CONTEMPORARY PERSPECTIVE ON LAW OF CONTRACT

Dr. Mehak Rani

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Dr. Mehak Rani (Assistant Professor)
LL.M., PhD (Law), Faculty of Law, Tantia University, Sri Ganganagar

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4378/4-B, Murarilal Street, Ansari Road, Daryaganj, New Delhi-110002.
Ph. No: +91-11-23281685, 41043100, Fax: +91-11-23270680
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Contents

Preface

The contemporary perspective on the law of contract reflects the dynamic nature of contractual relationships in modern society. At its core, contract law serves as a foundational framework for facilitating economic transactions, promoting commercial certainty, and upholding parties' autonomy and expectations. This perspective acknowledges the evolving nature of contractual arrangements, which are increasingly shaped by changing legal principles, societal norms, and economic factors.

One aspect of contemporary contract law is the emphasis on freedom of contract, which recognizes parties' rights to negotiate and enter into agreements on terms that are mutually beneficial. This principle underpins the autonomy of contracting parties and allows for flexibility in tailoring contractual arrangements to suit their individual needs and preferences.

Fairness and justice are central considerations in contemporary contract law, particularly in cases where power imbalances exist between parties. Courts may intervene to prevent unfair or unconscionable contracts and ensure that agreements are entered into freely, with full understanding and consent of the parties involved. Additionally, contractual terms may be subject to scrutiny for fairness, reasonableness, and compliance with public policy considerations.

Contemporary contract law also grapples with emerging challenges and opportunities posed by technological advancements and globalization. Issues such as electronic contracts, online transactions, and cross-border disputes require innovative approaches to address legal complexities and ensure enforceability across diverse legal systems and jurisdictions. Moreover, contemporary perspectives on contract law often incorporate considerations of social responsibility and ethical

standards. Contractual relationships are increasingly viewed through the lens of corporate social responsibility, environmental sustainability, and ethical business practices, reflecting broader societal expectations for ethical conduct and accountability in commercial dealings.

As contract law continues to evolve in response to changing legal, economic, and social landscapes, scholars and practitioners alike must remain attuned to emerging trends and developments. By embracing contemporary perspectives and adapting legal principles to meet the needs of modern society, contract law can effectively fulfill its role in promoting fairness, justice, and efficiency in contractual relationships.

–Author

1

Historical Background of Contract Law

Contract, in the simplest definition, a promise enforceable by law. The promise may be to do something or to refrain from doing something. The making of a contract requires the mutual assent of two or more persons, one of them ordinarily making an offer and another accepting. If one of the parties fails to keep the promise, the other is entitled to legal redress. The law of contracts considers such questions as whether a contract exists, what the meaning of it is, whether a contract has been broken, and what compensation is due the injured party.

HISTORICAL DEVELOPMENT

Contract law is the product of a business civilization. It will not be found, in any significant degree, in noncommercial societies. Most primitive societies have other ways of enforcing the commitments of individuals; for example, through ties of kinship or by the authority of religion. In an economy based on barter, most transactions are self-enforcing because the transaction is complete on both sides at the same moment. Problems may arise if the goods exchanged are later found to be defective, but these problems will be handled through property law—with its penalties for taking or spoiling the property of another—rather than through contract law.

Even when transactions do not take the form of barter, noncommercial societies continue to work with notions of property rather than of promise. In early forms of credit transactions, kinship ties secured the debt, as when a tribe

or a community gave hostages until the debt was paid. Other forms of security took the form of pledging land or pawning an individual into "debt slavery." Some credit arrangements were essentially self-enforcing: livestock, for example, might be entrusted to caretakers who received for their services a fixed percentage of the offspring. In other cases—constructing a hut, clearing a field, or building a boat—enforcement of the promise to pay was more difficult but still was based on concepts of property. In other words, the claim for payment was based not on the existence of a bargain or promise but on the unjust detention of another's money or goods. When workers sought to obtain their wages, the tendency was to argue in terms of their right to the product of their labour.

A true law of contracts—that is, of enforceable promises—implies the development of a market economy. Where a commitment's value is not seen to vary with time, ideas of property and injury are adequate and there will be no enforcement of an agreement if neither party has performed, since in property terms no wrong has been done. In a market economy, on the other hand, a person may seek a commitment today to guard against a change in value tomorrow; the person obtaining such a commitment feels harmed by a failure to honour it to the extent that the market value differs from the agreed price.

ROMAN LAW

The Roman law of contracts, as found in the Byzantine emperor Justinian's law books of the 6th century ce, reflected a long economic, social, and legal evolution. It recognized various types of contracts and agreements, some of them enforceable, others not. A good deal of legal history turns upon the classifications and distinctions of the Roman law. Only at its final stage of development did Roman law enforce, in general terms, informal executory contracts—that is, agreements to be carried out after they were made. This stage of development was lost with the breakup of the Western Empire. As western Europe declined from an urbanized commercial society into a localized agrarian society, the Roman courts and administrators were replaced by relatively weak and imperfect institutions.

The rebirth and development of contract law was a part of the economic, political, and intellectual renaissance of western Europe. It was everywhere accompanied by a commercial revival and the rise of national authority. Both in England and on the Continent, the customary arrangements were found to be unsuited to the commercial and industrial societies that were emerging. The informal agreement, so necessary for trade and commerce in market economies, was not enforceable at law. The economic life of England and the Continent flowed, even after a trading economy began to develop, within the legal framework of the formal contract and of the half-executed transaction (that is, a transaction already fully performed on one side). Neither in continental Europe nor in England was the task of developing a law of contracts an easy one. Ultimately, both legal systems succeeded in producing what was needed: a body of contract doctrine by which ordinary business agreements, involving a future

exchange of values, could be made enforceable. The new contract law began to grow up throughout Europe through the practices of merchants; these were at first outside the legal order and could not be upheld in courts of law. Merchants developed informal and flexible practices appropriate for active commercial life. By the 13th century, merchants' courts had been established at the international trade fairs. The merchant courts provided expeditious procedures and prompt justice and were administered by men who were themselves merchants and thus fully aware of mercantile problems and customs.

In the 12th and 13th centuries the development of the law of contracts on the Continent and in England began to diverge. In England the common law of contracts developed pragmatically through the courts. On the Continent the process was very different, with speculative and systematic thinkers playing a much larger role.

COMMON LAW

From perhaps the 13th century on, English common law dealt with contractual problems primarily through two actions: debt and covenant. When a fixed sum of money was owed, under an express or implied agreement, for a thing or a benefit given, the money was recoverable through a simple action at debt. Other debt action was available for breach of a promise, made in an instrument with a seal, to pay a fixed sum of money.

A so-called action at covenant could also be brought, but only for breach of a promise under seal. These actions did not, however, provide a remedy for the breach of an informal agreement to do something. In the 15th century the common-law courts started to develop a form of action that would render such agreements enforceable, and by the middle of the 16th century they had done so through the form of action known as *assumpsit* (Latin: "he has undertaken"). Originating as a form of recovery for the negligent performance of an undertaking, it came step by step to cover the many kinds of agreement called for by expanding commerce and technology. Having established in principle a comprehensive remedy, it was necessary for the courts to limit its scope. The courts found the limiting principle in the doctrine of "consideration," according to which a promise as a general rule is not binding unless something is given or promised in exchange. This consideration need not be of commensurate value, but it must be of some value, must be bargained for, and cannot be simply a formality.

CIVIL LAW

On the Continent, the revived study of classical Roman law had an immense influence upon the developing law of contract. It stimulated the rediscovery or construction of a general law concerning the validity of agreements. The Roman law, however, as crystallized in Justinian's law books, tended to confirm the notion that something more than an informal expression of agreement was required if a contract was to be upheld by a court. Another significant influence

in the development of contract law on the Continent was the Roman Catholic Church. The church in its own law (canon law) strongly supported the proposition that a simple, informal promise should be binding (*pacta sunt servanda*). This attitude was to encourage the development of informal contracts. The natural-law philosophers took up such ideas as *pacta sunt servanda*, although they were slow to abandon the view that some contracts, especially contracts of exchange, should require part performance if they were to be held enforceable. By the 18th century the speculative and systematic thought of jurists and philosophers had finally and fully carried the day. The legal writers and legislators of the period generally considered informal contracts as enforceable in the courts. Thus, in the French civil code (the Napoleonic Code) of 1804, contract was approached essentially in terms of agreement; obligations freely assumed were enforceable except when the welfare of society or the need to protect certain categories of persons, such as minors, dictated otherwise. With the generalization that contract rests ultimately on agreement, the civil-law systems achieved a foundation quite different from the common law's view that contract is basically a promise supported by a consideration.

All the Western systems of modern contract law provide mechanisms through which individuals can voluntarily assume, vis-à-vis others, legally binding obligations enforceable by the other person. Contract law strives to give legal expression to the endlessly varying desires and purposes that human beings seek to express and forward by assuming legal obligations. The resulting system is open-ended; in principle, no limits are set in modern contract law to the number of possible variations of contracts.

THE SETTING OF STANDARDS

In theory, contractual obligations should be concluded between parties of substantially equal awareness and bargaining power and for purposes fully approved of by society. The law reflects this utopian idea in the sense that it tends to conceive of contract as an arrangement freely negotiated between two or more parties of relatively equal bargaining power. The manifestations of intention required to form a contract are accordingly thought of as indicating real willingness, although in fact they may simply represent acquiescence.

FAIRNESS AND SOCIAL UTILITY

Much of the law of contract is concerned with ensuring that agreements are arrived at in a way that meets at least minimum standards respecting both parties' understanding of, and freedom to decide whether to enter into, the transactions. Such provisions include rules that void contracts made under duress or that are unconscionable bargains; protection for minors and incompetents; and formal requirements protecting against the ill-considered assumption of obligation. Thus, section 138 of the German Civil Code renders void any contract "whereby a person profiting from the distress, irresponsibility, or inexperience of another" obtains a disproportionately advantageous bargain. In addition, more general

social requirements and views impinge upon contracts in a number of ways. Certain agreements are illegal, such as—in the United States—agreements in restraint of trade. Others, such as an agreement to commit a civil wrong, are held by the courts to be contrary to the public interest. Certain systems discourage some purposes, such as the assumption of a legally binding obligation to confer a gift of money or other gratuitous benefit upon another, by various special requirements.

Legal systems often have recourse to interpretation in the interest of fairness and social utility. Many litigated cases in which a remedy is sought for breach of contract are concerned with the meaning to be attached to the verbal expressions and acts of the parties in their dealing with each other. Ambiguities, for example, may be resolved against the party thought to have the superior bargaining position. This decision is common in cases in which one party is able to set the terms of a contract without bargaining. Again, a written agreement may be interpreted against the party who drafts or chooses the language. Or the court may prefer an interpretation it finds to be in accord with the public interest.

Although all legal systems try to achieve a reasonable approach to freedom of contract, there are bound to be contractual obligations that depart in some degree from the ideal. No one seeking to enforce a contract is required to show affirmatively that it advances specific ends desired by society or that the contracting process is without blemish. Such a requirement would be administratively cumbersome and expensive. In addition, it would reduce the general usefulness of the contract as an economic and social instrument. Differences in the economic resources available to individuals are found in most societies; to the extent that these differences flow from general conditions and are reflected in, rather than produced by, individual contracts, it is usually not feasible to take remedial action through the law of contracts. A single contract, moreover, is often only one element in a complex of economic and legal relations. Thus, in times of severe inflation or deflation, it may simply not be feasible to seek to deal with the resulting inequities in terms of redoing individual contracts.

CONTRACTS OF ADHESION

There are large areas of economic life in which the parties to contracts have such unequal bargaining positions that little real negotiation takes place. These contracts are often known as contracts of adhesion. Familiar examples of adhesion contracts are contracts for transportation or service concluded with public carriers and utilities and contracts of large corporations with their suppliers, dealers, and customers. In such circumstances a contract becomes a kind of private legislation, in the sense that the stronger party to a large extent assigns risks and allocates resources by its fiat rather than through a reciprocal process of bargaining. Enforcement of such standard contracts can be justified on the ground that they are economically necessary. The question then becomes whether these decisions are to be made by private enterprise or by other agencies of society—in particular, government—and to what extent the interest of those

who deal with such economic enterprises can be represented and protected in the decision-making process. Contract law in such cases provides only what can be called the legal relationship. The content of the relationship derives not from bargaining between the parties but from the fiat of the large enterprise often offset by the fiat of some government agency. In a sense, the socially regulated contract of adhesion seeks to eat the cake of bureaucratic rationality while having, as well, the cake of individual choice and decision. Doubtless both cakes are diminished in the process, but the result may well be more satisfying than if only one had to be chosen. At all events, the resulting legal-economic phenomenon is radically different from that envisaged by traditional contract law. Legislative attempts have been made in a number of countries, such as the former West Germany, the United Kingdom, and France, to strike a balance between the general freedom to contract and the protection of the weaker party.

CONTRACT TERMS: CONSTRUCTION AND INTERPRETATION

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

Uncertainty, Incompleteness and Severance

If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law. An agreement to agree does not constitute a contract, and an inability to agree on key issues, which may include such things as price or safety, may cause the entire contract to fail. However, a court will attempt to give effect to commercial contracts where possible, by construing a reasonable construction of the contract. In New South Wales, even if there is uncertainty or incompleteness in a contract, the contract may still be binding on the parties if there is a sufficiently certain and complete clause requiring the parties to undergo arbitration, negotiation or mediation.

Courts may also look to external standards, which are either mentioned explicitly in the contract or implied by common practice in a certain field. In addition, the court may also imply a term; if price is excluded, the court may imply a reasonable price, with the exception of land, and second-hand goods, which are unique.

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

than the whole or complete performance of a promise to warrant payment. However, express clauses may be included in a non-severable contract to explicitly require the full performance of an obligation.

Classification of Terms

Contractual terms may be given different names or required different content, depending upon the context or jurisdiction. Terms establish conditions precedent. English (but not necessarily non-English) common law distinguishes between important *conditions* and warranties, with a breach of a condition by one party allowing the other to repudiate and be discharged while a warranty allows for remedies and damages but not complete discharge. Whether or not a term is a *condition* is determined in part by the parties' intent.

In a less technical sense, however, a condition is a generic term and a warranty is a promise. Not all language in the contract is determined to be a contractual term. Representations, which are often precontractual, are typically less strictly enforced than terms, and material misrepresentations historically was a cause of action for the tort of deceit. Warranties were enforced regardless of materiality; in modern United States law the distinction is less clear but warranties may be enforced more strictly. Statements of opinion may be viewed as "mere puff".

In specific circumstances these terms are used differently. For example, in English insurance law, violation of a "condition precedent" by an insured is a complete defense against the payment of claims. In general insurance law, a warranty is a promise that must be complied with. In product transactions, warranties promise that the product will continue to function for a certain period of time.

In the United Kingdom the courts determine whether a term is a condition or warranty; for example, an actress' obligation to perform the opening night of a theatrical production is a *condition*, but a singer's obligation to rehearse may be a warranty. Statute may also declare a term or nature of term to be a condition or warranty; for example the Sale of Goods Act 1979 s15A provides that terms as to title, description, quality and sample are generally *conditions*. The United Kingdom has also contrived the concept of an "intermediate term" (also called innominate), first established in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962].

