

POINTS TO REMEMBER

CHAPTER 1

INTRODUCTION TO LAW AND BUSINESS LAW

■ MEANING OF LAW

In general, law is defined as a rule which regulates the human actions. It is, in fact, a rule or set of principles developed in a society and recognized by the state in the administration of justice which is backed by some sort of punishment.

■ CHARACTERISTICS OF LAW

The nature or characteristics of law can be stated as follows:

1. Law consists of a rule.
2. It is a rule of the external rational human beings.
3. It is developed, issued or enacted by state.
4. It is enforced by state in the administration of justice.
5. It is backed by sanction or punishment.
6. It treats all persons in the same situation equally.
7. It regulates human actions by three ways, i.e., Prohibitory, Mandatory and Promissory.
8. It is pervasive in nature.
9. The function of law is to keep peace by maintaining law and order situation.
10. The aim of law is justice.

■ TYPES OF LAW

1. On the basis of Territorial Limits of Operations
 - a. National law
 - b. International law
2. On the basis of Nature of Law
 - a. Substantive law
 - b. Procedural law
3. On the basis of Subject Matter of Law
 - a. Public law
 - b. Private law
4. On the basis of an Individual's Duty towards the Society
 - a. Criminal law
 - b. Civil law

■ SOURCES OF LAW

The sources of law can be studied by dividing them into two categories:

Binding Sources of Law: It includes

- a. Legislation
- b. Precedent
- c. Customs or usages
- d. Agreements or conventions

Persuasive Sources of Law: It includes

- a. Decision of foreign courts

- b. The principles of foreign law
- c. Opinion of experts/ Jurist
- d. Text books, journals, periodicals, etc.
- e. Rules of morality and religious books

■ MEANING OF BUSINESS LAW

Business law is a branch of civil law or private law which makes certain rules for business transactions. Thus, the law which deals with business activities of people and provides various provisions for commercial world is known as business law.

■ NATURE OR CHARACTERISTICS OF NEPALESE BUSINESS LAW

1. Regulation of business activities
2. State made Law/ Statutory law
3. Backed by punishment
4. Instrumental to control the business sector
5. Enforced by state
6. A component of business environment
7. Pervasive in nature
8. The aim of business law is industrial peace and justice
9. Impact of common law
10. Strengthening public private partnership

■ SOURCES OF NEPALESE BUSINESS LAW

1. Legislation
2. Precedent
3. Customs or usages
4. Agreements or conventions
5. Decision of foreign courts
6. The principles of foreign law
7. Opinion of experts/ Jurist
8. Text books, journals, periodicals, etc.
9. Business ethics and morality
10. Religious texts and books
11. Provisions of English law
12. Principles of Indian law

■ IMPORTANCE OF BUSINESS LAW

1. It provides legitimacy, peace and security.
2. It regulates the commercial activities.
3. It governs the trade and commerce or business sector.
4. It determines punishment and reward.
5. It establishes business ethics and social responsibility.
6. It protects Industrial Interests.
7. It creates the institutions for the betterment of business communities.
8. It establishes the dispute resolution system.

■ CHANGING DIMENSIONS OF NEPALESE BUSINESS LAW

1. Social dimension
2. Cultural dimension
3. Political dimension
4. Economic dimension
5. Technological dimension
6. Global dimension
7. Moral dimension

■ CONSTITUTIONAL FRAMEWORK OF BUSINESS IN NEPAL

The constitutional framework provides Directive Principles of State Policy, Fundamental Rights and division of legislative powers between the central and the state governments. Various civil, political, economic, social and cultural rights are guaranteed as fundamental rights under the constitutional provisions. The Constitution has intended to create a conducive and liberal environment for trade and industry by guarantying the freedom to practice any profession, carry on any occupation and establish and operate any industry, trade and business in any part of Nepal. The State shall not, except for public interest, requisition, acquire, or otherwise create any encumbrance on the personal or private property of a person. At the same time the Constitution has imposed responsibility to the business communities by assuring the right of consumers. All these rights can be enforced through the judicial process as a right to constitutional remedies in case of their violation or any infringement to them. Directive principles have kept the national prosperity through trade, industry or business in center.

These principles, policies and provisions enshrined in the Constitution have immense of impact on trade and commerce or to the entire business sector and within this constitutional ambit all other required orders, directives and legislations are enacted, amended and repealed. Legislations such as Civil Code, Companies Act, Industrial Enterprises Act, Foreign Investment and Transfer of Technology Act, Bank and Financial Institutions Act, Consumers Protection Act, Insolvency Act, Foreign Exchange Management Act, Securities Act, the various labour laws and host of other legislations jointly create the framework of legal environment in the country.

■ LEGAL ENVIRONMENT OF BUSINESS IN NEPAL

A business being a social organization has to operate in society and with other organizations and people. In the course of operation, a business firm is affected by other environmental factors or forces. In this sense, the environment is those influences that surround and affect the business. Environment factors or constraints are essentially the givers within which firms and their managements must operate in a specific country and vary from country to country. Among these factors,

legal factor is the most important factor which constitutes a legal environment of business that provides incentives to the business for its development and controls it for grater happiness of the society or welfare of the people. Thus, the scope of the study of legal environment includes following aspects of law

1. An introduction of major legal institutions and their processes in the concerned state.
2. An overview of the private law that includes the study of contract law, law of tort, corporate laws, or property law, etc. which directly affects many business transactions.
3. An examination of specific areas of law: e.g. agency law, insolvency law, sale of goods, partnership law, banking law, insurance law, etc. in which significant regulations and directions are made relating to business activities.
4. An analysis of the relationship between law and ethics where it gives emphasis upon social responsibilities of the business firm.

Though there are numbers of Acts, rules, regulations and policies, these are not properly enforced in practice. So, to develop the national economy, we should adopt modern and developed legal principles and, similarly, efficient law enforcement mechanism to handle properly the trade and commercial activities to develop the business and industrial sector.

CHAPTER 2

THE LAW OF CONTRACT AND OTHER LIABILITIES

2.1 LAW OF CONTRACTS

■ MEANING OF CONTRACT

The agreements creating obligations between the parties if enforceable by law are treated as contract. The contract in juristic concept consists of two constituent elements, viz, Agreement and Obligation.

■ NATURE OF CONTRACT

1. Contract is an agreement between two or more person on a particular matter or matters.
2. Contract creates legal and binding obligations between the parties.
3. Contract establishes a course of actions between the parties which is to be perform by them.
4. Contract provides certain remedies if things go wrong to the affected party.
5. Contract is recognized and enforceable by law, i.e., contract law.

■ FUNCTIONS OF CONTRACT

1. Contract normally establish the value of the exchange or transaction.
2. Contract lays down the respective responsibilities of the parties and the standard of performance to be expected by them.
3. Contract enables the economic risks involved in the transactions.

4. Contract provides remedies to the affected party if promise is not fulfilled.
5. Contract, in effect is the instrument by which the separate and conflicting interests of the participants can be reconciled and brought in to a common goal.

■ ESSENTIAL ELEMENTS OF A VALID CONTRACT

1. Two parties
2. Offer and Acceptance
3. Intention to create legal relationship
4. Meeting of minds or consensus-ad-idem
5. Consideration
6. Free consent
7. Contractual capacity of the parties
8. Legality of object
9. Not expressly declare void
10. Possibility to perform
11. Certainty and clarity
12. Legal formalities

■ TYPES OF CONTRACT

1. On the basis of enforceability contracts
 - a. Valid contract
 - b. Void contract
 - c. Voidable contract
 - d. Unenforceable contract
 - e. Illegal contract
2. On the basis of formation contracts
 - a. Express contract
 - b. Implied contract
 - c. Quasi contract
3. On the basis of existing duty under a contract
 - a. Unilateral contract
 - b. Bilateral contract
4. On the basis of performance of contracts
 - a. Executed contract
 - b. Executory contract
5. On the basis of future contingency of contracts
 - a. Simple contract
 - b. Contingent contract

■ MAJOR PROVISIONS OF THE CIVIL CODE, 2074

1. Definition
2. Contractual capacity
3. Autonomous of parties
4. Offer and acceptance
5. Contingent contract
6. Void and voidable contracts
7. Specific contracts
8. Performance of contract
9. Breach of contract and remedies
10. Limitations

2.2 OFFER AND ACCEPTANCE

■ OFFER

Offer is an expression of willingness by one to another to do or not to do something with an intention to enter into a contract by obtaining assent from the another. It is the first step to enter into a contract.

■ CHARACTERISTICS OF OFFER

The characteristics of offer are as follows:

1. Offer is an obvious expression of offeror's intention to be bound by it.
2. It relates to do something or abstain from doing something.
3. It is made with a view to obtaining the assent of the offeree to such act or abstinence.
4. It can be made by express words, written or spoken or by the conduct of the parties or the circumstances of the case.
5. It may be of general or specific.
6. It becomes a promise when it is accepted by the offeree.
7. It must be communicated to the offeree.

■ RULES REGARDING OFFER

1. An offer must be one capable of creating legal relations
2. The terms of an offer must be definite, unambiguous and certain
3. An invitation to make an offer is not an offer
4. A statement of the lowest price; or providing information is not an offer.
5. Offer may be general or specific.
6. Every offer must be communicated.
7. Offer must be made with a view to obtaining the assent.
8. Offer can be made with terms limiting or excluding liability of the offeror

■ MEANING OF ACCEPTANCE

Acceptance is an assent or expression of willingness given by the offeree to be bound by the terms of offer with a view of entering into a contract.

■ CHARACTERISTICS OF ACCEPTANCE

Characteristics of acceptance can be stated as follows, numerically:

1. Acceptance is an expression of willingness to be bound by the terms of offer.
2. It shows the consent of the offeree to do or abstain from doing something.
3. It is given with an intention to enter into a contract.
4. It may be express or implied.
5. It is a communicated acceptance.
6. It concludes the contract between the parties.
7. It is made by the offeree to whom the offer is made.
8. It is given in the manner as prescribed or indicated by the offeror.

■ RULES REGARDING ACCEPTANCE

1. The acceptance must be absolute and must correspond with the terms of the offer
2. Acceptance must be communicated to the offeror in general.
3. It must be according to the mode prescribed or usual and reasonable mode.
4. Offeree must have knowledge of offer.
5. Acceptance must be given within a reasonable time.
6. Acceptance cannot be implied from silence or inaction.
7. Acceptance must be given by the offeree only.
8. Acceptance must be given before the offer lapses or terminates.

■ COMMUNICATION OF OFFER, ACCEPTANCE AND REVOCATION

Where the parties are not in face to face and the parties have used postal communication, there may arise a question regarding the time of communication of offer, acceptance or their revocation.

Communication of Offer

"The communication of an offer is complete when it comes to the knowledge of the person to whom it is made."

Communication of Acceptance

The communication of an acceptance is complete against the offeror when he receives it and; as against the acceptor when it comes to the knowledge of the offeror.

Revocation of Offer

Offeror, by giving notice, shall revoke his offer; at any time before its acceptance before the communication of acceptance to the offeror.

Revocation of Acceptance

The offeree, by giving notice, shall revoke his acceptance;

■ TERMINATIONS OR LAPSE OF OFFER

1. By revocation of Offer
2. By lapse of time for acceptance
3. By death or Insanity of the offeror.
4. By death or insanity of the offeree.
5. By making counter offer.
6. By nonfulfillment by the offeree of a condition precedent to acceptance.
7. By not being accepted in the mode prescribed.
8. By Operation of Law.

2.3 CONSIDERATION**■ MEANING OF CONSIDERATION**

Consideration is a technical term used in the sense of 'quid pro quo': i.e. something in return of something. It refers which is of some value in the eye of law. It may be some benefit to one party or some detriment to the another."

■ CHARACTERISTICS OF CONSIDERATION

1. Consideration consists of some value in the eye of law.
2. It is promise to do or abstain from doing something.
3. It consists either in some benefit to the promisor or some detriment to the promisee.
4. It must necessarily be given in return for the promise.
5. It is not the fulfillment of a condition.
6. It is a return promise by the promisee at the desire of the promisor.

