PGCM (S2) 04
Exam. Code: BL

Business Laws

SEMESTER 2

MASTER OF COMMERCE

BLOCK 1

KRISHNA KANTA HANDIQUI STATE OPEN UNIVERSITY

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February, 2019 ISBN: 978-93-87940-96-3

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Printed and published by Registrar on behalf of the Krishna Kanta Handiqui State Open University.

Headquarters : Patgaon, Rani Gate, Guwahati-781 017

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The university acknowledges with thanks the financial support provided by the **Distance Education Bureau, UGC** for the preparation of this study material.

MASTER OF COMMERCE

BUSINESS LAWS

Block 1

DETAILED SYLLABUS

UNIT 1: Introduction to Business Law **Pages: 7-13**

Introduction, Meaning and Nature of Law, Sources of Indian Business Law, Indian Legal System, Mercantile Law

UNIT 2: Law of Contract **Pages: 14-29**

Introduction, Objectives, Definition of a Valid Contract, Offer and Acceptance, Capacity to Contract, Consent, Consideration, Performance of Contract, Discharge of Contract, Breach of Contract and Void Agreements, Quasi Contracts, Freedom to Contract

UNIT 3: Contracts of Guarantee and Indemnity **Pages: 30-40**

Introduction, Contract of Indemnity, Contract of Guarantee, Kinds of Guarantee, Creditor, Surety

UNIT 4: Contract of Bailment and Pledge **Pages: 41-50**

Introduction, Definition of Bailment, Kinds of Bailment, Bailor and Bailee, Termination of Bailment, Finder of Lost Goods, Pledge or Pawn, Pledge by Non Owners, Pledgor and Pledgee

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UNIT 6: Law of Sales of Goods **Pages: 70-87**

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UNIT 7: Law of Negotiable Instruments **Pages: 88-104**

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UNIT 8: Formation of a Company **Pages: 105-133**

Introduction, Formation of a Company, Stages of Formation of Company, Documents Required for Incorporation, Types of Company, Meaning of Meetings and Kind of Company, Meaning of Minutes, Role of Chairman, Postal Ballot, Resolution and its Diferent Kinds

COURSE INTRODUCTION

This is the fourth course in M.Com 2nd semester. This course introduces us to the subject– Business Laws. This course is designed as an introduction to law in management. As such, it will provide us with an overview of the many regulations that takes place in business. We will discuss different Law related to business. After going through this self learning material, learners will also come to know about Business Law, Law of Contract, Law of Partnership etc. The course has 14 units and is divided into two blocks; Block 1 and Block 2.

Block 1 deals with 8 units which includes Business Law, Law of Contract, Law of Partnership, formation of a Company, etc.

Block 2 deals with 6 units which includes Regulatory Framework of Insurance, The Companies Act, The Consumer Protection Act, etc.

Each unit of these blocks includes some along-side boxes to help you know some of the difficult, unseen terms. Some “EXERCISES” have been included to help you apply your own thoughts. You may find some boxes marked with: “LET US KNOW”. These boxes will provide you with some additional interesting and relevant information. Again, you will get “CHECK YOUR PROGRESS” questions. These have been designed to self-check your progress of study. It will be helpful for you if you solve the problems put in these boxes immediately after you go through the sections of the units and then match your answers with “ANSWERS TO CHECK YOUR PROGRESS” given at the end of each unit. you in making your learning more active and efficient. And, at the end of each section, you will get “CHECK YOUR PROGRESS” questions. These have been designed to self-check your learning.

BLOCK INTRODUCTION

This is the first block of the course Legal aspects of Business. This block consists of eight units. The structure of Block 1 is as follows:

UNIT 1: Introduction to Business Law

UNIT 2: Law of Contract

UNIT 3: Contracts of Guarantee and Indemnity

UNIT 4: Contract of Bailment and Pledge

UNIT 5: Law of Partnership

UNIT 6: Law of Sales of Goods

UNIT 7: Law of Negotiable Instruments

UNIT 8: Formation of a Company

UNIT 1: INTRODUCTION TO BUSINESS LAW

UNIT STRUCTURE

1.1 Learning Objectives

1.2 Introduction

1.3 Meaning and Nature of Law

1.4 Sources of Indian Business Law

1.5 Indian Legal System

1.6 Mercantile Law

1.7 Let Us Sum Up

1.8 Further Reading

1.9 Answers to Check Your Progress

1.10 Model Questions

1.1 LEARNING OBJECTIVES

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

- explain meaning and nature of law
- explain sources of Indian Law
- describe about mercantile law
- explain essentials of law.

1.2 INTRODUCTION

Law cannot be static and with the development of the societies, it has to change and grow. Hence, the definition of law is also not static and it changes with the development of the societies. In this unit we are going to discuss about meaning and nature of law. After going through this unit, you will able to know sources of Indian Law. Through this unit, you will also understand the concept of mercantile law and you will able to know the brief concepts of business law.

1.3 MEANING AND NATURE OF LAW

People living in an organized society and has to obey certain common rules that help in peaceful living. Jurists have tried to define the term law at different times. But there is no single definition which is universally applied.

Broadly 'Law' is a national pattern of conduct to which actions do or ought to confirm. Law defined from different approaches like– i) its basis in reason, ethics or religion, ii) by its source in custom, legislation or precedent, iii) by its effects on the life of the society, iv) by the method of its formal expression or authoritative application, v) by the ends that it seeks to achieve.

According to Austin's definition of law, it must have the essential elements like—

1) Law emanates from sovereign i.e. to him sovereign is determinate person or body of persons who command the whole corpus of the law.
2) Law is Sovereign's command i.e. law are backed by power of force of the sovereign by which people are bound to obey laws.
3) Command implies a sanction i.e an enforcement of obedience and an evil acts like physical force applied in case of disobedience or a duty be broken.

According to Holland, Law is, "a rule of external human action enforced by the sovereign political authority."

According to Salmond, ''Law is the body of principles recognized and applied by the State in the administration of justice.

According to Gray's, "The law of the state or of any organized body of men is composed of the rules which the courts, that is the judicial organ of that body lays down for the determination of legal rights and duties."



CHECK YOUR PROGRESS

Q.1: Define Law.

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1.4 SOURCES OF INDIAN BUSSINESS LAW

The sources of Indian business law are based upon Custom, Statute of Indian Legislature, English Mercantile Law, Indian Mercantile law, Precedents. The following are the sources from which Indian business law derived.

a) **Custom:** Custom is a habitual course of conduct observed uniformly and voluntarily by the people. It is one of the oldest forms of law making where human conduct was regulated by practices which grew up spontaneously and were later adopted by the people. The custom which are not contrary to justice, equity or good conscience or opposed to public policy or statute but, reasonable become legally recognized when it is accepted by court and incorporated in a judicial decision.

b) **Precedents:** A precedents means a previous instance or case which is or may be taken as an example or rule for subsequent cases. Precedents are based on practical experiences rather than logic. Article 141 of the Constitution of India provides that law declared by Supreme Court to be binding on all courts within the territory of India. The Judges of court explain statutes and interpret it. The judicial decisions or precedents are based on rules of equity and good conscience and thus when the law is silent on a point the judges has to decide the case according to his idea what is equitable and frequently referred the precedents.

c) **Statutes of Indian Legislature:** Custom played a significant role in ancient times lost much of its importance. At present customary laws have been incorporated in statutes. Now, the legislature is one of the main sources of law. In India the Central and State legislatures possess law making powers and have exercised their powers extensively. Moreover, the greater part of Indian commercial law is statutory.

d) **English Mercantile Law:** The English Mercantile Law is a mixture of diverse elements and originating from sources like Rules of Roman

Law, Rules of Equity, Rules developed by custom in England, statutes of British Parliament etc.



CHECK YOUR PROGRESS

Q.2: Mention the two sources of Indian business law.

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1.5 INDIAN LEGAL SYSTEM

The legal system is a part of social system of a country. It reflects the social, political, economic and cultural characteristics of the country. The Indian legal system consists: a) constitution, b) rights and liabilities spelt out of the citizens of the country in the laws, c) institutional structure and d) legal personal.

a) **Constitution:** It is a written document which distributes State power amongst different organs legislative, executive and judiciary. It is fundamental law of land. The constitution guarantees certain fundamental rights and gives certain directives.

b) **Laws:** All laws grouped into two categories based on remedies as civil and criminal law. Criminal laws concerned with wrong against the community as a whole which are prosecuted and punished by the State and civil law is related with rights, duties and obligation of individuals which includes law of contract, commercial laws, labour laws etc.

c) **Institutional Structure:** Courts are institutional structure which created by statutes wherein disputes are adjudicated and administered. The Supreme Court is the highest court of appeal.

The Supreme Court and High Court resolves the disputes between State and Union, State and State and State and Citizens. There are more subordinate courts where for criminal disputes Session Court, Magistrate Court and for civil disputes Munsiffs Court, Sub-Divisional Court and District Court. Besides these, there are certain Special Courts and Tribunals set up for different specific purposes.

d) **Legal Personal:** Judges and lawyers are the key legal personnel who assist in administration of justice. Judges are free to administer law and the lawyers are experts which assist the judges to find out unravel truth from the disputed issues.

1.6 MERCANTILE LAW

Mercantile law is a broad aspect. It is based on law, customs, statutes that deal matters relating to industry, trade and commerce. It includes the laws relating to contract, partnership, sale of goods, companies, negotiable instruments etc. There is no fixed line of division between mercantile laws and other branches of laws. When any mercantile suit files in a court of law the procedure of it not different from that suit related to other matters. The mercantile law is that part of law which regulates the transactions of the mercantile community.



1.7 LET US SUM UP

In this unit, we have discussed the following:

- According to Holland, Law is, “a rule of external human action enforced by the sovereign political authority.”
- The sources of Indian business law are based upon Custom, Statute of Indian Legislature, English Mercantile Law, Indian Mercantile law, Precedents.
- The Indian legal system consists: a) constitution, b) rights and liabilities spelt out of the citizens of the country in the laws, c) institutional structure and d) legal personal.



1.8 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.
5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



1.9 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: According to Salmond," Law is the body of principles recognized and applied by the State in the administration of justice.

Ans. to Q. No. 2: The two sources of Indian business law are:

A) Custom: It is one of the oldest forms of law making where human conduct was regulated by practices which grew up spontaneously and were later adopted by the people.

B) Precedents: It is previous instance or case which is or may be taken as an example or rule for subsequent cases. Precedents are based on practical experiences rather than logic.



1.10 MODEL QUESTIONS

Q.1: 'Law is a national pattern of conduct to which actions do or ought to confirm.' Define Law.

Q.2: Write short note on :

a) The Indian legal system

b) Mercantile Law

Q.3: Explain the Indian business law.

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UNIT 2: LAW OF CONTRACT

UNIT STRUCTURE

2.1 Learning Objectives

2.2 Introduction

2.3 Objectives

2.4 Definition of a Valid Contract

2.5 Offer and Acceptance

2.6 Capacity to Contract

2.7 Consent

2.8 Consideration

2.9 Performance of Contract

2.10 Discharge of Contract

2.11 Breach of Contract and Void Agreements

2.12 Quasi Contract

2.13 Freedom to Contract

2.14 Let Us Sum Up

2.15 Further Reading

2.16 Answers to Check Your Progress

2.17 Model Questions

2.1 LEARNING OBJECTIVES

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

- define the meaning of a Contract and its essentials
- explain discharge of Contract
- explain about breach of contract and void agreements
- describe quasi contract.

2.2 INTRODUCTION

The urgency of passing the Indian Contract Act, 1872 was the English Common Law applicable in India. The use of English Common Law in judicial system of India has created lots of biasness. As a result, this Indian Contract

Act, 1872 was passed. The passing of this Indian Contract Act, 1872 helps the parties to enforce their rights and obligations which derived from a contract based on consequences in India. In this unit we are going to discuss about details of Indian Contract Act, 1872 and essentials of a valid contract. Through this unit, you will also able to know about discharge of contract. The unit discuss about the meaning of quasi contract, freedom to contract. Through this unit, you will also understand about the concept of breach of contract and void agreements. Thus, through this unit, you will able to know the objective of Indian Contract Act, 1872 and its different concepts stipulated under this Act.

2.3 OBJECTIVES

Initially when Court of Justice in three presidency towns Calcutta, Madras and Bombay were established, the English Common Law only was applicable. The use of English Common Law in India created lots of inconveniencies to Hindus and Mohammedans. As a result the Court of Justice in three presidency towns Calcutta, Madras and Bombay empowered by statute 1781 to determine the all matters of contract of Hindus and Mohammedans as per their bye laws. This continues till upto passing Indian Contract Act, 1872.

The law relating to contracts in India is contained in Indian Contract Act, 1872. The Act was passed by British India and is based on the principles of English Common Law which amended later many times. This Indian Contract Act, 1872 extends to whole of India except the State of Jammu and Kashmir. We all enter a numbers of contracts every day and each contract creates some rights and duties on the contracting parties. This Indian Contract Act, 1872 explains the all rights, power, liabilities and duties which can enforce on the parties.

2.4 DEFINITION OF A VALID CONTRACT

The term ‘Contract’ defines under Section 2(h) of Indian Contract Act, 1872. The definition clear it that all contracts are agreements but all

agreements are not contracts. It means every kind of agreement is not contract, an agreement creates legal rights, liabilities between the parties and which has some value in the eye of law are contract. Thus, valid contract can be define as the agreements that are enforceable at law. Such agreement is fully operative with the intention of the parties and has value in the eye of law. Such agreement has to satisfy the following essentials/ conditions for a valid contract under the Act :

i) **Offer and Acceptance:** To constitute a contract there must be an agreement. There must be two parties to an agreement where on party making offer (offeror) and the other party accept the offer (offeree). Thus, the offeror must communicated the offer to the offeree which is not an invitation and is should be certain (not vague) intend to create legal obligation. But the offer is said to be accepted when the person to whom the offer is made give his assent thereto.

ii) **Consideration:** Consideration is essential for a valid contract. A contract not supported by consideration is void. Consideration means something in return which may be cash, kind, an act or abstinence. The consideration should be real and lawful. It can be past, present or future.

iii) **Capacity to Contract:** The parties must be competent to contract parties. i.e they are not disqualified from contracting by any law to which they are subject. The parties should attain the age of majority and are sound mind.

iv) **Free Consent:** The agreement must have been made by the free consent of the parties. They must have agreed to something in the same sense and the consent of the party must not have been obtained by a.) Coercion, b.)Undue influence, c.)Fraud, d.) Mistake or e.) Misrepresentation.

v) **Performance of Contract:** The terms of contract must be certain and attainable. If it is not possible to ascertain than it is not enforceable at law and become not valid.

vi) **Not Declared as Void:** The agreement should not be declared as void under any law in the country. E.g: Certain agreements are

specifically declared as void agreement like: agreement by way of wager, agreement of immoral acts, agreement that is uncertain etc.

vii) **Lawful Object:** The object of the contract should not be illegal or unlawful.

viii) **Contract may Oral or Written:** A contract may be equally valid whether it may be oral or written.



CHECK YOUR PROGRESS

Q.1: Mention any three essentials for a valid contract under the Indian Contract Act, 1872.

i) .....

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ii) .....

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iii) .....

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2.5 OFFER AND ACCEPTANCE

Offer: Section 2(a) of the Indian Contract Act, 1872 defines an 'offer' as: "When one person signify to another his willingness to do or abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence he is said to make a proposal." e.g.: Ram offer to Rita Rs. 70,000 to buy her car. The promise to pay Rs. 70,000 is binding as soon as Rita accepts the said proposal. But until than Ram is free to withdraw his offer.

There are certain essentials of a valid offer as follows:

i) The offer must give rise to legal consequences: It means the offerer must have intentions to create legal obligation and absence of such intention means there is no contract between the parties.

ii) *The terms of offer must be definite:* There is no contract between the parties if the offer is uncertain or vague. It must be certain.

iii) *An invitation is different from offer:* An invitation to offer by advertisement etc is not same as offer. e.g.: A send a letter to B "will you give any bumper sale on bed sheets in your shop?", and in reply B send a letter to A that "lowest price of bumper sale on bed sheets is Rs, 450". A replied that he agree to buy at Rs. 450 as asked by him. Here in a suit, A against B, it was held that mere statements at lowest price at which B would sell contained no implied offer at that price and it was no reply to agree to sell the bed sheets. And thus it is not concluded contract.

iv) *Every offer must be communicated to the offeree:* The offer must be communicated to the offeree or otherwise he will not have knowledge to that offer to accept.

Acceptance: According to Section 2(b) of the Indian Contract Act, 1872 defines an 'acceptance' as: "The proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise."

Thus the mode of acceptance may be:

a) By express
b) In writing
c) By conduct

Thus, an offer valid only when:

a) an acceptance is communicated to the offeror;
b) it must be by the party named in the offer;
c) it must be expressed in some usual manner and
d) it must be absolute and unqualified.

e.g.: A sends a letter to B to buy B's land for Rs. 10,00,000 and in reply B accepts and sends a letter to A. This is a formal acceptance. But silence is no acceptance. Although the person to whom the proposal is made need not reply, but silence cannot be regarded as an acceptance of the proposal.



CHECK YOUR PROGRESS

Q.2: Mention the mode of acceptance.

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2.6 CAPACITY TO CONTRACT

Section 11 of the Act specifies the capacity to contract as capacity to enter into a legal agreement. The basic element of valid contract here is that the parties must attain the age of majority and are sound mind. Certain classes of people who are not competent to enter into contract are like minors, people who are mentally incompetent.

Under Section 3 of Indian Majority, Act 1875, age of majority attain when he has completed the age of 18 years. But a contract entered with a minor is not voidable but void. It is because a minor is immature and is not supposed to be capable of judging what is good for him. The law granted a privileged position to a minor where a minor cannot compel to repay any money that he received under a contract.

Section 11 of the Act specifies that people who are mentally sound are competent to enter into a contract and who are 'unsound mind 'are incompetent. The contract entered by person of unsound mind is void.

2.7 CONSENT

Under section 13 of Indian Contract Act, 1872 two or more person are said to consent when they agree upon the same thing in the same sense. Under section 14 of the Indian Contract Act, 1872 a contract is not valid without free consent. A consent is said to be free when it is not caused by:

a) Coercion (as defined under section 15), or
b) Undue influence (as defined under section 16), or
c) Fraud (as defined under section 17), or
d) Misrepresentation (as defined under section 18), or
e) Mistake (subjects to provisions of under section 20, 21 and 22)

Coercion (under section 15) means–

a) committing or threatening to commit any act forbidden by Indian Penal Code (45 of 1860) or
b) threatening to detain any property of any person whatever,
c) with the intention of causing any person to enter into an agreement.

But a mere threat by a person to prosecute another would not amount to coercion. There must be a contract and that contract should be made under threat and avoided due to coercion.

Undue influence (under section 16) means–

1) the relation subsisting between the parties are that one party dominate the will of the other enter into a contract and thus obtain the unfair advantage over the other;
2) the relation subsisting between the parties are that one party dominate the will of the other enter into a contract:
   a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or
   b) where he contract with a person whose mental capacity temporarily or permanently affected by reasons o age, illness, mental distress.
3) the relation subsisting between the parties are that one party dominate the will of the other enter into a contract where from the face of the transaction and evidence alleged or the wrong made therein appears that the burden to proof that the contract is not made with an intention of undue influence fall on to the person whose will is dominated.

Fraud (under section 17) means–

Acts committed by a party or his connivance or by his agent to a contract with intent to deceive another party or his agent or to induce him to enter into the contract:

i) on a fat that which is not true
ii) active concealment of the fact by one having knowledge or belief of the fact
iii) a promise made without any intention of performing it

iv) any other act to deceive

v) any act or omission where law specifically declared to be fraudulent.