Representations versus Warranties

Statements of fact in a contract or in obtaining the contract are considered to be either warranties or representations. Traditionally, warranties are factual promises which are enforced through a contract legal action, regardless of materiality, intent, or reliance. Representations are traditionally precontractual statements that allow for a tort-based action (such as the tort of deceit) if the misrepresentation is negligent or fraudulent; historically, a tort was the only action available, but by 1778, breach of warranty became a separate legal contractual action. In U.S., law, the distinction between the two is somewhat

unclear; warranties are viewed as primarily contract-based legal action while negligent or fraudulent misrepresentations are tort-based, but there is a confusing mix of case law in the United States. In modern English law, sellers often avoid using the term 'represents' in order to avoid claims under the Misrepresentation Act 1967, while in America 'warrants and represents' is relatively common. Some modern commentators suggest avoiding the words and substituting 'state' or 'agree', and some model forms do not use the words; however, others disagree.

Statements in a contract may not be upheld if the court finds that the statements are subjective or promotional puffery. English courts may weigh the emphasis or relative knowledge in determining whether a statement is enforceable as part of the contract.

In the English case of *Bannerman v White* the court upheld a rejection by a buyer of hops which had been treated with sulphur since the buyer explicitly expressed the importance of this requirement. The relative knowledge of the parties may also be a factor, as in English case of *Bissett v Wilkinson* where the court did not find misrepresentation when a seller said that farmland being sold would carry 2000 sheep if worked by one team; the buyer was considered sufficiently knowledgeable to accept or reject the seller's opinion.

Standard Terms and Contracts of Adhesion

Standard form contracts contain "boilerplate", which is a set of "one size fits all" contract provisions. However, the term may also narrowly refer to conditions at the end of the contract which specify the governing law provision, venue, assignment and delegation, waiver of jury trial, notice, and escape clauses ("get-out clauses") such as *force majeure*. Restrictive provisions in contracts where the consumer has little negotiating power ("contracts of adhesion") attract consumer protection scrutiny.

Implied Terms

A term may either be express or implied. An express term is stated by the parties during negotiation or written in a contractual document. Implied terms are not stated but nevertheless form a provision of the contract.

Terms Implied in Fact

Terms may be implied due to the factual circumstances or conduct of the parties. In the case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, the UK Privy Council, on appeal from Australia, proposed a five-stage test to determine situations where the facts of a case may imply terms. The classic tests have been the "business efficacy test" and the "officious bystander test". Under the "business efficacy test" first proposed in *The Moorcock* [1889], the minimum terms necessary to give business efficacy to the contract will be implied. Under the officious bystander test (named in *Southern Foundries (1926) Ltd v Shirlaw* [1940] but actually originating in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd* [1918]), a term can only be implied in fact if an "officious

bystander" listening to the contract negotiations suggested that the term be included the parties would promptly agree. The difference between these tests is questionable.

Terms Implied in Law

Statutes or judicial rulings may create implied contractual terms, particularly in standardized relationships such as employment or shipping contracts. The Uniform Commercial Code of the United States also imposes an implied covenant of good faith and fair dealing in performance and enforcement of contracts covered by the Code. In addition, Australia, Israel and India imply a similar good faith term through laws.

In England, some contracts (insurance and partnerships) require utmost good faith, while others may require good faith (employment contracts and agency). Most English contracts do not need any good faith, provided that the law is met. There is, however, an overarching concept of "legitimate expectation".

Most countries have statutes which deal directly with sale of goods, lease transactions, and trade practices. In the United States, prominent examples include, in the case of products, an implied warranty of merchantability and fitness for a particular purpose, and in the case of homes an implied warranty of habitability.

In the United Kingdom, implied terms may be created by:

- Statute, such as the Sale of Goods Act 1979, the Consumer Rights Act 2015 and the Hague-Visby Rules;
- Common Law, such as *The Moorcock*, which introduced the "business efficacy" test;
- Previous Dealings, as in *Spurling v Bradshaw*.
- Custom, as in *Hutton v Warren.*

Terms Implied by Custom

A term may be implied on the basis of custom or usage in a particular market or context. In the Australian case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Aust) Limited*, the requirements for a term to be implied by custom were set out. For a term to be implied by custom it needs to be "so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract".

THIRD PARTIES

The common law doctrine of privity of contract provides that only those who are party to a contract may sue or be sued on it. The leading case of *Tweddle v Atkinson* [1861] immediately showed that the doctrine had the effect of defying the intent of the parties. In maritime law, the cases of *Scruttons v Midland Silicones* [1962] and *N.Z. Shipping v Satterthwaite* [1975] established how third parties could gain the protection of limitation clauses within a bill of lading.

Some common law exceptions such as agency, assignment and negligence allowed some circumvention of privity rules, but the unpopular doctrine remained intact until it was amended by the Contracts (Rights of Third Parties) Act 1999 which provides:

A person who is not a party to a contract (a "third party") may in his own right enforce a contract if:

(a) The contract expressly provides that he may, or
(b) The contract purports to confer a benefit on him.

PERFORMANCE

Performance varies according to the particular circumstances. While a contract is being performed, it is called an executory contract, and when it is completed it is an executed contract. In some cases there may be substantial performance but not complete performance, which allows the performing party to be partially compensated.

Research in business and management has also paid attention to the influence of contracts on relationship development and performance.

DEFENSES

Vitiating factors constituting defences to purported contract formation include:

- Mistake (such as *non est factum*)
- Incapacity, including mental incompetence and infancy/minority
- Duress
- Undue influence
- Unconscionability
- Misrepresentation or fraud
- Frustration of purpose

Such defenses operate to determine whether a purported contract is either (1) void or (2) voidable. Void contracts cannot be ratified by either party. Voidable contracts *can* be ratified.

Misrepresentation

Misrepresentation means a false statement of fact made by one party to another party and has the effect of inducing that party into the contract. For example, under certain circumstances, false statements or promises made by a seller of goods regarding the quality or nature of the product that the seller has may constitute misrepresentation. A finding of misrepresentation allows for a remedy of rescission and sometimes damages depending on the type of misrepresentation.

In a court of law, to prove misrepresentation and/or fraud, there must be evidence that shows a claim was made, said claim was false, the party making the claim knew the claim was false, and that party's intention was for a transaction to occur based upon the false claim.

There are two types of misrepresentation: fraud in the factum and fraud in inducement. Fraud in the factum focuses on whether the party alleging misrepresentation knew they were creating a contract. If the party did not know that they were entering into a contract, there is no meeting of the minds, and the contract is void. Fraud in inducement focuses on misrepresentation attempting to get the party to enter into the contract. Misrepresentation of a material fact (if the party knew the truth, that party would not have entered into the contract) makes a contract voidable.

Assume two people, Party A and Party B, enter into a contract. Then, it is later determined that Party A did not fully understand the facts and information described within the contract. If Party B used this lack of understanding against Party A to enter into the contract, Party A has the right to void the contract.

The foundational principle of "caveat emptor," which means "let the buyer beware," applies to all American transactions. In Laidlaw v. Organ, the Supreme Court decided that the buyer did not have to inform the seller of information the buyer knew could affect the price of the product.

According to *Gordon v Selico* [1986] it is possible to misrepresent either by words or conduct. Generally, statements of opinion or intention are not statements of fact in the context of misrepresentation. If one party claims specialist knowledge on the topic discussed, then it is more likely for the courts to hold a statement of opinion by that party as a statement of fact.

It is a fallacy that an opinion cannot be a statement of fact. If a statement is the honest expression of an opinion honestly entertained, it cannot be said that it involves any fraudulent misrepresentations of fact.

For an innocent misrepresentation, the judge takes into account the likelihood a party would rely on the false claim and how significant the false claim was.

Remedies for misrepresentation. Rescission is the principal remedy and damages are also available if a tort is established. In order to obtain relief, there must be a positive misrepresentation of law and also, the person to whom the representation was made must have been misled by and relied on this misrepresentation: *Public Trustee v Taylor*.

Contract law does not delineate any clear boundary as to what is considered an acceptable false claim or what is unacceptable. Therefore, the question is what types of false claims (or deceptions) will be significant enough to void a contract based on said deception. Advertisements utilizing "puffing," or the practice of exaggerating certain things, fall under this question of possible false claims.

Mistake

A mistake is an incorrect understanding by one or more parties to a contract and may be used as grounds to invalidate the agreement. Common law has identified three types of mistake in contract: common mistake, mutual mistake, and unilateral mistake.

- Common mistake occurs when both parties hold the same mistaken belief of the facts. This is demonstrated in the case of *Bell v. Lever*

Brothers Ltd., which established that common mistake can only void a contract if the mistake of the subject-matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible. In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, the court held that the common law will grant relief against common mistake, if the test in *Bell v. Lever Bros Ltd* is made out. If one party has knowledge and the other does not, and the party with the knowledge promises or guarantees the existence of the subject matter, that party will be in breach if the subject matter does not exist.

- Mutual mistake occurs when both parties of a contract are mistaken as to the terms. Each believes they are contracting to something different. Courts usually try to uphold such mistakes if a reasonable interpretation of the terms can be found. However, a contract based on a mutual mistake in judgment does not cause the contract to be voidable by the party that is adversely affected.
- Unilateral mistake occurs when only one party to a contract is mistaken as to the terms or subject-matter. The courts will uphold such a contract unless it was determined that the non-mistaken party was aware of the mistake and tried to take advantage of the mistake. It is also possible for a contract to be void if there was a mistake in the identity of the contracting party. An example is in *Lewis v Avery* where Lord Denning MR held that the contract can only be voided if the plaintiff can show that, at the time of agreement, the plaintiff believed the other party's identity was of vital importance. A mere mistaken belief as to the credibility of the other party is not sufficient.

Duress and Undue Influence

Duress has been defined as a "threat of harm made to compel a person to do something against his or her will or judgment; esp., a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition." An example is in *Barton v Armstrong* [1976] in a person was threatened with death if they did not sign the contract. An innocent party wishing to set aside a contract for duress to the person only needs to prove that the threat was made and that it was a reason for entry into the contract; the burden of proof then shifts to the other party to prove that the threat had no effect in causing the party to enter into the contract. There can also be duress to goods and sometimes, 'economic duress'.

Undue influence is an equitable doctrine that involves one person taking advantage of a position of power over another person through a special relationship such as between parent and child or solicitor and client. As an equitable doctrine, the court has discretion. When no special relationship exists, the question is whether there was a relationship of such trust and confidence that it should give rise to such a presumption.

Unconscionable Dealing

In Australian law, a contract can be set aside due to unconscionable dealing. Firstly, the claimant must show that they were under a special disability, the test for this being that they were unable to act in their best interest. Secondly, the claimant must show that the defendant took advantage of this special disability.

Illegal Contracts

If based on an illegal purpose or contrary to public policy, a contract is *void*. In the 1996 Canadian case of *Royal Bank of Canada v. Newell* a woman forged her husband's signature, and her husband agreed to assume "all liability and responsibility" for the forged checks. However, the agreement was unenforceable as it was intended to "stifle a criminal prosecution", and the bank was forced to return the payments made by the husband.

In the U.S., one unusual type of unenforceable contract is a personal employment contract to work as a spy or secret agent. This is because the very secrecy of the contract is a condition of the contract (in order to maintain plausible deniability). If the spy subsequently sues the government on the contract over issues like salary or benefits, then the spy has breached the contract by revealing its existence.

It is thus unenforceable on that ground, as well as the public policy of maintaining national security (since a disgruntled agent might try to reveal *all* the government's secrets during his/her lawsuit). Other types of unenforceable employment contracts include contracts agreeing to work for less than minimum wage and forfeiting the right to workman's compensation in cases where workman's compensation is due.

OTHER PROBLEMS OF CONTRACT LAW

Many contracts involve more than two persons. The law of contracts provides special rules for regulating claims by multiparty plaintiffs or claims against multiparty defendants, or for determining rights among the parties. Multiparty problems arise in other contexts as well. There is the problem of whether the immediate parties to a contract can enter into an agreement that will confer rights upon a person not an original party to the contract. Probably because the dogmatic structure of contract law was largely formed on the model of the simpler two-party situation, and because the contract for the benefit of third parties did not have great practical importance until such relatively modern developments as the emergence of life insurance, many systems of contract law have encountered difficulty in working out the relationship between the third party and the underlying contract. English law took the view that, as a rule, persons cannot acquire a right on a contract to which they are not a party. Some of the problems posed are difficult to resolve: under what circumstances and to what extent should the third party control the underlying contract when, for example, the original parties desire to rescind or modify it?

Another variation of the party problem is presented by efforts to add or substitute parties to a contract. In the absence of an express regulation of the problem in the basic contract, the law works with the notion of the presumed intention of the contracting parties, based on considerations of fairness and practicality. A contracting party cannot, in principle, assign to another its right under a contract if the assignment would result in a significant change in the burden assumed by the other contracting party. A contractual right to receive money or goods is a different matter; it can ordinarily be assigned because the resulting burden on the person under obligation is not great, and because society as a whole benefits from having this flexible economic and legal instrument.

One problem of contract law that has been mentioned above deserves further consideration—the problem of interpretation. Many rules of contract law are simply presumptions, based on experience and tradition, as to what the parties ordinarily intend; if they clearly intend otherwise, the rules are not mandatory. Problems of interpretation frequently arise with respect to the particulars of a given agreement; thus the court seeks to determine what the parties actually had in mind. The effort to ascertain intention may encounter difficulties arising from the law of evidence. Many legal systems limit the use of testimonial evidence to explain the essential elements of a written contract.

MODERN TENDENCIES

ARBITRATION

Modern commercial practice relies to a growing extent on arbitration to handle disputes, especially those that arise in international transactions. There are several reasons for the growing use of arbitration. The procedure is simple, it is more expeditious, and it may be less expensive than traditional litigation. The arbitrators are frequently selected by a trade association or business group for their expert understanding of the issues in the dispute. The proceedings are private, which is advantageous when the case involves trade or business secrets. In many legal systems, the parties can authorize arbitrators to base their decision on equitable considerations that the law excludes. Finally, when the parties are from different countries, an international panel of arbitrators may offer a greater guarantee of impartiality than would a national court. Despite these advantages of arbitration, the development of contract law may suffer considerably by a withdrawal from the courts of litigation involving some of the most significant and difficult problems of the present day, all the more so because the reasoning in arbitral awards is usually not made public.

CODIFICATION

Trade and commerce flow increasingly across national and state boundaries. In response to this there have been many efforts to unify the traditional legal systems. In the United States, the Uniform Commercial Code has replaced earlier uniform statutes such as the Sales Act and the Negotiable Instruments Law; by

1990 it had been adopted by every state. Internationally, the decade of the 1960s saw significant progress toward uniform regulation of the law of sales. The creation of a uniform body of substantive rules is, of course, easiest when the communities involved have roughly similar rules and principles. In addition, the greater the volume of multistate transactions, the greater the pressure for uniform regulation. It is understandably easier to achieve a Uniform Commercial Code within the United States than to create such a system internationally.

When a transaction has a significant relationship with more than one legal order, difficult problems of private international law often arise with respect to which law shall govern. A kind of halfway point between legal diversity and unification—the creation of uniform rules for choice of law—is of some help, and in this area the Hague Conference on Private International Law has done significant work.