■ TYPES OF CONSIDERATION

- a. Past consideration
- b. Present or executed consideration
- c. Future or executory consideration

■ RULES REGARDING CONSIDERATION

1. Consideration must move at the desire of Promisor
2. It may move from the promisee or any other person
3. It need not be adequate
4. Consideration must be real
5. Performance of an existing duty is not a real consideration.
6. Consideration must not be illegal, immoral or opposed to public policy

■ DOCTRINE OF PRIVACY OF CONTRACT

It is a general rule of law that refers the contractual relationship between the parties entered into an agreement to do or abstain from doing something. It is a legal bond or tie between the contracting parties which binds the parties in a common interest to a contract. A person who has no privity of contract, i.e., stranger to contract cannot sue and be sued.

■ EXCEPTIONS TO THE RULE "NO CONSIDERATION NO CONTRACT"

Consideration is necessary for the formation of every simple contract; a promise (unless in a deed) made without consideration is not actionable as a contract. In each case of promise it becomes necessary to ask whether the promisor gets any benefit or the promisee sustains any detriment in respect of the promise. If not, the promise is gratuitous and not binding.

In some cases a promise without consideration be treated as an enforceable and binding upon the parties.

1. Natural love and affection
2. Compensation for past voluntary services
3. Promise to pay time barred debt
4. Promise to subscribe to a charitable organization
5. Completed gift
6. Creation of Agency and other contract

2.4 INCAPACITY TO CONTRACT**■ MEANING OF CONTRACTUAL CAPACITY**

Contractual capacity means an ability of a person to make a reasonable calculation of the effects of the terms of a contract upon his best interest. Under the

Civil Code, 2074 that all the persons have contractual capacity except minors, person of unsound mind and other person disqualified by law-in-force.

■ MINORS

Minors are the person not attaining the age of majority as fixed by the law to which they are subjected.

■ MINOR'S CONTRACTS: EFFECTS OF MINORITY

1. Contracts for Necessaries and Other Beneficial Contracts
2. Contract Valid If for Minor's Benefit
3. Contract valid until avoided

■ PERSONS OF UNSOUND MIND

The second group of persons who do not have contractual capacity by reason of mental deficiency are the persons of unsound mind. The persons of unsound mind are treated as a minor and free from his liability as arisen out of his promise. Persons of unsound mind include:

1. Idiot
2. Lunatic/ Mad
3. Drunken/ intoxicated persons

■ PERSONS DISQUALIFIED BY LAW

The third group of persons who are incapable to enter into a contract is the person disqualified by any law to which they are subject. The law makes them as disqualified and incapable as a result of their special status, position, circumstances and responsibilities. Incapacity arising out of status or circumstances or responsibilities may be divided into:

1. Political or Civil Status
 - i. Foreign sovereign and ambassadors
 - ii. Alien Enemy
 - iii. Criminals/ Felons
2. Professional status
3. Corporate status
4. Married status

2.5 FREE CONSENT

■ MEANING OF FREE CONSENT

When the consent has been given knowingly and voluntarily to the terms of contract, it is known as free consent. Similarly, if the consent is not caused by coercion, undue influence, misrepresentation, fraud or mistake, it amounts as a free consent.

■ IMPORTANCE OF FREE CONSENT

1. It binds the parties morally to their promises
2. It reduces the anarchy and injustice in society
3. It assures the knowledge of the parties regarding the subject matters of contract.
4. It provides of proof of deliberate intention of the parties

■ VITIATING ELEMENTS OF A FREE CONSENT AND THEIR EFFECT

Where a responsibility undertaken or promise has made voluntarily and knowingly by a person, he is bound to fulfill it morally as well as legally. His moral obligation might be waterdowned if his promise is not made with his knowledge or free will. In such a case the law cannot enforce the promise as against him. By different reason or factors or causes a consent cannot be a free consent, these factor, in totality, known as vitiating elements of a free consent. The vitiating element of a free consent are:

- a. Coercion
- b. Undue influence
- c. Misrepresentation
- d. Fraud
- e. Mistake

■ COERCION/ DURESS

Coercion is the unlawful detaining or threatening to detain any property, or committing or threatening to commit any harm against the life or dignity of other, or any act forbidden by law-in-force with an intention causing to enter into a contract without one's will.

Therefore a coercion is:

- i. Committing or threatening to commit any harm against the life or dignity or property of one.
- ii. Detaining or threatening to detain any property.
- iii. The committing or threatening to commit any act forbidden by law-in-force.
- iv. Such must be done with an intention of causing the other to enter into a contracts.

■ UNDUE INFLUENCE

Where the contracting parties are, out the time of agreement, in such a position by which one can easily dominate the will of another and such relationship is used for some benefit from the transaction, the consent is said to an undue influence. It may be:

1. Actual Undue Influence
2. Implied (Presumed) Undue Influence

■ MISREPRESENTATION

Where a party represents something regarding the facts of the subject matter of a contract turns to be untrue or false amount to misrepresentation. Therefore, it is a false statement of one party made during the negotiation with a view to entering into a contract without intention to deceive the other.

■ FRAUD

Where a contract is made or consent is taken by committing fraud, the party whose consent is so caused has got right to avoid the contract.

Effects of Fraud

1. Where consent is caused by fraud, consent can not be a free consent.
2. The party whose consent was so caused can go to the court to declare the contract as void

3. The legality of contract caused by fraud is voidable contract.
4. Contract until avoided is valid and binding.
5. Injured party can claim for compensation for his loss.
6. He can sue upon quantum-meruit and claim for his remuneration.
7. The party in default may be punished with imprisonment in jail.
8. The party injured can treat the contract as discharged or rescinded.

Can Silence be Fraud/ Misrepresentation?

As a general rule mere silence is not fraud but he must refrain from making active concealment.

In some cases, silence and inaction also amounts to fraudulent representation in as much as positive language of conduct. A person can be held liable for fraud on the basis of his silence provided there is an obligation on him to speak and holds his tongue in breach of that obligation.

■ MISTAKE

Mistake may be defined as an erroneous belief about something. Mistake is made by the parties without misleading by other but they believe something about the fact of something but it turns to be another. Mistake may be of two kinds a mistake of law or, mistake of fact.

Mistake of Law

Where there is mistake of law, the legality of contract, is unchanged. It is not a ground for excuse. Under it, a contract cannot be avoided.

Mistake of Fact

Where there is a mistake of fact, contract can be avoided as mistake negatives the consent of the parties to a contract. In this case, contract becomes void. Mistake of fact may be of two kinds:

- i. Bilateral mistake
- ii. Unilateral mistake

■ BILATERAL MISTAKE

Where both of the parties mistook or misunderstood the facts of the subject matter of contract, it is known as bilateral mistake. The contract caused by bilateral mistake is void. It may be:

1. Mistake as to the existence of the subject matter
2. Mistake as to title of the subject matter
3. Mistake as to identity of the subject matters
4. Mistake as to price of the subject matter
5. Mistake as to quality of the subject matter
6. Mistake as to quantity of the subject matter

■ UNILATERAL MISTAKE

When, in a contract, only one of the parties is mistaken regarding the subject matter or in expressing or understanding the terms or the legal effect of the agreement, the mistake is a unilateral mistake.

The rule is that a contract caused by unilateral mistake is valid. He cannot blame the other for his mistake and cannot avoid the contract.

Exceptions:

1. Mistake as to nature of contract and,
2. Mistake as to identify of the person contracted with.

2.6 LEGALITY OBJECT AND CONSIDERATION

■ MEANING OF LEGALITY OBJECT AND CONSIDERATION

The consideration or object of an agreement is unlawful—

1. If it is prohibited by law
2. If it defeats the provisions of any law
3. If it is fraudulent
4. If it involves or implies injury to the person or property of another
5. If the court regards it immoral
6. Where the court regards it as opposed to public policy

■ NEED FOR LEGALITY OF OBJECT

1. Contract law should not be an instrument to commit a wrong or harm, or an offence prohibited by law. If an act is forbidden by one law cannot be done by way of making contracts.
2. Where public policy imposes certain limitations upon freedom of dealings or action, such limitations should not lift by way of contract.
3. It saves the time and effort of court from engaging in such unintended dealings.
4. It brings certainty by imposition of various conditions where remedy is not available even to the injured party, so, a person may remain far from such dealings.
5. The court should not be a means to enforce rights in unlawful transaction.
6. It helps to keep good moral in a society or state.

■ UNLAWFUL AND ILLEGAL AGREEMENT

An unlawful agreement is one which, like a void agreement, is not enforceable as it is discountenanced by law. An unlawful agreement may be illegal, or immoral, or opposite to public policy.

■ ILLEGAL AGREEMENTS

An illegal agreement, while resembling the void contract, in that it also has no legal effect as between the immediate parties, has this further effect that even transactions collateral to it become tainted with illegality and are therefore, not enforceable and in certain circumstances punishable by law as like that of principal agreement.

If an agreement is illegal, the law will help neither party to the agreement. This means that as a result of refusal of the court to help the plaintiff in recovering the amount, the defendant who is equally guilty stands to gain.

■ IMMORAL AGREEMENT

If an act, in the opinion of court, is immoral, the court refuses to enforce the obligations in it. In most of cases, morality is related to personal affairs either marital or sexual but such affairs must affect negatively the public morality recognized in a particular society at a particular period of time.

An agreement is unlawful for immorality in the following set of circumstances:

1. Where an agreement between a husband and wife from future separation
2. Illicit co-habitation
3. Misuse of influence
4. Where the consideration is an act of sexual immorality
5. Where the object of the agreement is the furtherance of sexual immorality

■ AGREEMENTS OPPOSED TO PUBLIC POLICY

An agreement is said to be opposed to public policy when it is harmful to the public welfare. Public is a vague and elastic term, therefore, it is not possible to give a precise or exact definition of the term public policy.

Some of the agreements which the courts will not enforce because they are contrary to public policy and are unlawful may be arranged under certain heads as given here in below:

1. Agreement to commit a crime or civil wrong or to perpetrate a fraud
2. Agreement of trading with an alien enemy
3. Agreements to sale of public office and titles
4. Agreements to interfere the administration of justice
 - a. Interference with the course of justice
 - b. Agreements for stifling prosecution
 - c. Agreements for maintenance and champerty
 - d. Agreements of ousting the jurisdiction of courts
 - e. Agreement to vary the period of limitation
5. Agreement in restraint of parental rights
6. Agreements in restraints of marriage
7. Agreements in restraint of trade
8. Agreement in restraint of personal liberty
9. Agreements in restraints of using common facilities provided by state
10. Agreements to defraud tax or revenue

■ VOID AGREEMENTS

Void agreements are those which are not enforceable by law and no legal effect from the beginning. Where an agreement does not fulfill all the essential elements of a valid contract, it becomes a void. Void agreements, in some cases punishable by law if they are made to commit a crime.

An agreement is called void agreement if:

- a. It has no legal effect from the beginning, i.e. void-ab-initio.
- b. It does not bind the parties.

- c. It does not make arise legal actions and remedies even to the injured party.
- d. It is not enforceable by law.
- e. It is either illegal, or immoral, or opposed to public policy.

2.7 CONTINGENT CONTRACTS

■ MEANING OF CONTINGENT CONTRACT

A contingent contract is a contract to do or not to do something. If some event, collateral to such contract does or does not happen.

■ CHARACTERISTICS OF A CONTINGENT CONTRACT

1. The performance of contract depends upon happening or non-happening of some event.
2. The event must be the future event.
3. The future event must be uncertain. If the event is certain or is bound to happen, the contract is not valid. But, if the time of happening of the future event is uncertain it amounts as uncertain event and the contract valid.
4. The uncertain future event is collateral, i.e., incidental to the contract. Where the event is sole determining factor the contract is leveled as wagering agreement.

■ RULES REGARDING THE PERFORMANCE OF CONTINGENT CONTRACTS

1. In the event of happening: Contract is not enforceable until the future event happens.
2. In the event of non-happening: Contract is enforced if the happening of future event becomes impossible.
3. Happening of event within a specified period: Contract is enforced only if the future event happens within the specific time.
4. Non-happening of event within a specified period: Contract is enforced only if the happening of future event becomes impossible within the fixed time.
5. Specified person
6. Impossible event: Contract becomes void.
7. Supervening impossibility: Contract becomes void.
8. Effect of illegality: Contract becomes void.
9. Certainty of event: Contract becomes void.
10. Uncertain as to time of happening: Contract becomes valid.

■ WAGERING AGREEMENTS

A wagering agreement is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event.