Misrepresentation (under section 18)–

It is a statement of fact made by one contracting party to the other on the basis of which the other party enters into a contract. Thus, essential elements of misrepresentation are:

a) making statements which are not true although the person making it believes to be true;

b) any breach of duty give advantages to the person who committing it thus thereby his act mislead the other;

c) the party do mistake as to the substance of the thing which is subject matter of the agreement.

Mistake (subjects to provisions of under section 20, 21 and 22) means–

It is an erroneous belief concerning something and a contract cannot be said as free if it is entered under a mistake. It may be mistake of law and mistake of fact. Under mistake of law, it is presumed that every man of the country knows the law of the country and ignorance of the same and enter into a contract under mistake must suffer him the consequences. Under mistake of fact, the contracts entered are void except both parties to the agreement are mistaken and the mistake is as to a fact important to the agreement.

2.8 CONSIDERATION

Section 2(d) of the Indian Contract Act, 1872 defines 'Consideration" as: "When at the desire of the promisor, the promise or any other person or abstained from doing, anything or does or abstains from doing or promises to do or to abstain from doing, something such act or abstinence or promise is called a consideration for the promise." e.g: P promise to pay Rs. 5,000 to Q after 3 month if R fails to pay it which he borrowed from Q. Q grants time to R. Here, the promise of each party is the consideration for the promise of the other.

The essential conditions for consideration under the Indian Contract Act, 1872 are:

a) Consideration is essential to every contract
b) Consideration must move at the desire of the promisor and from the promisee or any other person
c) Consideration need not be adequate
d) Pre-existing legal obligation
e) Consideration must be real and competent
f) It may be past, present and future
g) Consideration must be legal or lawful

2.9 PERFORMANCE OF CONTRACT

Section 37 of the Indian Contract Act, 1872 defines 'Performance of Contract' as 'The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this act, or of any other law.' Under the 'Performance of Contract', the legal obligations have to perform which creates during formation of the contract.

The following persons have to perform a contract:

a) Personal Performance: The contract creates obligations and if it involves personal skills, tastes etc than the promisor must himself perform the contract.

b) Performance by representatives: In all other cases the promisor or his representatives may employ a competent person to perform it.

c) Effect of performance from a third person: When promise is made to perform by a third person, he cannot enforce it against the promisor.

d) Death of a promisor: The personal cause of action dies with the promisor and his legal heirs or legal representatives are not bound to perform such contract.

e) Performance of joint promises: When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons must jointly fulfill the promise.

2.10 DISCHARGE OF CONTRACT

The contract creates obligations and discharge of contract means this obligation comes to an end. This rules regarding the obligation comes to an end for any of the following reasons:

a) Termination by performance
b) Termination by mutual agreement
c) Supervening Impossibility
d) Termination by Operation of Law
e) Lapse of time
f) Termination by breach of contract
g) Termination by Material Alteration

a) Termination By Performance: When the obligation of the contract perform by the parties, it discharge contract.

b) Termination by mutual agreement: A contract may come to an end by mutual agreement in any one of the following reasons :

i) Novation: It means the new contract is substituted for an existing contract either between the same parties or between different parties.
ii) Alteration: It means change the terms of agreement. It is valid only when such changes made with the consent of all parties.
iii) Remission: Remission means the contract where the promisee accepts smaller amounts in comparison to the amount for which the contract entered.
v) Accord and Satisfaction: Accord means the contract where the promisee accepts smaller amounts due in the old agreement and such smaller payment made thereby is satisfaction.
vi) Rescission: Rescission means cancellation of all or any terms of the contract which may do by mutual agreement or when the parties fail to perform a contract.
vii) Waiver: It means abandonment of right.
viii) Merger: Merger means when the superior rights overlap the inferior right, the inferior right vanishes.

c) **Supervening Impossibility:** Supervening Impossibility may occur in any of the following ways:
   i) Destruction of Object
   ii) Change of law
   iii) Failure of pre-condition
   iv) Death
   v) Outbreak of war

d) **Termination by Operation of Law:** A contract may come to an end by termination by operation of law in case of death, insolvency and merger.

e) **Lapse of Time:** A contract may come to an end by lapse of time.

f) **Termination by Breach of Contract:** When a party breaks any obligation of a contract, the contract may come to an end by such termination of breach of contract.

g) **Termination by Material Alteration:** When the term of a contract is materially altered without the consent of other parties, the contract may come to an end.

2.11 BREACH OF CONTRACT AND VOID AGREEMENTS

Breach of Contract: When a party breaks any obligation of a contract, the contract may come to an end or it is free to the other parties to perform it. The breach of contract may arise for the following reason :

a) Anticipatory Breach of Contract: Anticipatory breach of contract occurs when any party repudiates his liability and his performance thereby remains due or by his own act disables himself from performing the contract.

b) By Actual Breach: When one party either fails or refuses to perform his obligation under the contract.

Under Section 73 of the Indian Contract Act, 1872 the injured party can claim for such damages–

- Compensation for loss or damages caused by breach of contract: It means due to breach of contract, who suffer is entitled to receive

from the party who has broken the contract compensation for any loss or damages caused to him thereby.

- Compensation for failure to discharge obligation resembling those created by contract: If any obligation resembling as created by contract has been incurred but has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had taken his contract.

Thus, under Section 73 the following elements should present for deciding about damages:

i) There is a breach of contract
ii) The party who made such breach of contract is liable to compensation
iii) The party who suffer for such breach of contract is entitled to receive compensation
iv) The loss or damages should be such that arose in usual course of thing from such breach or the party know that it will likely to happen from such breach of contract
v) Such compensation is not given for remote or indirect loss caused from the breach of contract
vi) If any circumstances exist to reduce the damages then it should try to reduce to that extent.

Void Contract: An agreement not enforceable by law is said to be void. It confers no legal obligation to any party. But an agreement which is legally enforceable by law may subsequently become void due to impossibility of performance, change of law or other reasons. An illegal agreement is void ad initio. But an agreement having uncertain terms is void but, not illegal.

2.12 QUASI CONTRACT

A quasi contract has been defined as "a situation in which law impose upon one person, on grounds of natural justice, an obligation similar to that which arises from a true contract, expressed or implied, which has in fact been entered into by him." Section 68 to 72 of the Act provide five kinds of quasi contractual obligations—

a) Supply of necessaries (Sec 68)
b) Payment by an interested person (Sec 69)
c) Liability to pay for non-gratuitous acts (Sec 70)
d) Finder of lost goods (Sec 71)
e) Mistake or coercion (Sec 72)

a) Supply of necessaries (Sec 68): It means if a person incapable of entering into a contract or anyone whom, he is legally bound to support is supplied by another person with necessaries required to his life, the person who has furnished such supplies is entitle to reimbursed from the property of such incapable person.

b) Payment by an interested person (Sec 69): A person who is interested in the payment of money which is bound to pay by the other person under law and who therefore pays it is entitled to reimburse by the other.

c) Liability to pay for non-gratuitous acts (Sec 70): It means the intention to enter into a contract of a person is absent but the law implies the contract. Thus, it should include the essentials—

- the act must lawfully done,
- the act must be done by a person not intending it to be gratuitous,
- the other person for whom the act is done must enjoy the benefit of it
- such person is bound to compensate.

e.g. P is a tradesman leaves goods at Q's shop by mistake. Q treats the goods as his own. He is bound to pay P for them.

d) Finder of lost goods (Sec 71): A person who finds goods belonging to another and takes them to custody is subject to the same responsibility as bailee i.e the finders of goods is liable to try and find out the true owner and to take due and proper care of the goods.

e) Mistake or coercion (Sec 72): A person to whom money has been paid or anything delivered by mistake or coercion must repay or return it.



CHECK YOUR PROGRESS

Q.3: Define quasi contract.

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2.13 LET US SUM UP

In this unit, we have discussed the following:

- Valid contract can be define as the agreements that are enforceable at law.
- An 'offer' means "When one person signify to another his willingness to do or abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence he is said to make a proposal."
- An 'acceptance' means "The proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise."
- An agreement not enforceable by law is said to be void. It confers no legal obligation to any party.



2.14 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.

4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.

5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.

6) The Consumer Protection Act, 1986 (Bare Act).



2.15 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Three essentials for a valid contract under the Indian Contract Act, 1872 are:

i) **Offer and Acceptance:** The offeror must communicate the offer to the offeree which is not an invitation and is should be certain (not vague) intend to create legal obligation. But the offer is said to be accepted when the person to whom the offer is made give his assent thereto.

ii) **Consideration:** Consideration is essential for a valid contract. A contract not supported by consideration is void.

iii) **Capacity to Contract:** The parties must be competent to contract parties. i.e they are not disqualified from contracting by any law to which they are subject.

Ans. to Q. No. 2: The mode of acceptance may be:

a) By express b) In writing c) By conduct

Ans. to Q. No. 3: A quasi contract means "a situation in which law impose upon one person, on grounds of natural justice, an obligation similar to that which arises from a true contract, expressed or implied, which has in fact been entered into by him."



2.16 MODEL QUESTIONS

Q.1: Define valid contract and the essentials of a valid contract.

Q.2: Define offer and the essentials of a valid offer.

Q.3: 'A contract is not valid without free consent.' Explain.

Q.4: 'Under the performance of contract, the legal obligations have to perform by certain person which creates during formation of the contract.' Explain.

Q.5: Mention the rules regarding discharge of contract.

Q.6: Mention the elements which should present for deciding about damages.

Q.7: Define quasi contract. What are the different kinds of quasi contract ?

Q.8: Discuss the reasons when a contract may come to an end by mutual agreement.

Q.9: Short Notes:

a) Consideration
b) Void Agreement
c) Valid Agreement
d) Breach of contract
e) Performance of contract.

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UNIT 3: CONTRACTS OF GUARANTEE AND INDEMNITY

UNIT STRUCTURE

3.1 Learning Objectives

3.2 Introduction

3.3 Contract of Indemnity

3.4 Contract of Guarantee

3.5 Kinds of Guarantee

3.6 Creditor

3.7 Surety

3.8 Let Us Sum Up

3.9 Further Reading

3.10 Answers to Check Your Progress

3.11 Model Questions

3.1 LEARNING OBJECTIVES

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

- define the meaning of contract of indemnity and guarantee
- explain the kinds of guarantee
- define creditor
- describe about surety.

3.2 INTRODUCTION

The contract of indemnity and guarantee is a special type of contract which helps from protection against loss in the form of a promise to pay for loss of money or goods. This special type of contract discussed in Section 124 to 147 under the Indian Contract Act, 1872. In this unit we are going to discuss about contract of indemnity and guarantee. Through this unit, you will also able to know the kinds of guarantee. Through this unit, you will also understand about the concept of surety and creditor. Thus, through this unit, you will able to know the detail concept of special type of contract

indemnity and guarantee, surety, creditor stipulated under the Indian Contract Act, 1872.

3.3 CONTRACT OF INDEMNITY

The contract of indemnity is the compensation of security against loss of money or goods. The principles of general law of contract are equally applicable for it as under the Indian Contract Act, 1872. Under contract of indemnity the person who indemnifies or pays the loss is known as 'indemnifier' and in whose favor such promise is made to pay the loss is known as 'indemnified' or 'indemnity holder'. Under Section 124 of the Indian Contract Act, 1872 define a contract of indemnity as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by conduct of any other person'. Thus, it is valid when–

- there is a promise
- to save another person from loss or make good the loss
- which may be caused by the conduct of the promisor himself or by the conduct of any other person
- the promisor undertakes to make good the loss
- it covers indemnity for loss caused by human only

P contract to indemnify sum of Rs. 5,000 to Q for the loss which may cause or any proceeding which may carried on by R against Q. This is contract of indemnity.

Hence, indemnity for loss caused due to fire or in the death of a person or expiry of stipulated period as in case in insurance is not fall under Sec 124 of the Indian Contract Act, 1872. It is because the life of a person cannot value and the question for amount of loss suffered by the assured does not arise.

Rights of indemnity holder–

It is explained under Sec 125 of Indian Contract Act, 1872 as the promisee is entitled to recover loss or compensation from the promisor when sued all damages, costs and all other sums which he have to pay under the terms of compromise in respect of any matters to which he promise to pay or indemnify under the contract of indemnity.



CHECK YOUR PROGRESS

Q.1: 'Insurance is not falling under Sec 124 of the Indian Contract Act, 1872'. Explain.

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3.4 CONTRACT OF GUARANTEE

The term 'contract of guarantee' defines under Section 126 of the Indian Contract Act, 1872 as–

"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

It is a contract to discharge the liability of third person when the third person makes default to perform. The object of contract of guarantee is to provide additional security by the surety to the creditor in the form of promise to fulfill certain obligation if the principal debtor unable to perform it. e.g., P promise to pay Q Rs. 2,000 on behalf of R, if, R make default in returning Rs. 2,000 to Q, P will pay.

Here,

Q is creditor

R is principal debtor and

P is surety

Thus, for a contract of guarantee the following features must present—

- A contract of guarantee may be either oral or written
- There should be principal debt
- Benefit of the principal debtor is sufficient consideration
- Consent of the surety should not have been obtained by misrepresentation or concealment.

There are distinction between contract of indemnity and contract of guarantee:

Sl. No.	**Contract of Indemnity**	**Contract of Guarantee**
1	A contract of indemnity is defined as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself o by conduct of any other person'.	A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.
2	Under contract of indemnity, there are two parties 'indemnifier' and 'indemnity holder'.	Under contract of guarantee, there are three parties 'creditor', 'principal debtor 'and 'surety'.
3	The contract of indemnity protects the promisee from the loss.	The contract of guarantee is for the surety of the creditor.
4	In contract of indemnity, the primary liability is of the promisor.	In contract of guarantee, the primary liability is of principal debtor.
5	In contract of indemnity, there is only one agreement i.e the agreement between indemnifier and indemnity holder.	In case contract of guarantee, there three agreements i.e. viz. agreement between— 1) the creditor and the principal debtor; 2) the creditor and surety and 3) the principal debtor and surety.



CHECK YOUR PROGRESS

Q.2: Mention any three differences between contracts of indemnity and guarantee.

a) .....

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b) .....

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c) .....

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3.5 KINDS OF GUARANTEE

In case of contract of guarantee, surety has to perform the promise or discharge the liability of the principal debtor in case of his default. But this contract of guarantee may be specific guarantee or continuous guarantee.

Specific guarantee is a contract of guarantee where the surety guarantees against the conduct of the principal debtor in respect of a particular transaction. E.g.: A guarantee to pay B Rs. 15,000 on behalf of C as repayment of loan, if, C make default in returning the same to B. It is a specific guarantee where the surety 'A' guarantees against the default in returning the loan by the principal debtor 'C' in respect of the particular transaction to the creditor 'B'.

In case of continuous guarantee, the guarantee extends to a series of transactions. The continuous guarantee may extend to a series of transactions during a fixed period e.g for two years. E.g.: P guarantee (surety) to pay Q (creditor) the dealer of tea Rs. 1,000 for supply of tea from time to time within two year to R (principal debtor). R (principal debtor) paid Rs.

1,000 for the tea supplies to Q (creditor) within first year. Thus, P (surety) has to pay Q (creditor) Rs. 1,000 on default of payment by R. But say, in the second year Q (creditor) the dealer of tea supply tea from time to time to R (principal debtor) in Rs. 1,200. Now, P (surety) has to pay Q (creditor) Rs. 1,000 on default of payment by R not Rs. 1,200.

3.6 CREDITOR

Under contract of guarantee, there are three parties 'creditor', 'principal debtor 'and 'surety' and they enter three agreements viz creditor with the principal debtor, creditor with surety and principal debtor with surety to perform the promise, or discharge the liability, of the principal debtor in case of his default. The creditor has the right to sue either principal debtor or surety or both to recover the amount make default in payment by the principal debtor. In certain cases, the creditor shall not act upon the guarantee of the surety until another person joined as co-surety and the creditor has the right to sue either principal debtor or sureties as he prefer. But if creditor loss the securities taken at the time of contract of suretyship, the creditor entitled to recover the amount to that extent. Securities received by the creditor after the contract of guarantee, the sureties have no rights on those securities or otherwise the sureties has the rights on the securities which received by the creditor at the time of contract of suretyship entered for the payment made due to default made by the principal debtor.

3.7 SURETY

In case of contract of guarantee, the surety is the person who makes good the loss which may arise due to promise and default made by the principal debtor to the creditor. The Section 128 of the Indian Contract Act, 1872 define the liability of surety as– "The liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract." It means the liability of surety is exactly the same as that of the principal debtor. The liability of the creditor can recover from the hand of surety all what he could recover from the principle debtor only. As stated example

above, P guarantee (surety) to pay Q (creditor) the dealer of tea Rs. 1,000 for supply of tea from time to time within two year to R (principal debtor). Thus, P (surety) has to pay Q (creditor) Rs. 1,000 only on default of payment by R.

The liability of principal debtor if reduce for any payment made to the creditor by the principal debtor than the liability of surety will also reduce accordingly. Now, say R paid Rs. 200 to Q, than the liabilities remain to pay Q on default of R by P is Rs. 800.

On the other hand, the liability arise for default caused to the creditor by the principal debtor for illegal contract which cannot enforceable at law, the surety cannot held liable.

Besides, if the principal debtor makes any default than the creditor has option to sue either principal debtor or surety or both.

Limit on surety's liability by contract: As stated above that the liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract i.e if the contract between the parties so provides, the liability of the surety may less as that of the liability of the principal debtor if he make any default. E.g., P guarantee (surety) to pay Q (creditor) the dealer of tea Rs. 600 for supply of tea from time to time within a year to R (principal debtor) where R is liable to pay Rs. 1,500. Thus, P (surety) has to pay Q (creditor) Rs. 600 only on default of payment by R not Rs. 1,500.

Co-surety and its liability: In certain cases, the creditor shall not act upon the guarantee of the surety until another person joined as co-surety. Thus, in such contract surety can be made liable only if such co-surety join the contract, otherwise not. As stated above the liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract i.e. this same principle is applicable and hence, the rights and liabilities of sureties are same and thus, if the contract between the parties so provides, the liability of the sureties may less as that of the liability of the principal debtor. Besides, if the principal debtor makes any default than the creditor has option to sue either principal debtor or sureties or all and the co-surety cannot insist the creditor to choose any of them for proceeding.

The rights of sureties:

- Rights of subrogation: When the surety makes payment upon default of principal debtor against guaranteed debt, he gets the all rights which the creditor has against the principal debtor.
- Right to indemnity: In every contract of guarantee, there is an implied promise of the principal debtor to indemnify the surety and the surety can recover from the principal debtor whatever sum rightfully paid under the said guarantee.
- Rights against co-sureties to contribute equally: When two or more person act as co-sureties for same debt or different, with or without knowledge of each other, in absence of any contract, they are liable to share equally whole debt or the unpaid part of payment has to made by the principal debt.

Discharge of surety from liability: The mode of discharge of surety from his liability may be:

- Revocation by the surety: The surety can revoked a continuing guarantee by giving notice to the creditor for the future transactions.
- By surety's death: A continuing guarantee revoked automatically from surety's death as to future transaction.
- By variance in the terms of contract: It is expected that the liability which is agreed to pay due to default of the principal debtor under certain terms, it should remain unchanged for that particular period and if it changes without consent of the surety, the surety discharged from the contract of guarantee.
- Discharge of principal debtor: As principal debtor discharge from his debt, the surety also discharged from the contract of guarantee.
- When creditor compounds with, gives time to or agrees not to sue the principal debtor: If the surety gives his assent on such contract where the creditor promise to give time to pay debt or agrees not to sue the principal debtor, the surety discharged from his liabilities.
- By loss of the securities by the creditor: When creditor loss the securities which the creditor taken at the time of contract of suretyship, the surety discharged from his liabilities to that extent.



CHECK YOUR PROGRESS

Q.3: Mention any three mode of discharge of surety from his liability.