HISTORY OF THE INDIAN CONTRACT ACT 1872

The Indian Contract Act brings within its ambit the contractual rights that have been granted to the citizens of India. It endows rights, duties and obligations on the contracting parties to help them to successfully conclude business- from everyday life transactions to evidencing the businesses of multi-national companies. The Indian Contract Act, 1872 was enacted on 25th April, 1872 [Act 9 of 1872] and subsequently came into force on the first day of September 1872. The essence of the India Contract Act has been modelled on that of the English Common Law.

The extent of modifications made in the Act as per the Indian conditions and its adaptability to the Indian economy is an important area of research. In this regard it is pertinent to note that since the enactment of the Act there have been no amendments and thus the Law that was made in 1872 still stands good. However, these are questions of interpretation that not only depend on the text of the Act, but also on the English authorities that framed the law and before it, the subsequent development of law.

The history of the Act brings to light the very origin of the economic processes and in this regard, the importance of contracting in order to conduct one's business in everyday life. The prevalent system in the ancient times was barter and it was based on the mutual principle of give and take. This was confined to commodities as there was no medium of exchange as is seen in the form of money today and this system can be traced back in time to the Indus Valley Civilization (the earliest human civilization). The system still finds relevance in the contemporary world, where it can be found in commercially and economically underdeveloped areas.

However, the relevancy of such a system in modern times is questioned as the complexity in the nature of the economic systems as well as the increasing demand and supply systems due to the change in the wants and needs of the human beings came to the fore. Also, money had evolved as the medium of

exchange such that the value of every commodity could now be quantified. Thus, in such an era of greater economic transaction one finds the existence of Contract Laws and with it, their relevance.

The Indian Contract Act codifies the way we enter into a contract, execute a contract and implement provisions of a contract and effects of breach of a contract. The contractual capacity is restricted in certain situations otherwise it is the prerogative of the individual to contract. There are specific areas which deal with property, movable gods and specific performance such as the Transfer of Property Act, The Sale of Goods Act and The Specific Relief Act. Some of these acts, were originally a part of the Indian Contract Act enacted in 1872 but were later codified as separate laws. Moreover the Act is not retrospective in nature. Hence a contract entered into prior to 1st September 1872, even though to be performed after passing of this Act is not hit by this Act. Hence, we arrive of the conclusion that the basic framework of contracting is covered in the Indian Contract Act and it is an important area of law, with roots deep in the history of civilization- and thus forms the subject matter of this project of this course of Legal History.

RESEARCH METHODOLOGY

For this project titled, 'History of the Indian Contract Act, 1872' the doctrinal method was judged to be most appropriate. Primary resources referred to in the course of research include books, journals, law reports and cases, most of them accessed from the NALSAR law library. Other sources like articles, and the like were accessed online through the use of online databases. All direct quotations have been properly footnoted.

RESEARCH SCHEME

Aim and Objectives

The aim of the project is to trace the history of the Indian Contract Act, 1872 and analyse the developments that led to its enactment in 1872. The project also ventures to seek the history of 'Law of Contracts' in general and present a brief view on the changing notions about the contract law.

Scope and Limitations

The project covers the development of the 'Law of Contracts' right from the early stages of human civilization, making its way through Roman and English notions that eventually led to the formation of the Indian Contract Act. The project also shows the relevance of such legislation, codifying the principles of contract making.

The research is limited to the resources available at the NALSAR Library. Books related to the topic are available at the library. Also, the sources available on the internet helped a considerable deal. Suggestions from the course-instructor and fellow students have been incorporated wherever necessary.

EARLY LAW OF CONTRACT: INDIA

Vedic and Medeival Period

During the entire ancient and medieval periods of human history in India, there was no general code covering contracts. Principles were thus derived from numerous references- the sources of Hindu law, namely the Vedas, the Dhramshatras, Smritis, and the Shrutis give a vivid description of the law similar to contracts in those times. The rules governing contracts form a part of the law called Vyavaharmayukha.

Studies of the smritis reveal that the concept of contract originated in the Vedic period itself. Topics, as we know them today like debt deposit and pledges sale without ownership, mortgage and gifts, which are all contracts in nature, are mentioned therein. The general rules of contract bear a striking resemblance to the modern law of contract.

For *e.g.*, as mentioned in the Manusmriti, the first and the foremost requirement for a contract process to start is the competence of the persons who are willing to enter into a contract.

This norm laid down for competence corresponds with the provisions of the present law (Section 11, Indian Contract Act), namely, dependents, minors, sanyasis, persons devoid of limbs, those addicted to vices were incompetent to contract. The Narad smriti categorizes competent persons into three; the king, the Vedic teacher and the head of the household.

The concept of liability in contract law finds its birth in the Vedic period too. Spiritual debts were referred as 'wrin' and it was constantly reinforced by the srmitis that failure to pay back the debts meant re-birth as a slave, servant, woman or beast in the house of creditor. So, the son was liable to pay of his father's debts even if he did not inherit any property from him.

Towards the end of the medieval age, the law of contracts was pretty much being governed by two factors; the moral factor and the economic factor. Activities like transfer of property, performance of services, *etc.* required rules for agreements and promises, which covered not just business and commercial transactions, but also personal relationships in all walks of life. This takes us to the next source, *i.e.*, the Arthashastra by Kautilya, which is considered to be the only existing secular treatise on politics and governments.

During Chandragupta's reign, contract existed in the form of "bilateral transactions" between two individuals of group of individuals. The essential elements of these transactions were free consent and consensus on all the terms and conditions involved. It was an open contract openly arrived at. It was laid down that the following contracts were void:

- Contracts formed during the night.
- Contracts entered into the interior compartment of the house.
- Contracts made in a forest
- Contracts made in any other secret place.
- There were certain exceptions to clandestine contracts such as:

- Contracts made to ward off violence, attack and affray
- Contracts made in celebration of marriage
- Contracts made under orders of government
- Contracts made by traders, hunters, spies and others who would roam in the forest frequently.

The contract would be rendered void if there was any undue influence or if the contract was entered into a fit of anger or under influence of intoxication, *etc.* In general, women could not make contracts binding on their husbands or against family properties. It was possible for a competent person to authorise a dependent to enter into transactions. The dependents in such case included a son whose father was living, a father whose son managed the affairs, a woman whose husband was alive, a slave or hired servant.

It has to be noted that money lending was seen as an occupation. Usury was a sin only when the usurer cheated the debtor, for *e.g.*, when he lent goods of a lower quality, but received goods of a higher quality in return or if he extracted fourfold or eightfold return from a distressed debtor. The interest would be fixed with reference to the article pledged or surety given. Although, all commentaries are not in agreement with the amount of interest to be charged, they all agree that it was sinful to take exorbitant interest and such interest would not be enforceable in court. The Yajnavalkya smriti provided that in case of cattle being loaned, their progeny was to be taken as profit.

Also, the rights and duties (of a Bailee) in a Bailment, as we know it today in the form of sections 151 and 152 of the Indian Contract Act, 1872, has its root to the Katyaynasmriti containing a special provision called the 'silpinyasa' dealing with the deposit of raw materials with an artisan- talking about the degree of care attached. The text laid down that "if an artisan does not return the things deposited with him during the stipulated time, he should be made to pay its price even in the cases, where the loss is due to acts of God or King. The artisan, however, is not responsible for the loss of an article which was defective at the very time of bailment, unless the loss is due to his own fault."

It is also interesting to note that there was no 'limitation' for bringing a suit for money lent. This was because of the rule of 'damdupat' which laid down that 'the amount of principle and interest recoverable at one time in a lump sum cannot be more than double the money lent.' It took into consideration the fact that debts were not necessarily recoverable from a man himself, his descendents were also liable. Thus there was no concept of a 'limitation period' for filing a suit. The rule of 'damdupat' is still prevalent in Calcutta and Bombay as it has been upheld to be a valid custom and thus enjoys enforceability under the savings clause, Section 1.

Islamic Law

During the Muslim rule in India, all matters relating to contract were governed under the Mohammedan Law of Contract. The word contract in Arabic is Aqd

meaning a conjunction. It connotes conjunction of proposal (Ijab) and acceptance which is Qabul. A contract requires that there should be two parties to it one party should make a proposal and the other accept it, the minds of both must agree that is there declaration must relate to the same matter and the object of contract must be to produce a legal result.

It also supplied rules to govern specific contracts to commercial, mercantile and proprietary nature like agency (vakalat), guarantee and indemnity (zamaanat and tamin), partnership (shirkat), one person's money and another's work (muzarabat), bailment (kafalat). All transactions were treated as secular contracts and rules were provided for settlement of all types of disputes even relating to property and succession.

Another thing to be noted is that under Islamic Law even marriages (Nikah) were treated as contracts and till date the situation remains the same. Either of the parties to the marriage makes a proposal to the other party and if the other party accepts, it becomes a contract and the husband either at the time of marriage or after it has to pay an amount to the wife as a symbol of respect known as Mahr. Also the Mahommedans were the firsts to recognize the concept of divorce. This way, a party to marriage could absolve itself of the contractual obligations under marriage. Muslim marriages are thus considered contracts for these reasons.

EARLY LAW OF CONTRACT: ROME

In early Rome, the law of contracts developed with the recognition of a number of categories of promises to be enforced rather than creation of any general criteria for enforcing promises. Thus, the notion that promise itself may give rise to an enforceable duty was an achievement of Roman law. A promise might be morally binding but it was not legally enforceable until it fell within the specified categories viz. "stipulation", "real" contracts and "consensual" contracts.

STIPULATION: (stipulatio) It put into force formalities and dates from a very early time in Roman law. A party could make a binding promise called "stipulation" in which the party observed a prescribed form of question and answer. Though the participation of both parties was required, only one party was bound.

REAL CONTRACTS: These were those that suited to executory exchange of promises. For example, the contract of loan, in which the recipient's promise to restore the subject matter was binding.

CONSENSUAL CONTRACTS: These were more flexible and did not hold a legal basis for enforcing purely executory exchanges of promises. They deviated from the formalities in "stipulation" and in agreement alone, without delivery, sufficed to make the promises binding. Although they were limited to four important types of contracts- sale, hire, partnership and mandate.

These three categories of enforceable promises met the Roman needs through the classical period (500 BC – 300 BC). Later on a fourth category of enforceable promise was recognized as "innominate" contracts.

INNOMINATE CONTRACTS: These were agreements under which one party was promised to give or do something in exchange for a similar promise by the other party. Unlike both real and consensual contracts they were not limited to specified classes of transactions and were therefore called "innominate".

The enforceability of the promise required some performance given in exchange and was called quid pro quo (*i.e.*, the modern concept of 'consideration' of the contract). But these contracts were limited because they were binding only when one of the parties had completed performance and until that happened either party could escape liability.

Roman law always had the tendency of primitive societies to view each type of transaction as a distinct complex of rights and it never fully rid itself of this proclivity. Thus the development of a general theory of contracts was left to the modern legal systems that arose in Europe during the Middle Ages, the common law system that arose in England and the civil law systems of the European continent.

Relevance of Roman Contract Notions in Indian Law

Though Roman notions of contract law have not been directly included under the Indian law of contracts. However, the framers of the Indian Contract Act, the English, were aware of the developments in the field of law of contracts in Rome. Thus, Roman Contract notions have helped in the development of English law, thus affecting the Indian Contract Act.

EARLY LAW OF CONTRACT: ENGLAND

As stated earlier, the Roman law notions of contract were known to the English but their influence faded with the break-up of the Roman political system. English Courts therefore, had to reconstruct law in the Middle Ages. The courts succeeded in a remarkable way keeping in the view the fact that when they started, the English law of contracts was little more advanced than that of many primitive societies.

Now, since no system can afford to make all promises enforceable, the English tried out two assumptions:

One, the assumption that promises are generally enforceable, and then create exceptions for promises considered undesirable to enforce.

Secondly the assumption that promises are generally unenforceable, and then create exceptions for promises thought desirable to enforce.

The common law Courts chose the latter assumption, the same as Roman law *i.e.*, "mere promise doses not give rise to an action." This decision accorded well with the procedural niceties of the common law courts, where the plaintiff did not have the recovery until his claim could be fitted with one of the established forms of action. It also suited the status-oriented society of the Middle Ages where no great pressure existed for enforcing promises as contracts were not yet a significant part of the business of the common law courts.

The Fifteenth and Sixteenth Centuries

The challenge faced by the common law Courts in the fifteenth and sixteenth centuries was to develop a general criterion for enforcing promises within the framework of the forms of action. And by the end of the 15th century, two forms of action for enforcing rights, which included some of those which we now call contractual, had taken a fairly definite shape. These were action on 'debt' and the action on 'convenant'.

Convenant

The word 'convenant' is the nearest medieval equivalent to current definition of 'contract'. The action of convenant mainly concerned breaches of agreement for services like building or for sales or leases of land. The primary claim was for performance, and in royal courts the action was begun by the praecipe writ ordering the defendant to keep the agreement; but judgements ceased to order specific performance and damages were awarded instead. But the action of convenant soon fell out of use, not because it was ineffective but because the other action of 'debt' proved more effective.

Debt

The action on debt covered the claims for the price of goods sold and delivered. The essential feature of it was that the claim was for money compensation for benefit received.

The defendant's liability in debt was not based on a mere promise but on the debtor's receipt of what the debtor had asked for, called quid pro quo like the Romans in the form of loan. It was therefore thought to be unjust to allow the debtor to retain it without paying for it.

The debtor's wrong was more in misfeasance than nonfeasance. Following this rationale the courts finally broadened the action of debt to allow recovery by anyone who had conferred a substantial benefit. However, the lacuna in this system was that the defendant might avoid liability by a procedure known as "wager of law", in which the defendant denied the debt under oath accompanied by a number (usually 11) of oath-helpers, who swore that defendant was telling the truth.

The Sixteenth Century: Development of 'Assumpsit'

Now, at this point the main question that confronted the courts as that how the common law would break out of this mould of "wager of law". The courts finally found answer to this question in the law of torts. They had already developed a liability in tort, where if a person undertook to perform a duty and while performing it he caused harm to the obligee; the obligee could sue on the common law action of "trespass on the case" and this principle came to be known as 'assumpsit' (from the Latin assumere, meaning that the defendant undertook).

Assumpsit

'Assumpsit' was an action for the recovery of damages by reason of the breach or non-performance of a simple contract, either express or implied, and whether made orally or in writing. It was the word always used in pleadings by the plaintiff to set forth the defendant's undertaking or promise, hence the name of the action. Claims in actions of assumpsit were ordinarily divided into (a) common assumpsit brought usually on an implied promise, and (b) special assumpsit, founded on an express promise.

As an example it was explained that "if a carpenter makes a promise to me to make me a good house and strong and of certain form, and he makes me a house which is weak and bad and of another form; I shall have an action of trespass on my case." Justice could be done by requiring the promisor to pay compensation to the promisee in an amount sufficient to restore the promisee in the same position as the promise would have been, had the promise never been made.

Also, a case in point is the case of a ferry- man who was sued. He had undertaken to ferry a horse across the Humber, but he mismanaged the whole affair in such a way that the horse was drowned. The defendant knowing that there was no sealed document about the deal argued that the proper action would be 'convenant'. However, the action was held rightly brought in tort because the plaintiff complained about the killing of the horse and not the failure to transport it. Such claims of 'misfeasance' regularly succeeded.