"A contract by A to pay money B on the happening of a given event in consideration of B's promise to pay money to A on the event of not-happening." There are three points to be noticed:

1. It must be a promise either to pay money or to give something, which has a monetary value.

2. This promise must necessarily be conditional, on the happening of an event specified at the time of promise.
3. This event must be an uncertain one in the sense that it is to happen in the future and no body knows whether it will happen or not.

■ **ESSENTIALS OF A WAGERING AGREEMENT**

1. Nature of promise- Price to pay money or money's worth
2. Uncertain event
3. Mutual chance of gain or lose
4. No control over the event
5. Future event is sole determining factor

■ **EFFECT OF WAGERING AGREEMENTS**

1. Wagering agreements are expressly declared as void under the Contract Act, 2056.
2. Money deposited with a person to be paid to the party wining upon wager cannot be recovered by the winner from the stakeholders.
3. In case of agent and principal relation; (a) an agent cannot recover against the principal any money paid on a wager entered into on behalf of his principal, (b) The principal cannot sue agent where he fails to carry out his instruction in respect of a wagering transaction and (c) where the agent receives the winnings on successful bets made on behalf of his principal, he is bound to hand the over he had received the money in respect of a void transaction.
4. The transactions collateral to the wagering agreements are not affected and stand valid as they are only void.

2.8 PERFORMANCE OF CONTRACT

■ **MEANING OF PERFORMANCE**

The term performance refers the fulfillment of contractual obligators by the parties of it in accordance with the terms and conditions of the agreement. The general rule of performance is that the performance of contract must be exact and precise.

■ **IMPORTANCE FOR PERFORMANCE**

1. To fulfill the expectations of the parties.
2. To avoid the legal consequences of punishment which may arise from the non-performance.
3. To fulfill the legal duty as the performance is binding obligation of the parties.
4. All contracts are made for performance.
5. If the performance is impossible, the contract is not valid. The validity of contract depends upon the matter of performance.
6. It is an essential elements of a valid contract that if the contract need not be perform or cannot be perform, there is no valid contract.

■ **TYPES OF PERFORMANCE**

It can be classified into two divisions.

1. Actual performance
2. Tender or offer to perform
Requisites of a valid tender: An offer or tender to perform is considered valid and binding if:
 - a. It is unconditional.
 - b. It is made at the proper time and place.
 - c. It is made for the whole performance of contract.
 - d. It is expressed by the promisor or the person obliged and willing to perform the promise.
 - e. It is made to the proper person.
 - f. It is made at such a period of time where the promisee is able to accept the delivery of goods or the performance of contract.

■ **RULES REGARDING PERFORMANCE**

1. Time of performance
2. Place of performance
3. Manner of performance
4. Person bound to perform
 The other persons, than the promisor, who can perform the contract are:
 - a. Agent
 - b. Legal representatives
 - c. Third person
 - d. Joint promisor
5. Person entitled to demand performance
 - a. Joint promisee
 - b. Agent duly appointed
 - c. Legal representatives
 - d. Official assignee/ Official receiver
 - e. Trustee of a trust.
6. Performance of reciprocal promises
 - a. Simultaneous performance of reciprocal promises
 - b. Order of performance of reciprocal promises
 - c. Effect of default as to promise to be performed first
 - d. Effect of one party preventing another from performing promise
7. Contract need not be performed

■ **ASSIGNMENT OF CONTRACTS**

It may take place in the following ways:

1. By the act of the parties
 - a. Contractual obligations are generally not assignable
 - b. Contractual obligations involving personal skill or diligence never be assigned
 - c. Contractual rights or benefits are generally assignable
 - d. An actionable claim can always be assignment
 - e. Assignment of rights affecting third persons
2. By operation of law
 - a. By death
 - b. By insolvency

2.9 TERMINATION OF CONTRACT

MEANING OF TERMINATION OF CONTRACT

When the parties of a contract become free from their contractual relationship, or when the contract comes to an end, or the contracting parties are released from the contractual obligation is called the discharge or termination of contract.

MODES OF TERMINATION OF CONTRACT

1. Termination by Performance
 - i. Actual performance
 - ii. Tender/ offer to perform or Attempted performance
2. Termination by Agreement

Forms of Agreement:

 - i. Novation
 - ii. Recession
 - iii. Alteration
 - iv. Waiver
 - v. Remission
 - vi. Merger
3. Termination of Contract by Operation of Law: It may take place:
 - i. By death
 - ii. By insolvency
 - iii. By unauthorized alteration
 - iv. By merger
 - v. Rights and liability vesting in the same person
4. Termination of contract by Lapse of time
5. Termination of Contract by Supervening Impossibility

Supervening Impossibility: The impossibility arising subsequent to the formation of contract is called supervening impossibility.

It was held that in these circumstances the contract must be treated as at an end.

 - a. Cases where the rule of supervening impossibility may apply
 - i. Destruction of subject matter of contract
 - ii. Non-occurrence of a particular event
 - iii. Death or incapacity
 - iv. Change in law
 - v. Out break of war
 - vi. Failure of all objects set forth
 - b. Cases where the rule of supervening impossibility does not apply:
 - i. Difficulty of performance
 - ii. Commercial impossible
 - iii. Impossibility due to failure of a third party
 - iv. Strikes, lockouts and civil disturbances
 - v. Failure of one or more of the objectives
6. Termination by Breach
 - a. Actual breach of contract
 - i. On the due date of performance

- ii. During the performance
- b. Anticipatory breach of contract

Effects of anticipatory breach: Where there is an anticipatory breach, the other party:

May treat the contract as terminated, or

May wait till the date of performance.

If he treats the contract as dead or terminated, the contract comes to an end immediately and he can go to court for damages and need not wait till the due date of performance.

2.10 REMEDIES OF BREACH OF CONTRACT

MEANING

The breach of contract affects negatively to the rights created and defined in a contract and the law recognizes the different remedies to the injured party or the party other than default by which he or she may fulfill the loss suffered by him or her. Therefore, the remedies are those means assured by law which the innocent party can use for the enforcement of his rights. Remedies are given as under.

RECESSION

In Recession is a right of an Innocent party of contract to refuse to perform his obligation under it when it has already been breached by the other party. In such a case, on one hand, he becomes free from the contractual obligations and, on the other hand, he can sue the other party for damages.

DAMAGES

The damages refer a monetary compensation allowed to the injured party awarded by the court for the loss or injury suffered by him by the breach of contract. The fundamental object of awarding damages is to put the injured party in the same position, if money can do it, as if the contract had not been breached or the contract had been performed.

SPECIFIC PERFORMANCE

It is an order of the court which directs the party in default to perform the contractual obligation in accordance with its terms. The performance is specific as the contract once breached but defaulting party has to perform the contract by the order of court.

An order of specified performance is issued if it is established that:

- Where the damages are not an adequate relief. That is, the monetary compensation cannot fulfilled the loss caused by him because of the breach.
- Where there exists no standard for ascertaining the actual loss and to awarded damages caused by the breach of contract.

The specific performance will not be granted in the following cases:

- i. Where the damages are an adequate relief.
- ii. Where the damages can be ascertained.

- iii. Where the contract is not certain.
- iv. Where the contract is unequal to either party.
- v. Where the contract is entered by trustee in breach of their trust.
- vi. Where the contract is entered by an agent beyond the limit of his authority.
- vii. Where the contract is of a personal nature, for example, a contract to marry.
- viii. Where the contract is entered into by a company in such a manner ultra-virus to its memorandum and articles of association.
- ix. Where the court cannot supervise it carrying out.
- x. Where the contract is impossible.
- xi. Where the contract is unlawful.

■ QUANTUM MERUIT

An action upon quantum meruit may arise when an act has done or service has render by one to another without to do so gratuitously whether or not there is a contract between them for such act or service or its remuneration, he is entitled to recover the reasonable remuneration of his act or service from that another. It may be contractual or quasi contractual obligation.

■ INJUNCTION

It is an order of a court, on the request of a party of a contract, where the other party of the contract is going to breach of contract or doing such acts for which he had promised not do to restraining him from doing what he promised not do to.

2.11 QUASI CONTRACTS

■ MEANING OF QUASI CONTRACT

Under some circumstances, or relation existing between the parties where a person may render some services, or may act something or incur some expenses to other or a person may receive some benefit to which the law regards he should pay to the other party from whom he has received such benefits even though there is no contract between the parties for such work, service or expenses. Such kinds of relationship are termed quasi contracts as there is no offer, acceptance or consent or agreement to establish a contract that relation.

■ KINDS OF QUASI CONTRACTUAL OBLIGATIONS

1. Supply of necessaries to a person incapable of contracting
2. Maintenance of incompetent person
3. Taking care of property of other
 - a. Not to be abandoned the other's property managed voluntarily, (Negotiorum gestio)
 - b. To care or manage property taken in custody
4. Obligation under acts done in case of emergency or necessity
5. Payment by an interested person
6. Obligation to pay for non-gratuitous acts
 - a. To pay price or remuneration

- b. Right to claim for maintenance
7. Reimbursement of expenses incurred in obsequies of deceased
8. Recovery of money paid by one for the benefit of another
 - a. Treatment expenses to be reimbursed
 - b. To bear expenses made by public bodies
9. Obligation of finder of lost goods

■ QUANTUM MERUIT

The term Quantum meruit literally means as much as one has earned; a reasonable amount. An action upon quantum meruit arises where some work has done or service has rendered or incurred some expenses by one for the benefit of another in such circumstances entitling the former to receive a reasonable remuneration therefor.

The types or cases of Quantum Meruit are given as under:

1. Where there is no contract but act has done, he can recover a reasonable remuneration.
2. Where there is a contract for work or service but no agreement as to the payment, can recover the price of work done or service rendered.
3. Where the agreement is discovered to be void, remuneration can be claimed.
4. Where a contract is divisible
5. Where the completion of contract has been prevented by the act of the other party than the party claiming for the price
6. Where a contract is discharged by breach
7. Where a contract is fully performed but not exactly

2.12 UNJUST ENRICHMENT

■ MEANING OF UNJUST ENRICHMENT

"If any person gets any benefit or advantage from another person, without for the reason of doing any lawful act or fulfilling any obligation, the person who so gets the benefit or advantage shall be deemed to have got an unjust enrichment."

Under the doctrine of unjust enrichment which no person shall be allowed to enrich himself unjustly at the expense of another. The doctrine is applied in the satisfaction of the following conditions:

- a. A person (the defendant) has been enriched by the receipt of a benefit.
- b. This enrichment is at the expense of other (the plaintiff).
- c. The retention of the enrichment amounts to unjust.

■ OBLIGATIONS UNDER UNJUST ENRICHMENT

1. Things taken by mistake to be returned (solutio indebiti)
2. To pay back debt paid by mistake
3. To return goods or amount taken with mala fide intention
4. To pay debt paid by third person

5. Right to claim reimbursement if payable tax paid by another person
6. Failure of consideration
7. Money of one obtained by another from third parties which the first party seeks to recover

2.13 LEASE CONTRACT

■ LEASE CONTRACT

A lease is an implied or written agreement specifying the conditions under which a lessor accepts to let out a property to be used by a lessee. The agreement promises the lessee use of the property for an agreed length of time while the owner is assured consistent payment over the agreed period. Both parties are bound by the terms of the contract, and there is a consequence if either fails to meet the contractual obligations.

■ RIGHTS AND DUTIES OF LESSOR AND LESSEE

Rights of Lessor

1. Right to receive lease rent
2. Right to sue for damages
3. Right to get information as to the condition of leased goods
4. Right to inspect the leased goods
5. Right to terminate the contract

Duties of Lessor

1. To repair and maintain leased goods
2. To indemnify/reimburse the lessee
3. Duty to compensate lessee
4. To terminate the contract
5. To ensure the lessee

Rights of Lessee

1. Right to possess and use the goods
2. Right to be indemnified for expenses incurred in the goods
3. Right to claim compensation for loss
4. Right to be informed about the leased goods
5. Right to sub-lease
6. Right to terminate the lease

Duties of Lessee

1. Duty not to change the form of the leased goods
2. Duty to use the leased goods in good faith
3. Duty to inform lessor if goods are not usable
4. Duty to take reasonable care and caution of the goods from being lost or damaged
5. Duty to compensate for loss or damage of goods leased
6. Duty to pay lease rent
7. Duty to return leased goods

■ SUB-LEASE

The lessee may, with the prior consent of the lessor, sub-lease to any person the goods or any part thereof

case the lessee shall not be free from his or her obligation towards the lessor for the reason that he or she has made a sub-lease.