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3.8 LET US SUM UP

In this unit, we have discussed the following:

- Under contract of indemnity the person who indemnifies or pays the loss is known as 'indemnifier' and in whose favor such promise is made to pay the loss is known as 'indemnified' or 'indemnity holder'.
- A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default.
- The liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract.
- In every contract of guarantee, there is an implied promise of the principal debtor to indemnify the surety and the surety can recover from the principal debtor whatever sum rightfully paid under the said guarantee.
- When creditor loss the securities which the creditor taken at the time of contract of suretyship, the surety discharged from his liabilities to that extent.
- Specific guarantee is a contract of guarantee where the surety guarantees against the conduct of the principal debtor in respect of a particular transaction.

- In case of continuous guarantee, the guarantee extends to a series of transactions.



3.9 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.
5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



3.10 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Insurance is not falling under Sec 124 of the Indian Contract Act, 1872. Indemnity for loss in case in insurance caused due to fire or in the death of a person or expiry of stipulated period is not fall under Sec 124 of the Indian Contract Act, 1872. It is because the life of a person cannot value and the question for amount of loss suffered by the assured does not arise.

Ans. to Q. No. 2: The three differences between contracts of indemnity and guarantee are—

a) Under contract of indemnity, there are two parties 'indemnifier' and 'indemnity holder' and under contract of guarantee, there are three parties 'creditor', 'principal debtor' 'and 'surety'.

b) A contract of indemnity is defined as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself o by conduct of any other person'. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

c) In contract of indemnity, there is only one agreement i.e the agreement between indemnifier and indemnity holder. In case contract of guarantee, there three agreements entered i.e. viz. 1) the creditor and the principal debtor; 2) the creditor and surety and 3) the principal debtor and surety.

Ans. to Q. No. 3: The three mode of discharge of surety from his liability are—

a) Revocation by the surety: The surety can revoked a continuing guarantee by giving notice to the creditor for the future transactions.

b) By surety's death: A continuing guarantee revoked automatically from surety's death as to future transaction.

c) Discharge of principal debtor: As principal debtor discharge from his debt, the surety also discharged from the contract of guarantee.



3.11 MODEL QUESTIONS

Q.1: Define the contract of indemnity under The Indian Contract Act, 1872.

Q.2: Define contract of guarantee and mention its features.

Q.3: Distinguish between contract of indemnity and contract of guarantee.

Q.4: Discuss about co-surety and its liability.

Q.5: Who is surety under a contract of guarantee? Mention the rights of sureties.

Q.6: "The liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract." Explain.

Q.7: What are the different kinds of contract of guarantee?

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UNIT 4: CONTRACTS OF BAILMENT AND PLEDGE

UNIT STRUCTURE

4.1 Learning Objectives

4.2 Introduction

4.3 Definition of Bailment

4.4 Kinds of Bailment

4.5 Bailor and Bailee

4.6 Termination of Bailment

4.7 Finder of Lost Goods

4.8 Pledge or Pawn

4.9 Pledge by Non-owners

4.10 Pledgor and Pledgee

4.11 Let Us Sum Up

4.12 Further Reading

4.13 Answers to Check Your Progress

4.14 Model Questions

4.1 LEARNING OBJECTIVES

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

- define bailment and its kinds
- explain about pledge or pawn
- define pledgor and pledgee
- describe about termination of bailment.

4.2 INTRODUCTION

The chapter IX of the Indian Contract Act, 1872 deals with the contract of bailment where Section 148 defines the term bailment. In this unit we are going to discuss about contract of bailment and its kinds. Through in this unit, you will also able to know about bailor and bailee. Through this unit, you will also understand the concept of pledge or pawn. Thus, through this unit, you will able to know the detail concept of bailment, pledge or pawn.

4.3 DEFINITION OF BAILMENT

The contract of indemnity is the compensation of security against loss of money or goods. According to Section 148 of the Indian Contract Act, 1872 defines bailment as a bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the “bailor”, the person to whom they are delivered is called the “bailee”. Thus, bailment involves two main essentials :

a) Delivery of goods by one person to another for some purpose upon a contract

b) When the purpose is accomplished the goods shall returned or otherwise disposed of according to the directions of the person delivering them

a) Delivery of goods by one person to another for some purpose upon a contract: It means goods delivered or transfer from one person to another. This delivery may or may not actual according to Section 148 of the Indian Contract Act, 1872. A person may possess the goods as bailee for another contract and the owner as bailor although the good is not delivered under bailment. For example, P sells his horse to Q. But P asked to keep for a month the horse with him on Q‘s behalf. Before this sale P keep the horse as owner, but now he keep the horse as bailee for Q.

b) When the purpose is accomplished the goods shall returned or otherwise disposed of according to the directions of the person delivering them: The delivery or transfer of goods from one person to another is only for some purpose or otherwise disposed of according to the directions of the person delivering them. Thus it is different from sale or gift. Here the goods have to be returned in same or altered form.



CHECK YOUR PROGRESS

Q.1: Mention the two essentials of bailment.

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4.4 KINDS OF BAILMENT

The bailment may be gratuitous or non gratuitous. In case of gratuitous bailment, it is the duty of the bailor to disclose the defects that involve with the goods in case use of it or extraordinary risk associated with it. He is bound to disclose the risk or faults involve with the good which he is aware. This duty is of gratuitous bailor or the bailor without reward.

The bailment may be non gratuitous. The bailor is liable for damage caused by the defective goods even though he is not aware of the defect in them. So, it is the duty of bailor to inform the bailee about the defects or probable risk which may associate with the goods bailed to him. If the goods bailed for hire, the bailor is responsible for the damages which may cause to the bailee although the bailor may or may not aware about the faults remain with the goods.

4.5 BAILOR AND BAILEE

In bailment, the person delivering the goods is called the “bailor”, the person to whom goods are bailed is called the “bailee”. According to Section 150 of the Indian Contract Act, 1872, the bailor has the following duties:

- The bailor is responsible to compensate the damages for the risk associated with the goods bailed to the bailee and should disclose faults in the goods which he is aware. The bailor should interfere with the use of such defect goods and expose the bailee from the extraordinary risk.

- The goods may be bailed for hire. In such case, the bailor shall be responsible for the damages although the bailor may or may not aware about the faults remain with the goods which may cause to the bailee.

In bailment goods are delivered by the bailor to the bailee for certain purpose. The bailee has the following duties under bailment:

- The bailee is responsible to take all reasonable care of the goods bailed by the bailor,
- The bailee is also responsible to return the profit which may arise from the goods bailed,
- The bailee should not mix with the goods bailed by the bailor with his own goods,
- The bailee should return the goods bailed to him after fulfillment of the purpose,
- It is the duty of the bailee not to make unauthorized use of goods bailed.

4.6 TERMINATION OF BAILMENT

According to Section 153 of the Indian Contract Act, 1872, the contract of bailment may be terminated for use of the goods bailed which is incontinent with the conditions of bailment. The bailor may claim back the goods bailed to the bailee and terminate the said bailment. For example : P lets to Q for hire a car for his own purpose. But, Q lets on hire to S. P can terminate the bailment. Thus, a contract of bailment terminates for the following circumstances:

a) Fulfillment of purpose: If the bailment for specific purpose, the bailment terminate when purpose is fulfilled.
b) Death: A gratuitous bailment terminates upon the death of either the bailor or the bailee.
c) Efflux of time: If the bailment for stipulated period, the bailment terminate when stipulated period expires.
d) Acts inconsistent with the terms of the bailment: If the bailee does any such act which is inconsistent with the terms of the contract of bailment, the bailment terminates.

e) Goods lent gratuitously: A gratuitous bailment can be terminated anytime. But if it is done prematurely and the bailee suffers any loss, than the bailor must indemnify the loss to the bailee.



CHECK YOUR PROGRESS

Q.2: Mention the two circumstances under which contract of bailment terminates.

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4.7 FINDER OF LOST GOODS

A finder of lost goods is in the position of a bailee if he takes the charge of goods under bailment. In such case the finder of lost goods has the following *rights*:

a) Sale: If the lost goods is the subject matter of sale and the owner refuse to pay the lawful charges of the finder or when the lost goods are perishable in nature and it losing its value or when the charges of the finder is two thirds of the value of the goods.

b) Reward: If the owner of the lost goods offered any rewards, than finder of lost goods has the rights to sue for such any awards which the owner might have offered for the return of goods lost.

c) Possession: The finder of lost goods can retain the lost goods from everybody except the owner of the goods.

d) Compensation and Lien: The finder of lost goods is entitled to be compensated for the trouble and all expenses incurred in preserving the said lost goods. He has the lien on the goods until these are paid.

A finder of lost goods has the following duties:

a) The finder of lost goods must try to find out the true owner of the said goods.

b) The finder of lost goods must mix the finder's goods with his own goods.

c) The finder of lost goods must not use the said goods for his own purpose.

d) He must take reasonable care of the goods.

e) He must return the goods to the owner.

f) If any accretion to the goods, it should return to the owner.

4.8 PLEDGE OR PAWN

The pledge is a particular kind of bailment. The bailment of goods as security for payment of a debt or performance of a promise is called Pledge or Pawn. The pledge has two parties Pledgor or the Pawnor and Pledgee or the Pawnee. The bailor in such bailment is called as Pledgor or the Pawnor and the bailee is called as Pledgee or the Pawnee.

The difference between pledge and other kinds of bailment lies in the purpose or objectives of the transactions. In case of pledge, the purpose of bailment of goods is to provide security for payment of a debt or performance of a promise and for the other kinds of bailment lies for different purposes like repair, safe custody etc.

In order to constitute of a valid pledge, the following requirements must satisfied:

a) There should be delivery of goods from one person to another i.e. bailment of goods.

b) The purpose of such delivery of goods from one person to another as security for payment of a debt or performance of a promise.



CHECK YOUR PROGRESS

Q.3: Define Pledge or Pawn.

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4.9 PLEDGES BY NON-OWNERS

A valid pledge always make by its real owner. But there are certain exceptions where a non-owner makes valid pledge.

a) Mercantile Agent: While acting in the ordinary course of business, a mercantile agent can make a valid pledge. A mercantile agent with the consent of the owner and in possession or title to the goods can make such valid pledge. But such valid pledge may be made in absence of authority of pledge by a mercantile agent if the pawnee acts in good faith and it is not notice during the time of pledge.
b) Possession under voidable contract: A person having possession of goods under voidable contract make a valid pledge. It is valid as long as the said contract is not rescinded. But pawnee gets goods title to the goods if the pawnee acts in good faith and it is not notice during the time of pledge.
c) Possession with the Co-owner: A good may have possession by several co-owners and with the consent of such co-owners, any co-owner may make a valid pledge of the goods.
d) Pawnor with a limited interest: A person may pledge a good where he has limited interest than in such case, the pledge is valid to the extent of that interest.

4.10 PLEDGOR AND PLEDGEE

Pledge or pawn is a kind of bailment of goods with a special purpose. Here, the goods that pledged serve as security for payment of a debt or performance of a promise. The person who pledged the goods is the pawnor or pledgor and the person with whom goods pledged known as pawnee or pledgee. This both pledgor and pledge has the following rights:

The Rights of Pawnor or Pledgor:

1) Maintenance and Preservation: The pawnor or pledgor can enforce the proper maintenance and preservation of the goods pledged.
2) Defaulting Pawnor's right to Rdeem: If time is stipulated for payment of a debt or performance of a promise where the pawnor make

default the same at the said stipulated time, than he may redeem the said goods pledged at any subsequent time before actual sale of it, but he must pay in addition any expanses which have arisen from his default.

3) Protection of debtors: The pledgor can avail various rights given to him by statute like under Moneylenders Act.

The Rights of Pawnee or Pledgee:

1) Right of retainer: The pawnee can retain the goods for payment of a debt or performance of a promise or interest of debt or other such expenses incurred by him in respect of possession or preservation of goods pledged.
2) Expenses: The pawnee is entitle to receive all other expenses incurred by him in respect of possession or preservation of goods pledged.
3) Retainer for subsequent advances: The pawnee cannot retain the goods for any other expenses other than for which goods are pledged as security except there is an expres contract. The pawnee may give fresh advances to the same debtor than it is presumed that the goods pledged create lien for fresh advances.
4) Pawnee's right where pawnor makes default: The pawnor may default in payment of debt or performance of a promise within stipulated time, than the pawnee can sue the pawnor or retain the goods pledged as collateral security or he may sell the thing pledged after giving notice to the pawnor.



4.11 LET US SUM UP

In this unit, we have discussed the following:

- Bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

- The bailment may be gratuitous or non gratuitous.
- In bailment, the person delivering the goods is called the "bailor", the person to whom goods are bailed is called the "bailee".
- The bailment of goods as security for payment of a debt or performance of a promise is called Pledge or Pawn. The pledge has two parties Pledgor or the Pawnor and Pledgee or the Pawnee.



4.12 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.
5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



4.13 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Bailment involves two main essentials:

a) Delivery of goods by one person to another for some purpose upon a contract
b) When the purpose is accomplished the goods shall returned or otherwise disposed of according to the directions of the person delivering them

Ans. to Q. No. 2: A contract of bailment terminates for the following circumstances:

a) Fulfillment of purpose: If the bailment for specific purpose, the bailment terminate when purpose is fulfilled.

b) Death: A gratuitous bailment terminates upon the death of either the bailor or the bailee.

Ans. to Q. No. 3: The bailment of goods as security for payment of a debt or performance of a promise is called Pledge or Pawn.



4.14 MODEL QUESTIONS

Q.1: Define bailment and its two essentials.

Q.2: Define the two kinds of bailment.

Q.3: Mention the duties of bailor and bailee.

Q.4: Under which circumstances a contract of bailment terminates?

Q.5: Define pledge and mention the requirements which must satisfied for a valid pledge.

Q.6: What are the rights of a pledgor and pledge?

Q.7: "A valid pledge always make by its real owner. But there are certain exceptions where a non-owner makes valid pledge." What are the exceptions?

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UNIT 5: LAW OF PARTNERSHIP

UNIT STRUCTURE

5.1 Learning Objectives

5.2 Introduction

5.3 Meaning and Nature of Partnerships

5.4 Registration of Firms

5.5 Partnership Deed

5.6 Relations of Partners to One Another

5.7 Relations of Partners to Third Parties

5.8 Changes in a Firm

5.9 Dissolution

5.10 Let Us Sum Up

5.11 Further Reading

5.12 Answers to Check Your Progress

5.13 Model Questions

5.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- explain meaning and nature of partnerships
- describe about registration of firms
- explain partnership deed
- explain about relations of partners to one another and to third parties
- describe about changes in a firm
- explain about dissolution.

5.2 INTRODUCTION

A partnership arises from a contract which is not governed only by Partnership Act but by the general law as well. It is a form of business where two or more persons join together and carry some business. In this unit we are going to discuss about meaning and nature of partnership. Through in this unit, you will able to know about registration of firms. Through this unit,

you will also understand partnership deed. In this unit we are going to discuss about relations of partners to one another and to third parties. Through in this unit, you will able to know about dissolution of a firm. Thus through this unit, you will able to know the brief concepts of partnerships.

5.3 MEANING AND NATURE OF PARTNERSHIPS

Section 4 of the Partnership Act defines a partnership as "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all." Thus, partnership as defined under this Act has three essential elements as :

1) There must be agreement between two or more persons.
2) The persons entered into the agreement have agreed to share the profits.
3) The business carried on by all or any of them acting for all.

The partnership firm is not a legal entity like company, but it is group of individual partners. A partnership can only arise as a result of an agreement express or implied between two or more persons. The existence of business is also important which may be any trade or occupations. The partnership business carried on by all partners or any of them acting for all and thereby every partner has the authority to act on behalf of all. The act of a partner binds all the partners of the firm. In partnership business, partners pools their resources and give efforts to start the business. But it is not essential that every partner invest some capital to start the partnership business.



CHECK YOUR PROGRESS

Q.1: Define partnership.

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5.4 REGISTRATION OF FIRMS

The registration of partnership firms are deals under Chapter VII (Sections 56 to 71). Section 58 and 59 deals with the procedures of

registration of a firm. The application for registration of firm has to make before Registrar of firms along with prescribed fees. The application must state the followings:

1) The name of the firm,
2) The place or principal place of business of the firm,
3) The date when each partner joined the firm along with their name and full addresses
4) Duration of the firm

A firm registered at any time after creation of partnership. The terms of the registered partnership may alter but it has to inform to the Registrar of firms along with prescribed fees. The registration of firm in India is entirely based on the discretion of the firm or partners concerned. Section 69 of Indian Partnership Act lays down the effects of non-registration as follows:

1) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of the firm against any third party.
2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered.
3) An unregistered firm cannot claim a set-off in a suit.



CHECK YOUR PROGRESS

Q.2: Mention the effects of non-registration of partnership firm?

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5.5 PARTNERSHIP DEED

The partners are free to choose any name as they desire for their partnership firm. But the name must not too identical or similar to the name of another existing firm doing similar type of business and the name must not contain the words like crown, emperor, empress, empire etc which imply approval of Govt. The document where the rights and liabilities of the partners of a partnership are written called the partnership deed. A partnership deed may be oral or written having certain features like:

a) Name and address of the firm as well as partner
b) Name of the business to be carried on
c) Duration of the partnership
d) Capital contribution by the partners
e) Profit sharing ration among the partners

FORMAT OF DEED OF PARTNERSHIP

THIS DEED OF PARTNERSHIP is made at ..... on this ..... day of ..... by and between:
Shri ..... aged about ..... years, son of Shri ..... resident of ..... (Hereinafter to be called the First Party);
Shri ..... aged about ..... years, son of Shri ..... resident of ..... (Hereinafter to be called the Second Party);
Shri ..... aged about ..... years, son of Shri ..... resident of ..... (Hereinafter to be called the Third Party);
Shri ..... aged about ..... years, son of Shri ..... resident of ..... (Hereinafter to be called the Fourth Party);
AND WHEREAS the parties to this deed have been carrying on the business of ..... under the name and style

of M/s. ..... with its principal place of business at ..... on the terms and conditions incorporated in the Partnership Deed executed on .....

AND FURTHER WHEREAS the parties to this deed have been carrying on the above said business in partnership on the terms and conditions orally and mutually agreed amongst themselves as aforesaid;

NOW, THEREFORE THIS DEED WITNESSETH as under, incorporating the aforesaid amendment/alteration in the terms and conditions of the partnership:

1) That the partnership business has been and shall continue to be carried on under the name and style of M/s. .....
2) That the partnership business has been and shall continue to be that of ..... with its principal place of business at ..... The parties by mutual consent may carry on business at such other place or places as they may deem fit and proper from time to time.
3) The initial capital of the Partnership shall be:
   a) i) The amount of ....., being the capital contribution made by ..... (First party) to the Partnership Firm and
      ii) The amount of ....., being the capital contribution made by ..... (Second party) to the Partnership Firm
      iii) The amount of ....., being the capital contribution made by ..... (Third party) to the Partnership Firm
      iv) The amount of ....., being the capital contribution made by ..... (Fourt party) to the Partnership Firm

   The initial capital so contributed by each of the Partners is credited to the capital account ("**Capital Account**") of each Partner. The following provisions of this Section 3.1 shall apply in respect of the capital contributions of the Partners:
   b) the capital funds of the Partnership shall belong to the Partners in the proportion contributed by each Partner;
   c) any further contribution of capital required by the Partnership may be contributed to the Partnership by any one of the Partners and

4) That interest at the rate of 18% per annum or as may be prescribed under section 40(b)(iv) of the Income-tax Act, 1961 or any other applicable provisions as may be in force in the income-tax assessment of the partnership firm and shall be paid to the partners or credited to the partners on the amount standing to the credit of the account of the partners.

   Such interest shall be considered as an expenditure of the firm and shall be debited to the Profit & Loss Account of the firm.