The principle of 'assumpsit' was originally limited to cases of 'misfeasance' but later on cases of 'nonfeasance' were also dealt with under the same principle. Thus the claim for the action of assumpsit lay whenever the defendant had given an undertaking and had either fulfilled it improperly or failed to fulfil it at all.

It was during this period itself that the word 'consideration' of a contract, which had earlier been used without technical significance, came to be used as a word of art to express the conditions necessary for an action in assumpsit to lie. It was therefore a tautology that a promise, at least if not under seal, was enforceable only if there was a 'consideration'.

The Seventeenth and Eighteenth Centuries

The seventeenth and eighteenth centuries saw the recognition of the transferability of contract rights as kind of property, the enactment of legislation requiring writing for some kind of contracts, and the shaping of the concept of the dependency of promises. But the movement was slow during this period. Towards the end of the eighteenth century, things had dramatically changed. A modern legal historian wrote that in America years from 1800-1875 were, "above all else, the years of contract." Contract expressed, "energetic self-interest," and the law it governed it expressed "the nature of contract by insisting that men assert their interests, push them, and fight for them, if they were to have

the help of the state." It is also generally supposed that it was during this period that Adam Smith had proclaimed that freedom of contract, freedom to make enforceable bargains would encourage individual entrepreneurial activity. Also from the utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore works for the good of the society.

THE RULES OF DIFFERENT LEGAL SYSTEMS

Traditional contract law developed rules and principles controlling the voluntary assumption of obligations, regulating the performance of obligations so assumed, and providing sanctions for failure to perform.

OFFER AND ACCEPTANCE

Some of the rules respecting offer and acceptance are designed to operate only when a contrary intention has not been indicated. Thus, in German law an offer cannot be withdrawn by an offeror until the time stipulated in the offer or, if no time is stipulated, until a reasonable time has passed, but this rule yields to a statement in the offer to the effect that it shall be revocable. In Anglo-American common law, when parties contract by correspondence, the acceptance takes place on dispatch of the letter, but the offeror can stipulate that no contract will be formed until the acceptance has been received. These rules serve to fill in points on which the parties in their negotiations have not, for one reason or another, been specific.

Another function of rules relating to offer and acceptance is to enable the parties to understand and to mark when their discussions pass from an exploratory stage to the stage of commitment. The concepts of offer and acceptance are somewhat formal; they assume that the negotiations pass through clearly distinguishable phases, which is often not the case. But they help the parties to distinguish negotiation from commitment. The two words *offer* and *acceptance* become firmly associated with the assumption of obligations.

Different legal systems frequently advance comparable policies in quite different ways. Several distinctly different patterns are found in the approach of modern legal systems to the problems of whether an offeror is free to revoke an offer before acceptance and of when an acceptance is effective to form a contract. Perhaps the polar extremes are represented by German civil law on one hand and Anglo-American common law on the other. In the German view, an offer binds the offeror for any stipulated period or, when the offer is silent as to time, for a reasonable period unless the offeror has expressly made the offer revocable. The common-law rule is the opposite: an offer is revocable until it has been accepted. The two systems also have sharply divergent rules with respect to the point at which, when the parties are contracting by correspondence, the acceptance takes effect to conclude the contract. In German law the acceptance takes effect when it reaches the offeror, in the sense that the offeror either knows or can learn of it. In the common law, on the other hand, if the offeree uses an appropriate means of communication, the acceptance is effective on dispatch unless the offeror stipulated

the contrary in the offer. (A revocation by the offeror, however, does not take effect until received by the offeree.) How are these divergencies in the rules respecting offer and acceptance to be explained? In particular, do they reflect fundamental policy differences or simply different techniques designed to forward quite similar purposes? An examination of a typical problem posed when parties contract by correspondence suggests the latter explanation. Upon receipt of an offer, offerees frequently change their position by, for example, refusing or ignoring other offers, neglecting to seek additional offers, or themselves making propositions based on the offer made to them. For this reason the legal system sees a need to provide offerees with a secure point of departure for their decision, in order both to protect them and to facilitate commerce generally. The German system provides this protection by making the offer in principle irrevocable. The common law, on the other hand, found this solution excluded by its doctrine of consideration; as the offeree does not give anything in exchange for the offer's irrevocability, consideration is lacking to support an obligation not to revoke. (On the other hand, the Uniform Commercial Code, which has been adopted everywhere in the United States, provides that a firm offer made by a merchant is irrevocable even though the other party has given no consideration.) The common law is not entirely insensitive to the offeree's predicament. The rule that the acceptance is effective upon dispatch creates a situation in which the offeror who wishes to revoke an offer is uncertain whether or not it can be revoked, since the revocation is not effective until receipt, whereas the offeree's acceptance, if one is made, takes effect on dispatch. This uncertainty makes the consequences of an attempted revocation unpredictable and thereby inhibits an offeror who might otherwise seek to revoke. In sum, the German and Anglo-American systems both try to achieve, and in a measure succeed in achieving, a fair balance between the offeror and the offeree.

UNENFORCEABLE TRANSACTIONS

In all systems of contract law, certain classes of transactions are treated as unenforceable by the judicial process because they are thought to involve unusual hazards for a contracting party or to be of marginal social utility. There are, in both civil-law and common-law systems, four kinds of concern that lead the systems to treat certain types of transaction as unenforceable. These four kinds of concern may be called evidentiary, cautionary, channeling, and deterrent. The evidentiary concern springs from the desire to protect both the individual citizen and the courts against manufactured evidence and insufficient proof. The cautionary concern seeks to safeguard individuals against both their own rashness and the importuning of others. The channeling concern seeks to mark off or label obligations that may be enforceable and to direct attention to the problem of the extent and kind of the legal obligation, so that individuals will know the legal significance that their actions may have. Finally, the deterrent concern refers to those types of transaction that are discouraged because they are felt to be of doubtful value to society.

Two quite different techniques are used to delineate types of transaction that are unenforceable in their natural, or normal, state. The first proceeds by describing the type in functional or economic terms. The common-law Statute of Frauds enacted by the English Parliament in 1677 provided that the following six kinds of contracts should be unenforceable unless expressed in writing: contracts to sell goods exceeding a certain value; contracts to sell any interest in land; agreements that are not to be performed within a year of their making; agreements upon consideration of marriage; suretyship agreements; and undertakings by an executor or administrator to be surety on a debt of the deceased for which the estate is liable. Civil-law systems typically describe as unenforceable in the absence of an appropriate formality noncommercial contractual obligations exceeding a certain value; mortgages created by contract; noncommercial compromise agreements; marriage contracts; agreements binding a party to transfer all, or a fractional part of, its property; leases to run for more than one year; assumptions of the obligation to stand as surety, at least when the operation is not a commercial one on the surety's part; promise of an annuity; and promises to make gifts.

Another less direct technique for delineating unenforceable types of transaction derives from the common law's doctrine of consideration. It holds transactions unenforceable in the absence of a bargained-for exchange. This class would include, for example, promises to make gifts. The approach tends to be too all-embracing, treating certain types of transaction as suspect when there is little or no practical justification for doing so. It is not clearly demonstrated, for example, that an option agreement made by two businessmen should be handled differently from many other kinds of commercial dealings. A strong argument exists that the common law's handling of commercial options, business compromises, and other business transactions lacking an element of exchange is more a logical deduction from the general doctrine of consideration than an expression of justifiable policy concerns.

Except in cases where the ground for unenforceability is radical, when a given transaction type is considered unenforceable the legal system should prescribe an extrinsic element the addition of which will cure the defect—for example, expressing the agreement in writing, performing it in part, or having a document drawn up with the participation of a legally qualified notary or other public official who holds a special appointment from the state and is charged with handling and recording various types of transactions.

A complex situation has arisen with respect to the two most generally available extrinsic elements, the seal and the payment of a nominal consideration. Various states of the United States no longer consider the seal as an effective extrinsic element. The seal's decline is rooted in its changed significance in the modern, literate, democratic world. The seal was originally an impression, usually in wax, of a device, or design, representing an individual or a family. In modern times, the courts, with legislative assistance in a fair number of the states of the United States, have recognized easy-going substitutes for the wax seal, such as

simple writing presumed to have been made for sufficient consideration or, in special circumstances, parol (oral) agreement for valid consideration. The effect has been to render the seal progressively less effective, particularly from the cautionary perspective, and many courts now refuse to accept it as a satisfactory formality.

Nominal consideration is a subtle and ingenious formality. Its essence is the introduction of a contrived element of exchange into the transaction. Thus A, desiring to be bound to give B $10,000, requests B to promise to give (or to give) A a peppercorn in exchange. B's promise (or performance) is an element, extrinsic to a normal gift promise, introduced by the parties in an effort to render the transaction enforceable (since the law does not treat normal gift promises as enforceable). Common-law courts often accept nominal consideration when used in a business context, such as in an option arrangement or a compromise agreement; its effectiveness is understandably more doubtful in the context of a gift promise, since such a transaction involves greater dangers for one party and is socially more marginal.

Civil-law systems have less need than the common law for a formality such as nominal consideration; they prescribe methods directly in their statutes. Interestingly enough, however, in some civil-law systems an analogous, judicially developed formality has emerged—the disguised donation (*donation déguisée*) of French law, in which the parties cast a gift promise in the form of an onerous transaction, such as a sale. It can be argued that both the nominal considerations and the disguised donation serve at least the cautionary and channeling functions of formalities mentioned above.

Another kind of extrinsic element recognized by some courts, especially in the common-law countries, is one party's reliance upon the promise of the other. The fact of reliance argues in favour of enforcement because it indicates that an underlying understanding existed between the parties and because the relying party may suffer as a consequence of its change of position. Some courts will enforce initially suspect transactions when several extrinsic elements are present in combination. A common-law court, for example, may enforce a gift promise in which the element of reliance was present in addition to a seal or a nominal consideration. Other extrinsic elements, either alone or in combination with reliance, a seal, or a nominal consideration, may also render a transaction enforceable. Cases, for example, in which the promisor dies without attempting to revoke a gift promise could be enforced, as distinguished from cases in which the promisor seeks to revoke.

PERFORMANCE

Contract law seeks to protect parties to an agreement not only by requiring formalities but in many other ways as well. Thus rules respecting deceit, fraud, and undue influence are designed to ensure that contractual obligations are assumed freely and without one party misleading the other. Other rules regulate the modification of ongoing contractual relations with a view to preventing a

party with considerable bargaining power from unfairly imposing changes in the contract. The law also allows contractual relations to be adjusted when they have been thrown out of balance by unforeseen circumstances. The task of adjustment is relatively easy in cases in which both parties made a mistake or in which one party laboured under a mistaken assumption that was, or plainly should have been, known to the other. The problem of mistake becomes more intractable when the error is chargeable to only one party. The solutions reached for such situations are complex and defy general statement.

Catastrophic events such as inflation, political upheaval, or natural disasters may upset the economy of a contract. In the case of natural catastrophes, relief is frequently available under theories of force majeure (action by a superior or irresistible force) and "act of God" (act of nature that is unforeseeable and unpreventable by human intervention). When the unsettling circumstances are economic in their nature, as with severe inflation or deflation, a solution is difficult to find. A party who benefits from inflation in one contractual or economic relation may suffer from it in another. A general readjustment in contracts would be enormously complicated and time-consuming and would interject an undesirable element of uncertainty into economic and business activity. Only under exceptional circumstances—and usually in the form of special legislation—are contractual relations adjusted for the effects of severe economic dislocations.

FAILURE TO PERFORM

Another branch of contract law deals with the sanctions that are made available to a contracting party when the other party fails to perform its contractual obligations. When these sanctions take the form of money damages—as they usually do in practice, even though some civil-law systems have a theoretical preference for specific relief—the system must decide whether plaintiffs are to be put in the same position economically that they would have been in had the contract been performed (expectancy damages) or simply reimbursed for the actual losses, if any, flowing from their reliance on the contract (reliance damages). Reliance damages can, of course, be very large. A subcontractor who fails to deliver parts required for the construction of an ocean liner (or delivers faulty parts) may be responsible for heavy reliance damages resulting from delay in the work or actual damage to the vessel. Legal systems utilize various techniques to limit both reliance and expectancy damages when otherwise they would be unreasonably large.

If a person has agreed to buy an article from a merchant, a refusal to take delivery will not ordinarily produce substantial reliance damages. Delivery costs will have been incurred, but the merchant will presumably not have lost sales elsewhere. In such circumstances, the merchant will seek to recover not delivery costs but lost profit—the expectancy damages. The law allows relief on the basis that the expectancy created by an enforceable promise has a current economic value, measured by the economic gain that the party would derive if

the particular agreement were performed. In some circumstances, performance is not measurable in terms of market value—as, for example, when one relative has agreed to sell to another a family painting of sentimental value but of little intrinsic worth. Many legal systems in such a case require specific performance (that is, compliance with the precise terms agreed upon in the contract). The availability of specific relief varies among contemporary legal systems, for reasons that seem more historical and doctrinal than practical.

2

Consideration within the Context of Contract Law

According to Section 2(d), Consideration is defined as: "When at the desire of the promisor, the promisee has done or abstained from doing, or does or abstains from doing, or promises to do or abstain something, such an act or abstinence or promise is called consideration for the promise. "Consideration" means to do something in return. In short, Consideration means *quid pro quo i.e.*, something in return.

An agreement must be supported by a lawful consideration on both sides. Essentials of valid considerations are:

- *It must move at the desire of the promisor:* An act constituting consideration must have been done at the desire or request of the promiser. If it is done at the instance of a third party or without the desire of the promisor, it will not be good considsration. For example "A" saves "B"'s goods from fire without being ask him to do so. "A" cannot demand payment for his service.
- *Consideration may move from the promisee or any other person:* Under Indian law, consideration may be from the promisee of any other person ie, even a stranger. This means that as long as there is consideration for the promisee, it is immaterial, who has furnished it.
- Consideration must be an act, abstinence or forbearance or a returned promise.
- *Consideration may be past, present or future:* Past consideration is not consideration according to English law. However it consideration

as per Indian law. Example of past consideration is, "A" renders some service to "B" at latter's desire. After a month "B" promises to compensate "A" for service rendered to him earlier. When consideration is given simultaneously with promise, it is said to be present consideration. For example "A" receives Rs.50/- in return for which he promises to deliver certain goods to "B". The money "A" receives is the present consideration. When consideration to one party to other is to pass subsequently to the maker of the contract, is said to be future consideration. For example. "A" promises to deliver certain goods to "B" after a week. "B" promises to pay the price after a fortnight, such consideration is future.

- *Consideration must be real:* Consideration must be real, competent and having some value in the eyes of law. For example "A" promises to put life to "B"'s dead wife, if "B" pay him Rs.1000/-. "A"'s promise is physically impossible of performance hence there is no real consideration.
- Consideration must be something which the promiser is not already bound to do. A promise to do something what one is already bound to do, either by law, is not a good consideration., since it adds nothing to the previous existing legal consideration.
- *Consideration need not be adequate:* Consideration need not be necessarily be equal to value to something given. So long as consideration exists, the courts are not concerned as to adequacy, provided it is for some value.