■ LEASE OF IMMOVABLE PROPERTY

Section 620 of the Civil Code, 2074 has provided some special provisions in relation to the contract of lease of immovable property.

■ TERMINATION OF LEASE CONTRACT

Sub-section (1) of Section 621 of the Civil Code, 2074 has provided the various circumstances where the lessor may terminate the contract of lease as follows:

- Non-payment of lease amount.
- Misuse of the goods.
- If the lessee fails to give information whether the leased goods or any part thereof are lost, damaged or destroyed.
- If the lessee fails to restore the leased goods into their original condition.
- If the goods leased are sub-leased without the prior consent of the lessor.

Similarly, the lessee may terminate the contract of lease in any of following circumstances:

- If the leased goods cannot be possessed or used for the purpose or object for which the goods have been leased,
- If the lessor fails to reimburse the repair and maintenance costs or make its adjustment to the lease rent.
- If the lessor does not reduce or agree to reduce the lease rent amount.

2.14 HIRE PURCHASE CONTRACT

■ MEANING OF HIRE PURCHASE

Hire purchase agreements are used as an arrangement when purchasing expensive goods or services. In a hire purchase agreement, the purchaser pays the initial installment or down payment at the beginning, followed by additional payments in the future to pay off the remaining balance of the good, plus interest.

Section 624 of the Civil Code, 2074 defines that a hire purchase contract is an agreement in writing whereby a person lets any goods to another person for hire on the following terms and conditions:

- Payment will be made in installments,
- The possession and use of the goods is given to the buyer immediately,
- The property (ownership) in the goods remains with the vendor till the last installment is paid,
- The seller can repossess the goods in case of default in payment of any installment, and
- Each installment is treated as hire charges till the last installment is paid.

5. Right to claim reimbursement if payable tax paid by another person
6. Failure of consideration
7. Money of one obtained by another from third parties which the first party seeks to recover

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2. Right to sue for damages
3. Right to get information as to the condition of leased goods
4. Right to inspect the leased goods
5. Right to terminate the contract

Duties of Lessor

1. To repair and maintain leased goods
2. To indemnify/reimburse the lessee
3. Duty to compensate lessee
4. To terminate the contract
5. To ensure the lessee

Rights of Lessee

1. Right to possess and use the goods
2. Right to be indemnified for expenses incurred in the goods
3. Right to claim compensation for loss
4. Right to be informed about the leased goods
5. Right to sub-lease
6. Right to terminate the lease

Duties of Lessee

1. Duty not to change the form of the leased goods
2. Duty to use the leased goods in good faith
3. Duty to inform lessor if goods are not usable
4. Duty to take reasonable care and caution of the goods from being lost or damaged
5. Duty to compensate for loss or damage of goods leased
6. Duty to pay lease rent
7. Duty to return leased goods

■ SUB-LEASE

The lessee may, with the prior consent of the lessor, sub-lease to any person the goods or any part thereof leased under the contract of lease, by concluding another contract of lease to that effect without prejudicing in any manner the right which the lessor

case the lessee shall not be free from his or her obligation towards the lessor for the reason that he or she has made a sub-lease.

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- If the goods leased are sub-leased without the prior consent of the lessor.

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- If the lessor fails to reimburse the repair and maintenance costs or make its adjustment to the lease rent.
- If the lessor does not reduce or agree to reduce the lease rent amount.

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- Payment will be made in installments,
- The possession and use of the goods is given to the buyer immediately,
- The property (ownership) in the goods remains with the vendor till the last installment is paid,
- The seller can repossess the goods in case of default in payment of any installment, and
- Each installment is treated as hire charges till the last installment is paid.

■ FEATURES OF HIRE PURCHASE

- The payment in instalments over a specified period of time.
- The possession of the goods is transferred to the buyer immediately.
- The property in the goods remains with the vendor (hiree) till the last installment is paid.
- The hiree or the vendor can repossess the goods.
- The installments in hire purchase include interest as well as repayments of principal.
- The hiree charges interest on flat rate.

■ TRANSFER OF OWNERSHIP OF GOODS

According to Section 628 of the Civil Code, 2074, the ownership of the goods related to a hire purchase contract shall be transferred to the hirer upon the payment of the last installment of the hire purchase price according to the hire purchase price determined in accordance with the contract concluded. Further, the right to possession and use shall immediately transfer at the time of receiving such goods by the hirer.

■ RIGHTS AND DUTIES OF HIRER AND HIREE

Rights of Hirer

1. Right to transfer his or her right and interest
2. Right to be discharged and refund the paid amount
3. Rights in case of forfeiture of goods

Duties of Hirer

1. Duty to be cared and maintained the goods on hire
2. Duty to pay installment
3. Duty not to use of goods contrary to the terms and conditions
4. Duty to give information of actual condition of goods

Rights of Hiree (Owner of Goods)

1. Right to receive installments
2. Right to recover back the goods delivered to the hirer
3. Right to terminate the contract
4. Rights in the event of termination of contract

Duties of Hiree

1. Duty to deliver the goods at the time of contract
2. Duty to pay compensation for defective goods
3. Duty to refund the paid amount in case of unlawful termination
4. Duty to refund the paid amount in case of forfeiture of goods

■ MODES OF TERMINATION OF CONTRACT

1. Termination of contract by giving a written notice by hirer
2. Termination of contract by paying installment
3. Termination of contract by returning goods
4. Termination of contract by non-furnishing information
5. Termination of contract by non-payment of installments
6. Termination of contract by non-performance

2.15 CONCEPT OF TORTS

■ MEANING OF TORT

A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In general, no person shall cause loss or damage, in any manner, to another person's body, life or property or legally protected right or interest by the reason of commission or omission done, whether by any default, negligence or recklessness on the part of himself or herself or of any one else to whom he or she must bear obligation if there is no any prior contractual relationship in relation to any commission or omission the loss or damage resulted from such a commission or recklessness, such act or mission in known as tort.

■ CHARACTERISTICS OF TORT

1. A tort is a civil wrong
2. A tort is an infringement of a right in rem
3. Torts deal with cases related to legal rights
4. Remedy in the form of Compensation
5. Rights are to be fixed by law
6. Law of Torts is totally based on precedents
7. Torts law is un-codified

■ PRINCIPLES OF TORT LIABILITY

1. Damnum Sine Injuria
2. Injuria Sine Damno
3. Vicarious Liability
4. Volenti Non-Fit Injuria
5. Strict Liability and Absolute Liability

■ REMEDIES FOR TORT

The law recognizes torts as civil wrongs and allows injured parties to recover for their losses. In the majority of tort cases, the court will award compensatory damages to an injured party that has successfully proven his or her case. Thus, courts may award damages for incurred as well as expected losses. In certain cases, courts will award punitive damages in addition to compensatory damages to deter further misconduct.

■ TORTIOUS LIABILITY UNDER THE CIVIL CODE, 2074

1. Parents to bear liability
2. Guardian or curator to bear liability
3. Employer to bear liability
4. Owner of animal to bear liability for loss or damage caused by animal
5. House-owner to bear liability for loss or damage caused by its collapse
6. Owner of property to bear liability
7. House-head to bear liability
8. To bear liability for trespass
9. To bear liability jointly
10. Compensation to be paid for liability
11. Not to bear liability if separate provision is made

CHAPTER 3

CONTRACT OF BAILMENT AND PLEDGE

■ BAILMENT

Bailment and pledge are a special class of contract where some goods or cattle are delivered for some specified purpose or as security for the performance of a specific obligation. A bailment is a delivery of goods or movable property on the condition that the receiver shall ultimately return back them to the person from whom he may receive them.

■ ESSENTIALS OF BAILMENT

1. Contract between Bailor and Bailee
2. Delivery of possession
3. Goods
4. For a purpose
5. To be returned

■ TYPES OF BAILMENT

1. On the basis of benefit derived by the parties
 - a. Bailment for the exclusive benefit of the bailor.
 - b. Bailment for the exclusive benefit of the bailee.
 - c. Bailment for the mutual benefit of the bailor and bailee.
2. On the basis of charge fee or remuneration
 - a. Gratuitous bailment
 - b. Non-gratuitous bailment

■ RIGHTS AND DUTIES OF BAILOR AND BAILEE

Rights of Bailee

1. Right of enforce the bailor's duty as his right
2. Right to delivery of goods to one of the several joint bailor
3. Right to delivery of goods to bailor without title
4. Right of lien/ Bailee's lien

Duties of Bailee

1. To take care of the goods bailed
2. Duty to pay compensation
3. Duty not to make any unauthorized use of goods
4. Duty not to mix the goods bailed with his own goods
5. Duty not to set up an adverse title
6. Duty to return the goods bailed
7. Duty to return any accretion to the goods

Rights of Bailor

1. Right to enforce the bailee's duty as his right
2. Right to terminate the contract
3. Right to return the goods lent gratuitously
4. Right to sue for damages against wrong doer
5. Right to recover compensation for loss or destruction of the goods bailed or wrong delivery

Duties of Bailor

1. Duty to disclose known defect in the goods bailed
2. Duty to bear extra ordinary expenses of bailment
3. Duty to indemnify bailee
4. Duty to compensate bailee for loss caused by premature termination

5. Duty to respect the bailee's lien
6. Duty to receive back goods when returned by bailee

■ FINDER OF LOST GOODS

Where a person finds the lost goods of another and keeps it in his own charge, his position is compared with the position of bailee in a bailment contract.

- a. Right of finder of lost goods
 1. Right to be indemnified
 2. Right of lien
 3. Right to sue for reward
 4. Right of sale the found goods
- b. Obligations of finder of lost goods
 1. Duty to take reasonable care of the goods.
 2. Duty not to use the goods for his own purpose.
 3. Duty not to mix the goods found with his own goods.
 4. Duty to take reasonable steps to find out the true own.

■ TERMINATION OF BAILMENT

1. On the expiry of the time
2. On the completion of the purpose
3. On unauthorized use of goods
4. On destruction of the subject matter
5. On gratuitous bailment
6. On death of the bailor or bailee

■ PLEDGE

Pledge is also called by Pawn. This is a kind of bailment where a thing is delivered as security for the repayment of a debt. The bailment of goods as security for the payment of debt or performance of a duty is called pledge.

■ ESSENTIAL OF PLEDGE

1. It is a delivery of goods/ valuables/ documents of title.
2. The delivery is made by the pledger/ pawnor to pledgee/ pawnee.
3. There is a contract.
4. Delivery is made as security of debt or performance of a duty.
5. The pledgee/ pawnee must return back the articles to the pledger/ pawnor after the payment of debt or performance of the promise.
6. In case of default of pawnor, pawnee can sell the goods.
7. The pledgee/ pawnee cannot use the goods.

■ RIGHTS AND DUTIES OF PAWNOR AND PAWNEE

Rights of Pawnor

1. Right to receive back goods
2. Right to recover compensation
3. Right to redeem debt
4. Right to ask for the preservation and maintenance of the goods
5. Right of an ordinary debtor

Duties of Pawnor

The duties of pawnor are those of the duties of bailor and his fundamental duty is to pay back the debt or performance of a specific duty for which the property is bailed. Similarly he is under duty to respect the Pawnee's rights which are discussed later.

Rights of pawnee

1. Right of lien
2. Right to claim for extraordinary expenses
3. Right of lien for subsequent advances
4. Right to sell
5. Right to claim for the amount

Duties of pawnee

1. Duty not to use the goods.
2. Duty of care and diligence.
3. Duty of not to mix the goods with his own or other's goods,
4. Duty to return back the goods, etc..

■ PLEDGE BY NON-OWNER

The law is that the pledge by non-owner is void, i.e., a non-owner cannot make a valid pledge. This rule has certain exceptions;

1. Pledge by mercantile agent
2. Pledge by a person in possession under a voidable contract
3. Pledge by seller in possession after sale
4. Pledge by buyer before sale
5. Pledge by a finder of lost good
6. Pledge by joint owner in possession
7. Pledge by liquidator or official assignee or receiver

CHAPTER 4**CONTRACT OF SALE OF GOODS****■ MEANING OF SALE OF GOODS**

"A contract relating to sale of goods shall be deemed to have been concluded in case any seller agrees to transfer ownership in the goods to the buyer immediately or in the future by receiving a price."

