rules made by the Government for this purpose. The proposal must be approved by the special resolution passed by Company at the general meeting before the issue of debentures or raising of the loan. For this purpose the Central Government has framed the Public Companies (Terms of issue of debentures and raising of loans with option to convert such debentures or loan into equity shares) Rules, 1977. The following is the broad gist of these rules :-

1. The debenture or loan is raised or issued either through private subscription or through issue of the prospectus to the public.
2. The financial institutions specified for this purpose either underwrite or subscribe to the whole or part of the issue of debentures or sanction the raising of loan.

NOTES

3. Having regard to financial position of the company, the terms of issue of debentures or terms of loan (e.g. rate of interest payable on debenture and loan the capital of the company, its liabilities and its profits during immediately preceeding five years and the current market price of shares of the company), the conversion must be either at par and or at premium not exceeding 25 percent of the face value of the shares.

The provisions of rights and preferential issue do not apply in the following cases:-

1. Increase in share capital by a private company.
2. Increase in share capital by a deemed public company.

Issue of Shares at Discount

A company may issue shares at a discount i.e., at a value below its par value. The following conditions must be satisfied in connection with the issue of shares at a discount:-

1. The shares must be of a class already issued
2. Issue of the shares at discount must be authorised by resolution passed in the general meeting of company and sanctioned by the company law board.
3. The resolution must also specify the maximum rate of discount at which the shares are to be issued
4. Not less than one year has elapsed from the date on which the company was entitled to commence the business.
5. The shares to be issued at discount must issued within 2 months after the date on which issue is sanctioned by the company law board or within extended as may be allowed by the Company Law Board.
6. The discount must not exceed 10 percent unless the Company Law Board is of the opinion that the higher percentage of discount may be allowed in special circumstances of case.

Issue of Shares at Premium

A company may issue shares at a premium i.e. at a value above its par value. The following conditions must be satisfied in connection with the issue of shares at a premium:-

1. The amount of premium must be transfered to an account to be called share premium account. The provisions of this Act relating to the reduction of share capital of the company will apply as if the share account premium account were paid up share capital of the company.

2. Share premium account can be used only for the following purposes :-
   (a) In issuing fully paid bonus shares to members.
   (b) In Writing off preliminary expenses of the company.
   (c) In writing off public issue expenses such as underwriting commission, advertisement expenses, etc.
   (d) In providing for the premium payable paid on redemption of any redeemable preference shares or debentures.
   (e) In buying back its shares.

Issue of Bonus Shares

Bonus shares are issued by converting the reserves of the company into share capital. It is nothing but capitalization of the reserves of the company. Bonus shares can be issued by a company only if the Articles of Association of the company authorises a bonus issue. Where there is no provision in this regard in the articles, they must be amended by passing special resolution act at the general meeting of the company. Care must be taken that issue of bonus shares does not lead to total share capital in excess of the authorised share capital. Otherwise, the authorised capital must be increased by amending the capital clause of the Memorandum of association. If the company has availed of any loan from the financial institutions, prior permission is to obtained from the institutions for issue of bonus shares. If the company is listed on the stock exchange, the stock exchange must be informed of the decision of the board to issue bonus shares immediately after the board meeting. Where the bonus shares are to be issued to the non-resident members, prior consent of the Reserve Bank should be obtained.

Only fully paid up bonus share can be issued. Partly paid up bonus shares cannot be issued since the shareholders become liable to pay the uncalled amount on those shares.

Sweat Equity and Employee Stock Options

Sweat Equity Shares mean equity shares issued by the company to its directors and / or employees at a discount or for consideration other than cash for providing know how or making available the rights in the nature of intellectual property rights or value additions.

A company may issue sweat equity shares of a class of shares already issued if the following conditions are fulfilled:-

(i) A special resolution to the effect is passed at a general meeting of the company.

(ii) The resolution specifies the number of shares, the current market price, consideration, if any, and the class of employees to whom the shares are to be issued.

NOTES

(iii) At least 1 year has passed since the date on which the company became eligible to commence business.

(iv) In case of issue of such shares by a listed company, the Sweat Equity Shares are listed on a recognized stock exchange in accordance with SEBI regulations and where the company is not listed on any stock exchange, the the prescribed rules are complied with.

Share Certificate

A share certificate is a document issued by the company stating that the person named therein is the registered holder of specified number of shares of a certain class and they are paid up upto the amount specified in the share certificate. The share certificate must bear the common seal of the company and also must be stamped under the relevant stamp act. One or more directors must sign it .It should state the name as well as occupation of the holder and number of shares , their distinctive number and the amount paid up.