The consideration or object of an agreement is lawful, unless and until it is:

1. *Forbidden by law:* If the object or the consideration of an agreement is for doing an act forbidden by law, such agreement are void. For example,"A" promises "B" to obtain an employment in public service and "B" promises to pay Rs one lakh to "A". The agreement is void as the procuring government job through unlawful means is prohibited.
2. *If it involves injury to a person or property of another:* For example, "A" borrowed Rs. 100/- from "B" and executed a bond to work for "B" without pay for a period of 2 years. In case of default, "A" owes to pay the principal sum at once and huge amount of interest. This contract was held void as it involved injury to the person.
3. *If courts regards it as immoral:* An agreement in which consideration or object of which is immoral is void. For example, An agreement between husband and wife for future separation is void.
4. *Is of such nature that, if permitted, it would defeat the provisions of any law:*
5. Is fraudulent, or involves or implies injury to the person or property of another, or
6. *Is opposed to public policy:* An agreement which tends to be injurious to the public or against the public good is void. For example, agreements of

trading with foreign enemy, agreement to commit crime, agreements which interfere with the administration of justice, agreements which interfere with the course of justice, stifling prosecution, maintenance and champerty.

7. *Agreements in restrained of legal proceedings:* This deals with two category. One is, agreements restraining enforcement of rights and the other deals with agreements curtailing period of limitation.
8. *Trafficking in public offices and titles:* Agreements for sale or transfer of public offices and title or for procurement of a public recognition like padma vibhushan or padma sree, *etc.*, for monetary consideration is unlawful, being opposed to public policy.
9. *Agreements restricting personal liberty:* Agreements which unduly restricts the personal liberty of parties to it are void as being opposed by public policy.
10. *Marriage brokerage contact:* Agreements to procure marriages for rewards are void under the ground that marriage ought to proceed with free and voluntary decisions of parties.
11. *Agreements interfering marital duties:* Any agreement which interfere with performance of marital duty is void being opposed to public policy. An agreement between husband and wife that the wife will never leave her parental house.
12. Consideration may take in any form-money, goods, services, a promise to marry, a promise to forbear, *etc.*

Contract Opposed to Public Policy can be Repudiated by the Court of law even if that contract is beneficial for all of the parties to the contract- What considerations and objects are lawful and what not-Newar Marble Industries Pvt. Ltd. Vs. Rajasthan State Electricity Board, Jaipur, 1993 Cr. L.J. 1191 at 1197, 1198 [Raj.]- Agreement of which object or consideration was opposed to public policy, unlawful and void-

What better and what more can be an admission of the fact that the consideration or object of the compounding agreement was abstention by the board from criminally prosecuting the petitioner-company from offence under Section 39 of the act and that the Board has converted the crime into a source of profit or benefit to itself. This consideration or object is clearly opposed to public policy and hence the compounding agreement is unlawful and void under Section 23 of the Act. It is unenforceable as against the Petitioner-Company.

COMPETENT TO CONTRACT

Section 11 of The Indian Contract Act specifies that every person is competent to contract provided:

1. He should not be a minor *i.e.*, an individual who has not attained the age of majority *i.e.*, 18 years in normal case and 21 years if guardian is appointed by the Court.
2. He should be of sound mind while making a contract. A person who is usually of unsound mind, but occasionally of sound mind, can make a

contract when he is of sound mind. Similarly if a person is usually of sound mind, but occasionally of unsound mind, may not make a valid contract when he is of unsound mind.

3. He is not a person who has been personally disqualified by law to which he is subject.

FREE CONSENT

According to Section 14, " two or more persons are said to be consented when they agree upon the same thing in the same sense (*Consensus-ad-idem*).

A consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake.

Elements Vitiating free Consent:

1. *Coercion (Section 15):* "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code under(45,1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. For example, "A" threatens to shoot "B"if he doesn't release him from a debt which he owes to "B". "B" releases "A" under threat. Since the release has been brought about by coercion, such release is not valid.
2. *Undue influence (Section 16):* "Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."
   (Section 16(2)) States that "A person is deemed to be in a position to dominate the will of another;
   - Where he holds a real or apparent authority over the other. For example, an employer may be deemed to be having authority over his employee. An income tax authority over to the assessee.
   - Where he stands in a fiduciary relationship to other, For example, the relationship of Solicitor with his client, spiritual advisor and devotee.
   - Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by the reason of age, illness or mental or bodily distress"
3. *Fraud (Section 17):* "Fraud" means and includes any act or concealment of material fact or misrepresentation made knowingly by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract. Mere silence is not fraud. A contracting party is not obliged to disclose each and everything to the other party. There are two exceptions where even mere silence may be fraud, one is where there

is a duty to speak, then keeping silence is fraud. or when silence is in itself equivalent to speech, such silence is fraud.

4. *Misrepresentation (Section 18):* "causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement".
5. *Mistake of fact (Section 20):* "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void". A party cannot be allowed to get any relief on the ground that he had done some particular act in ignorance of law. Mistake may be bilateral mistake where both parties to an agreement are under mistake as to the matter of fact. The mistake must relate to a matter of fact essential to the agreement.

3

Indemnity Contracts: Understanding Liability and Compensation

DEFINITION

The Contracts of Indemnity has been defined as: "A Contract whereby one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a contract of indemnity."

Indemnity, in simple words, is protection against future loss. The person who promises to save the other is called the Indemnitor or Indemnifier and the person who is compensated is the Indemnitee, Indemnified or the indemnity-holder. An indemnity can be defined as a sum paid by A to B by way of compensation for a particular loss suffered by B. A, the indemnitor may or may not be responsible for the loss suffered by the B, the indemnitee. Forms of indemnity include cash payments, repairs, replacement, and reinstatement.

Contract of Indemnties should all satisfy the conditions of a valid contract. All Contracts of Insurance are Contracts of Indemnity except life insurance.

RIGHTS

Rights of Indemnified or Indemnity Holder:

- All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- All costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the

promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

- All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

The indemnity holder can call upon the indemnifier to save him from loss even before the actual loss is incurred.

Rights of Indemnifier:

- After compensating the indemnity holder, indemnifier is entitled to all the ways and means by which the indemnifier might have protected himself from the loss.

INDEMNITY

An indemnity is a sum paid by A to B by way of compensation for a particular loss suffered by B. The indemnitor (A) may or may not be responsible for the loss suffered by the indemnitee (B). Forms of indemnity include cash payments, repairs, replacement, and reinstatement.

GENERAL & LEGAL MEANING

Indemnity is often used as a synonym for compensation or reparation. All three can be construed as obligations to act on an injured party's behalf given the occurrence of a contractually-specified event. However, indemnity as a legal concept has a much broader meaning than the other two terms; namely, an indemnity is to make a party to a contract "whole" again should that contractually-specified event occur.

While the event may be specified by the contract, the actions that must be taken to make the injured party "whole" again are largely fact-based and unknown to the parties until the event occurs, while the maximum liability is often expressly limited by the contract.

A car insurance policy is an example of indemnification. If a purchaser of a car insurance policy is involved in an accident wherein the liability for the accident is undisputedly of their insured driver, then the insurance carrier has the duty to indemnify their insured driver in very specific ways to "make them whole" again. The insurance carrier may pay them compensation (recompense for lost wages that would have normally occurred), pay them for medical/legal/(pain and suffering) damages (*i.e.*, those costs arising specifically as the result of the accident), reparations to tow and repair the vehicles involved in the accident returning them to their original condition, and the payment of rental vehicles while awaiting repairs.

It is in the breadth of the insurance carrier's obligations that we see the application of an indemnity; in other words, an indemnity is a "generalized

promise of protection against a specific type of event by way of making the injured party whole again." An indemnity should also be differentiated from a guarantee. A guarantee is the promise of a third party to honour the obligation of a party to a contract should that party be unable or unwilling to do so (usually a guarantee is limited to an obligation to pay a debt). This distinction between indemnity and guarantee was discussed as early as the eighteenth century in *Birkmyr v Darnell*. In that case, concerned with a guarantee of payment for goods rather than payment of rent, the presiding judge explained that a guarantee effectively says "Let him have the goods; if he does not pay you, I will."

COMMONWEALTH

INDEMNITY CLAUSES

Under section 4 of the Statute of Frauds (1677), a "guarantee" (an undertaking of secondary liability; to answer for another's default) must be evidenced in writing.

No such formal requirement exists in respect of indemnities (involving the assumption of primary liability; to pay irrespective of another's default) which are enforceable even if made orally.

In the UK, under the Unfair Contract Terms Act 1977 s4, a consumer cannot be made to unreasonably indemnify another for their breach of contract or negligence.

CONTRACT AWARD

In England and Wales an "indemnity" monetary award may form part of rescission during an action of Restitutio in integrum. The property and funds are exchanged, but indemnity may be granted for costs necessarily incurred to the innocent party pursuant to the contract.

The leading case is Whittington_v_Seale-Hayne, in which a contaminated farm was sold. Due to the contract, buyers renovated the real estate and, due to the contamination, incurred medical expenses for their manager who had fallen ill. Once the contract was rescinded, the buyer could be indemnified for the cost of renovation as this was necessary to the contract, but not the medical expenses as the contract did not require them to hire a manager. Were the sellers at fault, damages would clearly be available.

The distinction between indemnity and damages is subtle, but they may be differentiated by considering the roots of the law of obligations. How can money be paid where the defendant is not at fault? The contract before rescission is voidable but not void, meaning that, for a period of time, there is a legal contract. During this time both parties have legal obligation. If the contract is to be voided *ab initio* the obligations performed must also be compensated. Therefore the costs of indemnity arise from the (transient and performed) obligations of the claimant rather than a Breach of obligation by the defendant.

INSURANCE

Indemnity insurance compensates the beneficiaries of the policies for their actual economic losses, up to the limiting amount of the insurance policy. It generally requires the insured to prove the amount of its loss before it can recover. Recovery is limited to the amount of the provable loss even if the face amount of the policy is higher. This is in contrast to, for example, life insurance, where the amount of the beneficiary's economic loss is irrelevant. The death of the person whose life is insured for reasons not excluded from the policy obligate the insurer to pay the entire policy amount to the beneficiary. Most business interruption insurance policies contain an Extended Period of Indemnity Endorsement, which extends coverage beyond the time that it takes to physically restore the property. This provision covers additional expenses that allow the business to return to prosperity and help the business restore revenues to pre-loss levels.

FREEING OF SLAVES AND INDENTURED SERVANTS

Slave owners suffered a loss whenever their slaves or indentured servants were granted their freedom. Slave owners might have been paid to cover their losses. When the slaves of Zanzibar were freed in 1897, it was by compensation since the prevailing opinion was that the slave owners suffered the loss of an asset whenever a slave was freed.

In the 1860s in the United States, U.S., President Abraham Lincoln had requested many millions of dollars from Congress with which to compensate slave owners for the loss of their slaves. On July 9, 1868, Section IV of the Fourteenth Constitutional Amendment dismissed all of the claims that slave owners had been injured by the freeing of the slaves. In 1807-08, in Prussia, statesman Baron Heinrich vom Stein introduced a series of reforms, the principal of which was the abolition of serfdom with indemnification to territorial lords. Haiti was required to pay an indemnity of 150,000,000 francs to France in order to atone for the loss suffered by the French slave owners.

COSTS OF WAR

The nation that wins a war may insist on being paid compensations for the costs of the war, even after having been the instigator of the war.

- Following the Sino-Japanese War of 1894-95, the Treaty of Shimonoseki required that China pay Japan the sum of 200,000,000taels (or liangs).
- China incurred an indemnity which resulted from massacres of foreigners during the Boxer Rebellion. The payment of 450,000,000 Haikwan taels, or $330,000,000 became necessary.

GUARANTEED INVESTMENT CONTRACT

A guaranteed investment contract (GIC) is a contract that guarantees repayment of principal and a fixed or floating interest rate for a predetermined period of

time. Guaranteed investment contracts are typically issued by life insurance companies and marketed to institutions qualified for favourable tax status under the Internal Revenue Code (for example, 401(k) plans). A GIC is used primarily as a vehicle that yields a higher return than a savings account or United States Treasury securities. GICs are sometimes referred to as funding agreements, although this term is often reserved for contracts sold to non-qualified institutions. It is not to be confused with a Guaranteed Investment Certificate, a product sold by Canadian banks, which also goes by the acronym of GIC.

Example: Funds obtained through a municipal bond issuance will generally take time to be drawn down. Depositing the bond proceeds in a GIC gives the bond issuer the liquidity of having the funds available while earning a higher rate of return than it would earn in a money market account. GICs are considered safe vehicles since most insurance companies offering them are rated in the AA to AAA range.

The term "GIC" is sometimes used in the context of "Guaranteed Investment Agreements" (GIAs).

HISTORY

As of 1990, a large amount of people's 401k retirement money had been invested into GICs. However when life insurance companies started failing, people began to lose their faith in GICs as a product. For example, Executive Life Insurance Company had some junk bond problems in 1990, and people started redeeming their GICs. So many people redeemed Executive GICs that it couldn't pay all that it owed. It was 'failed' and seized by the government. Investors who had bought GICs, such as the Unisys employee fund, found that their money was frozen. This resulted in a lawsuit against Unisys.

In 1995 the New York State Insurance Department enabled the 'monoline' municipal-bond insurance companies to write insurance on GICs. Thus if the GIC issuer failed, the monoline insurer could pay back investors instead. Insured GICs were called "wrapped" GICs. In the late 2000s, insurance company AIG was bailed out by the federal government to the tune of over a hundred billion dollars. Much of the government money (at least 9 billion dollars) was used to pay out on "Guaranteed Investment Agreement" contracts that AIG had sold to investors.

In 2010 many GIC sellers were sued by counties such as Los Angeles and Oakland over alleged price fixing regarding GICs. Many large banks and other companies were named as 'co-conspirators'

FINANCIAL GUARANTEE CONTRACTS AND CREDIT INSURANCE

Financial guarantee contracts (sometimes known as 'credit insurance') require the issuer to make specified payments to reimburse the holder for a loss it incurs if a specified debtor fails to make payment when due under the original or modified terms of a debt instrument. These contracts can have various legal forms, such as that of a financial guarantee, letter of credit, credit default contract

or insurance contract. Some financial guarantee contracts result in the transfer of significant insurance risk and thus meet the definition of 'insurance contract' in IFRS 4 *Insurance Contracts*.

Mindful of the need to develop a 'stable platform' of Standards for 2005, the Board decided to finalise IFRS 4 without specifying the accounting for these contracts and to subsequently develop separate proposals on this aspect.

As part of finalising IFRS 4, the IASB also decided:

- If a financial guarantee contract is not an insurance contract, as defined in IFRS 4, it should be within the scope of IAS 39 *Financial Instruments: Recognition and Measurement*
- If a financial guarantee contract was entered into or retained on transferring to another party financial assets or financial liabilities within the scope of IAS 39, the issuer should apply IAS 39 to that contract even if the contract is an insurance contract, as defined in IFRS 4.

This project page discusses the development and finalisation of these additional proposals.

BAILMENT

Bailment describes a legal relationship in common law where physical possession of personal property, or a chattel, is transferred from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property. It arises when a person gives property to someone else for safekeeping, and is a cause of action independent of contract or tort.

GENERAL

Bailment is distinguished from a contract of sale or a gift of property, as it only involves the transfer of possession and not its ownership. To create a bailment, the bailee must both intend to possess, and actually physically possess, the bailable chattel. Bailment is a typical common law concept although similar concepts exists in civil law (Spain- Depósito).

In addition, unlike a lease or rental, where ownership remains with the lessor but the lessee is allowed to use the property, the bailee is generally not entitled to the use of the property while it is in his possession.