■ ESSENTIAL ELEMENTS OF A CONTRACT OF SALE OF GOODS

1. Two parties
2. Goods
3. Transfer of ownership or ownership
4. Price
5. Fulfillment of essential elements of a valid contract

■ CONDITION AND WARRANTY

Condition: A condition is a stipulation or representation or promise regarded as so essential that on breach of it, it would be open to the buyer to reject the goods, and treat the contract as discharged. It goes to the root of the contract and its non-fulfillment upsets the very basis of the contract.

Warranty: A warranty is a stipulation collateral or secondary to the main part and purpose of the contract.

The breach of which gives rise a claim for damages but not to a right to reject the goods and treat the contract as terminated.

When condition transform into a warranty

1. Voluntary waiver of condition
2. Acceptance of goods by buyer
3. By impossibility or other reason

■ TYPES OF CONDITIONS AND WARRANTIES

In a contract of sale of goods, there are two types of conditions and warranties: Express conditions and warranties and implied conditions and warranties.

Implied Conditions

1. Condition as to title to goods sold
2. Condition in sale by sample
3. Condition in sale by description
4. Condition in sale by sample as well as description
5. Condition as to quality or fitness
6. Condition as to merchantability
7. Condition implied by custom or usage of trade
8. Condition as to wholesomeness of goods sold

Implied Warranties

1. Warranty as to quiet possession
2. Warranty as to freedom from encumbrances
3. Warranty as to disclose the dangerous nature of goods
4. Warranty as to quality or fitness of goods by custom or usage of trade

■ CAVEAT EMPTOR

The term 'caveat emptor' means 'let the buyer beware'. In a contract of sale of goods it is the duty of buyer that he should examine the goods thoroughly and be sure that whether or not the goods he is selecting is fit for his particular purpose. This is formulated by the doctrine of caveat emptor.

The exception can be stated as under:

1. Where the buyer make known, expressly or impliedly, to the seller the specific purpose for which he needs the goods and depends upon the skill and judgment of the seller.
2. Where the consent of buyer has obtained by fraud or coercion or the seller knowingly conceals a defect which could not be discovered on a reasonable examination, i.e., latent defect in the goods.
3. Where the implied conditions are applied the rule of caveat emptor does not apply.
4. Where goods are sold by description there is an implied condition that the goods shall be of merchantable quality.
5. Where the quality or fitness of goods in annexed by custom or usage of trade.
6. Where the defects in the goods cannot be easily discovered even examined with care and skill.

■ RULES REGARDING THE TRANSFER OF OWNERSHIP

1. Where the goods is unascertained goods, the property in such goods does not transfer until the goods are ascertained.
2. Where the goods is ascertained goods, the property does pass immediately at the time of contract.
3. Contract for ascertained goods without expression as to passing the property
 - a. Passing of property at the time of contract, if the goods is in a deliverable state.
 - b. Passing of property in goods after the date of contract, if the goods is not deliverable state.
 - c. Where the price of goods is to be ascertained by weighing, measuring, printing, etc., the property passes after pricing and communicating the same.
4. Contract for a future goods
5. Contract for a contingent goods
6. Goods sold on sale or return

■ SALE BY NON-OWNERS

The general rule of law regarding the transfer of ownership is that no one can give that which one has not got. This is expressed in Latin maxim "nemo dat quod non-habet".

In the following cases, the following persons though they are not the owner of goods can make a valid sale and the property in goods transfers to the buyer:

1. Sale by a person having title by estoppel
2. Sale by a mercantile agent
3. Sale by one of the several joint owners
4. Sale by a person in possession of goods under a voidable contract
5. Sale by seller in possession after sale
6. Sale by buyer in possession before sale
7. Sale by an unpaid seller
8. Sale by the finder of lost goods
9. Sale by pawnee or pledge
10. Sale by an official assignee or receiver or liquidator
11. Sale in market over

■ PERFORMANCE OF CONTRACT OF SALE OF GOODS

The term performance in relation to the contract of sale of goods refers as regards the seller, the delivery of the goods to the buyer and as regards the buyer, acceptance of the delivery of the goods and payment for them in accordance with the terms of the contract of sale.

■ DELIVERY OF GOODS

Delivery means voluntary transfer of possession of goods from one person to another or voluntary dispossession in favour of another. Delivery of goods, therefore, may be

1. Actual delivery
2. Symbolic delivery
3. Constructive delivery

■ RULES REGARDING DELIVERY OF GOODS

1. Mode of delivery: Actual, Symbolic or Constructive
2. Delivery and payment
3. Part delivery
4. Demand for delivery
5. Place of delivery
6. Time of delivery
7. Cost of delivery
8. Delivery of wrong quantity

■ RIGHTS AND DUTIES OF AN UNPAID SELLER

A seller of goods is called as an unpaid seller in the following conditions:

1. When the whole of the price has not been paid or tendered.
2. When the price was paid through a negotiable instrument which was dishonored by the concerned person therein.
3. When the goods are sold on credit, the buyer fails to pay on the due date of payment.

Rights of an Unpaid Seller

1. Right of an unpaid seller against the goods
 - a. Right of lien
 - b. Right of sue for price
 - c. Right to stoppage the goods in transit
 - d. Right of resale
2. Right of an unpaid seller against the buyer personally
 - a. Right to sue for price
 - b. Rights to sue for damages
 - c. Right to sue for interest
 - d. Right to rescind the contract

Duties of an Unpaid Seller

1. Duty to keep goods safely
2. Duty to give notice for the payment of price
3. Duty not to exercise right of lien or stoppage in transit as against the right of buyer/ transferee
4. Duty to bear the expenses of redelivery
5. Duty to keep the goods to the extent of payment of price
6. Duty to keep the goods in deliverable state and to be delivered at the time of payment
7. Duty not to resale the goods without giving notice of resale

■ RIGHTS AND REMEDIES OF BUYER FOR THE BREACH OF CONTRACT

- Right to cancel the contract.
- Right to recover the price paid for undelivered goods.
- Right to get replacement of goods being defective or not being in the intended condition as per the contract.
- Right to recover damages for loss.
- Right to claim for specific performance for unique goods.
- Right to claim interest of the money paid by him.

CHAPTER 5

CONTRACT OF AGENCY

MEANING OF AGENCY

The term agency is used to refer the relationship between two persons where a person is appointed to act as a representative of another. 'Agency' is a contract between agent and principal where the agent is appointed by the principal to act on behalf of him while dealing with a third party.

ESSENTIALS OF AGENCY

A contract between two parties amounts a contract of agency if it fulfills the following at essentials:

1. Agreement between the agent and principal
2. Universal declaration of the principal to be bound by the act of his agent
3. Intention of the agent to act on behalf of the principal

BASIS OF AGENCY

There are two important rules on which the whole law of agency depends. They are:

1. Whatever a person can do personally, he can do through an agent.
2. He who acts through another, acts by himself.

POSITION OF AN AGENT

A question may rise regarding the position of an agent in an agency with three possible propositions:

1. He is not independent or sovereign character
2. He is not Servant
3. He is above than servant and below than independent character

WHO MAY EMPLOY AN AGENT?

Any person who is not suffered by incapacity to contract as described under section 3(1) of the Contract Act, 2056 may employ an agent to perform those acts which he can do personally or has authority to do so.

CONTRACTUAL CAPACITY OF AN AGENT

An agent who brings the principal in a contractual relationship with third person and he does not incur liability, it is not necessary that he should have contractual capacity.

TYPES OF AGENT

1. On the basis of the extent of authority
 - a. Special agent
 - b. General agent
 - c. Universal agent
2. On the basis of nature of work to be performed by agent
 - a. Mercantile agents: It includes:
 - i. Factor
 - ii. Auctioneer
 - iii. Commission agent
 - iv. Broker

v. Del-credere agent

vi. Banker

- b. Non-mercantile agent: It includes attorney, solicitor, wife, custom clearance agent.

CREATION OF AGENCY

The relationship of agent and principal may arise by any one of the following ways:

1. **By express authority/ Contract:** Where contract is made or authority is given by express words written or spoken.
2. **By implied authority/ Contract**
It may take place either one of the following forms:
 - a. Agency by estoppel
 - b. Agency by holding out
 - c. Agency by necessity
3. **By ratification:** It is the subsequent acceptance of the previous acts done by the principal without his authority.

Essentials of a valid ratification:

- i. Principal must be named or identifiable
- ii. The principal must be in existence at the time of contract
- iii. The principal must have contractual capacity
- iv. Principal must have full knowledge of the true facts
- v. Ratification must be done within a reasonable time
- vi. The whole transaction must be ratified
- vii. The act to be ratified must not be unlawful or ultra -vires incase of a company
- viii. Ratification must be communicated
- ix. Ratification may be express or implied
- x. Ratification should not put a third party to damages

Limitation to the ratification:

- i. Where agent not disclosed the principal.
 - ii. Where the principal is incapable to contract.
 - iii. Where the principal, at the time of contact, was incapable to contract.
 - iv. Where the principal, does not have full knowledge of facts.
 - v. Where the ratification is not communicated to the concern parties.
 - vi. Where the principal has no power of ratify the acts done.
 - vii. Where the ratification causes harm or injury and third person.
4. **Agency by operation of law:** The law places a person as an agent of another.

RIGHTS AND DUTIES OF AGENT AND PRINCIPAL

- a. Duties of the Agent
 1. Duty to follow the instructions given by the principal
 2. Duty to exercise care skill and diligence
 3. Duty to keep and render proper accounts to his principal
 4. Duty to follow custom

5. Duty to communicate with the principal in case of difficulty
 6. Duty to pay sums received to the principal
 7. Duty not to deal on his own account
 8. Duty not to make secret profit from the business of agency
 9. Duty not to use information obtained in the course of agency against the principal
 10. Duty to protect and preserve the interest of the principal in case of his death or insolvency
 11. Duty not to delegate authority
- b. Rights of Agent
1. Right to receive remuneration
 2. Right to be indemnified
 3. Right to receive compensation
 4. Right of lien
 5. Right of retainer
- c. Duties of principal
1. Duty to indemnity
 - Duty to indemnify the agent against the consequences of all lawful acts
 - Duty to indemnify the agent against the consequences of acts done in good faith
 2. Duty to pay compensation
 3. Duty to pay remuneration or commission
 4. Duty to respect the agent's right of lien
- d. Rights of Principal
1. Right to recover damages
 2. Right to be indemnified
 3. Right to demand accounts of business
 4. Right to recover secret profit earned by agent
 5. Right to terminate the agency

■ DELEGATION OF AUTHORITY

The general rule of agency that 'Delegatus non-potest delegare', which means a person having delegated authority cannot delegate that authority to another. Where the original agent delegates his authority, the person so appointed may be either sub-agent or substituted agent.

Sub-agent

A sub-agent is a person employed by and acting under the control of the original agent in the business of agency.

An agent may delegate his authority in the given conditions:

1. Where the business of agency is such for its performance no personal skill or confidence required.
2. Where the nature of work is such that necessitates executing by a deputy.
3. Where customs or usage of trade permits to appoint sub-agent.
4. Where the principal is aware of the intention of agent to appoint a sub-agent but does not object to it.
5. Where the contract expressly authorizes the agent to appoint sub-agent.
6. Where there is an unforeseen emergency.

7. Where the principal permits for the appointment of a sub-agent.

Co-agent and Substituted Agent

Where an original agent, with the express or implied authority or consent of principal, appoints or employs another to act on behalf of the principal in the business of agency for which the original agent was appointed, he is known as substituted agent.

■ PERSONAL LIABILITY OF AGENT

The general rule is that only the principal enforce, and can be held liable on a contract entered into by the agent. An agent will be personally liable in the following cases:

1. When the contract expressly provides
2. When agent acts for an undisclosed principal
3. When agent acts for a principal who cannot be sued
4. When agent signs a contract in his own name
5. When agent acts in contravention of or beyond the authority given to him
6. When agent acts for a foreign principal
7. Where agent acts for a principal not in existence.
8. When custom or usage of trade makes him personally liable
9. When money paid by mistake or fraud
10. When authority is one coupled with interest

■ TERMINATION OF AGENCY

When the agency relation comes to an end or the agent becomes free from the contract of agency, is known as the termination of agency.