5) That Shri ....., Shri ..... and Shri ..... the parties of the ..... parts have agreed to keep themselves actively engaged in conducting the affairs of the business of the partnership firm. The said partners shall be working partners. It is hereby agreed to that in consideration of the said parties keeping themselves actively engaged in the business of the partnership firm and working as working partners, shall be entitled to remuneration.

   The remuneration payable to the said working partners shall be computed in the manner laid down or deduction under section 40(b)(v), read with Explanation 3 of the Income-tax Act, 1961 or any other applicable provision as may be in force in the following proportion:

   A) Shri .... per cent of such amount
   B) Shri .... per cent of such amount
   C) Shri .... per cent of such amount

   The partners shall be entitled to increase or reduce the above remuneration as the case may be.

6) That the parties hereto shall be true and faithful to each other and shall not do or cause to be done anything which may be detrimental to the interest of the firm.

7) That the parties shall keep or cause to be kept proper books of account and documents and shall make entries and each partner shall have a right to have access to and to inspect and take copy of the same.

8) That the partnership has been and shall be a partnership at will.

9) That the net profit of the partnership firm after deduction of all expenses including rent, salaries, other establishment expenses, interest and

remuneration payable to the partners in accordance with this deed of partnership or any supplementary deed as may be executed by the partners from time, to time, shall be divided and distributed amongst the partners in the following proportion:

Sr. No.	Name of Party	Share in profits
1)		
2)		
3)		
4)		

The losses, if any, including loss of capital suffered in any year shall also be apportioned in the above said proportion.

10) That the bank account or accounts have been and shall be maintained in the name of the firm and shall be operated singly or jointly by the partners.

11) That the books of account shall be closed on 31st day of March each year. The net profit or loss after deducting all expenses, interest, remuneration, outgoings shall be divided between the parties in proportion to the sharing ratio referred to hereinabove.

12) That notwithstanding anything contained in the Indian Partnership Act it is hereby mutually agreed to by and between the parties that in case of death of any one or more partners, the firm shall not be dissolved but shall continue to be carried on by and between the surviving partners and legal heirs and/or representatives of the deceased partner, as a continuing concern.

13) That the partners to this deed are partners in their individual capacity/ representing HUF styled as M/s. .....
The parties do not represent any other person.

14) All bonds, bills, notes, bills of exchange, hundies or promissory notes or other securities given on behalf of the partnership (except cheques) shall be signed, endorsed, accepted or executed jointly by all the partners and the firm against payment thereof and against all actions, proceedings, costs, charges, expenses, claims and demands in respect thereof.

15) That the parties of ..... part are not working partners but are only financing, dormant and sleeping partners. The

parties of ..... part need not be in charge of, responsible to the firm for the conduct of the business of the firm and need not take interest in day-to-day working and business of the partnership firm.

16) That the partners shall be entitled to modify the above terms of this deed of partnership.

17) That all disputes and questions in ..... connection with the partnership or this deed arising between the partners or between any one of them shall be referred to the arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996 then in force.

IN WITNESS WHEREOF the parties to this deed have set their hands on the day and year first above written and in the presence of:

WITNESSES:

1) _____

(First Party)

2) _____

(Second Party)

3) _____

(Third Party)

4) _____

(Fourth Party)

5.6 RELATIONS OF PARTNERS TO ONE ANOTHER

Chapter III (Sections 9 to 17) of Indian Partnership Act contains the provisions of relations of partners to one another. The mutual rights and duties of the partners of a firm may be determined by contract between the partners which may be expressed or may be implied. There are two general rules regarding the conduct of the partners under the Indian Partnership Act as follows:

a) General duties of the partners: Under section 9 “Partners are bound to carry on the business of the firm to greatest common advantage, to be just and faithful to each other, and to render true accounts and

full information of all things affecting the firm to any partner or his legal representative."

b) Indemnity: Under section 10 "Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm."

The rights and duties of the partners contained in sections 12 to 17 are 'subject to contract between the partners'.

Rights of the partners:

1) Right to take part in the conduct of the business: Every partner is entitled to take part in the business of the partnership firm. But it is depending that the terms in the partnership agreement who among the partners take active participation in the business of the partnership firm and who will not.
2) Right to express opinion: There may be difference in the opinion of the partners. The matter of difference may be related to the ordinary matters of business of partnership firm than it can be resolved by the decision of the majority of the partner. But if the matter of difference is of fundamental importance consent of all partners is required.
3) Right to have access to books of the firm: Both active and dormant partners have right to access the books of the firm.
4) Right to share profits: Every partner is entitled to share profits. If there is absence of partnership agreement, the partners are to share the profits equally.
5) Right to interest on capital and advances: Usually the partners are entitled to share profits. In case the partners agree that interest on capital is to be give, such interest shall be payable only out of profits.
6) Right to indemnity: The partners make certain payments and also certain losses. Thus, the partners can claim indemnity for the act done for the partnership firm.

Section 9 to 10 of Indian Partnership Act contains certain duties of partners.

Duties of the partners:

1) To carry the business of the partnership firm to the greatest common interest: The partners have to carry the business of the partnership

firm to the greatest common interest that no partners carry any personal advantage in the cost of the other. If any partner makes any secret profit out of any transaction of the partnership firm, it is duty of the partner to return that profit to the firm.

2) To be just and faithful to each other: The partners have to carry the business to the greatest interest of the partners. The partners have to provide all information to all partners and render true accounts which have to be just and faithful to each other.
3) To render true accounts: Every partner has the right to access, inspect and copy the books of accounts of the partnership firm. Every partner has to spent the funds of the partnership firm properly and maintains all records of such expenditures.
4) To render full information of all things affecting the firm: Every partner has to disclose all material information that related to the partnership firm. Any concealment of any facts by a partner renders him liable to others.
5) Duty to indemnify for fraud: Every partner has to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.
6) Duty to be diligent: Every partner has to do his duties diligently since negligent in the performance of his duty cause loss not only to the partners but also to the firm. If any partner or firm suffer any loss for willful neglect of a partner, than he has to indemnify the firm for such loss.
7) Duty to properly use the property of the firm: The partners have used the properties of the firm for the purpose of the firm. If any partner carry any personal advantage from use of the properties of the firm than it is duty of the partner to return the same to the firm.

5.7 RELATIONS OF PARTNERS TO THIRD PARTIES

Chapter IV (Sections 18 to 30) of Indian Partnership Act contains the provisions of 'relations of partners to third parties' under following heads:

A) Nature and extent of liability of the firm for the acts of a partner
B) Doctrine of holding out
C) Rights of transferee of a partner's interest
D) Position of a minor admitted to the benefits of partnership

A) Nature and extent of liability of the firm for the acts of a partner:

A partner is an agent of the firm and all the partners of the firm become liable for the act done by any partner for the firm. The liability of all the partners are joint and several that is the liability of the firm may compensate to all partner for the act of the firm or may be done by any one partner. Any act or omission which create right enforceable is an act of the firm. All partners are equally liable for wrongful act of any partner as they would liable for a contract entered into by one of them on behalf of the firm.

The partners are liable for the following different acts:

i) Liability for the acts done within the authority which may be express or implied
ii) On rectification of partner's act
iii) Acts in emergency
iv) Liability for the admission made by a partner
v) Liability for torts and wrongly acts
vi) Liability for the misapplication of property of the firm:
vii) Liability on notice to an acting partner

i) Liability for the acts done within the authority which may be express or implied: The acts done to carry the business of the firm by the partner may be under express or implied authority. The express means when it is given by words or written whereas implied authority inferred from the circumstances or from an act.
ii) On rectification of partner's act: The act done by the partner as agent may be without prior authority of the principal and later it mat ratify by the principal or the partner. This act binds the all partner for such acts.
iii) Acts in emergency: The partners have the authority to do all acts under emergency to protect the firm for any losses and such acts binds the firm.

iv) Liability for the admission made by a partner: The partner may enter into contract or execute document or may pay money etc on behalf of the firm to the third party. Such admission is done by the partner in ordinary course of business. Such admission is done by the partner with the third party act as evidence against all other partners.

v) Liability for torts and wrongly acts: The partners along with the firm are liable for any wrongful act done by the partner in ordinary course of business or injury caused to any third party.

vi) Liability for the misapplication of property of the firm: A partner may receive any property under apparent authority from a third party and misapplies it or the firm may receive any property from a third party and misapplies it by the partners. But in both case the firm is liable to make good loss.

vii) Liability on notice to an acting partner: The partners are the agent of the firm and any notice to the partner who habitually do business of the firm means notice to the firm.

B) Doctrine of holding out: Every partner is liable for all acts of the firm while he is a partner and the firm cannot make liable for the acts of the firm to the person who is not a partner. But a person who is not a partner may be liable for the acts of the firm if he deemed himself as a partner or knowingly permitted somebody else to represent that he is a partner of the firm and third party acted on the faith of such representation given credit to the firm.

Section 28 of Indian Partnership Act makes the following liability under doctrine of holding out:

1) Anyone who by words spoken or written or by conduct represent himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the be representation has reached the person so giving credit;

2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal be representative or his estate liable for any act of the firm done after his death.

Thus in nutshell the following are essential under doctrine of holding out:

a) Representation
b) Third party acted on the faith of the representation and given credit to the firm

a) Representation: A person himself represents or knowingly permitted somebody else to represent that he is a partner of the firm. This representation may be made by express or implied.
b) Third party acted on the faith of the representation and given credit to the firm: The third party acted on the faith of the representation made by a person or knowingly permitted somebody else to represent that he is a partner of the firm and the third party on faith of that representation given credit to the firm. But the person made liable under the doctrine of holding out only when the third party is not aware about such representation.

C) Rights of transferee of a partner's interest: The partnership is based on mutual trust and confidence between the partners and the existing partners never like to assign his share in a way which may substitute an outsider in his place. During the continuance of the partnership business the rights of transferee of a partner's interest does not entitled him to interfere in the conduct of the business of the firm. Besides, he neither entitles to inspects books of accounts nor requires accounts of the firm. He cannot interfere in the conduct of the business of the firm. He is only entitled to receive the share of profit of that transferring partner.

He is not entitled in share of properties of the firm until the firm is dissolved. Final settlement of accounts made after dissolution of the

firm. At that time only, the transferee is entitled to the share of the assets of the transferring partner.

D) Position of a minor admitted to the benefits of partnership: Section 30 contains the following provisions regarding position of a minor admitted to the benefits of partnership firm:

i) Minor's admission to the benefits of partnership: Admission of a minor to the benefits of partnership can be done only with the consent of the all partners. A guardian is allowed to receive the benefits on behalf of the minor.

ii) Minor's position during minority: Every partner is jointly and severely liable for all the acts done to the firm whereas the minor is not liable for the acts. The minor entitle for the accounts only. He is not entitled to access or inspect or copy of books of account. He is also entitled in share of profits and property of the firm as agreed upon by all the partners. But the minor cannot sue the partners for an account or payment of his share or property.

iii) Option on attaining majority: At any time within six month of attaining majority or his obtaining knowledge that he had been admitted to the benefits of partnerships, whichever date is later, such person may give public notice that he has elected to become or he has elected not to become a partner in the firm and such notice shall determine his position as regards the firm. But if he fails to give such notice, he shall become a partner in the firm on the expiry of the six month.

iv) His position if he becomes a partner: Where such partner becomes a partner his rights and liabilities of the minor continue upto the date on which he becomes partner but he also become personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnerships. Besides, his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

v) Minor's position if he elects not to become a partner: When a partner not elects to become a partner his rights and liabilities of the minor continue to be same as minor.

5.8 CHANGES IN A FIRM

The constitution of partnership firm may be changed. These changes may be any of the following reasons:

1) Death of partner
2) Introduction of new partner
3) Retirement of a partner
4) Insolvency and expulsion of partner
5) Transfer of a partner's share to an outsider

1) Death of partner (Sec 35): The death of partner may dissolve the partnership firm. But the partners may agree to continue the firm.
2) Introduction of new partner (Sec 31): A new partner can be introduced only with the consent of all partners. The share of profit is fixed at the time when he becomes a partner and he is liable for all debts of the firm.
3) Retirement of a partner (Sec 32): A partner may retire with the consent of all partners; as per terms of agreement of the partnership firm; where the partnership is at will by giving notice in writing to all partners about his intention to retire.
4) Insolvency and expulsion of partner (Sec 34): The partner may be adjudicated as insolvent and the partnership firm may dissolve or may continue. If the partnership firm dissolved, the procedure of dissolution is adopted and if continue, the share of insolvent partner may be transferred to the Official Assignee of the Official Receiver.
5) Expulsion of a partner (Sec 33): A partner can be expelled for the following conditions:
   a) When the contract of partnership firm contain the provision of expulsion
   b) The majority of partners expel any partner in good faith.
   c) The expelled partner has given notice of his charges against him and he has given an opportunity to answer the charges.
6) Transfer of a partner's share to an outsider (Sec 29): A partner may transfer his share to an outsider. The transferee does not become

the partner of the firm. He is only entitled to receive the share of profit. He is also entitled to receive the share of assets when the partnership firm is dissolved or the transferring partner ceases to be a partner.

5.9 DISSOLUTION

Chapter VI of Indian Partnership Act contains the provisions of dissolution of firm which means the end of a firm by ceasing the relation of partnership between all the partners. A firm may be dissolved for the following reasons:

a) By agreement
b) Compulsory dissolution
c) Contingent dissolution
d) Dissolution by notice
e) Dissolution by court

a) By Agreement: A partnership firm is created by contract and dissolved at any time as with the consent of all partners.

b) Compulsory Dissolution: A partnership firm may be dissolved for adjudication of all partners or declaration of any partner as insolvent or happening of an event which makes the business of the firm unlawful.

c) Contingent Dissolution: The following reasons may dissolve a partnership firm :

i) By death of a partner,
ii) By adjudication of all partners or declaration of any partner as insolvent,
iii) If the partnership firm formed for certain fixed term and the term get expiry,
iv) If the partnership firm formed to carry out one or more undertakings and completion of the same.

d) Dissolution By Notice: If the partnership firm is at will than by giving notice in writing to all partners by any partner about his intention to dissolve the partnership firm.

e) **Dissolution By Court:** On any of the following ground, a partnership firm may dissolved by order of a court :

i) Insanity: If the partner has become unsound mind.

ii) Guilty conduct: If the partner is guilty of conducts which affect the business of the partnership firm.

iii) Permanent incapacity: If the partner becomes permanently incapable of performing his duties as a partner of the partnership firm.

iv) Just and equitable clause: If the court considers just and equitable to dissolve the partnership firm.

v) Loss: In such situation where court found that it is impossible to make profit by the partnership firm.

vi) Transfer of whole interest: If the partner transfers of whole interest to an outsider of the partnership firm.

vii) Breach of agreement: If the partner willfully commits breach of agreement of the partnership firm.



CHECK YOUR PROGRESS

Q.3: Mention the two reasons of dissolution of partnership firm.

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5.10 LET US SUM UP

In this unit, we have discussed the following:

- The partnership firm is not a legal entity like company, but it is group of individual partners. A partnership can only arise as a result of an agreement express or implied between two or more persons.

- A firm registered at any time after creation of partnership.
- The document where the rights and liabilities of the partners of a partnership are written called the partnership deed.
- A partner is an agent of the firm and all the partners of the firm become liable for the act done by any partner for the firm.
- Admission of a minor to the benefits of partnership can be done only with the consent of the all partners.



5.11 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.
5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



5.12 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Section 4 of the Partnership Act defines a partnership as "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

Ans. to Q. No. 2: Section 69 of Indian Partnership Act lays down the effects of non-registration as follows:

1) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of the firm against any third party.

2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered.
3) An unregistered firm cannot claim a set-off in a suit.

Ans. to Q. No. 3: The two reasons for dissolution of partnership firm are:

A) By Agreement: A partnership firm is created by contract and dissolved at any time as with the consent of all partners.
B) Compulsory Dissolution: A partnership firm may be dissolved for adjudication of all partners or declaration of any partner as insolvent or happening of an event which makes the business of the firm unlawful.



5.13 MODEL QUESTIONS

Q.1: Explain the position of a minor admitted to the benefits of partnership firm?

Q.2: What are the effects of non-registration of partnership firm?

Q.3: What are two general rules regarding the conduct of the partners under the Indian Partnership Act?

Q.4: Explain the rights and duties of partner in a partnership firm.

Q.5: Short Notes:

a) Partnership
b) Partnership deed
c) Doctrine of holding out
d) Rights And Duties of partner
e) Rights of transferee of a partner's interest

Q.6: What are the rights of transferee of a partner's interest?

Q.7: 'A firm registered at any time after creation of partnership'. Explain.

Q.8: 'A partner is an agent of the firm and all the partners of the firm become liable for the act done by any partner for the firm.' Explain.

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UNIT 6: LAW OF SALES OF GOODS

UNIT STRUCTURE

6.1 Learning Objectives

6.2 Introduction

6.3 Contract of Sale

6.4 Sales and Agreement to Sell

6.5 Meaning of Price

6.6 Conditions and Warranties

6.7 Passing of Property in Goods

6.8 Transfer of Title by Non-owners

6.9 Performance of a Contract of Sale

6.10 Unpaid Seller and His Rights

6.11 Remedies for Breach of Contract

6.12 Let Us Sum Up

6.13 Further Reading

6.14 Answers to Check Your Progress

6.15 Model Questions

6.1 LEARNING OBJECTIVES

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

- define financial leverage
- define contract of sale, goods, price
- explain about conditions and warranties
- explain passing of property in goods
- describe transfer of title by non-owners
- explain about performance of a contract of sale
- explain about remedies for breach of contract.

6.2 INTRODUCTION

Originally the law relating to the sale of goods was spelt in Chapter VII of the Indian Contract Act which subsequently repealed. Now the Sale

of Goods Act, 1930 is defined and amends. This Act extends to whole of India except the State of Jammu and Kashmir. In this unit we are going to discuss about the definition of contract of sale, goods, price, conditions and warranties.

Through in this unit, you will also able to know about passing of property in goods. Through this unit, you will also understand the concept of transfer of title by non-owners, performance of a contract of sale. Thus, through this unit, you will able to know the detail concept contract of sale and all relevant terms like goods, price, conditions and warranties, passing of property in goods etc.

6.3 CONTRACT OF SALE

According to Section 4(1) defines contract of sale as "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price." Thus the following are the essentials constitute the contract of sale :

a) The contract must have two parties one is seller and the other is buyer.
b) 'Goods' is the subject matter of the contract.
c) The seller agree to transfer or transfer the goods to the buyer.
d) The seller agree to transfer or transfer the goods to the buyer is for price.

a) The contract must have two parties one is seller and the other is buyer: It is contract where two different parties has to present one is buyer who agree to buy and the other is seller who agree to sell the goods for consideration i.e for price. There should be two different parties. The same person cannot be the buyer and the seller.

b) 'Goods' is the subject matter of the contract: According to Section 2 (7) defines goods as every kind of movable property other than actionable claims and money; and includes stock and share, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale.

Certain things are included as goods like stock and share, growing crops, grass and things attached to or forming part of the land. But other certain things are excluded as goods like actionable claim, money etc. The goods are classified into the following categories:

i) Existing or Future goods: Existing goods are goods which are owned or possessed by the seller at the time of making of contract. Future goods are the goods which are manufactured or produced or acquired by the seller after making of the contract of sale.

ii) Specific or Unascertained goods: Specific goods are goods which are identified and agreed at the time of the contract of sale by the parties. E.g X agrees to sell 5 packets of sweets having yellow color design to Y at the time of making his contract and then he earmarked it. Unascertained goods are goods if it is not identified and agreed at the time of the contract of sale by the parties. E.g X agrees to sell 5 packets of sweets to Y.

c) The seller agrees to transfer or transfer the goods to the buyer: The seller agrees to transfer or transfer the goods to the buyer where such transfer of property may be either at the time of making of the contract or at a later time. Here the ownership in the goods from the seller to the buyer is the essence of the contract.

d) The seller agrees to transfer or transfer the goods to the buyer is for price: The seller agree to transfer or transfer the goods to the buyer for price and it should be in terms of money. The contract may be other than that of sale if such consideration is made other than money.