A common example of bailment is leaving your car with a valet. Leaving your car in a parking garage is typically a license rather than a bailment, as the car park's intent to possess your car cannot be shown. However, bailments arises in many other situations, including terminated leases of property, warehousing (including store-it-yourself) or in carriage of goods.

PURPOSES

There are three types of bailments:

1. For the benefit of the bailor and bailee
2. For the sole benefit of the bailor; and
3. For the sole benefit of the bailee.

Examples: A bailment for the mutual benefit of the parties is created when there is an exchange of performances between the parties (*e.g.*, a bailment for the repair of an item).

A bailor receives the sole benefit from a bailment when a bailee acts gratuitously (*e.g.*, a restaurant, the bailee, provides an attended coatroom free of charge to its customer, the bailor).

A bailment is created for the sole benefit of the bailee when a bailor acts gratuitously (*e.g.*, the loan of a book to a patron, the bailee, from a library, the bailor).

TYPES

Modifying the earlier opinion of Lord Holt (Coggs v. Bernard, 92 Eng. Rep. 107 (K.B. 1704)), Sir William Jones in his 1781 An Essay on The Law of Bailments divided bailments into five sorts, namely:

- Deposit (*depositum*);
- Gratuitous agency (*mandatum*);
- Loan for use (*commodatum*);
- Possessory pledge (*pignori acceptum*);
- Loan for hire (*locatum*). Also called *locatio et conductio*, this is subdivided into *locatio rei*, or hiring by which the hirer (*bailee*) gains a temporary use of the thing, *locatio operis faciendi* when something is to be done to the thing delivered, and *locatio operis mercium vehendarum* when the thing is merely to be transported from one place to another.

LIABILITY

No matter how a bailment arises, the bailee will incur liability in the taking of a bailment in some cases insuring the goods. Different jurisdictions maintain different standards of care.

STRICT LIABILITY

The old common law held a bailee strictly liable for the bailment. The exception to this rule was the case of involuntary bailments, when the bailee is only held to a standard of due care.

TIERED SYSTEM

In many jurisdictions the system of strict liability has been replaced by a tiered system of liability that depends on the relationship of the bailee to the bailor. The bailee is generally expected to take reasonable precautions to safeguard the property, although this standard sometimes varies depending upon who benefits from the bailment.

- If both bailor and bailee are found to benefit from the relationship, such as sending a package, then the bailee is held to a standard of ordinary, or reasonable, care. (*mutual-benefit bailment*)

- If the bailment is to the primary benefit of the bailor, such as finding a lost wallet, the bailee must be found grossly negligent to be liable for damage done to the bailment.
- If the bailee primarily benefits, such as if you borrow your neighbour's rake to clean your lawn, the bailee must exercise highest care, *i.e.*, is liable for any damages arising from slight negligence.

NORMAL CARE

Some jurisdictions have held bailees to a standard of normal care regardless of who benefits in the bailor/bailee relationship.

INVOLUNTARY BAILEES

An exception to all the above is the case of an involuntary bailee, one who by not intentional acts is made a bailee.

For example, if one is given a stock certificate but it turns out to be the wrong certificate (intended for someone else), he is an unintentional bailee, he has made no intentional act to become a bailee.

He is therefore entitled to divest himself of the certificate regardless of a duty of care, so long as he does no malicious or intentional harm to another.

DAMAGES

Plaintiffs will be able to sue for damages based on the duty of care. Often this will be normal tort damages. Plaintiff may elect also to sue for conversion, either in the replevin or trover, although these are generally considered older, common law damages.

TERMS

Bailment can arise in a number of situations, and is often described by the type of relationship that gave rise to the bailment. Several common distinctions are:

- *Voluntary vs Involuntary:* In a voluntary bailment, the bailee agrees to accept responsibility for possession of the goods. In an involuntary bailment, the bailee has possession of the goods without intent to do so. A common situation that creates voluntary bailment is when a person leaves goods with someone for service (*e.g.*, dry cleaning, pet grooming, car tune-up). The bailee must hold the goods safe for the bailor to reclaim within a reasonable time. An involuntary (or *constructive*) bailment occurs when a person comes into possession of property accidentally or mistakenly, as where a lost purse or car keys are found and need to be protected until properly redelivered – a bailment is implied by law.
- *For consideration vs gratuitous. NO:* If a person agrees to accept a fee or other good consideration for holding possession of goods, they are generally held to a higher standard of care than a person who is doing so without being paid (or receives no benefit). Consider a paid coat-

check counter versus a free coat-hook by the front door, and the respective obligations of the bailee. Some establishments even post signs to the effect that "no bailment" is created by leaving your personal possessions in their care, but local laws may prevent unfair enforcement of such terms (especially attended car parks).

- *Fixed term vs indefinite term:* A bailor who leaves property for a fixed term may be deemed to have abandoned the property if it is not removed at the end of the term, or it may convert to an involuntary bailment for a reasonable time (*e.g.*, abandoned property in a bank safe, eventually escheats to the state, and the treasurer may hold it for some period, awaiting the owner). However, if there is no clear term of bailment agreed upon, the goods cannot be considered abandoned unless the bailee is given notice that the bailor wishes to give up possession of the goods. Frequently, in the case of storage of goods, the bailee also acquires a contractual or statutory right to dispose of the goods to satisfy overdue rent; a lawful conversion of bailed goods.

CASES

- *Coggs v Bernard* (1703)

REFERENCES IN POPULAR CULTURE

- In season two episode 18 of TV show Big Bang Theory character Sheldon Cooper references Bailment when attempting to explain to a fellow character his "obligation" once he signed for a package. His supporting argument is to describe the concept of Bailment by quoting the first sentence of this article.

PLEDGE

A Bailment *or delivery of* Personal Property *to a creditor as security for a debt or for the performance of an act.*

Sometimes called *bailment*, pledges are a form of security to assure that a person will repay a debt or perform an act under contract. In a pledge one person temporarily gives possession of property to another party. Pledges are typically used in securing loans, pawning property for cash, and guaranteeing that contracted work will be done. Every pledge has three parts: two separate parties, a debt or obligation, and a contract of pledge. The law of pledges is quite old, but in contemporary U.S., law it is governed in most states by the provisions for Secured Transactions in article 9 of the Uniform Commercial Code.

Pledges are different from sales. In a sale both possession and ownership of property are permanently transferred to the buyer. In a pledge only possession passes to a second party. The first party retains ownership of the property in question, while the second party takes possession of the property until the terms of the contract are satisfied. The second party must also have a lien—or legal

claim—upon the property in question. If the terms are not met, the second party can sell the property to satisfy the debt. Any excess profit from the sale must be paid to the debtor, or first party. But if the sale does not meet the amount of the debt, legal action may be necessary.

A contract of pledge specifies what is owed, the property that shall be used as a pledge, and conditions for satisfying the debt or obligation. In a simple example, John asks to borrow $500 from Mary. Mary decides first that John will have to pledge his stereo as security that he will repay the debt by a specific time. In law John is called the *pledgor*, and Mary the *pledgee.* The stereo is referred to as *pledged property.* As in any common pledge contract, possession of the pledged property is transferred to the pledgee. At the same time, however, ownership (or title) of the pledged property remains with the pledgor. John gives the stereo to Mary, but he still legally owns it. If John repays the debt under the contractual agreement, Mary must return the stereo. But if he fails to pay, she can sell it to satisfy his debt.

Pledged property must be in the possession of a pledgee. This can be accomplished in one of two ways. The property can be in the pledgee's *actual* possession, meaning physical possession (for example, Mary keeps John's stereo at her house).

Otherwise, it can be in the *constructive* possession of the pledgee, meaning that the pledgee has some control over the property, which typically occurs when actual possession is impossible. For example, a pledgee has constructive possession of the contents of a pledgor's safety deposit box at a bank when the pledgor gives the pledgee the only keys to the box.

In pledges both parties have certain rights and liabilities. The contract of pledge represents only one set of these: the terms under which the debt or obligation will be fulfilled and the pledged property returned. On the one hand, the pledgor's rights extend to the safekeeping and protection of his property while it is in possession of the pledgee. The property cannot be used without permission unless use is necessary for its preservation, such as exercising a live animal. Unauthorized use of the property is called conversion and may make the pledgee liable for damages; thus, Mary should not use John's stereo while in possession of it.

For the pledgee, on the other hand, there is more than the duty to care for the pledgor's property. The pledgee has the right to the possession and control of any income accruing during the period of the pledge, unless an agreement to the contrary exists.

This income reduces the amount of the debt, and the pledgor must account for it to the pledgee. Additionally, the pledgee is entitled to be reimbursed for expenses incurred in retaining, caring for, and protecting the property. Finally, the pledgee need not remain a party to the contract of pledge indefinitely. She can sell or assign her interest under the contract of the pledge to a third party. However, the pledgee must notify the pledgor that the contract of pledge has been sold or reassigned; otherwise, she is guilty of conversion.

AGENCY AGREEMENT

An agency agreement is a legal contract creating a fiduciary relationship whereby the first party ("the principal") agrees that the actions of a second party ("the agent") binds the principal to later agreements made by the agent as if the principal had himself personally made the later agreements. The power of the agent to bind the principal is usually legally referred to as authority. Agency created via an agreement may be a form of implied authority, such as when a person gives their credit card to a close relative, the cardholder may be required to pay for purchases made by the relative with their credit card.

Many states employ the equal dignity rule whereby the agency agreement must be in writing if the later agreement would also necessarily be written, such as a contract to buy thousands of dollars worth of goods.

An example of the existence of an agency agreement at issue in a 2006 court case arose when a tennis tournament sponsor suedVenus and Serena Williams for not participating. The sponsor argued that their father, Richard Williams, had committed to their participation in the tournament. The Williams sisters argued that their father did not have the authority to bind them to such an agreement. If their father did commit the sisters to play, the issue for the court to decide is whether a valid agency agreement existed between the Williams sisters and their father. If not, then they likely were not bound to his agreement under the law of agency.

Manufacturers and suppliers of goods frequently appoint agents to act on their behalf in promoting sales, both in the home country of the manufacturer as well as overseas. A formal agreement is usually signed setting out the commission the agent will receive, the territory, duration and other terms on which the principal and agent will do business together.

Within the European Union, there is legislation designed to give some protection to agents, in particular the right to compensation in certain circumstances when an agency is terminated. The same applies in other parts of the world and in some countries it is necessary for a foreign manufacturer to appoint as agent an individual or company that is a national of the country where the agency will operate.

An agent should be distinguished from a distributor – in commercial parlance, a distributor will buy stock from the supplier or principal and then sell it on to his customers at a mark-up, whereas an agent will find customers for the principal who then sells direct to the customers and pays commission to the agent.

4

Standard Form Contract Law

A standard form contract (sometimes referred to as a *contract of adhesion,* a *leonine contract*, a *take-it-or-leave-it contract*, or a *boilerplate contract*) is a contract between two parties, where the terms and conditions of the contract are set by one of the parties, and the other party has little or no ability to negotiate more favourable terms and is thus placed in a "take it or leave it" position.

While these types of contracts are not illegal *per se*, there exists a potential for unconscionability. In addition, in the event of an ambiguity, such ambiguity will be resolved *contra proferentem*, *i.e.*, against the party drafting the contract language.

THEORETICAL ISSUES

There is much debate on a theoretical level whether, and to what extent, courts should enforce standard form contracts.

On one hand, they undeniably fulfill an important role of promoting economic efficiency. Standard form contracting reduces transaction costs substantially by avoiding the need for buyers and sellers of goods and services to negotiate the details of a sale contract each time the product is sold.

On the other hand, there is the potential for inefficient, and even unjust, terms to be accepted by signatories to these contracts. Such terms might be seen as unjust if they allow the seller to avoid all liability or unilaterally modify terms or terminate the contract. These terms often come in the form of, but are not limited to, forum selection clauses and mandatory arbitration clauses, which can limit or foreclose a party's access to the courts; and also liquidated damages clauses, which set a limit to the amount that can be recovered or require a party

to pay a specific amount. They might be inefficient if they place the risk of a negative outcome, such as defective manufacturing, on the buyer who is not in the best position to take precautions.

There are a number of reasons why such terms might be accepted:

Standard form Contracts are Rarely Read

Lengthy boilerplate terms are often in fine print and written in complicated legal language which often seems irrelevant. The prospect of a buyer finding any useful information from reading such terms is correspondingly low. Even if such information is discovered, the consumer is in no position to bargain as the contract is presented on a "take it or leave it" basis. Coupled with the often large amount of time needed to read the terms, the expected payoff from reading the contract is low and few people would be expected to read it.

Access to the full Terms may be Difficult or Impossible before Acceptance

Often the document being signed is not the full contract; the purchaser is told that the rest of the terms are in another location. This reduces the likelihood of the terms being read and in some situations, such as software license agreements, can only be read after they have been notionally accepted by purchasing the good and opening the box. These contracts are typically not enforced, since common law dictates that *all* terms of a contract must be disclosed *before* the contract is executed.

Boilerplate Terms are not Salient

The most important terms to purchasers of a good are generally the price and the quality, which are generally understood before the contract of adhesion is signed. Terms relating to events which have very small probabilities of occurring or which refer to particular statutes or legal rules do not seem important to the purchaser. This further lowers the chance of such terms being read and also means they are likely to be ignored even if they are read.

There may be Social Pressure to Sign

Standard form contracts are signed at a point when the main details of the transaction have either been negotiated or explained. Social pressure to conclude the bargain at that point may come from a number of sources. The salesperson may imply that the purchaser is being unreasonable if they read or question the terms, saying that they are "just something the lawyers want us to do" or that they are wasting their time reading them. If the purchaser is at the front of a queue (for example at an airport car rental desk) there is additional pressure to sign quickly. Finally, if there has been negotiation over price or particular details, then concessions given by the salesperson may be seen as a gift which socially obliges the purchaser to respond by being co-operative and concluding the transaction.

Standard form Contracts may Exploit Unequal Power Relations

If the good which is being sold using a contract of adhesion is one which is essential or very important for the purchaser to buy (such as a rental property or a needed medical item) then the purchaser might feel they have no choice but to accept the terms. This problem may be mitigated if there are many suppliers of the good who can potentially offer different terms, although even this is not always possible (for instance, a college freshman may be required to sign a standard-form dormitory rental agreement and accept its terms, because the college will not allow a freshman to live off-campus).

Some contend that in a competitive market, consumers have the ability to shop around for the supplier who offers them the most favourable terms and are consequently able to avoid injustice. However, in the case of credit cards (and other oligopolies), for example, the consumer while having the ability to shop around may still have access to only form contracts with like terms and no opportunity for negotiation. Also, as noted, many people do not read or understand the terms so there might be very little incentive for a firm to offer favourable conditions as they would gain only a small amount of business from doing so. Even if this is the case, it is argued by some that only a small percentage of buyers need to actively read standard form contracts for it to be worthwhile for firms to offer better terms if that group is able to influence a larger number of people by affecting the firm's reputation. Another factor which might mitigate the effects of competition on the content of contracts of adhesion is that, in practice, standard form contracts are usually drafted by lawyers instructed to construct them so as to minimize the firm's liability, not necessarily to implement managers' competitive decisions. Sometimes the contracts are written by an industry body and distributed to firms in that industry, increasing homogeneity of the contracts and reducing consumers' ability to shop around.