A. Termination of Agency by Acts of the Parties

1. By agreement
2. By revocation by principal

An agency becomes irrevocable in the following cases:

- a. Where agency is coupled with interest
- b. Where agent has incurred personal liability
- c. Where the agent has partly exercised the authority

B. Termination of Agency by Operation of Law

1. By performance of contract
2. By expiry of time
3. By destruction of subject matter of the agency
4. By happening of any event rendering the agency impossible or unlawful
5. By death of either party
6. By insanity of either party
7. By insolvency of either party
8. Dissolution of a company

■ AGENCY LAW IN NEPAL

In Nepal, the law relating to agency is regulated by Agency Act 2014 and Agency regulations 2019, and the Civil Code, 2074.

■ REGISTRATION OF AGENCY BUSINESS

A person if he wants to act as an agent he has to apply to the Commerce Department of Nepal Government to register his name stating particulars in the form of

schedule - 1 of Nepal agency rules, 2019 along with Rs. 1,000 as registration fee. When an application is submitted then the concerned officer shall examine the application and his name is registered as an agent. If his name is not to be registered such notice should be given to him.

Agency shall be valid for one year only and is to be renewed within the month of Baisakh of each fiscal year with a prescribed amount.

■ EFFECT OF NON-REGISTRATION

A person intending to act as an agent necessarily registered his name and no one can be an agent without being registered. Under section 8 of the Agency Act 2014 if a person is found doing agency business without registering his name he should be fined by up to Rs. 1,000.

CHAPTER 6

CONTRACT OF CARRIAGE

■ MEANING

In general the term the carriage refers an act of transporting or carrying goods, roughly speaking, the people from one place to another by the different means of carriage within the country or beyond the country. In fact, it is the act of transportation of goods as a business from one place to another by the different mean of carriage.

Carrier: The person who as his business carries the goods of other for consideration generally, either an individual or a company known as the carrier.

Contract of carriage: The contract made between a carrier and the owner or consignor of goods for the carriage of goods from one place to another known as a contract of carriage.

■ TYPES OF CARRIER

The kinds of carrier are as follows:

1. On the basis of nature of carrier
 - a. Private carrier
 - b. Common carrier
2. On the basis of reward they received
 - a. Gratuitous carrier
 - b. Non-gratuitous carrier
3. On the basis of things they carry
 - a. Passenger carrier
 - b. Goods carrier
4. On the basis of means of carriage
 - a. Land/ Road ways carries: It includes:
 - i. Private carrier
 - ii. Common carrier
 - b. Water/ Sea ways carrier
 - c. Airways carrier

■ CARRIAGE BY GOODS BY LAND

Goods are carried by land either by a private carrier or by a common carrier.

1. **Private carrier:** A private carrier is the carrier who carries the goods of other from one place to another not as a regular business of carrier.
2. **Common carrier:** A common carrier is a person either an individual or a firm or a company.

■ CHARACTERISTICS OF A COMMON CARRIER

The followings are the characteristics of a common carrier:

1. It may be an individual, or a firm or a company either private or public but it is not a government carrier.
2. Carrying goods is its regular business.
3. It carries only the goods of owner or consignor.
4. It always carries the good through a fixed or particular or customary route.
5. It carries goods without discrimination.
6. It is a non-gratuitous carrier.

The common carries only the goods from one place to another through a fixed or particular route. It is a land ways carrier, therefore, it finds an important role while moving the goods from one place to another as almost all the goods are to be carried through land or road ways. It is the oldest form of carrier and still it has been providing its service to the commercial world.

■ RIGHTS AND DUTIES OF A COMMON CARRIER

Duties of a Common Carrier

1. Duty not to make discrimination
2. Duty to carry the goods with reasonable care, skill and diligence
3. Duty to carry and deliver the goods within a reasonable time
4. Duty to deliver the goods to the receiver or consignee of the goods
5. Duty to deliver the goods at the fixed place
6. Duty to pay compensation
7. Duty to communicate in case of emergency
8. Duty to insure the goods
9. First carrier to be hold responsible in case goods are carried through several means of carriage

Rights of a Common Carrier

1. Right to refuse the goods from carrying them
2. Right to receive remuneration
3. Right to be indemnified
4. Right of compensation
5. Right to receive extra remuneration for extra work
6. Right of lien

Liabilities of a Common Carrier

Some of the liabilities of a common carrier are as follows:

1. To be liable for compensation for the loss, damage or destruction of the goods whatsoever may be the reason.
2. To be liable to deliver the goods to a proper place in the proper condition.

3. To be liable to carry the good at a fixed or within a reasonable time.
4. To be liable to take proper care of the good during the goods are in his custody.

Liabilities of a Common Carrier to be limited under-

1. Act of God
2. Inherent defects of goods
3. Exoneration by law from liability

Termination of the Common Carrier's Liability

- a. In case the common carrier or his agent delivers them to the owner or his agent.
- b. In case the goods delivered to the common carrier are received by the owner or consignor or his agent.
- c. In case the goods are returned back to the owner or consignor of goods or his agent.

■ AFFRIEGHMENT CONTRACT

It is a contract in writing between the owner and master of ship or shipping company in one hand and the owner or consignor of goods or any other person on the other hand by which the owner or master of ship or the shipping company for price promises to carry the goods of owner or consignor from one port to another port by keeping the goods in the ship and deliver them to the receiver or consignee of the goods within the time as mentioned in the contract.

■ TYPES OF AFFREIGHTMENT CONTRACT

Broadly speaking, the contract of affreightment can be classified into the following two divisions:

1. Charter party
2. Bill of lading

■ CHARTER PARTY

Charter party is a contract in writing between the owner or master of ship or the shipping company and the owner or consignor of goods or any other person whereby some or substantial or major part of the ship or the whole ship is hired and the owner or master of ship or the shipping company promises to carry the goods of owner or consignor or any other person by keeping them in the hired placed in the ship from one port to another port within a country or beyond the country for a fixed price. A charter party contract may be of two types.

1. Time charter
2. Voyage charter

Further, the charter party either it is time or voyage charter it may be with demise or without demise.

1. Charter party with demise
2. Charter party without demise

■ BILL OF LADING

Bill of lading can be characterizes by two ways:

Firstly, it is a receipt of goods issued and authenticated by the owner or master of ship or shipping company delivered by the owner or consignor of goods for the purpose of carrying them.

Secondly, it can be defined as a contract entered into, in writing, between the owner or master of ship or shipping company and the owner or consignor of goods whereby the first party by receiving the charge or fee agrees to carry the goods of owner by keeping them though without hiring place in the ship.

■ CARRIAGE OF GOODS BY AIR

Law Applicable to Airways Services

1. Warsaw Convention, 1929
2. Hague Protocol, 1955

Documents of Carriage

1. Passenger ticket
2. Luggage ticket
3. Air way bill

■ INCOTERMS 2010

The Incoterms or International Commercial Terms are the trade terms published by the International Chamber of Commerce (ICC) which is commonly used in both international and domestic trade contracts. The Incoterms rules are intended primarily to clearly communicate the tasks, costs, and risks associated with the transportation and delivery of goods.

Universal Incoterms

- EXW – Ex Works (named place of loading)
- FCA – Free Carrier (named place of delivery)
- CPT – Carriage Paid To (named place of destination)
- CIP – Carriage and Insurance Paid to (named place of destination)
- DAT – Delivered at Terminal (named terminal at port or place of destination)
- DAP – Delivered at Place (named place of destination)
- DDP – Delivered Duty Paid (named place of destination)

Incoterms applying only to sea and inland waterway transport

- FAS – Free Alongside Ship (named port of shipment)
- FOB – Free on Board (named port of shipment)
- CFR – Cost and Freight (named port of destination)
- CIF – Cost, Insurance & Freight (named port of destination)

CHAPTER 7

INDEMNITY AND GUARANTEE

■ CONTRACT OF INDEMNITY

Indemnity is a specific contract where a person promises or gives an assurance to another to save him from loss caused to him in the dealing between them in such circumstances as promised by the promisor. Therefore, in case of loss occurred in the dealing or loss suffered as per the terms of contract, the promisor is bound to make good for such loss or compensate the injured party.

■ RIGHT OF INDEMNITY HOLDER

1. To recover the entire amount mentioned in the contract as indemnity.

CHAPTER 8

LAW OF COMPANY AND INSOLVENCY

■ MEANING OF COMPANY

In simple terms, a company means a group of persons associated together for the attainment of a common end, social or economic. In common law, a company is a legal person or legal entity separate from, and capable of surviving beyond the lives of, its members.

■ FEATURES/CHARACTERISTICS OF A COMPANY

1. Separate legal entity/ corporate personality
2. Limited liability
3. Perpetual succession
4. Common seal
5. Separate property
6. Capacity to sue and subject to be sued
7. Transferability of shares
8. Management by representatives
9. Formalities, publicity and expense

■ INCORPORATION OF A COMPANY

Informal or Primary Stages

1. Selection of the name of company
2. Preparation of the memorandum and articles

Formal or Legal Stages

1. Application and submission of documents
2. Investigation to the application
3. Registration and certificate of incorporation

■ BOARD OF DIRECTORS

A company is itself a legal person with an existence independent of that of its members. Yet it remains an artificial person; its policy can be formulated and decided upon only by individual human beings, and can be put into effect and carried out only by human agencies. In practice, the initial constitution of the company will provide for the appointment of a board of directors and expressly delegate all the powers of management to it.

The director's report: The directors must prepare a report for each financial year. This must contain a fair review of the development of the business of the company and its subsidiaries during the financial year and the position at the end of it, they must state what amount if any, they recommend should be paid as dividend, and what amount if any, they proposed to carry to reserves. In addition, it must give the name of all persons who at any time during the financial year were director of the company and describe the principal activities of the company and its subsidiaries and any changes therein during the course of the year.

■ GENERAL MEETINGS

The formal relationship between the shareholders and the board of directors is that the shareholders elect the

directors, the directors' report on their stewardship to the shareholders and the shareholders appoint the auditors to provide the external check on the directors' financial statements.

Importance of general meetings

1. It helps in formulation and implementation of the policies.
2. It provides an opportunity of discussion and direction to the officers.
3. Shareholders can get a chance of knowledge of the true facts.
4. Appointment and removal of the directors and auditor.
5. Ratification of transactions.
6. Decision can be made over major issues affecting the business of the company.
7. Accountability of the directors about their acts can be assured.
8. Appointment of Auditor.

Types of General Meetings

1. Primary General Meeting
2. Annual General Meeting
3. Extra-Ordinary General Meeting

■ EXTRA ORDINARY GENERAL MEETING

Any meeting other than the AGM shall be called an extraordinary general meeting, and it may be convened by the directors whenever they think fit. An extraordinary meeting can be called by either Shareholders, Auditor and Office of the Companies Registrar.

Special resolution: The following matters are to be presented in the company's meetings as a special resolution:

- i. Increase of authorized capital of the company.
- ii. Decrease of share capital.
- iii. Conversion of company from private to public company or public to private company.
- iv. Amalgamation or merger of company.
- v. Bonus share.
- vi. Change of name and objectives of the company.

■ AUDIT

Audit of annual accounts of a company is compulsory and is an indispensable part of incorporated business.

Appointment of Auditor

Auditor may be appointed in a company either one of any following ways:

1. By the board of directors
2. By the general meeting of shareholders
3. By the Office of the Company Registrar
4. By the Auditor General Office

Rights and Powers of Auditors

The rights and power of an auditor are as under-

1. Right of access to books, accounts and vouchers.
2. Right to obtain information and explanations.
3. Right to visit branch offices and right of access to books kept therein.
4. Right to receive notice of general meeting and to attend the meeting.

5. Right to receive remuneration.
6. Right to prepare and present his report to the members.

Functions and Duties of Auditors

While performing his function, the auditor shall have to comply with the following duties:

1. Duty of care and caution.
2. Duty to verify the accounts.
3. Duty to conduct necessary interrogations and inquires.
4. Duty to report the members with the matters to be stated in his report as per sub-section (3) of section 115.
5. Duty to give suggestions if any to the company.
6. Duty to attend the meeting.

Tenor of office: An auditor appointed at the annual general meeting holds the office from the conclusion of the annual general meeting at which he is appointed until the conclusion of the next annual general meeting.