CHECK YOUR PROGRESS

Q.1: Define 'Goods'.

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FORMAT OF AGREEMENT FOR SALE

THIS AGREEMENT FOR SALE is made and executed on this the ..... day of ....., 2017

BETWEEN

Sri ..... S/o ..... aged ..... years residing at hereinafter called the "SELLER" (which expression shall mean and include her legal heirs, successors, successors-in-interest, executors, administrators, legal representatives, attorneys and assigns) of ONE PART.

AND

Sri ..... S/o ..... aged ..... years residing at hereinafter called the "PURCHASER" (represented by his power of attorney) which expression shall mean and include his heirs, successors, executors, administrators, legal representatives, attorneys and assigns of the OTHER PART.

WHEREAS THE SELLER is the absolute owner in possession and enjoyment of the more fully described in the schedule hereunder and hereafter called the "SCHEDULE PROPERTY".

WHEREAS the SELLER being in need of funds has decided to sell the property more fully described in the Schedule hereunder and the PURCHASER has offered to purchase the same.

WHEREAS the SELLER offered to sell and transfer the schedule property to the PURCHASER for a sale consideration of Rs. ..... (Rupees ..... only) and the PURCHASER herein has agreed to purchase the same for the aforesaid consideration on the following terms and conditions:

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1) The Sale consideration of the Schedule Property is fixed at Rs. ..... (Rupees ..... only)
2) The PURCHASER has paid a sum of Rs. ..... (Rupees ..... only)

by cash / cheque / D.D. bearing No. ..... drawn on ..... dated ..... as advance, the receipt of which sum the SELLER hereby acknowledges.

3) The balance payment of Rs. ..... (Rupees ..... only) will be paid by the PURCHASER to the SELLER at the time of execution of the absolute Sale Deed and thus completing the Sale transaction.
4) The parties herein covenant to complete the Sale transaction and to execute the Absolute Sale Deed by the end of .....
5) The SELLER confirms with the PURCHASER that he/she has not entered into any agreement for sale, mortgage or exchange whatsoever with any other person relating to the Schedule Property of this Agreement.
6) The SELLER hereby assures the PURCHASER and he / she has absolute power to convey the same and there are no encumbrances, liens, charges, Government dues, attachments, acquisition, or requisition, proceedings etc.
7) The SELLER agrees to put the purchaser in absolute and vacant possession of the schedule property after executing the sale deed and registering the same in the jurisdictional Sub-Registrar's office.
8) The SELLER covenants with the purchaser that he/she shall not do any act, deed or thing creating any charge, lien or encumbrance in respect of the schedule property during the subsistence of this Agreement.
9) The SELLER has specifically agreed and covenants with the PURCHASER that he/she shall do all acts, deeds and things which are necessary and requisite to convey absolute and marketable title in respect of the schedule property in favour of the PURCHASER or his nominee.
10) It is agreed between the parties that all expenses towards Stamp Duty and Registration charges shall be borne by the PURCHASER only.
11) The PURCHASER shall have the right to nominate or assign his right under this agreement to any person / persons of his choice and the

SELLER shall execute the Sale Deed as per terms and conditions of this Agreement in favour of the PURCHASER or his nominee or assignee.

12) The SELLER has agreed to get consent deed duly executed to this Sale transaction from his wife/her husband, sons and daughters on or before date of registration of Sale Deed and assured that they all join to execute sale deed in favour of the purchaser.

13) It is hereby expressly provided and agreed by the parties here to that both parties are entitled to enforce specific performance of the agreement against each other in case of breach of any conditions mentioned in this Agreement.

14) The original of the ‘‘AGREEMENT’’ signed by both the parties shall be with the PURCHASER and copy of the same similarly signed shall be with the SELLER.

SCHEDULE

1)

2)

IN WITNESS WHEREOF the SELLER and the PURCHASER have signed this Agreement of Sale on the day month and year herein above mentioned in the presence of the witnesses:

WITNESSES:

1) SELLER

2) PURCHASER

6.4 SALES AND AGREEMENT TO SELL

A contract of sale may be either sale or agreement to sale. Sale means when goods transferred from the seller to the buyer under contract of sale. But in case of agreement to sale goods transferred from the seller to the buyer at a future time or subject to some condition to be fulfilled later. The sale is different from agreement to sale like–

a) Transfer of ownership: In case of sale, goods transferred from the seller to the buyer. But in case of agreement of sale, the goods remain with the seller until expiry of the future agreed time or fulfillment of agreed conditions.

b) Transfer of risk: In case of sale, goods transferred from the seller to the buyer and the goods remain in the hand of the buyer. So, the risk of the goods remains in the hand of the buyer. But in case of agreement of sale, the goods remain with the seller until expiry of the future agreed time or fulfillment of agreed conditions.

c) Remedial measures: In case of sale, the unpaid seller has the remedy like stoppage in transit of goods etc and in case of agreement of sale, suit for damages.

d) Nature of contract: Sale is an executed contract and agreement of sale is executory contract.



CHECK YOUR PROGRESS

Q.2: Mention two distinctions between sale and agreement to sale?

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6.5 MEANING OF PRICE

According to Section 2(10) price means the money consideration for a sale of goods. The price may be fixed at the time of contract by the

parties or by course of dealing later by the parties. It may be conditional and fixed after valuation. Where the price is not fixed, the buyer must pay a reasonable price.

6.6 CONDITIONS AND WARRANTIES

In a contract of sale, there may be various terms like conditions and warranties. Condition means it is stipulation or terms essential to the main purpose of contract, the breach of which gives rise to a right to treat the contract as repudiated. On the other hand, the warranty means stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for the damages but not a right to reject the goods and treat the contract as repudiated.

The condition is different from warranties.

a) In case of condition, it is essential to the main purpose of contract whereas warranty collateral to the main purpose of the contract.
b) The breach of condition gives rise to a right to treat the contract as repudiated. On the other hand, the breach of warranty gives rise to a claim for the damages but not a right to reject the goods and treat the contract as repudiated.
c) The breach of condition gives rise to warranty, but breach of warranty cannot gives rise to condition.



CHECK YOUR PROGRESS

Q.3: Distinguish between conditions and warranties.

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6.7 PASSING OF PROPERTY IN GOODS

Goods transferred from the seller to the buyer for price under the contract of sale. The following rules are laid down under the Sales of Goods Act when the goods pass from the seller to the buyer:

i) Property transferred as intended: The goods are transferred from the seller to the buyer at the time when the parties intend to pass. It is for the ascertained and specific good.

ii) Specific goods in a deliverable state: The deliverable state of goods is the state when the buyer is bound to take the delivery of them.

iii) Specific goods not in a deliverable state: In case of contract of sale of specific goods, the seller is bound to do something with the goods for the purpose of putting them into deliverable state. Such goods are not transferred from the seller to the buyer until such things are done and the buyer notices the same.

iv) Specific goods to be weighted, tested etc by the seller: In case of contract of sale of specific goods, the seller is bound to weight, test, measured or do something with the goods for the purpose of ascertaining the price. Such goods are not transferred from the seller to the buyer until such things are done and the buyer notices the same.

v) Goods delivered on approval or on sale or return: Under Section 24 goods are delivered on approval or on sale or return under contract of sale, 'When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer–

   a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction,

   b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, if a time has been fixed for the return of the goods, on expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.'

Goods are sold on approval or on sale or return basis under contract of sale to the buyer, but it does not means the goods are transferred to the buyer until the following conditions are fulfilled:

i) When the buyer signifies to the seller his approval or accepted the goods.

ii) The goods passes to the buyer when the buyer adopts the transactions.

iii) When the buyer does not signifies to the seller his approval or accepted the goods. But retains the goods without giving notice of rejection to the seller and if on expiration of fixed time of return and, if no time has been fixed, on the expiration of a reasonable time, than it is supposed that the goods passes to the buyer.

6.8 TRANSFER OF TITLE BY NON-OWNERS

The owners only can transfer a better title and sale the goods to the buyer, none can give who does not himself possess. In the following cases, a person who is not an owner can give to the transferee a valid title to the goods:

i) Estoppel: Sometimes the law of estoppels may apply against the owner of the goods and he may not be allowed to deny seller's authority to sell. The owner did not have the right to stop the seller from selling the goods even though the seller did not have any right title of the good.

   It is happen when the owner of the goods by his act or omission makes the buyer to believe that the seller of those goods has a right to sell subsequently, he cannot deny the existence of such a right in the seller.

ii) Sale by a mercantile agent: In following conditions, sale by a mercantile agent may pass good title to the buyer–

   a) The agent possess the title or documents of the good

   b) The possessions of the goods with the agent is with the consent of the owner

   c) The agent sale the goods in ordinary course of business

d) The buyer belief on such sale without notice that the agent has no authority to sale the goods.

iii) Sale by one of several joint owners: Several joint owners can sale the good by the permission of the co-owners to any person and such transfer passes the title of the goods to the buyer and the buyer beliefs on such sale without notice that such joint owners has no authority to sale the goods.

iv) An unpaid seller: An unpaid seller are such seller of goods who may not get the whole price for the goods or receive any negotiable instrument as conditional payment which later dishonor. Such an unpaid seller can re-sale the goods to the buyer and thereby the good title possess by the buyer.

v) Sale by the seller in possession of goods after sale: The seller may continue to have after sale the title or possession of goods and subsequently, there may transfer the title or possession of goods by way of sale on pledge to other buyer. The buyer possesses good title by such transfer if the buyer beliefs on such sale without notice and had no knowledge of the seller's want of title. The buyer can obtain damages from such sale. But the buyer cannot recover the goods from the second buyer.

vi) Sale of goods obtained under voidable agreement: Sale of goods obtained under voidable agreement but such agreement is not rescinded at the time of sale, the buyer possesses good title by such transfer if the buyer beliefs on such sale without notice the defect of the seller's title.

vii) Seller has certain rights of the goods possess by the buyer: Seller may have certain rights of the goods possess by the buyer and the buyer may sell, pledge etc the goods to third party and thereby passes good title under the following conditions:

a) The possessions of the goods with the first buyer is with the consent of the seller

b) The transfer made by the buyer

c) The person who receives the goods acts in good faith and without notice the seller's rights of the goods.

viii) Sale under the Contract Act: Under pledge the pawnee may sale the goods to the pawnor or finder of lost goods can sale the goods and there by the buyer gets a good title.

6.9 PERFORMANCE OF A CONTRACT OF SALE

Under contract of sale, it is the duty of the seller to deliver the goods at a time and place, in a manner agreed upon and the buyer has to accept the same and pay accordingly to the seller. Here, delivery means voluntary transfer of possession from one person to another. The delivery may be actual or symbolic or constructive delivery. The following are the rules regarding delivery of goods concerning the performance of the contract of sale:

i) Possession of buyer: The delivery of goods to the buyer may be anyway as the parties agreed for delivery

ii) Place of delivery: Goods are delivered at a place by the seller to the buyer as they agreed under the contract of sale.

iii) Time of delivery: Goods are delivered at a time by the seller to the buyer as they agreed under the contract of sale. But if there is not any time fixed than within a reasonable time.

iv) Effect of part delivery: Under contract of sale, sometimes the parties may agree that the goods would pass when the goods are delivered. According to section 34 effect of part delivery means–

   1) A delivery of parts of the goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole.
   2) When the delivery of the part is not made in progress of the delivery of the whole, but it is made with an intention of serving the part from the whole that does not operate as a delivery of the remainder.

v) Application for delivery: The seller is not bound to deliver goods to the buyer until buyer applies for delivery.

vi) Possession of a third party: The goods may be in possession with the third person at the time of contract of sale and there is no delivery

of such goods take palce by the seller to the buyer until the third person acknowledges that he possesses the goods on his behalf.

vii) Expanses of delivery: Unless otherwise agreed, the expanses of the delivery of goods shall be borne by the seller.

viii) Buyer is not bound to return the rejected goods: Buyer is not bound to return the rejected goods where goods are delivered by the seller, but it is sufficient to intimate the seller that he refuse to accept the said goods.

ix) Delivery of the wrong quantity: The seller may deliver less or more goods to the buyer as agreed under the contract of sale. If deliver less amount of goods than the buyer has the option to reject them the whole or if accepts the goods than he has to pay for the same. On the other hand, if the seller deliver more goods than agreed with the buyer, the buyer may rejects the whole or accept only those quantities of goods that agreed under the contract of sale and reject the rest.

Besides, the seller may deliver the goods mix with different description of goods not included in the contract, the buyer may accepts the goods which are in accordance with the contract and reject the rest or may reject the whole.

x) Delivery to the carrier: Unless otherwise authorized by the buyer, the seller has to enter contract with carrier for delivery of goods and if it is not doing so and the goods are lost than the seller is responsible for damages or the buyer may refuse the goods from accepting or the risk with the seller during goods remain in transit.

xi) Examining the goods: The buyer can examine and ascertain the conformity of the goods with the contract of sale.

xii) Acceptance: On intimation by the buyer to the seller that the goods are accepted deemed it that it is accepted by the buyer.

xiii) Liability to the buyer: The buyer is liable for any loss for his neglect or refusal of goods to the seller.

xiv) Installment delivery: Usually the buyer is not bound to accept the goods delivered under installment unless otherwise agreed with the

seller. The buyer may accept the delivery of goods and separate payment for each of such installment as agreed. But if any party fails to perform his obligation, it may repudiate the contract or damages may be claimed for the same.

6.10 UNPAID SELLER AND HIS RIGHTS

Under contract of sale, the seller is any person who is in position of a seller and the buyer is the person who can buy and pay for the goods. An unpaid seller are seller of goods who may not get the whole price for the goods or he receive any negotiable instrument as conditional payment which later dishonor. The unpaid seller has the following certain rights–

a) Sellers' lien: The unpaid seller can exercise his lien when the goods are not sold on credit or credit period is getting expired or buyer become insolvent and possess the goods as agent or bailee for the buyer. The unpaid seller can also exercise his lien for non-payment of price, for the balance of goods not delivered if part delivery is made. The seller can abandoned his lien when he desire and does not lose his lien by reason only that he obtained a decree for the price of the goods.

b) The right to stoppage in transit: The unpaid seller has the right to stop while the goods are delivered to the carrier and remain in transit. This right comes to an end as soon as the goods are delivered. This right may also come to an end if the carrier wrongfully refuses to deliver the goods to the buyer.

c) Suit for prices: The unpaid seller has the right to sue the buyer if the buyer neglect or refuse to pay for the goods as agreed under the contract of sale.

d) The right of resale: The unpaid seller has the right to resale the goods if the goods are perishable in nature without any notice to the buyer or if notice is give and the buyer fail to pay the amount as agreed within that time.

e) Suit for damages: The unpaid seller has the right to sue for damages if the buyer neglect or refuse to pay for the goods as agreed under the contract of sale.

f) Claim for interest and special damages: The unpaid seller has the right to claim for interest and special damages for the goods as wherever it can be recoverable.

6.11 REMEDIES FOR BREACH OF CONTRACT

The contract of sale has two parties one is seller and the other is buyer. Both parties can sue to each other for breach of such contract and claim for damages.

Suits by the seller against the buyer:

a) Suits for price: The buyer has the duty to pay the seller for the goods delivered to him as agreed under the contract of sale. But if the buyer neglect or refuse to pay for the goods as agreed under the contract of sale and the goods delivered to him by the seller, the seller can sue against the buyer for price. This, there must be deliver of goods by the seller and the buyer neglect or refuse to pay. But if the goods are sold on credit, the seller can sue for price only when such credit period is expired.

b) Suit for damages: The buyer may wrongfully neglect or refuse to accept or pay for the goods as agreed under the contract of sale. The seller may sue for damages for non-acceptance of the goods.

Suits by the buyer against the seller:

a) Damages for non-delivery: The seller may wrongfully neglect or refuse to deliver the goods to the buyer as agreed under the contract of sale. The buyer may sue for damages for non- delivery of goods.

b) Suits for specific performance: Section 58 entitles the buyer to bring an action of specific performance and instead of retain the goods or pay for damages for non-delivery of goods by the seller, the court may pass a decree in favour of the buyer and direct the seller to specifically perform the contract i.e deliver the goods as agreed.

c) Remedy for breach of warranty: Under contract of sale, the buyer has to accept the goods and pay for the delivery of goods by the seller. When the buyer accepts the goods or a part thereof the buyer is bound to treat the breach of condition of contract of sale as breach

of warranty and notice the same to the seller. In such case, the buyer can sue for damages.



6.12 LET US SUM UP

In this unit, we have discuss the following:

- Contract of sale means "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price."
- Agreement to sale goods transferred from the seller to the buyer at a future time or subject to some condition to be fulfilled later.
- Condition means it is stipulation or terms essential to the main purpose of contract, the breach of which gives rise to a right to treat the contract as repudiated.
- Warranty means stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for the damages but not a right to reject the goods and treat the contract as repudiated.
- An unpaid seller are seller of goods who may not get the whole price for the goods or he receive any negotiable instrument as conditional payment which later dishonor.



6.13 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.

5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



6.14 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Under Section 2(7) of The Sales of Goods Act, 1930, goods means every kind of movable property other than actionable claims and money; and includes stock and share, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale.

Ans. to Q. No. 2: The sale is different from agreement to sale like—

a) Transfer of ownership: In case of sale, goods transferred from the seller to the buyer and in case of agreement of sale, the goods remain with the seller until expiry of the future agreed time or fulfillment of agreed conditions.

b) Transfer of risk: In case of sale, goods transferred from the seller to the buyer and the goods remain in the hand of the buyer. So, the risk of the goods remains in the hand of the buyer. But in case of agreement of sale, the goods remain with the seller until expiry of the future agreed time or fulfillment of agreed conditions.

Ans. to Q. No. 3: The condition is different from warranties:

a) In case of condition, it is essential to the main purpose of contract whereas warranty collateral to the main purpose of the contract.

b) The breach of condition gives rise to a right to treat the contract as repudiated. On the other hand, the breach of warranty gives rise to a claim for the damages but not a right to reject the goods and treat the contract as repudiated.

c) The breach of condition gives rise to warranty, but breach of warranty cannot gives rise to condition.



6.15 MODEL QUESTIONS

Q.1: Define contract of sale and its essentials.

Q.2: Define goods and its classifications.

Q.3: Define condition and warranties. Distinguish between condition and warranties.

Q.4: Distinguish between sale and agreement to sale.

Q.5: Mention the rules when the goods passed from the seller to the buyer under the Sales of Goods Act.

Q.6: When a person who is not an owner can give to the transferee a valid title to the goods?

Q.7: Mention the rules regarding delivery of goods concerning the performance of the contract of sale.

Q.8: Define unpaid seller and his rights.

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UNIT 7: LAW OF NEGOTIABLE INSTRUMENTS

UNIT STRUCTURE

7.1 Learning Objectives

7.2 Introduction

7.3 Object of the Act

7.4 Negotiable Instruments, Promissory Notes, Bill of Exchange, Cheques

7.5 Negotiation, Presentment, Dishonour

7.6 Crossing of Cheques

7.7 Paying Banker

7.8 Let Us Sum Up

7.9 Further Reading

7.10 Answers to Check Your Progress

7.11 Model Questions

7.1 LEARNING OBJECTIVES

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

- explain the meaning of Negotiable Instrument
- learn the object of the Negotiable Instrument Act,1881
- describe the concept of negotiation, Promissory Note, Bill of Exchange and Cheques
- describe the importance of Crossing of Cheques, Dishonour, Presentment and obligation of Paying Bankers.