LAW RELATED TO STANDARD FORM OF CONTRACTS

Standard contracts are contracts which are drafted by one party and signed by another party without any modification or change. Though standard contracts present the advantage of preprinted standard format; they are essentially "take it or leave it" contracts with no room for negotiations. These contracts are criticized for killing the bargaining power of the weaker party and open up wide opportunity for exploitation.

ISSUES WHICH ARE GENERALLY INVOLVED WITH STANDARD FORM OF CONTRACTS

Consent

In the case of commercial contracts courts have repeatedly held that contracts even if entered into the standard format, are meant to be performed and not to

be avoided. Unless it is shown that consent is obtained by fraud, mistake or duress a consent given by party to a contract cannot be vitiated. As defined under Section 13 of the Contract Act, 1872 two or more persons are said to consent, when they agree upon the same thing in the same sense. Consent, according to Section 14, is free, when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. Thus where the parties with equal bargaining powers have fairly consented to the terms of the contract without any fraud, duress or mistake courts have refused to interfere.

Unfair Terms of the Contract

Courts have looked into the terms of the contract in relation to the bargaining powers of the parties and have interfered in cases where the bargaining power of the parties was not equal. *In Life Insurance Corporation of India v. Consumer Education and Research Centre and others* the Hon'ble Supreme Court has held that "if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract".

In Central Inland Transport Corporation Limited v. Brojo Nath, Hon'ble Apex Court while giving some illustrations of unreasonable and unfair clauses in contracts, based on unconscionable bargaining in para 90 of the decision and explaining the scope of expression "public policy", in para 93 held in para 94 that the type of contracts to which the principle formulated by us above applies, are not contracts which are tainted with illegality, but are contracts which contain terms, which are so unfair and unresonable that they shock the conscience of the court. It is apt to reproduce the relevant extract of para 90 as under:-

"90. This principle is that the courts will not enforce and will when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful

choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard from or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a cause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

Thus courts will not enforce and will, strike down an unfair and unreasonable contact or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction.

Further cases where the terms of the contract are unreasonable as to the nature of the contract courts have struck them out following the principles as laid down under Contract Act or under common law. In *M Siddalingappa v. T Nataraj*, where applicability of the clause printed on the back of the laundry receipt which read as:

"All articles for cleaning and dyeing are accepted on conditions that the company shall incur no liability in respect of any damage which may occur and for delay or in the event of loss for which the company may accept the liability which shall in no case exceed eight times the cleaning charges." was in question Court held that petitioner is, undoubtedly, a bailee in respect of the sarees given to him and there is a minimum duty of care imposed upon all bailees under Section 151 of the Contract Act which they cannot contract themselves out of it is not subject to any contract to the contrary between the parties. Under that section, in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Once that minimum duty is imposed upon the bailee by the law, a breach of that duty undoubtedly clothes the party affected with the right to recover damages commensurate with the consequences".

Unconscionable Nature of the Contract

Basic test of "unconscionability" of contract is whether under circumstances existing at time of making of contract and in light of general commercial background and commercial needs of particular trade or case, clauses involved are so one-sided as to oppress or unfairly surprise party.

Precursors of Unconscionability: Courts of equity did not share the reluctance of common law courts to police bargains for substantive unfairness. Though mere "inadequacy of consideration" alone was not a ground for withholding equitable relief, a contract that was "inequitable" or "unconscionable" one that was so unfair as to "shock the conscience of the court" would not be enforced in equity.

In *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and another,* Supreme Court of India refused to interfere in adhesion contract on the ground that it was not unconscionable so as to "shock the conscience of the court"

Inequality of Bargaining Powers

Courts have strictly ruled against those standard contracts which exploit the position of an employee vis a vis the employer. They have repeatedly held that in case of employment contract between the employer and employee, there is a universal tendency on the part of the employer to insert those terms, which are favourable to him in a printed and standard form, leaving no real meaningful choice to the employee except to give assent to all such terms. In such a situation the parties cannot said to be in even position possessing equal bargaining power. Where the parties are put on unequal terms the standard form of contract cannot be said to be the subject-matter of negotiation between the parties and the same is said to have been dictated by the party whose higher bargaining power enable him to do so.

In *Superintendence Company of India (P) Ltd v. Sh. Krishan Murgai*, Hon'ble Supreme Court held that

"It is well settled that employees covenants should be carefully scrutinized because there is inequality of bargaining power between the parties; indeed no bargaining power may occur because the employee is presented with a standard form of contract to accepts or reject. At the time of the agreement, the employee may have given little thought to the restriction because of his eagerness for a job; such contracts "tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression."

Such a protection is also given against the action of the state where the Courts have ruled that that the action of the State in contractual field also must be fair and reasonable. The requirement of Article 14 of the Constitution should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled, the State cannot cast of its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist. Therefore, total exclusion of Article 14 non-arbitrariness which is basic to rule of law -

from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contacts where the bargaining power is unequal so that these are not negotiated contracts but standard form of contracts between unequals. Bringing the State activity in contractual matters also within the purview of judicial review is inevitable.

Conclusion

Despite absence of a specific legislation courts have shown a marked willingness to interfere with standard form of contracts where there is evidence of unequal bargaining power. Courts have given reliefs in cases where weaker party has been burdened with unconscionable, oppressive, unfair, unjust and unconstitutional obligations in a standard form contract. In *D.C.M. Ltd. v. Assistant Engineer (HMT Sub-Division), Rajasthan State Electricity Board, Kota* where the division bench had to consider the question whether the Rajasthan State Electricity Board functioning under the Electricity Act of 1910 and the Electricity (Supply) Act, 1948 could in exercise of its powers under Section 49 of the Supply Act require the consumer-appellant before them to pay by way of minimum charges at nearly three times the normal rate charged from other consumers being heavy industries consuming heavy demand of 25 MW. Even though the appellant before them, D.C.M. Ltd., had entered into such an agreement with the Board it was held that the said term in the agreement was unreasonable and consequently the demand of such excessive minimum consumption charges was not justified and could not be countenanced on the touchstone of Article 14 of the Constitution of India as the Electricity Board was an instrumentality of the State. The Court in this connection had to consider the nature of the written agreements entered into by the consumers of the electricity with the Board which was a monopolist and the further question whether an apparently inconceivable and unjust term in the written contract could be enforced by the Board against the consumer. Following pertinent observations were made by J.S. Verma, C.J in paragraph 24 of the Report:

...We may further add that for the reasons already given it is obvious that the giving of such an undertaking by execution of the agreement was no doubt a conscious act of the petitioner, but in the circumstances it cannot be held to indicate the petitioner's willingness to be bound by such an onerous condition, if it had the option; It is obvious that there was no option to the petitioner and, therefore, it cannot be said that the petitioner voluntarily and willingly chose and accepted the more onerous condition of a higher rate instead of the normal rate for payment of minimum charges. The willingness to accept such an onerous term with free consent can be assumed only where a consumer has an option or in other words he can get the supply of electricity he wants even without agreeing to any such term specified by the Board for being incorporated in the written contract without execution of which the consumer cannot insist on supply of electricity to him. It is not the Board's case that it was willing to honour the petitioner's requisition and make the supply even without the petitioner

undertaking in writing to pay minimum charges according to Clause 16(c). How can it be said that the petitioner willingly accepted this term when the fact is that it had no option in the matter. It is further observed that Assuming that reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Such is the disparity between the bargaining power of large enterprises (both private and public) and the consumer that terms have often been imposed upon him which are onerous or unfair in their application and which exempt the party putting forward the document, either wholly or in part, from his just liability under the contract. This may be one of the reasons why, at common law, the Courts evolved certain canons of construction which normally work in favour of the party seeking to establish liability and against the party seeking to claim the benefit of the exemption. The impression should not be given, however, that the" application of these canons of construction render exemption clauses generally ineffective. If the clause is appropriately drafted so as to exclude or limit the liability in question, then the Courts must (subject to the powers now conferred on them by the Unfair Contract Terms Act 1977) give effect to the clause.

Moreover, as between businessmen, exemption clauses can perform a useful function in that they may, for example, anticipate future contingencies which hinder or prevent performance, establish procedures for the making of claims and provide for the allocation of risks as between the parties to the contract. In a business transaction, the effect of an exemption clause may simply be to determine which of the parties is to insure against a particular risk. Exemption clauses in business transactions are not necessarily unfair or inequitable. But even in business transactions the Courts must be satisfied that the clause, on its wording, does have the effect contended for by the person relying on it, that is, the party seeking to exclude or restrict his liability. (a) Strict interpretation of the clause. 'If a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words.' The words of the exemption clause must therefore exactly cover the liability which it is sought to exclude. So an exemption clause in a contract excluding liability for 'latent' defects' will not exclude the condition as to fitness for purpose implied by the Sale of Goods Act."

COMMON LAW STATUS

As a general rule, the common law treats standard form contracts like any other contract. Signature or some other objective manifestation of intent to be legally bound will bind the signor to the contract whether or not they read or understood the terms. The reality of standard form contracting, however, means that many common law jurisdictions have developed special rules with respect to them. In general, in the event of an ambiguity, the courts will interpret standard form contracts *contra proferentem* (against the party that drafted the contract), as that party (and only that party) had the ability to draft the contract to remove ambiguity.

UNITED STATES

Generally

Standard form contracts are generally enforceable in the United States. The Uniform Commercial Code which is followed in most American states has specific provisions relating to standard form contracts for the sale or lease of goods. Furthermore, standard form contracts will be subject to special scrutiny if they are found to be contracts of adhesion.

Contracts of Adhesion

The concept of the contract of adhesion originated in French civil law, but did not enter American jurisprudence until the *Harvard Law Review* published an influential article by Edwin W. Patterson in 1919. It was subsequently adopted by the majority of American courts, especially after the Supreme Court of California endorsed adhesion analysis in 1962.

For a contract to be treated as a contract of adhesion, it must be presented on a standard form on a "take it or leave it" basis, and give one party no ability to negotiate because of their unequal bargaining position.

The special scrutiny given to contracts of adhesion can be performed in a number of ways:

- If the term was outside of the reasonable expectations of the person who did not write the contract, and if the parties were contracting on an unequal basis, then it will not be enforceable. The reasonable expectation is assessed objectively, looking at the prominence of the term, the purpose of the term and the circumstances surrounding acceptance of the contract.
- Section 211 of the American Law Institute's Restatement (Second) of Contracts, which has persuasive though non-binding force in courts, provides:

Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

This is a subjective test focusing on the mind of the seller and has been adopted by only a few state courts.

- The doctrine of unconscionability is a fact-specific doctrine arising from equitable principles. Unconscionability in standard form contracts usually arises where there is an "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." (*Fanning v. Fritz's Pontiac-Cadillac-Buick Inc.*)

Shrink Wrap Contracts

Courts in the United States have faced the issue of shrink wrap contracts in two ways. One line of cases follows *ProCD v. Zeidenberg* which held such

contracts enforceable (*e.g.*, *Brower v Gateway*), and the other follows Klocek v. Gateway, Inc, which found them unenforceable. These decisions are split on the question of assent, with the former holding that only objective manifestation of assent is required while the latter require at least the possibility of subjective assent.

CANADA

In Canada, exclusion clauses in a standard form contract cannot be relied on where a seller knows or has reason to know a purchaser is mistaken as to its terms (*Tilden Rent-A-Car Co. v. Clendenning*).

AUSTRALIA

Standard form contracts have generally received little special treatment under Australian common law. A 2003 New South Wales Court of Appeal case (*Toll (FGCT) Pty Limited v Alphapharm Pty Limited*) gave some support for the position that notice of exceptional terms is required for them to be incorporated. However the defendant successfully appealed to the High Court so currently there is no special treatment of standard form contracts in Australia.

Since 1 January 2011, the Australian Consumer Law has been enacted in Australia at the national level, and due to a Council of Australian Governments (COAG) agreement this legislation is now part of each jurisdiction's (state's or territory's) Fair Trading laws.

INDIA

In India leonine contracts are generally deemed unconscionable contracts (though not all leonine contracts are unconscionable contracts) and are voidable. The 199th Law Commission report (2006) on "UNFAIR (PROCEDURAL & SUBSTANTIVE) TERMS IN CONTRACT" deals with it. The unfairness can be procedural or substantive.

However, standard form contracts are ubiquitous in India and especially in the digital age, standard form contracts are used much more frequently than any other form. They can be legally valid if reasonable notice has been given and if the terms are not unreasonable. Unfair terms in non-negotiated agreements are often held void.

LEGISLATION

In recognition of the consumer protection issues which may arise, many governments have passed specific laws relating to standard form contracts. These are generally enacted on a state level as part of general consumer protection legislation and typically allow consumers to avoid clauses which are found to be unreasonable, though the specific provisions vary greatly. Some laws require notice to be given for these clauses to be effective, others prohibit unfair clauses altogether (*e.g.*, Victorian Fair Trading Act 1999).

UNITED KINGDOM

Section 3 of the Unfair Contract Terms Act 1977 limits the ability of the drafter of consumer or standard form contracts to draft clauses which would allow him to exclude liability in what is termed an exclusion clause - the act does not per se render ineffective provisions in other areas which to the layman appear "unfair".

Where a contract is negotiated the provisions of the act likely would not apply - the law protects from a lot of things but openly making a bad bargain is not one of them.

ISRAEL

The Standard Form Contract Act 1982 defines a set of depriving conditions that may be canceled by a court of law, including unreasonable exclusion or limitation of liability, unreasonable privileges to unilaterally cancel, suspend or postpone the execution of the contract and to change any fundamental charges or pricing, transfer of liability for the execution of the contract to a third party, unreasonable obligation to use the services of a third party or to limit, in any way, the choice of contracting third parties, denial of legal remedy, unreasonable limitations on contractual remedies or setting unreasonable conditions for the consummation of the remedy, denying or limiting the right for legal procedures, exclusive rights to decide on the location of the trial or arbitration, obligatory arbitration with unilaterally control over the arbitrators or the location of the arbitration and setting the holder of the burden of proof contrary to common law.

The act also establishes a Standard Form Contract Court, chaired by a district judge and consists of a maximum of 12 members, appointed by the justice minister, including an acting chairman (also a district judge), civil servants (no more than a third) and, at least, 2 consumer organization representatives. The court holds hearings regarding appeals against standard form contract clauses or approval of a specific standard form contract at the requests of a provider.

LITHUANIA

Standard conditions in Lithuania shall be such provisions which are prepared in advance for general and repeated use by one contracting party without their content being negotiated with another party, and which are used in the formation of contracts without negotiation with the other party. Standard conditions prepared by one of the parties shall be binding to the other if the latter was provided with an adequate opportunity of getting acquainted with the said conditions (Article 6.185. Standard conditions of contracts, Lithuanian Civil Code).

A consumer shall have the right to claim within the judicial procedure for invalidity of conditions in a consumer contract that are contrary to the criterion of good faith (Article 6.188).

CIVIL LAW COUNTRIES

RUSSIA

In July 2013, Russian Dmitry Agarkov won a court case against Tinkoff Bank after he altered the standard form contract he had received in the mail. The bank, failing to notice the changes, accepted the application and gave him an account based on the amended contract. The judge ruled that the bank was legally bound to the contract it had signed. Agarkov is further suing the bank for failing to comply with the terms he had added to the contract, which it had unwittingly agreed to by signing the contract. Agarkov's lawyer, Dmitry Mihalevich said – "They signed the documents without looking. They said what usually their borrowers say in court: 'We have not read it'."