■ WINDING UP OF A COMPANY

Winding up or liquidation is a process by which the life of a company can be brought to an end where the management of the company's affairs are taken out from the director's hands, the assets of a company is disposed of, the debt is paid off and the surplus, if any, distributed among the members in proportion to their holdings in the company.

Voluntary winding up

1. Where a company was formed for a fixed period or the Articles had provided that the company was to be dissolved on the happening of certain event or events.
2. Where the company passes a special resolution that the company be wound up voluntarily either passed by the general meeting of shareholders or meeting of the creditors.

Compulsory Winding up

A company may be wound up at an order of the court. It is also called compulsory winding up. The cases in which a company may be wound up by the order of court are as follows:

1. Special resolution
2. Default in holding statutory meeting
3. Non-commencement or suspension of business
4. Reduction in membership
5. Failure to pay off debt
6. Just and equitable ground

■ LIQUIDATOR

Liquidator is an officer of a company appointed to carry on the liquidation process who after his appointment can collect all the assets and calculate all the debts or liabilities of the company, pays off the debts to all the creditors and other persons as per the priority and finally distributes the remaining surplus if any to the shareholders as per the ratio of share which they have subscribed in the company.

Appointment of Liquidator

A liquidator may appoint either:

1. By the company itself, which includes:
 - a. By the shareholders.
 - b. By the creditors.
2. By the order of court.

Powers, Functions and Duties of Liquidator

Rights and Powers

1. Right to institute or defend any suit or legal proceeding in the name and on behalf of the company.
2. Right to conduct business of the company being liquidated in a profitable manner.
3. Right to sell the assets of the company.
4. Right to make a call for partly paid-up shares.
5. Right to settle all the debts.
6. Power to issue, accept or endorse the negotiable instruments on behalf or in the name of the company.
7. Right to pledge the assets of the company.
8. Power to summon and interrogate the directors and officials of the company.
9. Right to convey the meeting of creditors.
10. Right to pay debts of the company.

Functions and Duties

1. Duty to take the company's assets into his custody.
2. Duty to exercise all his powers.
3. Duty to call the meeting of shareholders and creditors.
4. Duty to notify the fraud committed against the company or creditors.
5. Duty to settle the liabilities according to the property of the company.
6. Duty to submit the accounts to the office of the Company Registrar.
7. Duty to maintain correct and accurate records and account.
8. Duty to submit particulars to the general meeting.
9. Duty to submit the final report for the dissolution of the company.

■ MEANING OF INSOLVENCY

It refers a state of being unable or appearing to be unable, to pay any or all the debt due and payable to or payable in future to creditors or a situation where the amount of liabilities of a company exceeds the value of its assets. A company shall be deemed to have become insolvent on the following condition:

1. The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or
2. The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or
3. The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the period to void such notice

■ FEATURES OF THE INSOLVENCY ACT, 2063

The major features of the Insolvency Act, 2063 can be stated as under:

1. Applicable only to the insolvency matter of body corporate
2. Approval of the judicial authority
3. Liberal procedure
4. Commencing the insolvency proceedings
5. Restructuring scheme
6. Insolvency and restructuring system
7. Provisions of insolvency professional
8. Provision of insolvency administration office
9. Protection of the company's assets

■ COMMENCEMENT OF INSOLVENCY PROCEEDINGS

Any of the following persons may make an application to the Court in the prescribed form for the institution of such proceedings:

- a. A company itself which has become insolvent;
- b. Out of the total creditors of a company which has become insolvent, creditor or creditors who has or have lent at least ten percent of the total loan of the company;
- c. Shareholder or shareholders that have or have subscribed at least five percent of shares, out of the total shareholders of a company;
- d. Debenture-holder or debenture-holders that has or have subscribed at least five percent of debentures, out of the total debenture-holders of a company;
- e. A liquidator who has been appointed to liquidate a company; or
- f. In the case of a company that carries on any specific type of business set forth in Section 8, a body authorized to administer and regulate such business.

■ INTERIM ORDER

Where, in making hearing, it appears that there exists some situations in the company which may prejudice the interests of the creditor or any other person having dealing with the company, the Court may, on an application by the concerned party or at its own discretion, issue an interim order.

■ RESTRUCTURING SCHEME OF COMPANY

Where the Court makes an order to restructure any company pursuant to Sub-section (2) of Section 22, the restructuring manager shall prepare a restructuring scheme of the company in writing. The scheme prepared shall contain the following programs:

- a. To capitalize the debt of the company and alter the capital structure;
- b. To pay the claims of creditors by selling any portion of the assets of the company;
- c. To change the nature of claims of creditors of the company and issue securities for the same;
- d. To get the creditors of the company to participate in capital investment by issuing shares in consideration for their claims;

- e. To amalgamate the company with any other company;
- f. To change the management of the company; or
- g. To do any such other act which the Court considers appropriate to restructure the company.

■ LIQUIDATION OF COMPANY

Where the Court makes an order to liquidate a company pursuant to this Act, the Court shall make an order to appoint one person as the liquidator, from amongst the persons who are entitled to carry on insolvency business at the time of making of such order.

Functions, Duties and Powers of Liquidator

- a. To institute or defend any case or legal action on behalf of the company;
- b. To appoint employees to assist in the discharge of his or her functions;
- c. Where any installment on any share of the company is due, to make a call on the shareholder for payment of such installment;
- d. To do and execute, or cause to be done and executed, all such acts and deeds or documents as required to be done and executed on behalf of the company and in the name of the company and use the seal of the company for that purpose;
- e. To borrow loans against security of the assets of the company;
- f. Where the liquidator considers that the sale and disposal of any property or termination of any contract or liability will render benefits to the company, to sell and dispose of such property or terminate such contract or liability;
- g. To enter into compromise with any creditor of the company or any person who claims to be a creditor of the company in relation to the claim made by such creditor or person;
- h. To enter into compromise with any person against whom the company may make a claim in relation to any loan, liability or any other claim;
- i. To sell the assets of the company and distribute the proceeds of such sale pursuant to this Act; and
- j. To perform, or cause to be performed all such other acts as may be necessary to liquidate the company.

Power of the Court to make order in relation to liquidation of company:

The Court may at any time issue the following order in respect of any company which is undergoing liquidation proceedings:

- a. To suspend or terminate the liquidation of the company;
- b. To require to hand over the assets of the company to the liquidator;
- c. To pay any call made for payment of installment;
- d. Where there is a doubt that any person is possessing or using any property of the company, to stop such possession or use; or
- e. To arrest any person who causes any hindrance in or obstruction to the performance of functions or duties or the exercise of powers by the liquidators.

CHAPTER 9

DISPUTE SETTLEMENT SYSTEMS IN NEPAL

■ COURT SYSTEM IN NEPAL

The constitution of Nepal has provided three tiers of court including the Supreme Court, High Courts and District Courts. The constitution has mentioned about the provisions relating to judiciary under part 11 with clear provision that the courts and other judicial bodies can exercise the power relating to justice in Nepal under the constitution and other laws and the principles of justice.

■ TIERS OF COURT

1. **Supreme Court:** It is highest level of court and called as the court of record.
Jurisdiction of the Supreme Court
 - a. Ordinary Jurisdiction
 - b. Extra-ordinary Jurisdiction
 - c. Miscellaneous Jurisdiction
2. **High Court:** It is a court appeal. It can exercise ordinary and extra ordinary powers as per the constitution and laws.
3. **District Court:** It is a court of first instance.

■ CIVIL PROCEDURE IN NEPAL

Procedures to be followed by the court in civil cases are provided under the Code and Civil Procedures, 2074.

■ GENERAL PRINCIPLES CIVIL PROCEDURAL LAW

1. Hearing to be held in open bench
2. Hearing to be made by competent court
3. Question of entitlement or disentitlement to be settled by court only
4. Dispute relating to legal status to be settled by the regular court only
5. Equal treatment of parties
6. One to have locus standi to make plaint
7. Jurisdiction not to be in vacuum
8. Not to be allowed to avoid making decision
9. Opportunity to be given for compromise or mediation
10. Principle of res judicata to be followed
11. Right of appeal

■ ARBITRATION

Arbitration is an alternative dispute resolution process where the parties of a dispute refer their disputes and difference relating to civil matters to settle them in a judicial manner to a person a group of persons, called arbitrators, appointed by them without recourse to a court of law whereby the parties of dispute agrees to follow the decision given by them.

■ FEATURES OF ARBITRATION

1. An alternative dispute resolution process
2. A private mechanism for dispute resolution
3. Selected and controlled by the parties
4. Final and binding determination of parties' rights and obligations
5. More expertise service

■ IMPORTANCE OF ARBITRATION

The importance of arbitration can be stated as follows:

1. It is speedy
2. It is simple
3. Less expensive
4. Secrecy or privacy can be maintained
5. More expertise service
6. Easy in execution of the award
7. More convenient in the international disputes

■ MATTERS REFERABLE TO ARBITRATION

But this cannot be used to decide all disputes between the parties in a state.

What can be referred?

The following matters can be validly referred to arbitration:

1. Matters of civil nature, i.e., matters relating to property or money.
2. Matters relating to personal rights, i.e., maintenance payable to wife, terms of separation.
3. Dispute relating to dignity and respect-violation of rights.
4. Time-barred claims.

What cannot be referred to arbitration?

The following matters are not referable to arbitration:

1. Disputes relating to matrimonial relation, e.g., a suit for divorce or restitution of conjugal right.
2. Testamentary matters; e.g., the questions of genuineness of proofs, evidence or a will documents.
3. Insolvency matters
4. Matters relating to public charities or charitable trust.
5. Matters relating to the guardianship of a minor or lunatic.
6. Criminal matters and disputes.

■ ARBITRATORS AND THEIR APPOINTMENT

Arbitrator

A person who is appointed by the parties of disputes themselves by their mutual consent to act as a judge to decide their dispute impartially and judicially out of the court is called an arbitrator.

Qualification of Arbitrators

- a. Person Incapable to enter into a contract as per the prevailing law.
- b. Person punished by a court on criminal charges involving moral turpitude.
- c. Insolvent or bankrupt.
- d. Person having any personal interest in the dispute which has to be settled through arbitration.

- e. Person not having any specific qualification specified in the agreement for becoming eligible for the appointment as an arbitrator.

Appointment of Arbitrators

As per the Arbitration Act, 2055,

1. By the parties themselves
2. By the order of court

Appointment of Arbitrator by Court

Court for the appointment of arbitrator in the following circumstances:

- a. In case no arbitrator can be appointed as per the agreement.
- b. In case the agreement does not mention anything about the appointment of arbitrators.

Removal of Arbitrators

Subsection (2) of section 11 of the Arbitration Act, 2055, has provided the grounds for the removal of an arbitrator are as follows:

1. Bias or partiality of arbitrator.
2. Improper conduct or commits fraud in the course of arbitration.
3. If arbitrator frequently commits mistake.
4. If any irregularities committed by arbitrators in the course of arbitration.
5. If arbitrator does not attend arbitration meetings or refuses to take part in the arbitration proceedings for more than three times without furnishing satisfactory reasons with the objective of prolonging or delaying the arbitration proceedings in an improper manner.
6. If arbitrator acts opposite to the principles of natural justice.
7. If arbitrator does not possess necessary qualifications or lost his qualifications.

PROCEDURES OF REMOVAL

1. Party intending to remove an arbitrator may submit an application within 15 days from the date of his appointment having knowledge of the conditions for the removal of arbitrators.
2. If the alleged arbitrator does not remove his post voluntarily or other party does not agree with the grounds, the remaining arbitrators must take decision within 30 days.
3. If a party does not agree with the decision of the arbitral tribunal may file an appeal to the High Court and the decision of the High Court becomes final.

ARBITRAL AWARD

Award is a judgment or final decision of an arbitrator or Arbitral Tribunal on all matters referred to arbitration.

Matters to be mentioned in the Award

Section 27 of the Act is concerned with the matters to be mentioned in the Award. Therefore, the arbitrator must explicitly include in the award:

- a. Brief particulars of the matter referred to them.

- b. Matter of jurisdiction if asked.
- c. Issues raised in hearing to be given the award.
- d. About the documents, proofs or other evidences examined by the arbitrator.
- e. Claims, counter claims or particulars of rejoinder.
- f. Award and its reason
- g. Cost of arbitration.
- h. Date place or venue of arbitration, etc.