Every company making allotment of shares must deliver the share certificate of all shareholders within three months of allotment. In case of transfer of shares, the share certificate must be ready for delivery within two months after the shares are lodged with the company for transfer. If default is made in complying with the above provisions, the company and every officer of company who is in default is liable to punishment by way of fine which may extent to Rs. 500 for every day of default. The allotee must give notice to the company reminding of its obligation and even then, if default is not made good within 10 days of the notice, the allotee may apply to the Company Law Board for direction to the company to issue such share certificate in accordance with the Act. Application for this purpose must be made with the concerned regional bench of the Company Law Board by way of petition. The petition should be accompanied by the following documents:-

1. Copy of the letter of allotment issued by the company
2. Documentary evidence for the allotment of the shares or debentures for transfer
3. Copy of the notice served on the company requiring to make good the default
4. Any other correspondence
5. Affidavit verifying the petition
6. Bank draft evidencing payment of application fee
7. Memorandum of appearance with the Board copy of resolution of the board for the executive Vakalat Nama as the case may be Companies act does not prescribe any form for share certificate.

A Shareholder must keep his share certificate in safe custody or in case of shares which are traded in demat mode, with the depository. The company may renew or issue a duplicate certificate if such certificate is proved to have been lost or destroyed or having being defaced or mutilated or torn or is surrendered to the company. However, if the company, with the intention to defraud issues duplicate certificate, the company shall be punishable with the fine upto Rs. 10000 and every officer of the company who is in default with imprisonment upto 6 months or fine upto Rs. 10000 or both.

Once a share certificate is issued by the company, the name of the person in whose favour it has been issued becomes the registered shareholder. Nobody can then deny the fact of his being the registered shareholder of the company. Similarly, if the certificate states that on each of shares a certain amount has been paid up, nobody can deny the fact that such amount has been paid up.

Debentures

A debenture is a document that either creates a debt or acknowledges it. The term is used in corporate finance for a medium to long-term debt instrument used by large companies to borrow money. In some countries the term is used interchangeably with bond, loan stock or note.

Debentures are generally freely transferable by the debenture holder. Debenture holders have no voting rights and the interest paid to them is a charge against profit in the company's financial statements.

In the United States, debenture refers specifically to an unsecured corporate bond;[1] i.e., a bond that does not have a certain line of income or piece of property or equipment to guarantee repayment of principal upon the bond's maturity. Where security is provided for loan stocks or bonds in the US, they are termed 'mortgage bonds'.

However, in the United Kingdom a debenture is usually secured. In Asia, if repayment is secured by a charge over land, the loan document is called a mortgage; where repayment is secured by a charge against other assets of the company, the document is called a debenture; and where no security is involved, the document is called a note or 'unsecured deposit note'.

A US corporation receives an advantage when it issues debentures (as opposed to issuing secured corporate bonds) because it means that the company does not have to set aside certain assets or income to guarantee against its default in paying back the principal at maturity. Therefore, a corporation that issues debentures may use for other financing activities those assets or funds that would otherwise be held in a separate account.

TYPES

NOTES

There are two types of debentures:

1. **Convertible debentures,** which are convertible bonds or bonds that can be converted into equity shares of the issuing company after a predetermined period of time. "Convertibility" is a feature that corporations may add to the bonds they issue to make them more attractive to buyers. In other words, it is a special feature that a corporate bond may carry. As a result of the advantage a buyer gets from the ability to convert, convertible bonds typically have lower interest rates than non-convertible corporate bonds.
2. **Non-convertible debentures,** which are simply regular debentures, cannot be converted into equity shares of the liable company. They are debentures without the convertibility feature attached to them. As a result, they usually carry higher interest rates than their convertible counterparts.

SUMMARY

- A company is nothing but a group of persons who have come together or who have contributed money for some common person and who have incorporated themselves into a distinct legal entity in the form of a company for that purpose.
- Promotion and formation of a company refers to the entire process by which a company is brought into existence. It starts with the conceptualisation of the birth of a company and determination of the purpose for which it is to be formed.
- It is the constitution or charter of the company and contains the powers of the company. No company can be registered under the Companies Act, 1956 without the memorandum of association.
- The Articles of Association (AA) contain the rules and regulations of the internal management of the company. The AA is nothing but a contract between the company and its members and also between the members themselves that they shall abide by the rules and regulations of internal management of the company specified in the AA.
- Capital refers to the amount invested in the company so that it can carry on its activities. In a company capital refers to "share capital". The capital clause in Memorandum of Association must state the amount of capital with which company is registered giving details of number of shares and the type of shares of the company.

- A debenture is a document that either creates a debt or acknowledges it. The term is used in corporate finance for a medium to long-term debt instrument used by large companies to borrow money.

GLOSSARY

- **Company:** A group of persons who have come together or who have contributed money for some common purposes and who have incorporated themselves into a distinct legal entity for that purpose.
- **Promotion and formation:** The entire process by which a company is brought into existence.
- **Capital:** It refers to the amount invested in the company so that it can carry on its activities.
- **Debenture:** A document that either creates a debt or acknowledges it.

REVIEW QUESTIONS

1. What do you understand by "company"? Discuss the features of any two type of companies.
2. How is a company formed and promoted?
3. What do you understand by articles of association?
4. What is share? Discuss features of any two type of preference shares.
5. What is share certificate? How is it issued?
6. What is a debenture? Classify it.