7.2 INTRODUCTION

Negotiable Instruments are basically the 'Instrument of Credit', which can be converted into money and also passable from one hand to another. A person who takes a negotiable instrument in good faith becomes its true owner and it is not affected even if the title of the person from whom he has taken is imperfect.

The Negotiable Instruments Act, 1881 is an important piece of legislation which came into existence to legalize the Indian system under which the negotiable instrument pass from hand to hand in negotiation like ordinary goods. This Act is not an exhaustive one and does not cover either all kinds of negotiable instruments or even all matters relating to them. Wherever the Act is silent, the Law Merchant including mercantile usage is a relevant consideration.

Considering the loopholes of the Negotiable Instruments Act, 1881 the Parliament has amended the Act several times. Recently, the Negotiable Instruments (Amendment) Act, 2015 came into force with retrospective effect. The Amendment makes changes in provisions relating to the territorial jurisdiction for filing Cheque dishonor Cases in the Negotiable Instrument Act.

7.3 OBJECT OF THE ACT

The main object of the Act is to legalize the system by which the instruments contemplated by it could pass from one hand to another by negotiation, like any other good.

The purpose of enactment was to present an orderly and authoritative statement of the leading principles of law.

7.4 NEGOTIABLE INSTRUMENTS, PROMISSORY NOTES, BILL OF EXCHANGE, CHEQUES

Negotiable Instruments: The word 'Negotiable' means transferable by delivery and the word 'Instruments' means written document. The Negotiable Instruments entitles a person to a certain sum of money. Thus the term Negotiable Instruments means a written document which creates a right in favour of some persons and which is freely transferable. According to Section 13(1) of the Act Negotiable Instruments means a Promissory Note, bill of exchange or Cheque payable either to order or to bearer.

A Negotiable Instrument thus posses two qualities:

a) The right of ownership contained in the instrument can be transferred from one person to another by mere delivery or sometimes by indorsement and delivery;

b) The transferee who takes the negotiable instrument in good faith and for consideration (known as holder) gets a good title to the same even though the title of the transferor is defective.

A currency note possesses these two qualities but for obvious reasons the Act expressly excludes a currency note from the purview of the Act.

The important characteristics of negotiable instruments are :

- It must be writing
- It must be unconditional
- Easily transferable from one person to another
- The amount of instrument is payable on demand
- It is always payable in terms of money
- It can be easily used for the payment of debt
- A cheque or Note gives the right to the creditors to recover the written amount from the debtor
- It is an exception to the general rule that 'nobody can transfer a better title than that of his own'. Here the title of the transferor becomes immaterial if the transferee takes in good faith
- Specified amount is written on the instrument.

Promissory Note: A Promissory Note is a promise in writing by a person to pay certain sum of money to a specified person or to his order or to the bearer.

Section 4 of the Negotiable Instruments Act defines a Promissory Note as 'a Promissory Note is an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.'

Illustrations: A signs instruments in the following terms

a) I promise to pay B or order Rs. 500

b) I promise to pay B Rs. 500 and all other sums which shall be due to him

The instrument marked (a) is a promissory note but (b) is not.

No particular form of word is required to constitute a promissory note. Following are the essential characteristics of a promissory note:

i) It must be in writing
ii) Signed by the maker
iii) Undertaking or promise to pay
iv) Undertaking to be unconditional
v) Promise to pay sum of money only
vi) Certainty of sum payable
vii) Certainty of the maker of the instrument, who have also to affix his signature
viii) Certainty of the payee.



CHECK YOUR PROGRESS

Q.1: What are the essential characteristics of a promissory note?

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Bill of Exchange: Section 5 of the Act defines Bill of Exchange as 'a Bill of Exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain sum of money, only to, or to the order of, a certain person or to a bearer of instrument'.

A Bill of Exchange requires three parties namely–

The drawer: The person who is the maker of the bill and gives the order.

The drawee: The person who is directed to pay the bill and who on affixing his signature becomes the acceptor.

The payee: The person to whom or to whose order the amount of the instrument is payable, unless the bill is payable to bearer.

The three parties should be indicated in the bill along with reasonable certainty.

In Punjab & Sind Bank vs. Vinkar Sahakari Bank Ltd. [(2001) 7 SCC721, 2002CrLJ, 93, (2002) 36 SCL 286] it has been held by the court that it cannot be said that in every bill of exchange there must necessarily be three parties, the maker, the payee and the person to whom direction is given to pay. The Court thus held a pay to be cheque although it had only two parties.



CHECK YOUR PROGRESS

Q.2: Define Bill of Exchange.

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Cheque: A cheque is a bill of exchange drawn on a specified banker and is payable only on demand.

Section 6 of the Act defines cheque as 'A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes electronic image of a truncated cheque and a cheque in the electronic form'. The definition of 'Cheque 'has been enlarged by the Amendment Act of 2002.

A cheque is a bill of exchange with the following qualifications:

i) It is always drawn on a specified bank and

ii) It is always payable on demand.

iii) After the Amendment Act of 2002, a cheque may also be in 'electronic' form.

All cheques are bill of exchange but all bills are not cheque.

Distinction between a Cheque and a Bill of Exchange:

1) The Drawee, in case of cheque is always a bank, but in case of Bill of Exchange, drawee could be any person.

2) A cheque is always payable on demand, but a bill of exchange may be either a time bill or it may be payable on demand.

3) In a Bill of Exchange acceptance by the drawee can be there. But a cheque is always payable on demand. So there is no system of acceptance of a cheque.
4) There is a system of crossing cheque but a bill of exchange cannot be crossed.
5) A Bill of Exchange cannot be made payable to bearer as well as on demand. A cheque is always payable on demand and it may be payable to bearer also.

7.5 NEGOTIATION, PRESENTMENT, DISHONOUR

Negotiation: When the holder of a negotiable instrument i.e., the person who is entitled to receive its payment transfers the negotiable instrument to another person so that the transferee now becomes entitled to receive the payment, the instrument is said to have negotiated. According to Section 14 of the Act, when a Promissory Note, bill of exchange or Cheque is transferred to any person, so as to constitute that person holder thereof, the instrument is said to be negotiated. Thus it is necessary that transfer of the instrument must have been made with an intention to transfer the rights. For example, If A delivers a bearer cheque to his servant foe safe custody, he will not be entitled to receive the payment of the same and he cannot be called the holder of the cheque. But if the cheque is delivered to the servant for his services, the servant will become holder.

Therefore in negotiation two conditions must be fulfilled:

i) There must be a transfer of instrument to another person.
ii) The transfer of the instrument must be made in such a manner as to constitute the transferee the holder of the instrument.

A negotiable instrument can be negotiated in two ways:

a) If the instrument is the bearer instrument, the rights in it can be transferred by mere delivery from one person to another. However it is necessary to have been made with an intention to transfer the ownership. (Section 47)
b) If the instrument is an order one, the rights in it can be transferred by indorsement and delivery. (Section 48)

The indorsement means signatures of the persons which are generally made at the back of the instrument for the purpose of transfer of rights to another person. (Section15)

A forged indorsement does not convey any title to the transferee of the negotiable instrument, even though the transferee may take the same in good faith and for value.

Presentment: Sections 61 to 77 of the Act deals with the presentment of a negotiable instrument.

The Act contemplates three kinds of presentment:

1) Presentment of a Bill of Exchange
2) Presentment of a Promissory Note for sight
3) Presentment of a Promissory Note, bill of exchange or cheque for payment.

To procure the payment, every negotiable instrument, a Promissory Note, bill of exchange or cheque has to be presented to the maker, drawee or acceptor.

Presentment for Acceptance: Only a bill of exchange is to be presented for acceptance. When a bill of exchange is expressed to be payable "after sight", it means that its payment is to be made only after acceptance. To fix the maturity of such bill of exchange its acceptance, which includes its presentment for acceptance, is absolutely necessary.

Every bill of exchange is not required to be presented for acceptance. The presentment is to be made by the holder of a bill of exchange. If any time or place for presentment is specified, it must be presented for acceptance accordingly.

Presentment of a Promissory Note for Sight: Sometimes a Promissory Note may be made payable at a certain period after sight. Such note must be presented to the maker for sight by a person entitled to demand payment within reasonable time after it is made and in business hours on a business day.

Presentment for Payment: All Promissory Note, bill of exchange and cheques are required to be presented when the payment becomes due. The presumption is that the payment is to be made at the debtor's place.

For electronic cheque, the drawee bank is entitled to demand any further information, regarding the truncated cheque from the bank holding the truncated cheque in case of reasonable suspicion.

Section 76 in the Negotiable Instruments Act, 1881:

When presentment unnecessary: No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases:

a) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or if the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours, or if the instrument not being payable at any specified place, he cannot after due search be found;
b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;
c) as against any party if, after maturity, with knowledge that the instrument has not been presented— he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment for payment;
d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

Dishonour: A bill may be dishonoured by non acceptance or by nonpayment. Section 91 provides for the dishonor of bills of exchange by non acceptance. This provision is applicable to bills payable at the sight or on demand.

Dishonour by Non Acceptance:

Dishonour by Non Acceptance occurs:

a) When a bill is duly presented for acceptance and the drawee or one of the drawees, does not accept within forty eight hours from the time of presentment, the bill is deemed to be dishonoured.

b) Where presentment for acceptance is excused and the bill is not accepted, the bill is dishonoured.

c) Where the drawee is incompetent to contract.

Dishonour by non acceptance of a bill gives the holder an immediate right of action against the drawer and indorsers and there is no need to wait till the maturity of the bill or to present it for payment.

Dishonour by Non Payment: According to Section 92 of the Act a Promissory Note, bill of exchange or Cheque is said to be dishonoured by nonpayment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

Notice of Dishonour: Notice of dishonour means information about the fact that the instrument has been dishonoured. It may be given to—

a) All persons whom the holder seeks to make liable

b) Authorised agents of such persons

c) Legal representatives in case the persons concerned have died.

d) Assignee, when the person has been declared an insolvent.

The Negotiable Instruments Act, 1881 is applicable for the cases of dishonour of cheque. This Act has been amended many times since 1881.

According to Section 138 of the Act, the dishonour of cheque is a criminal offence and is punishable by imprisonment up to two years or with monetary penalty or with both.

If payee decides to proceed legally, then the drawer should be given a chance of repaying the cheque amount immediately. Such a chance has to be given only in the form of notice in writing.



CHECK YOUR PROGRESS

Q.3: Discuss the rules of presentment of negotiable instruments.

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7.6 CROSSING OF CHEQUES

The practice of crossing cheques has been statutorily recognized to avoid, as far as possible, the losses, by getting into wrong hands. There are two types of cheques:

1) Open cheques or bearer cheques: They are payable in cash across the counter. Even a founder of a lost cheque or a thief may encash such a cheque.
2) Crossed cheque: Payment of a crossed cheque can be obtained only through a banker.

Types of crossing:

a) General crossing: Where a cheque is crossed generally the drawee banker must not pay it unless it is presented by a banker. For a general crossing there must be two parallel transverse lines on the face of the instrument either with or without the words 'any company'.

b) Special crossing: A special crossing is constituted when the name of a bank is added across the face of a cheque, either with or without the words 'not negotiable'. Payment of a specially crossed cheque can be obtained only through a specified banker.

c) Account payee crossing: It is now common practice to add the words 'account payee' or 'A/C payee only' to a crossing on cheques. Such crossing expresses the intention that the cheque should only be collected for the account of the payee. Such crossing though not statutorily recognized has gained acceptance by course of banking operations and general practice.



CHECK YOUR PROGRESS

Q.4: Write a note on crossing of cheques.

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7.7 PAYING BANKER

Banker: A banker is one who does banking business. Section 5(b) of the Banking Regulation Act, 1949 defines banking as, ‘‘accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft or otherwise.’’ This definition emphasizes on the following:

1) That the primary function of a banker consists of accepting of deposits for the purpose of lending or investing the same;
2) That the amount deposited is repayable to the depositor on demand or according to the agreement. The demand for repayment can be made through a cheque, draft or otherwise, and not merely by verbal order.

Protection of Paying Banker (Sections 10, 85 and 128): Section 85 lays down that where a cheque payable to order purports to be endorsed by or on behalf-of the payee the banker is discharged by payment in due course. He can debit the account of the customer with the amount even though the endorsement turns out subsequently to have been forged, or the agent of the payee without authority endorsed it on behalf of the payee. It would be seen that the payee includes endorsee. This protection is granted because a banker cannot be expected to know the signatures of all the persons in the world. He is only bound to know the signatures of his own customers.

Therefore, the forgery of drawer’s signature will not ordinarily protect the banker but even in this case, the banker may debit the account of the customer, if it can show that the forgery was intimately connected with the negligence of the customer and was the proximate cause of loss.

In the case of bearer cheques, the rule is that once a bearer cheque, always a bearer cheque. Where, therefore, a cheque originally expressed by the drawer himself to be payable to bearer, the banker may ignore any endorsement on the cheque. He will be discharged by payment in due course. But a cheque which becomes bearer by a subsequent endorsement in blank is not covered by this Section. A banker is discharged from liability on a crossed cheque if he makes payment in due course.

Payment in due Course (Section 10): Any person liable to make payment under a negotiable instrument must make the payment of the amount due there under in due course in order to obtain a valid discharge against the holder.

A payment in due course means a payment in accordance with the apparent tenor of the instrument, in good faith and without negligence to any person in possession thereof.

A payment will be a payment in due course if:

a) it is in accordance with the apparent tenor of the instrument, i.e. according to what appears on the face of the instrument to be the intention of the parties;
b) it is made in good faith and without negligence, and under circumstances which do not afford a ground for believing that the person to whom it is made is not entitled to receive the amount;
c) it is made to the person in possession of the instrument who is entitled as holder to receive payment;
d) payment is made under circumstances which do not afford a reasonable ground believing that he is not entitled to receive payment of the amount mentioned in the instrument; and
e) payment is made in money only.

Under Sections 10 and 128, a paying banker making payment in due course is protected.

Paying Bankers Duties and Responsibilities: A banker on whom the cheque is drawn should pay the cheque, when it is presented for payment. It is his obligation by section 31 of the Negotiable Instrument Act. A banker is bound to honour his customer's cheque to the extent of the fund available and the existence of no legal bar for payment. The paying banker should use reasonable care and diligence in paying a cheque so as to abstain from any action likely to damage his customer's credit.

At the time of making payment of he should observe the following very carefully:

i) Verification of signature of the drawer.
ii) Verification of the genuineness of the instrument.

iii) Payment not stopped by the A/c holder.

iv) Holders title on the cheque is valid.

v) A/c is not dormant one.

vi) A/c holder is not bankrupt, deceased and insanse.

vii) A/c is not under subject of liquidation process.

viii) No. 'Guernsey Order' is issued by count.

ix) Properly endorsed.

x) Cheque is not drawn beyond limit fixed by the drawer is respect of amount.

xi) Instrument being presented is crossed.

xii) Instrument is not state or post dated.

xiii) No material alteration is made.

xiv) Sufficient balance in the A/c.



CHECK YOUR PROGRESS

Q.5: Write the duties and liabilities of paying bankers.

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7.8 LET US SUM UP

In this unit, we have discussed the following aspects:

- The Negotiable Instrument Act deals with only three kinds of instruments. They are– Promissory Notes, Bill of Exchange and Cheques.
- This important piece of legislation came into existence to legalise the transfer of negotiable instruments from one person to another.
- It provides for the essential characteristics of all the negotiable instruments.

- Negotiation by delivery and negotiation by indorsement and delivery are the two modes negotiation.
- Promissory Notes, bill of exchange or Cheques are required to be presented for payment respectively to the maker, acceptor or drawee therefore by the holder.
- A Promissory Note, bill of exchange or Cheque is dishonoured by non payment. Only a bill of exchange may be dishonoured by nonpayment or non acceptance.
- Section 138 of the Act made provisions for criminal prosecution for dishonor of cheque.
- The Act provides protection to the paying bankers.



7.9 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.
3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.
5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



7.10 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: The essential characteristics of a promissory note are:

A) It must be in writing

B) Signed by the maker

C) Undertaking or promise to pay

D) Undertaking to be unconditional

E) Promise to pay sum of money only

F) Certainty of sum payable

G) Certainty of the maker of the instrument, who have also to affix his signature

H) Certainty of the payee

Ans. to Q. No. 2: Section 5 of the Act defines Bill of Exchange as 'a Bill of Exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain sum of money, only to, or to the order of, a certain person or to a bearer of instrument'.

Ans. to Q. No. 3: The rules of Presentment are: To procure the payment, every negotiable instrument, a Promissory Note, bill of exchange or cheque has to be presented to the maker, drawee or acceptor.

i) Presentment for acceptance: Only a bill of exchange is to be presented for acceptance. When a bill of exchange is expressed to be payable "after sight", it means that its payment is to be made only after acceptance.

Every bill of exchange is not required to be presented for acceptance.

The presentment is to be made by the holder of a bill of exchange.

ii) Presentment of a Promissory Note for sight: Sometimes a Promissory Note may be made payable at a certain period after sight. Such note must be presented to the maker for sight by a person entitled to demand payment within reasonable time after it is made and in business hours on a business day.

iii) Presentment for payment: All Promissory Note, bill of exchange and cheques are required to be presented when the payment becomes due.

Ans. to Q. No. 4: Crossing of Cheques: The practice of crossing cheques has been statutorily recognized to avoid, as far as possible, the losses, by getting into wrong hands. There are two types of cheques:

1) Open cheques or bearer cheques: They are payable in cash across the counter. Even a founder of a lost cheque or a thief may encash such a cheque.
2) Crossed cheque: Payment of a crossed cheque can be obtained only through a banker.

Types of crossing:

a) General crossing: Where a cheque is crossed generally the drawee banker must not pay it unless it is presented by a banker. For a general crossing there must be two parallel transverse lines on the face of the instrument either with or without the words 'any company'.
b) Special crossing: A special crossing is constituted when the name of a bank is added across the face of a cheque, either with or without the words 'not negotiable'. Payment of a specially crossed cheque can be obtained only through a specified banker.
c) Account payee crossing: It is now common practice to add the words 'account payee' or 'A/C payee only' to a crossing on cheques.

   Such crossing expresses the intention that the cheque should only be collected for the account of the payee. Such crossing though not statutorily recognized has gained acceptance by course of banking operations and general practice.

Ans. to Q. No. 5: Paying Bankers duties and responsibilities: A banker on whom the cheque is drawn should pay the cheque, when it is presented for payment. It is his obligation by section 31 of the Negotiable Instrument Act. A banker is bound to honour his customer's cheque to the extent of the fund available and the existence of no legal bar for payment. The paying banker should use reasonable care and diligence in paying a cheque so as to abstain from any action likely to damage his customer's credit.



7.11 MODEL QUESTIONS

Q.1: All negotiable instruments are transferable instruments but all transferable instruments are not negotiable, why? (Hint : write characteristics of negotiable instruments)

Q.2: Distinguish between promissory note and bill of exchange.

Q.3: Write a note on Dishonour of Cheques.

Q.4: State and explain the protection offered by the Negotiable Instruments Act to the Paying Banker.

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UNIT 8: FORMATION OF A COMPANY

UNIT STRUCTURE

8.1 Learning Objectives

8.2 Introduction

8.3 Formation of a Company

8.4 Stages of Formation of Company

8.5 Documents Required for Incorporation

8.6 Types of Company

8.7 Meaning and Kinds of Company Meeting

8.8 Meaning of Minute

8.9 Recording and Signing of Minutes

8.10 Role of Chairman

8.11 Postal Ballot

8.12 Resolution and its Different Kinds

8.13 Let Us Sum Up

8.14 Further Reading

8.15 Answers to Check Your Progress

8.16 Model Questions

8.1 LEARNING OBJECTIVES

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

- define and explain the formation of a company
- describe the stages of formation of company
- explain the documents required for incorporation of a company
- describe the certificate of incorporation
- explain the certificate of commencement of business
- explain the meaning of a company meeting and its different kinds
- define the meaning of a Minute
- elaborate the recording and signing of minutes
- explain the role of the Chairman and know about Postal Ballot
- describe the resolution and its different kinds.