APPEAL AND SETTING ASIDE OF THE AWARD

Any party dissatisfied with the decision taken by the arbitrators and wishes to invalidate the decision may file a petition to the High Court along with the related documents and a certified copy of the decision within 35 days from the High Court may set a side the decision in question.

1. If the agreement is not valid being entered into by or with an incompetent party, or against the law of the country or not clear.
2. If due notice was not given to appoint an arbitrator or about the arbitration proceedings.
3. If the decision has been given beyond the jurisdiction prescribed for the arbitrator or decision has been given to other matters which were not referred to the arbitrators.
4. If the arbitrators have acted in such a manner against the provisions of the agreement between the parties or against the provision of the Act.

EXECUTION OF AWARD

Pursuant to Section 31 of the Act, the concerned parties shall be under obligation to execute the award within 45 days from the date when they receive a copy thereof. In case the parties fail to perform or execute the award within the period of 45 days, the concern party may file a petition to the Execution Section of the District Court. When such an application filed, the District Court shall execute or implement the award within 30 days as if its own judgment.

Similarly, Section 34 of the Act has provided various provision for the execution of the award taken in the foreign country by foreign arbitration tribunal.

MAJOR PROVISIONS OF ARBITRATION ACT, 2055

1. Definitions
2. Matters referable to arbitration
3. Number of Arbitrators and their appointment
4. Qualification of Arbitrator
5. Revocation of Arbitrator's authority
6. Powers & duties of Arbitrators
7. Award
8. Appeal
9. Execution of award

CHAPTER 10

LAW OF INTELLECTUAL PROPERTY

10.1 INTELLECTUAL PROPERTY RIGHT LAW

MEANING OF INTELLECTUAL PROPERTY RIGHT

Intellectual property rights refer to the legal rights obtained by an individual or institution over the ownership and use of the IPs, hence, it is the rights granted to the creator of his/her creation. It is a legal right established with the sole motive of protecting the creation of the intellect. Any sort of inventions, such as: literature, designs, music, logos, images etc. can be copied, hence to protect and restrict misusing of the creations, Intellectual Property Rights can be very advantageous. Intellectual property rights protect the interests of creators by giving them property rights over their creations.

COPYRIGHT ACT, 2009

Copyright is that branch of law which grants author the exclusive privilege to reproduce, distribute, perform or display their creative works. The goal of copyright law is to encourage authors to invest effort in creating new works of art and literature.

The specific objectives of this paper are as follows:

- To familiarize concept of intellectual property and as well as copyright,
- To find out the provision of the Copyright Act, 2002 for the protection of copyright works.

MAJOR PROVISIONS OF THE COPYRIGHT ACT, 2009

The major provisions under the Act can be provided as under.

1. Scope of the application of the law
2. Rights of the authors
 - a. Economic Rights
 - b. Moral Rights
3. Protected works
4. Unprotected works
5. Ownership of copyright and its transfer
6. Terms of protection.
7. Limitations and exceptions
 - a. Private Use
 - b. Teaching and Illustration
 - c. Library and Archival Use
 - d. Reproduction for Information Purposes
 - e. Public Exhibition
 - f. Reproduction of Computer Programs
8. Infringement of Copyright
9. Remedies for Infringement
10. Enforcement

PATENT, DESIGN AND TRADEMARK ACT, 2022

The Patent, Design and Trademark Act, 2022 that provides protection for industrial property including patents, designs, and trademarks. Patent protection is afforded to and includes new inventions; principles and formulae; and the protection of design protection including physical shape and appearance. Trademark protections include the word, sign, picture, or combination thereof to differentiate the product from others in the market. The Act has authorized the Department to protect the industrial property like patent, design and trademark

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

The TRIPs Agreement, which came into effect on January 1995 as a multilateral agreement between WTO countries, is to date the most comprehensive multilateral agreement on intellectual property. Its main objective is to provide strong and comprehensive protection of various forms of intellectual property, i.e., copyright, patent, design and trademark throughout the world. The agreement requires compliance of the most recent amended version of WIPO, Paris Convention for the protection of Industrial Property and the Bern Convention for the Protection of Literary and Artistic Works (Bern Convention). The TRIPs principally mandates member countries to formulate domestic IPR enforcement procedures to allow right holders to exercise their IPR rights and remedies for the contravention of the agreement.

FEATURES OF THE TRIPS AGREEMENT

The four main features of the Agreement are:

1. Standards
2. Enforcement
3. Dispute settlement
4. Principle based agreement

10.2 INDUSTRIAL ENTERPRISES AND FOREIGN INVESTMENT RELATED LAW

INDUSTRIAL ENTERPRISES ACT, 2016

The Industrial Enterprises Act, 2016 has been enacted to encourage national productivity and employment opportunity by making the industrial environment more congenial and investment friendly to develop a strong, dynamic, and competitive and production oriented economy through the industrial development by promoting export and replacing imports by using the natural, physical and human resources available in the country. To achieve this objective the Act has provided various provisions relating to the classification, registration and licensing of industries, facilities and concessions and proper monitoring to foster the industrial development through institutional regulation.

■ SALIENT FEATURES OF THE ACT

- Industry cannot be operated or established without registering as per this Act.
- Registration Certificate of the industry will be provided within 15 days of the submission of the application.
- Investor, if required, needs to conduct Environmental Impact Assessment (EIA) or Initial Environmental Examination (IEE).
- Export Industry has to export at least 60 percent of its products.
- Licensing/Permission from the Industry and Investment Promotion Board is required to establish industry producing explosives, tobacco and alcohol industries, industry producing sand, stones and Industry producing radio communication equipment.
- Investor is required to commence its operations as stated in the Registration Certificate.

■ CLASSIFICATION OF INDUSTRY

The Industrial Enterprises Act, 2076, has classified the industry into various divisions on different basis. The industries are divided not only the sake of division but it is the basis of legal recognition and providing incentives, concession, and special treatment to the specified industries. The industries classified under Section 17 of the Act are as follows.

Classification of Industry on the Basis of Fixed Assets- S. 17(1)

- Micro Industry
- Cottage Industry
- Small Industry
- Medium Industry
- Large Industry

Classification of Industry on the Basis of its Nature- s. 17(2)

- Information, communication and information dissemination technology-based industry
- Manufacturing industry
- Agro and Forest based industry
- Mining industry
- Infrastructure industry
- Tourism industry
- Energy based Industry

■ PROCESS OF REGISTRATION OF INDUSTRY

1. Application of registration
2. Certificate of registration
3. Appeal against refusal
4. Matters to be stated in the certificate of registration
 - Date of issue of the industry registration certificate.
 - Date of commercial production and transaction to be commenced by the industry.
 - Terms and conditions to be followed by the industry.
 - Other terms and conditions as prescribed as per the nature of industry.
5. Prior approval and monitoring

- Industry provided under Schedule-1.
- Industry required to obtain the Board's approval pursuant to the prevailing law relating to the foreign investment and technology transfer.

■ FACILITIES, CONCESSION AND REBATE

Chapter 5 of the Industrial Enterprise Act, 2076 has provided the various concessions, rebate and facilities under different headings which are stated as follows.

- Income Tax Concessions (Section 24)
- Customs Duty Exemptions (Section 25)
- Exemptions for Micro Industries (Section 26)
- Additional benefits for Female Entrepreneurs (Section 27)
- Other Exemptions and Facilities

■ ONE STOP SERVICE CENTRE

Under Section 37 of the Act, the Government of Nepal may establish and bring into operation a One Stop Service Centre, as prescribed for the purpose of providing the incentives, exemptions, facilities or concessions easily to those industries or investors entitled under this Act and other prevailing laws and performing the functions to be discharged by various bodies of the Government of Nepal through one place in a timely manner and delivering industry administration related services from the permission to establish, registration, expansion and liquidation of, industries.

■ SICK INDUSTRIES

The Act has defined Sick Industry as the industry which has, after minimum five years of its operation, been continuously running under 30% capacity utilization and bearing loss for the last three years, because of the situation out of its control. The act has made some provisions for revival of such sick industry.

After considering the contribution of such sick industry before being sick to the foreign currency earnings, employment generation, substitution of import and promotion of export, the government may make necessary arrangement for the revival of such sick industry. Further, no duty, fee and tax of any kind shall be levied on the machinery imported by any industry necessary for the extension and diversification of such industry. Similarly, other exemption, concession, facilities or rebate can be provided to such industries for their revival, reconstruction and management.

■ PROVISION AS TO SUPPLY OF INDUSTRIAL HUMAN RESOURCE

According to Section 49 of the Act, the human resources required for the industry are to be fulfilled from Nepalese citizens only. However, if a Nepalese citizen could not be available for any skilled technical post or for senior level management post, the management may by submitting an application to the Department of Labour along with the evidence of such for the approval can appoint a non Nepalese citizen. The DOL may grant approval to engage a non

Nepalese citizen at work for a maximum period of five years, not exceeding two years at a time. Department may extend further two years in a specialized kind of skilled technical post.

■ CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility (CSR) which indicates the need for corporations to follow sustainable business practices. In the context of corporate governance, CSR means that corporations have to take into account society and the environment as stakeholders and cater to their needs instead of just pursuing profits at the expense of everything else. It is hoped that corporate would be responsible towards society and the environment.

■ CSR REQUIREMENT FOR INDUSTRIES

1. **Applicability:** Medium or large industry or cottage or small industry with annual turnover of more than one hundred fifty million rupees.
2. **Amount for the CSR:** At least one percent (1%) of the annual profit.
3. **Sectors specified for utilization of the amount of CSR:** The areas as prescribed, upon making annual plans and programs.
4. **Reporting requirement:** An industry shall submit details within six months after the end of the fiscal year.

■ FOREIGN INVESTMENT AND TECHNOLOGY TRANSFER ACT, 2075

The Foreign Investment and Technology Transfer Act (FITTA), 2075 (2019) intends to increase the industrialization and foreign investment for the long term and sustainable growth in national economy by utilizing the available resources and also by reforming the existing legal framework of foreign investment in Nepal to attract more foreign investments..

■ MAJOR PROVISIONS OF FOREIGN INVESTMENT AND TECHNOLOGY TRANSFER ACT, 2075

The major provisions of FITTA are given below:

1. **Foreign Investment:**
 - Investment in shares in foreign currency
 - Re-investment of dividend/Profits
 - Investment through lease of airlines, ships, machineries and equipment (Read with section 6)
 - Investment in Equity through "Venture Capital Funds" by "Corporate Foreign Investor" (Read with section 9)
 - Investment in secondary stock market (Read with section 10) (Not effective until further notification from Government)
 - Investment through purchase of shares or asset (Read with section 5)

- Investment by issue of securities in foreign stock markets (Read with section 11)
 - Technology transfer (Read with section 7)
 - Incorporating Branch Unit (Read with section 8)
2. Foreign Investors
 3. Borrowings from Foreign Financial Institutions
 4. Application for foreign investment approval
 5. Approving Authority of Foreign Investment
 6. Repatriation of Profit or Gains on Sale of Shares (Section 20)
 7. One Stop Service Centre: Services to be availed from the Centre are as follows:
 - Industry Registration & its related services
 - Foreign Investment and loan approval
 - Company registration & its related services
 - Labour permission (Work Permit)
 - Visa Facility
 - Environment Impact Assessment (EIA) Approval
 - Focal Point for energy & infrastructure development
 - Provide Permanent Account Number (PAN)
 - Quality Measurement and control of products of the industry
 - Concession/rebate for the Industries
 - Approval for Foreign Exchange
 - Any other services required under this act.
 8. Concession, facilities and incentives available to the Foreign Investors or Companies established under FDI
 9. Provisions for Visas (Section 30)
 - Non-tourist Visa
 - Business visa
 - Residential Visa
 10. Sectors restricted for investment

Primary agriculture sectors such as fish farming, animal husbandry, horticulture, milk business and others;

 - Small and cottage enterprise;
 - Personal service business such as tailoring, driving, barber shop;
 - Arms and ammunition industry;
 - Buying and selling of land and houses (other than construction industry);
 - Retail business;
 - Remittance service;
 - Local catering, travel agency, trekking agency, homestay and rural tourism;
 - Mass-media business such as newspapers, radio, TV and online news;
 - Movies of national language;
 - Management, accounts, engineering and legal consulting services, language training, music training, computer training; and
 - Other consulting services over 51% shareholding.