8.2 INTRODUCTION

In this unit, we are going to discuss about the formation of a company and company meetings. Here, you will be able to know details about the documents required for incorporation of the formation of a company. This unit also encompasses the stages of formation of company. The unit discusses the certificate of incorporation and the certificate of commencement of business. Thus, you will able to understand through this unit, the basic concept of company, the essential document for formation of a company, stages, documents required for incorporation, certificate of incorporation and certificate of commencement of business.

And at the end of this unit you will be able to know about company meetings and recording of minutes and prospectus.

8.3 FORMATION OF A COMPANY

Before formation of a company, there must be an idea originated in the mind of a person or persons to form a company and do the necessary steps to convert it into reality. Such persons are called as 'Promoter'.

The term 'promoter' is not define anywhere in the Companies Act. According to Palmer, "A person who originate a scheme for the formation of the company, has the Memorandum and Article prepared, executed and registered, and finds the first directors, settles the terms of preliminary contracts and prospectus (if any), and make arrangements for advertising and circulating the prospectus and placing the capital, is a promoter."

An idea has to come to start a business and it should bring into existence. The promoter is a person who originates the idea to start a business and plan to bring it into reality. He has very wide powers relating to the formation of the company. He is neither a trustee nor an agent of the proposed company. The promoter stands in a fiduciary relationship towards the company.

Lord Justice Lindley, defines the company as, "A company is voluntary association or an organization of many persons who contribute money or monies worth to a common stock and employee it in some trade or business

and who share the profit or loss arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons, who contribute it or to whom it belongs, are members of the company. The proportion of capital to which each member is entitled, is his share. The shares are of fixed value and the whole capital of the company is divided into equal number of shares. The shares are generally transferable although under certain special circumstances, the right to transfer may be restricted."

8.4 STAGES OF FORMATION OF COMPANY

A company is nothing but an association of persons incorporated under Companies Act, having legal separate existence from its members. A company is formed under three stages, as—

1) Promotion of a company
2) Registration, incorporation and Commencement of a company and
3) Raising of capital

1) Promotion of a company: An idea has to come in the mind of certain persons to form a company. These persons are called promoter. He takes all necessary steps to form the company. The promoter may be an individual, association of persons, partners etc. who originate the scheme for formation of the company; get together the subscribers to the memorandum, gets the Memorandum and Article, prepared, executed and registered, finds the bankers, brokers and legal advisers, find the directors, settle the terms of preliminary contracts with vendors and agreement with underwriters and makes arrangement for preparation, advertisement and circulation of the prospectus and placement of the capital.
2) Registration, incorporation and commencement of a company: The following aspects have to decide before a company incorporate and commence its business :
   a) **Types of company:** Any two or more persons required to start a private company and 7 members for a public company, associated for a lawful purpose, by subscribing their names to

the memorandum of association in respect of registration, form an incorporated company, with or without limited liability.

b) **Application for availability of name of company:** The promoters choose at least five names apart from the main name of the company and make an application along with prescribed fee (presently Rs. 500) to the Registrar of Companies to ascertain the availability of the name. According to Section 20 of the Act, a company cannot be registered with the name which is undesirable in the opinion of Central Government or which is identical with or too nearly resembles the name of an existing company. The name of the company must end with the word "Limited" in the case of a public company and the words "Private Limited" in the case of a private company. The Registrar of Companies shall have to furnish the information regarding the availability of name within seven days. In case the name is undesirable, the registrar may reject the same or ask for resubmission of the application with new name or calls for further information, ordinarily within three days of receipt of the application.

c) **Preparation of Memorandum and Article of Association:** Memorandum of Association is the constitution of the company which specifies the area of the company, within which it can act. It contains clauses like, name clause, object clause, capital clause, liability clause, subscription clause and registered office clause. Article of Association is another important document which contains rules and regulations relating to the internal management of a company.

d) **Vetting of Memorandum and Articles, Printing, Stamping and Singing of the same:** The draft of the Memorandum and Articles of Association should be prepared and typed. But before printing the Memorandum and Articles Association it is desirable to get the draft vetted by the Registrar. This helps in avoiding mistakes and unnecessary delay in registration of the Company. It should be signed separately by the subscribers. It should be stamped.

e) Power of attorney: With a view to fulfill the various formalities that are required for incorporation of a company, the promoters may appoint an attorney empowering him to carry out the instruction/ requirement stipulated by the Registrar. This requires execution of a Power of Attorney on a non-judicial stamp paper of a value prescribed in the respective State Stamp Laws.

f) Additional Documents Required:

A) Consent of director: In case of public limited company having share capital, the director has to give written consent to act as director.

B) Notice of the Registered office: The notice of location of the registered office in the memorandum and article of association is necessary.

C) Particulars of directors: The persons who are to act as first directors may file their particulars to the Registrar at the time of registration.

g) Statutory Declaration in e-Form No. 1: Statutory Declaration for completing of all legal formalities should be signed by an advocate of High Court or Supreme Court or attorney or Chartered Accountant or by a person named in the Article as a director, manager, or secretary of a company and filed with the Registrar. The Registrar may accept such a declaration as sufficient evidence of such compliance.

h) Payment of Registration Fees: The fee prescribed for registration of company is required to be paid to the Registrar.

i) Certificate of incorporation: If all the documents mentioned above are complete and the Registrar of the Companies is satisfied that all requirements are complied with, the Registrar shall certify under his hand that the company is incorporated. The certificate of incorporation given by the Registrar and it is the conclusive evidence that all requirements of the Companies Act, 1956, have been complied with in respect of registration.

But, a public company cannot start its business until it gets certificate of commencement of business from Registrar of

Companies. To get the certificate of commencement of business a public company has to pass through capital subscription state i.e. raise sufficient capital to commence its business. There are two ways of raising capitals i.e. from private source and from the public.

3) Raising of capital: If a company raises capital from private source i.e. from director's members and their relations, it is required to file a statement in lieu of prospectus with the Registrar at least three days before the allotment of shares. Where the company wishes to invite public in subscription for its shares, it will have to issue a prospectus after filing a copy of it with the Registrar. On receiving the minimum subscription, the company can allot shares and thus raise the required capital.



CHECK YOUR PROGRESS

Q.1: Mention any three aspects that have to decide before a company incorporate and commerce its business?

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8.5 DOCUMENTS REQUIRED FOR INCORPORATION

There are certain necessary documents that have to file with the Registrar of companies for its incorporation:

1) The Memorandum of Association: It is a document that describes the object of the company for which it is form and it should be signed by all the persons necessary to form the company.
2) The Article of Association: It is the document which contains the rules and regulation of the company and should be signed by the all the persons necessary to form the company.

3) The agreement which the company propose to enter with any individual for appointment as company's managing director, or whole-time directors or manager: If the company is entered into an agreement with any individual for appointment as company's managing director, or whole-time directors or manager than copy of the same should be filed with the Registrar of the company.
4) The declaration that all the requirements of the Companies Act relating to the registration of the company have been compiled with: Such declaration must be signed by any one of the following person—
   a) A Chartered Accountant in the whole-time practice in India;
   b) A company secretary in whole-time practice in India;
   c) An advocate of the Supreme Court or High Court;
   d) An attorney or pleader entitled to appear before High Court;
   e) A person named in the article of association as a director, manager, or secretary of the company.
5) A written consent of such directors to act as director of the company: It should be signed by the director himself or by his agent authorized in writing.
6) A written undertaking by such directors to take and pay for their qualification shares if any: It should be signed by all directors.
7) A list of persons who have agreed to become the first directors of the company.



CHECK YOUR PROGRESS

Q.2: Mention any three necessary documents that have to file with the Registrar of companies for its incorporation?

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LET US KNOW

STATEMENT IN LIEU OF PROSPECTUS:

The statement in lieu prospectus contains similar particular as are required for a prospectus and should fulfil similar conditions as regards statements. It must be in the form set out in Schedule III. When a private company converts itself into a public company it must either issue a prospectus or file a statement in lieu of prospectus.

A certificate of incorporation is issued by the Registrar of company which certifies that the company is incorporated. A private company can start its business from the date of the certificate of incorporation. Thus, the legal effect of certificate of incorporation are stated as,

1) The company comes into existence having separate legal existence.
2) The company can start its business from the date of the certificate of incorporation.
3) The 'memorandum of association' and 'articles of association' binds upon the company as well as its members and it acquire perpetual succession.
4) The liabilities of the members become limited of company limited by shares.

Conclusiveness of the Certificate of Incorporation: The certificate of Incorporation is conclusive evidence that all the requirements of the Companies Act, 1956, complied with and it is conclusive that—

a) All the requirements of the Act have been complied with in respect of the registration.
b) The company is duly registered and,
c) That the company came into existence on the date mentioned in the certificate.

Thus, once a private company gets registered, it can begin its business.

8.6 TYPES OF COMPANY

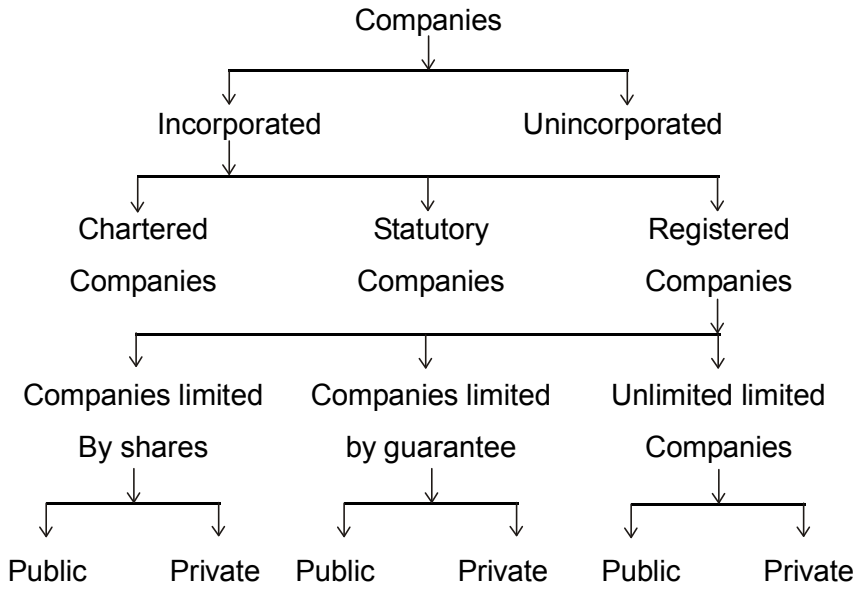
The word 'corporation' is derived from the Latin word 'corpus' which means anybody or any institution enjoying perpetual succession having own separate legal existence. It is divided into two parts :

a) A corporation sole;

b) Corporation aggregate.

A corporation sole means a single person constituted as a corporation in respect of some office or function, e.g., Governor, President etc; and corporation aggregate means a collection of individuals united into body having perpetual succession and an independent, e.g. trading and non-trading corporation.

The Companies Act, 1956, provides for a variety of companies which can be promoted and registered under the Act. The companies can be classified into the following categories, like:



A) Incorporated:

1) *Chartered Companies:* Chartered Companies formed under a special Royal Charter issued by the King or Queen. The Charter defined their powers and areas of operation.

2) *Statutory Companies:* Statutory Companies are formed under special Act like, RBI Act, LIC Act etc.

3) *Registered Companies:* Registered Companies are companies which are formed under the Companies Act, 1956. It may be—
   a) Companies limited by shares: A company that has the liability of its members limited by the memorandum to the amount, if, any unpaid on the shares respectively held by them is termed as a company limited by shares.
   b) Companies limited by guarantee: A company that has the liability of its members limited to such amount as the members may respectively undertake, by the memorandum, to contribute to the assets of the company in the event of its being wound up.
   c) Unlimited liability companies: In this type of company, the members are liable for the company's debts and their liability is unlimited.

A) Private Company: By virtue of section 3(1)(iii), a private company means a company, which has a minimum paid-up capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and by its articles:

i) Restrict the right to transfer its shares, if any;
ii) Limits the number of its members to fifty not including–
   a) persons who, are in the employment of the company; and
   b) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continue to be the members after the employment ceased;
iii) Prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company; and
iv) Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

Here it must be borne in mind that invitation is not prohibited but invitation to the public other than the members is prohibited. A private company can issue any number of debentures to its members but, not to the public in general. Similarly, the number of members is

limited to fifty and if two or more person holds one or more shares in a company jointly, it is treated as single member.

B) Public Company: By virtue of section 3 (1) (iv), a public company means a company which—

i) is not a private company,

ii) has a minimum paid-up capital of five lakh rupees or such higher paid-up capital as may be prescribed;

iii) is a private company which is a subsidiary of a company which is not a private company.

There should be 7 members to start a public company, which is registered under the Act. In case of public company, invitation to subscribe shares and debentures is not prohibited. It may be listed its shares and debentures to the stock exchange.

Every public company existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than five lakh rupees, was required to, within a period of two years from such commencement; enhance its paid-up capital to five lakh rupees. Where a public company failed to do so, such company was deemed to be a defunct company within the meaning of Section 560.

8.7 MEANING AND KINDS OF COMPANY MEETING

Company has a separate identity from its members. A company being an artificial person can not act on its own. It is however, constituted by the shareholders and express its decisions in the form of resolution in the meeting. Thus, a meeting has been defined as, “coming together of two or more persons face to face so as to be in each others’ presence or company”.

A meeting is a gathering or assembling of a numbers of persons for transacting any lawful business. It should be conducted under prescribed rules and regulation of the Companies Act, 1956. The shareholders and directors can take their decisions by calling the meeting.

The meeting of a company may be classified, as—

1) Meeting of the members (shareholders):
   i) Statutory Meeting
   ii) Annual General Meeting
   iii) Extraordinary General Meeting
   iv) Class Meeting
2) Meetings of the debentureholders.
3) Meetings of the creditors.
4) Meetings of the Board of Directors.

1) Meeting of the Members (Shareholders):

i) Statutory Meeting, (Section 165): According to section 165, of Companies Act, 1956, every company limited by shares or guarantee and having share capital, shall, within a period of not less than one month, but not more than six months from the date which the company is entitled to business, has to hold a general meeting of the members of the company. The meeting shall be called 'statutory meeting'.

The statutory meeting is held only once in the life time of the company. The Board of Directors are required to prepare a report, called 'statutory report'. The statutory report should be sent to each member at least 21 days before the day on which the meeting is to be held. A notice is also sent for the meeting to the members.

There are certain legal provisions relating to the statutory meeting, like—

1) The Board of Director has to prepare the 'Statutory Report' at least 21 days before the day the meeting is to be held.
2) The statutory meeting should be held within a period of not less than one month, but not more than six months from the date on which the company is entitled to business.
3) Statutory Report should be sent to the members of the company containing the particulars like total number of shares allotted and the total amount received from the same,

details of company's preliminary expenditures, particulars of company directors, managers, auditors ete.

4) The Statutory Report has to be certified by two directors. If the company has a managing director, then he has to certify the statutory report.

ii) Annual General Meeting, Section 166 (1): As the term denotes, annual general meeting is the meeting under section 166(1) which has to be held annually. It is the meeting of the members through which they get the opportunity to express their views on the management of the company. Through this meeting, the shareholders can exercise control over the affairs of the company. The 'Annual General Meeting' is sometimes called ''Ordinary General Meeting" as it usually deals with the so-called 'Ordinary Business'. The main purpose to hold this meeting are, like;

a) To submit the annual account, balance sheet, director's report and auditor's report.
b) To declare the dividend.
c) Special business— any other business to be transacted will be deemed special business likes:
   i) To increase share capital
   ii) To alter Article of Association
d) To appoint auditors and fix their remuneration.
e) To elect directors are that liable to retire by rotation.

Every company is required to hold this meeting. But, there are certain legal provisions which have to be followed, relating to the annual general meeting as contained in sections 166 to 168. There are:

a) The annual general meeting must be held once in each year in addition to other meeting.
b) The first annual general meeting must be held within 18 months of the incorporation of the company. The Registrar of Companies may extend this time period up to 3 months for special reasons.

c) The members of the company have to get at least 21 days before the meeting is held.

d) The meeting must be held during the business hours and on a day which should not be a public holiday.

e) The meeting must be held either at the registered office or at some place within the city, town or village.

As mentioned earlier, every company is required to hold this meeting according to the provision of the Companies Act. If any company fails to hold the annual general meeting the consequences are as follows:

A) As mentioned above, the annual general meeting provides the opportunity to the members to express views on the management of the company. Any member can apply to the Central Government for the failure of the company to call the meeting. The Central Government may give direction to the company for calling the meeting.

B) The company as well as every officer will become liable if they fail to held the meeting and shall be punishable with fine upto Rs. 50,000, and if the default continues , with a further fine of Rs. 2,500 for every day after the first day of default during which the default continues.

For example, 'ABC Private Ltd' was incorporated in February 2006. The first annual general meeting of the company was held in March 2007 and the next in July 2008.In this case, the company 'ABC Private Ltd' is not guilty of not holding the annual general meeting for the year 2006 or 2007. Because, the first annual general meeting was held within 18 months of incorporation of the company.

iii) Extraordinary General Meeting: A General meeting other than the statutory meeting and the annual general meeting is called 'Extraordinary General Meeting' (Clause 47 of Table A, Schedule I). Due to some urgent or special business purpose, the extraordinary general meeting is held between two consecutive

annual general meetings. Here, 'special business' means, all the business transacted at any meeting except in the annual general meeting. But, every 'Extraordinary General Meeting' has to be informed to the members through a notice accompanied by an 'Explanatory Statement', which explains the objective of the meeting. The 'Extraordinary General Meeting' can be convened by:

- ⟶ the Board of Directors of its own accord.
- ⟶ the directors on requisition.
- ⟶ the requisitionists themselves.
- ⟶ the Tribunal.

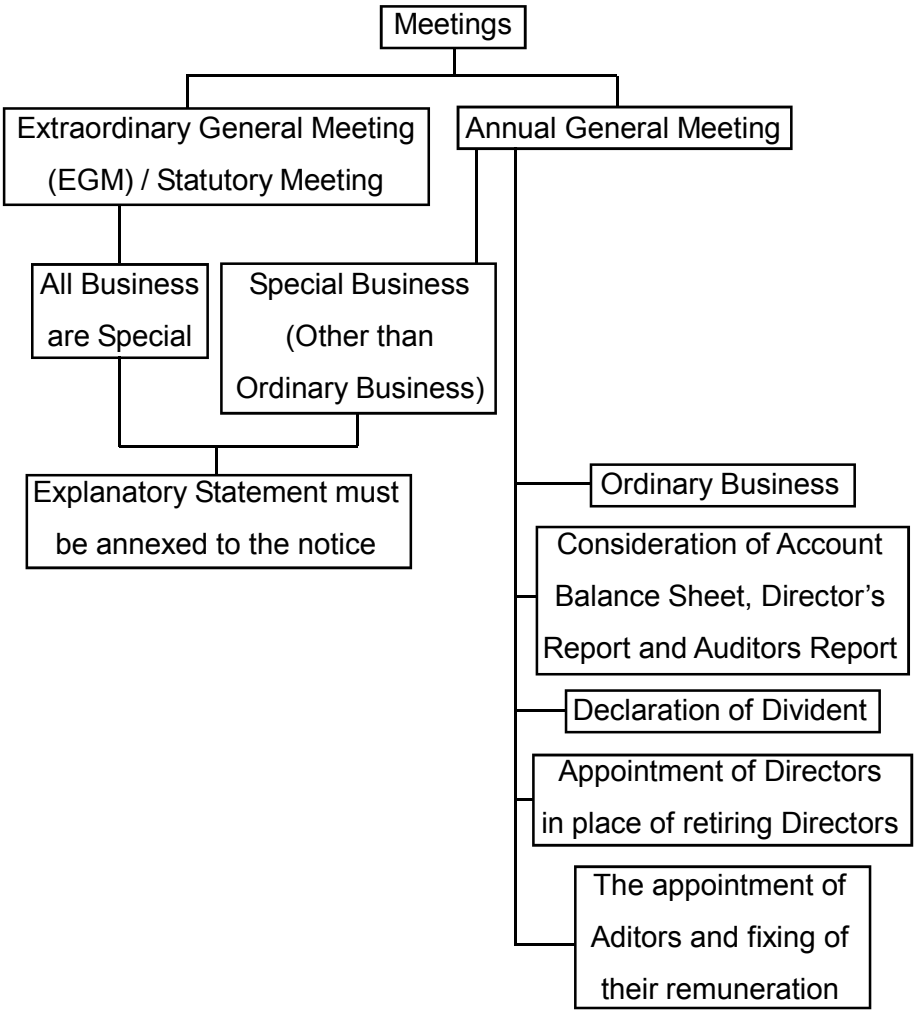
1) **Extraordinary general meeting convened by Board of Directors:** The Board of Directors under clause 48, table A, can call the extraordinary general meeting on its own whenever they like to call the meeting. However, they have to pass a resolution for convening such a meeting.
2) **The directors on requisition:** Under section 169, the extraordinary general meeting becomes necessary on the requisition of the members and the Directors are also become bound to call such a meeting.
3) **Extraordinary general meeting convened by requisitionists:** Some times, the Board of Directors fails to call the extraordinary general meeting though the members deposit a valid requisition. If the Board of Directors fails to call the extraordinary general meeting within 21 days from the deposit of valid requisition, a meeting may be called on a day not later than 45 days from the date of the deposit of the requisition, the meeting may be called by;
   a) the requisitionists themselves;
   b) the company having a share capital, by such of them as represent either a majority in value of the paid-up share capital held by all of them or not less than one tenth paid-up share capital of the company, whichever is less; or

c) a company not having share capital, by such of the requisitionists as represent not less than one tenth of the voting power of the members of the company.

Under section 169(7), the meeting must be held within 3 months of the deposit of valid requisition.

4) **Extraordinary general meeting convened by the Tribunal:** The tribunal under section 186 can call a meeting of the company. The tribunal may call the meeting either on its own motion or, on an application of any director, or, on an application of any member of the company entitled to vote at the meeting.

All Business at EGM are special business and Explanatory Statement must be annexed to the Notice:



v) **Class Meeting, Sections 106 and 107:** Class meeting are basically held for taking consent of a particular class of shareholders. Through this meeting, the rights and privileges of the shareholders can be altered, or conversion of one class to another can be done. If the article permits, the right of the different classes of the shareholders can be altered from the class of holder of that share, only when a resolution is passed in a separate meeting.

2) **Meetings of the debentureholders:** Meeting of the debentureholders are held according to the debenture trust deed to protect the interest of the debentureholders. Such type of meeting is held at the time of reconstruction, amalgamation, or winding up. The essential rules and regulations of valid meeting are contained in the debenture trust deed, like—

a) **Proper convening authority:** The meeting should be called by the proper authority. The proper authority in a company is the Board of Directors. Thus, if the Board of Directors makes default in calling the meeting, then the meeting can be called by the requisitionists or Company Law Board.

b) **Notice:** Previous notice should be given to every member about the holding of the meeting.

c) **Proxy:** Proxy is nothing but, an agent of the members authorized to give vote. Thus, proxy should be mentioned in the debenture trust deed.

d) **Voting by Poll:** Voting by showing hand is a general method in ascertaining the wishes of the members. But, sometimes a poll may be demanded by the chairman or by the members.

e) **Quorum:** According to the rule of the Companies Act, a minimum number of members should be present in the meeting. This is called the quorum for the meeting. For 'General Meeting' of a company, the quorum is laid down in the article of association of the company. But for Board Meeting, it is 1/3rd of the total number of the members or two directors, which ever is higher.

f) **Chairman of the Meeting:** There should be chairmen in the meeting. But, if no chairman is elected beforehand or the elected chairman can not come within 15 minutes of the fixed time, then any one director or a member can be elected as the chairman.

3) **Meetings of the Creditors:** Sometimes it becomes necessary to make certain arrangement with the creditors by the company. Usually, this type of meeting is held for such purposes only.

4) **Meetings of the Board of Directors:** As most of the power of the company is exercised by the directors of the company, it become necessary for then to interact frequently among them to review the management of company's affairs. Notice has to sent to every director about the meeting previously. The notice has to clearly mention the time, date and place of the meeting. The meeting of the Board of Directors of the company should be held—

i) at least once in every three months, and

ii) at least four such meetings shall be held in every year.



CHECK YOUR PROGRESS

Q.3: What do you mean by 'Extraordinary General Meeting'?

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8.8 MEANING OF MINUTE

A minute is nothing but a, written record of the proceedings of a meeting. Many important decisions are taken in the company general meeting and the Board meeting. Many new policies as well as existing policies are discussed in the meetings. It is necessary to record every decision taken in the meetings and a company has to keep a fair record of all the transactions and the resolutions arrived in a meeting in the form of 'minutes'. For this purpose, a book is maintained in every company and all the proceedings of each meeting should be recorded within 30 days.

Advantages of minute:

1) It is an official record of every meeting.
2) As it keeps the record of all the decisions taken in the previous meeting, it becomes an evidence of what new or prior decisions have been adopted or changed.
3) It helps the member who was absent in the previous meeting, in knowing the proceedings of that meeting and also enables him to review and understand the necessity of the meeting.
4) If the minutes are signed by the chairmen, it becomes a prima facie evidence of the proceedings of the meetings and the decisions recorded there are deemed valid.

Minutes to be Evidence: Minutes are constituted as the official records of all decisions, transactions, resolution made in a meeting. Care is always taken not to include any defamatory and detrimental statements in the minute. The minute books of the general meeting are signed by the chairman and on his death or absence by, any director authorized by the Board. On the other hand, in case of the Board meeting or meeting of the committee of the Board, the Chairman of the said meeting or the Chairman of the next succeeding meeting has to sign it. Thus, each proceeding of the minute of all meetings is recorded. Under section 194, all the records of the minutes of the different meetings of the company may act as evidence. 6.5



CHECK YOUR PROGRESS

Q.4: Mention three advantages of a minute.

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8.9 RECORDING AND SIGNING OF MINUTES

Every company is required to keep minutes of all meetings, such as—

a) All General Meetings;
b) Meeting of the Board of Directors;
c) Meeting of the Board of Directors.

But, there are certain legal obligations in maintaining the records in the form of minute:

1) All proceedings of each meeting should be recorded within 30 days from the conclusion of the meeting. [Section 193 (1)]
2) The minutes of each meeting must contains fair and correct records. [Section 193 (2)]
3) All the appointments and decisions made in the meeting must be included in the minutes. [Section 193 (3)]
4) In case of the Board Meeting and Committee of Board Meeting, the minute must record, [Section 193 (4)]
   i) The name of the each director present in the meeting.
   ii) If any resolution is passed in the meeting, the names of the directors who dissent or do not concur with the resolution of the meeting must be recorded.
5) The chairman of the meeting has the right to exclude any matter of the meeting, if he thinks it necessary.
6) The minute books are maintained at the registered office of the company.
7) In case of a general meeting of the company, minute books should be signed by the Chairman and on his death or in his inability to be present in the meeting any director can be sign the minute as permitted by the Board of Directors.
8) The pages of the minute books must be consecutively numbered.
9) If the minute is maintained properly, it shall be presumed that the meeting was duly held.

Every recording of the meeting in the minute should be signed and the last page should be dated and signed properly:

a) In case of the minutes of the Board meeting or meeting of the committee of the Board, thereof, these are to be signed by the chairman of the said meeting or the chairman of the next succeeding meeting.
b) In case of the minutes of a general meeting, minutes are to be signed by the Chairman of the same meeting or on his death or inability, by any director duly authorized by the Board.

8.10 ROLE OF CHAIRMAN

The Chairman is the person who has been elected to conduct the proceeding of the meeting. If the Article of association does not permit to elect the Chairman, than he is elected under Section 175. In this regards, the Section 175 lays down,

i) Unless the article of a company otherwise provides, the member personally present at the meeting shall elect one of them to be the Chairman.
ii) If a poll is demanded on the election of the chairman, it shall be taken forthwith. The Chairman elected on a show of hands shall exercise all the power of the chairman.
iii) If some other person is elected Chairman as a result of the poll, he shall be the Chairman for the rest of the meeting.

The Chairman is responsible for maintaining the proper rules and regulations and the decorum of the meeting. The chairman has to play a vital role in a company, like–

a) The chairman has to see that the meeting is properly convened and followed all the rules and regulations are followed in the meeting.
b) Sometimes the members raise their points in the meeting. The chairman has to interpret the rules regarding their points and the decision that is given by the chairman will be binding on the members.
c) He is responsible to observe whether all statutory rules, standing orders and regulations are followed in conducting the proceeding of the meeting.
d) He is also responsible for to giving opportunity to those who wish to speak and to express their views in the meeting.

e) The chairman has the duty on ruling over the points of order and all other emerging questions.

f) The minutes of the meeting should also be signed by the chairman. He has to check the records of the previous meeting whether they are properly entered, confirmed and duly signed.

g) The Chairman is also plays an important role in taking care that the sense of the meeting is properly ascertained with regard to any question before it. But, he can not adjourn the meeting or dispose it at his own choice.

h) The chairman has the right to cast vote as a member. But, he can cast vote in second time also if the rules expressly allow him to do.

i) He is to judiciously exercise his power of adjournment.

8.11 POSTAL BALLOT

The members of a company may be widely dispersed and it may be impossible for all to attend the meetings of the company. But, the company general meeting are required to be held during working hours. Thus, a listed company can pass resolution through postal ballot, where the members can give their consent easily. Under section 192(A)(1), the central Government may also empowers certain companies for passing resolution through postal ballot.

In case of listed companies, notice has to sent to all the members along with draft resolution explaining the reasons of the meeting and requesting them to give their assent within 30 days from the date of posting the notice. But, this notice has to be sent only Under Registered Post Acknowledgement Due or Under Certificate of Posting. In addition to that, an advertisement should be given in a leading English Newspaper and in any one vernacular Newspaper in the locality of the registered office. Thus, if the majority of the members have given their assent for passing the resolution, than it shall be deemed that the resolution has been duly passed at the general meeting.

8.12 RESOLUTION AND ITS DIFFERENT KINDS

Decisions are taken by the company by passing resolution. It is passed and prescribed by the majority of the members present at the meeting. It can be categorized into three types,

a) Ordinary Resolution
b) Special Resolution and
c) Resolution Requiring Special Notice

a) "Ordinary Resolution" means a resolution passed by the members of a company in general meeting by a simple majority of the votes cast in person or by proxy where proxies are allowed.
b) "Special Resolution" means a resolution passed by a majority of not less than 3/4 of the votes cast by those members of a company who, being entitled to do so, vote in person or by proxy where proxies are allowed at a general meeting of the company and, not being less than 21 days' notice of the meeting specifying the intention to propose the resolution as a special resolution.
c) "Resolution Requiring Special Notice" means under section 190 of the Companies Act, 1956, where by any provision in this Act or in the article, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not less than fourteen days before the meeting at which it is moved or deemed to be served and day of the meeting.

Section 192 of the Companies Act states that a copy of each of the following resolutions or agreement must within 30 days after the passing be printed or type written submitted to the Registrar who shall record the same.



LET US KNOW

SPECIMEN OF NOTICE OF ANNUAL GENERAL MEETING

PQR Ltd.

(Regd. Office)

Notice is hereby given that the 10th Annual General Meeting of the Company will be held at its Registered office at .....

At 2.00 P.M on ..... the day of ..... 2008 to transact the following business.

ORDINARY BUSINESS:

1) To receive and adopt the Balance Sheet as at.....and the Profit and Loss Account for the year ended..... And the Directors' and the Auditor's Report thereon.
2) To declare dividend.
3) To appoint director in place of Shri P, who retire by rotation and being eligible offers himself for re-appointment.

SPECIAL BUSINESS:

4) To consider and, if thought fit, to pass with or without modification, the following resolution as a SPECIAL RESOLUTION:
   Resoled that clause 5 of the Memorandum of Association of the Company be and is hereby substituted by the following clause 5:
5) "The Authorised Share Capital of the Company is Rs. 90,00,000 (Rupees ninety lakhs) divided into 30,000 (Thirty thousand) Preference shares of Rs. 100 (Rupees one hundred) each and 6,00,000 (Six lakhs) Equity Shares of Rs. 10 (Rupees ten each)."

By order of the Board of Directors
for PQR Ltd.
Sd/-
COMPANY SECRETARY

Dated :

Place :



LET US KNOW

SPECIMEN MINUTES OF

ANNUAL GENERAL MEETING OF MEMBERS

PQR Ltd.

Minutes of the 10th Annual General Meeting of the Company held at its Registered Office on ....., the date ..... at .....

Present: Mr. …… Chairman
Mr. …… Managing Director
Mr. …… Director
Mr. …… Director
Mr. …… Director
Mr. …… Director, and

…….. (Number) members present in person, and …… (Number) members represented by Proxies)

Also Present: Mr. …… Company Secretary
Mr. …….. General Manager (Finance)
Mr. ……Auditor of the Company

1) CHAIRMAN

Pursuant to Article ..... of the Article of Association, the Chairman of the Board of Directors being present took the chair.

2) QUORUM

After satisfying himself that there was adequate quorum, the chairman declared the meeting to be duly constituted and commenced the proceedings.

3) WELCOME

The Chairman welcomed the members for the company's Annual General Meeting.

4) REGISTER OF DIRECTORS' SHAREHOLDINGS

The Chairman informed the members that the Register of the Directors' Shareholdings maintained under Section 307 of the act was available at the meeting for inspection by any member till the conclusion of the meeting.

5) NOTICE OF THE MEETING

With the consent of the members, the Chairman said that the notice sent to members calling the Annual General Meeting along with the other documents had been taken as read.

6) CHAIRMAN'S SPEECH

The Chairman addressed the members.

7) REAPPOINTMENT OF MR. .....

The following motion was moved, by Mr. .....

And seconded by Mr. .....

"That Mr. ..... who retires by rotation and who is eligible for reappointment, be and is hereby appointed a director of the Company."

This was put to vote and declared by the Chairman to have been carried.

The meeting terminated with a vote of thanks to the Chair,

Dated..... CHAIRMAN



8.13 LET US SUM UP

In this unit, we have discussed the following:

- Promoters are generally the persons who assume the primary responsibility of matters relating to promotion of a company.
- A company is formed under three stages, as promotion of a company, registration and incorporation of a company and commencement of business.

- The word 'corporation' is derived from the Latin word 'corpus' which means any body or institution enjoying perpetual succession having own separate legal existence.
- A public company can not start its business from the date of the certificate of incorporation. It will have to obtain a further document called as 'certificate to commencement of business'.
- A meeting can be defined as, "coming together of two or more persons face to face so as to be in each others' presence or company".
- The statutory meeting is held only once in the life time of the company.
- Annual general meeting is the meeting under section 166(1) which has to be held annually.
- Due to some urgent or special business purpose, the extraordinary general meeting is held between two consecutive annual general meetings.
- Class meetings are basically held for taking consent of a particular class of shareholders.
- Meetings of the debentureholders are held according to the debenture trust deed to protect the interest of the debentureholders.
- Chairman is the person who has been elected to conduct the proceeding of the meeting.
- Under section 194, all the record of minutes of the different meeting of the company acts as an evidence.



8.14 FURTHER READING

1) Arun Kumar Sen and Jitendra Kumar Mitra (1977). *Commercial Law (including Company Law and Industrial Law)*. World Press Private Limited.
2) R. P. Maheshwari and S. N. Maheshwari (2014). *Principles of Mercantile Law*. New Delhi: Himalaya Pub. House.

3) N. D. Kapoor (2014). *Elements of Mercantile Law*. Sultan Chand & Sons.
4) K. C. Garg, V. K. Sareen, Mukesh Sharma & R. C. Chawla (2014). *Mercantile Law*. Kalyani Publishers.
5) V. K. Sareen, Mukesh Sharma & K. C. Garg (2015). *Business Law*. Kalyani Publishers.
6) The Consumer Protection Act, 1986 (Bare Act).



8.15 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Any three aspects that have to decide before a company incorporate and commence its business are—

i) Types of company,
ii) Application for availability of name of company and
iii) Preparation of Memorandum and Article of Association.

Ans. to Q. No. 2: Any three necessary documents that have to file with the Registrar of companies for its incorporation are—

i) The Memorandum of Association
ii) The agreement which the company propose to enter with any individual for appointment as company's managing director, or whole-time directors or manager and
iii) A written consent of such directors to act as director of the company.

Ans. to Q. No. 3: All General meetings other than the statutory meeting and the annual general meeting are called 'Extraordinary General Meeting' (Clause 47 of Table A, Schedule I).

Ans. to Q. No. 4: Three advantages of Minute are:

i) It is an official record of every meeting.
ii) As it keeps record of all decision taken in the prior meeting, it is become an evidence of what new or prior decisions have been adopted or changed.
iii) It helps the member who was absent in the prior meeting, to review and understand the necessity of the meeting.



8.16 MODEL QUESTIONS

Q.1: Define the company. What are the stages of formation of a company?

Q.2: Distinguish–

a) Private Company and Public Company

b) Corporation aggregate and corporation sole

Q.3: When a public limited company can commence its business?

Q.4: What are the various documents to be filled with the Registrar for incorporation of a company?

Q.5: "The 'certificate to commence business' is conclusive evidence in regards to start the businesses." Discuss.

Q.6: Define Meeting. What are the different type of meeting?

Q.7: Write short notes on:

a) Statutory Meeting

b) Extraordinary meeting

c) Minute

d) Postal Ballot

e) Role of chairman.

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Name of the Paper: .....
Course Code: .....

Centre for Internal Quality Assurance (CIQA)
Krishna Kanta Handiqui State Open University
City Office: Housefed Complex, Guwahati-781006

Learner's Feedback on Course

Dear Learner,

Regarding the course as mentioned above, we would like to know your opinions and comments so as to improve the quality of self learning materials in future. Please respond to the following statements by ticking the number you feel most reflect your opinion. After completion of the additional comments, please detach the page and send/mail the same to us at the address given below.

The Director, Centre for Internal Quality Assurance, KKHandiqui State Open University
Housefed Complex, Dispur, Guwahati-781006
(E-mail id: ciqa@kkhsou.in)

1) Approximately how many hours did you spend for studying the units in the course? ☐☐☐

2) Please give your opinions (by ✓ mark) to the following items based on your reading of the block:

Sl. No.	Statements	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
I)	The SLMs of the course fulfil the learning objectives set out in the beginning of each unit					
II)	The units of the SLM could satisfy my academic needs and expectations					
III)	The Unit writers have excellent knowledge about the course contents					
IV)	Language and contents of the units were presented at a level which I could readily understand					
V)	Ample opportunity for participation in the activities provided in the units					
VI)	Used enough Illustrations (Diagrams, tables etc.) for conceptual clarity					
VII)	Quality of content is engaging, relevant, and up-to-date					
VIII)	The self check questions are very helpful					
IX)	The Possible/model questions and the answers to check my progress have benefited me a lot					

Additional Comments: *(Please feel free to provide your open comments)*

1) Which aspects of the SLM, according to you, worked well?

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2) What sort of changes/improvements do you feel KKHSOU could implement to improve the overall quality of the SLM?

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Thank you for taking the time to complete this form.