STANDARD FORM OF CONTRACTS AND THE LAW IN INDIA

Legal system today has evolved from its past rules, evolution of law had provided a solution of the problems in the system adhering with demand and circumstances of modern day. Evolution has also led to the revelation of quandary in existing legal system. Envisioning within the ambience of standard form of contract, we encounter with similar kind of aspect which is a byproduct of evolution. In this technological age where contracts are made in thousands of numbers by a company daily. It has made difficult for the court to come at rescue for the weaker party. As in practical aspect general consumer or a person who signs a contract does not read terms and condition written in the contract. Even if they read it they don't understand most of the things about the terms and condition of the contract, so it becomes difficult to protect the weaker party. Standard form of contract are done on national and international level, and same problem exists everywhere in the world, it must be solved for the better evolution of the legal system.

STANDARD FORM OF CONTRACT

Standard form of contract in lay-man term means 'take it or leave it' kind of contract, in this type of contract the other party is not in position to negotiate with the terms and condition laid down in the contract, party just have the option of either enter into the contract or forget about the contract. Thus, the fundamental right to negotiate is affected by this type of arrangement popularly these type of contract are known as adhesion or a boilerplate kind of contract. Most common type of standard form of contracts are insurance company contract, on purchasing a washing machine, signing up for your e-mail, social networking sites, *etc.*

LEGAL STATUS OF STANDARD FORM OF CONTRACT (SFC)

Indian contract system does not have any specific differentiation between SFC and general contract, as the SFC is a kind of contract which is govern by

the laws provided for general contracts in Indian contract Act 1872. Due to heavy industrial development these kind of contract has become common and are executed in large numbers now a days. This had led to demand of formulation of fledge rules on standard form of contract to protect the rights of the weaker party in standard form of contract.

However, in many countries judiciary is empowered to apply the principle of natural justice and give good justice to the weaker party as it is in Israel there are certain provisions that may be cancelled by court of law. Apart from courts some legislature have also made laws related to this kind of contract. There are certain rules made by the legislature which seems to be unreasonable like in U.K, sec 3 of Unfair Contract Terms Act 1977 limits the ability of drafter on consumer or limits the provision of standard form of contract to the Drafter.

Why People Accept Standard form of Contract?

1. First reason why people accept SFC, they don't read the contract clauses thoroughly as even after reading they don't find it worthy of giving so much time in writing down the clauses.
2. In certain contracts, there are clauses like if you accept the given terms and condition then they will tell the full terms and condition of the contract.
3. SFC kind of contract the party generally focus on the price mentioned in the contract; he doesn't really care about other different clauses which might be exploitative in nature.
4. Manufactured pressure on the party is created by another party to sign SFC, earlier all the negotiation and the terms had been discussed orally and explained to them. So it becomes a kind of bounding on the party to sign the contract.
5. The major point SFC's are that they are take it or leave basis, so they don't have any choice but to accept the contract.

Ways to Limit Exploitation from SFC

It is easy to exploit the party entering into standard form of contract, there are certain rules made to protect the interest of the weaker party. Specific procedure has been mention in order to protect the weaker party in SFC contract.

Reasonable Notice

A reasonable notice must be given by the person delivering the document to give adequate information about the terms and condition laid down in the contract. This principle was propounded in the case of *Henderson V. Stevenson* from House of Lords. Case facts were that, a person buy a ship ticket on face of it only boarding place and arriving place was written on it but on its back side there were certain terms and conditions which party didn't see nor anything was written on face of it to turn over and look at the back of ticket. Simple reason given by court was that a person cannot agree to a term if he had not seen it or is not told of it.

Notice of the terms and condition should be given before or at the time of contract when it is to be signed. As clearly said by Lord Denning it is duty of the party relying on a clause to its benefit to make it clear to other party the terms and condition of contract in the famous case of *Thornton V. Shoe Lan Parking Ltd*.

Contractual Document

For a standard form of the document, there must be a contractual document signed between the parties in order to make it enforceable in court. The basic problem lies between identifying the document as a contract document or as a receipt. Different between these two is, if the document clearly explains the express and implied a condition in the document then it is a contractual document if not then it is a receipt. The contract must be signed by the person accepting the terms and conditions mentioned in the document.

Misrepresentation, Fraud, Mischief and other elements which makes a contract void should not present in the contract in order to make an agreement enforceable by law.

Unreasonable or Unfair Terms

Pointing out unreasonable terms in the contract can be one the protective safeguard for the weaker party. Unreasonable terms of contract can be said about those terms in the contract which contradicts the very purpose of the contract or are against the public policy. In *Lilly White V. Mannu-Swami* this principle has been clearly explained in the case. In this case the laundry receipt contained a condition that in case of loss or destruction of cloth only 15% money of the market price of cloth will be returned these clauses were held unreasonable from the court and was held that the clauses were against the public interest.

In an Indian financial case of *Seven Day Adventists Vs. M.A Uneerikutty and Anr.* MANU/SC/3291/2006 it says that if any consideration of several clauses mentioned in the contract is unlawful then agreement itself is void and the decision of the court says that this type of cases are against the public policy, if any type of clauses violating public policy that contract is void. This doctrine is not only applicable to harmful cases but to the cases with harmful tendencies.

In the case of contract with the government certain points must be observed in order to prevent exploitation of the other party in the contract. As the decision from the government had been taken in bad faith. Decision is based on irrational or irrelevant consideration. Decision has been taken without following the prescribed procedure in the system. If these things are not followed diligently contract will be termed as irrelevant by the court and party will be protected by certain clauses against exploitation of contracted party.

THEORY OF FUNDAMENTAL BREACH

It's one of the tools to protect the weaker party from exploitation through this theory. What happens in theory there is a core or fundamental of the contract

which is bounding on both parties to follow them and if that is not followed then there will be a breach of contract. In the case of breach of contract the weaker party will not be bound to follow the contract in case of breach of contract by other party.

Test of fundamental breach of contract can be done through sec 11 of 1977 unfair contract act which says the contract will be void if it will not satisfy the reasonableness of the contract.

In case of *Food Corporation of India Vs. Laxmi Cattle Feed Industries* MANU/SC/8041/2006, Supreme Court held that in case of breach of contract, the plaintiff has to prove all the essentials of breach of contract. If the plaintiff is not able to prove, it will not be considered as breach of contract.

EXEMPTION CLAUSES AND THIRD PARTY

Under this clause we have to take a look at the doctrine of privity of contract which says that the contract is between the two parties who have contracted with each other and no third party is entitled to enjoy the right provided in the contract nor hold any liability.

As the third party does not hold any responsibility for the irregularity in the contract, he is not entitled to any benefit from the contract.

AMBIT AND AUTHORITY OF CONTRACT ACT

Under the Indian contract, there is no such form or condition which is binding on the parties. Parties may agree to contract in a particular mode which is not probihited under the law.

Problem that is prevalent in the Indian context is that there is no such specific rule provided in Contract Act, different provision has been mentioned in different kinds of Act which govern activity of contract like specific provision of railways act, public transport control by the government. Different kinds of rules provided by the government to contract in coffee industry, tea plantation which is entered into by workers with the industry.

CONCLUSION

The standard form of contract are written in fine print with all the terms and conditions laid down clearly in the contract. In Indian context cases are entertained under the rules provided by Indian Contract Act, there is no any act only made to deal with standard form of contract specifically. In this type of contract weaker party can easily be exploited and there is no specific rule for the prevention from this type of action by dominating party.

With the evolution of legal system the courts had found different kinds of method and tools to protect the basic right of the weaker party by applying the principles of natural justice, precedent of different cases helping in protecting interest of weaker section. As through transformation these kind of contract are made on daily basis in enormous number, that's why proper scrutiny and providing a lengthy procedure will not work best thing can be done is to provide

awareness about the rule so that the parties entering into the contract will read the clauses and try to understand and ask question on certain clauses if they are not able to understand it.

Take it leave it as it is the nature of the contract which leads to commencement of certain cases in court in which there is an immediate urge to provide justice to the weaker party who without knowing the specific clauses entered into the contract.

5

The Regulation of Contract Labour Law

The increased tendency for outsourcing, offloading or subcontracting is the most clearly obvious change in the time of globalization and privatization. The rationale is that the establishment could focus on more productivity in the core or predominant activity so as to remain competitive while outsourcing the incidental or ancilliary activities.

A mechanism to regulate engaging of contractor and contract labour is provided by the Contract Labour (Prohibition and Regulation) Act 1970. The Act provides for registration of contractors (if more than twenty workers are engaged) and for the appointment of a Tripartite Advisory Board that investigates particular forms of contract labour, which if found to be engaged in areas requiring perennial work connected with the production process, then the Board could recommend its abolition under Section 10 of the Act. A tricky legal question has arisen as to whether the contract workers should be automatically absorbed or not, after the contract labour system is abolished. It was recently held by a Constitutional Bench of the Supreme Court that it is not necessary for such automatic absorption to be there.

EMPLOYMENT INJURY, HEALTH, AND MATERNITY BENEFIT

We can count the Workmen's Compensation Act 1923 among the earliest pieces of labour legislation. It covers all cases of 'accident arising out of and in the course of employment' and the rate of compensation to be paid in a lump sum, is determined by a schedule proportionate to the extent of injury and the

loss of earning capacity. The younger the worker and the higher the wage, the greater is the compensation subject to a limit. The injured person, or in case of death the dependent, can claim the compensation. This law applies to the unorganised sectors and to those in the organised sectors who are not covered by the Employees State Insurance Scheme, which is conceptually considered to be superior to the Workmen's Compensation Act.

The Employees' State Insurance Act, 1948 provides a scheme under which the employer and the employee must contribute a certain percentage of the monthly wage to the Insurance Corporation that runs dispensaries and hospitals in working class localities. It facilitates both outpatient and in-patient care and freely dispenses medicines and covers hospitalization needs and costs. Leave certificates for health reasons are forwarded to the employer who is obliged to honour them. Employment injury, including occupational disease is compensated according to a schedule of rates proportionate to the extent of injury and loss of earning capacity.

Payment is monthly, unlike in the Workmen's Compensation Act. Despite the existence of tripartite bodies to supervise the running of the scheme, the entire project has fallen into disrepute due to corruption and inefficiency. Workers in need of genuine medical attention rarely approach this facility though they use it quite liberally to obtain medical leave. There are interesting cases where workers have gone to court seeking exemption from the scheme in order to avail of better facilities available through collective bargaining.

The Maternity Benefit Act applies to notified establishments. Its coverage can therefore extend to the unorganised sector also, though in practice it is rare. A woman employee is entitled to 90 days of paid leave on delivery or on miscarriage. Similar benefits, including hospitalisation facilities are available under the law described in the paragraph above.

RETIREMENT BENEFIT

Workers generally find two types of retirement benefits available to them. One is under the Payment of Gratuity Act,1972 and the other is under the Employees Provident Fund Act. In the first case a worker who has put in not less than five years of work is entitled to a lump sum payment equal to 15 days' wages for every completed year of service. Every month the employer is expected to contribute the required money into a separate fund to enable this payment on retirement or termination of employment. Both the employee and the employer can equally contribute into a national fund in the latter scheme.

The current rate of contribution is 12 per cent of the wage including a small percentage towards family pension. This contribution also attracts an interest, currently 9.5 per cent per annum, and the accumulated amount is paid on retirement to the employee along with the interest that has accrued. The employee is allowed to draw many types of loan from the fund such as for house construction, marriage of children, and education, *etc.* This is also a benefit, which is steadily being extended to sections of the unorganised sector, especially where the employer is clearly identifiable.

DIVISION OF INDUSTRY BY INDIAN LABOUR LAW

Indian labour laws divide industry into two broad categories:

- *Factory*: The Factories Act, 1948 (the said Act) has provisions which regulate factories. All industrial establishments employing 10 or more persons and carrying manufacturing activities with the aid of power come within the definition of Factory. The said Act makes provisions for the health, safety, welfare, working hours and leave of workers in factories.

The State Government, through its inspectorates, enforces the said Act. The said Act empowers the State Governments to frame rules, so that the local conditions prevailing in the State are appropriately reflected in the enforcement. The said Act puts special emphasis on welfare, health and safety of workers. The said Act is instrumental in strengthening the provisions relating to safety and health at work, providing for statutory health surveys, requiring appointment of safety officers, establishment of canteen, crèches, and welfare committees, *etc.*, in large factories.

The said Act also provides specific safe guards against use and handling of hazardous substance by occupiers of factories and laying down of emergency standards and measures.

- *Shops and Commercial Establishments*: 'Shops and Commercial Establishments' are regulated by Shops and Commercial Establishments Act which are state statutes and respective states have their respective Shops and Commercial Acts which generally provide for opening and closing hour, leave, weekly off, time and mode of payment of wages, issuance of appointment letter, *etc.*

STATUTORY REGULATION OF CONDITION OF SERVICE IN CERTAIN ESTABLISHMENTS

There is statutory provision for regulating and codifying conditions of service for an industrial establishment employing more than 100 workmen under the provisions of Industrial Employment (Standing Orders) Act, 1946 (this Act). Under the provisions of this Act every employer of an Industrial Establishment employing 100 or more workmen is required to define with sufficient precision the condition of employment and required to get it certified by the certifying authorities provided under Section 3 of this Act.

Such certified conditions of service will prevail over the terms of contract of employment. In a significant judgement recently the Delhi High Court has held that a hospital even though employing more than 100 workmen is not covered under the provisions of this Act, as a hospital is not an Industrial Establishment as defined under this Act.

DISTINCTIVE FEATURE OF INDIAN LABOUR AND EMPLOYMENT LAWS

A distinguishing feature of Indian Labour and Employment Laws are that in India there are three main categories of employees: government employees, employees in government controlled corporate bodies known as Public Sector Undertakings (PSUs) and private sector employees. The rules and regulations governing the employment of government employees stem from the Constitution of India. Accordingly, government employees enjoy protection of tenure, statutory service contentions and automatic annually salary increases.

Public sector employees are governed by their own service regulations, which either have statutory force, in the case of statutory corporations, or are based on statutory orders.

Employees in the private sector can be classified into two groups: management staff and workman. Managerial, administrative or supervisory employees drawing a salary of ₹1600/-or more per month are considered management staff and there is no statutory provisions relating to their employment and accordingly in case of managerial and supervisory staff/employee the conditions of employment are governed by respective contracts of employment and their services can be discharged in terms of their contract of employment. As has been detailed above, the provisions of the Industrial Disputes Act cover workmen category.

FORMATION AND CONTENT AND EMPLOYMENT LAW IN INDIA

Before the middle of Nineteenth Century, a class of general casual labourers as such was almost unknown in India. Whenever required, either the community collectively contributed labour or forced labour of cultivators was used. The large public works by and large became important from the second half of the 19th century and consisted of railway construction, irrigation works, road construction, construction of military barracks and Government buildings. These works were required ordinary, unskilled labourers in large numbers. At the same time these labourers were employed for a considerably long time.

The main classes from which these labourers were recruited were the agricultural labourers, the poorer among the cultivators and some village artisans affected by the competition from factory made goods. However, in the second half of the Nineteenth Century, the periodic occurrences of famines led to misery. The shortage of fodder meant the loss of cattle wealth causing pauperization of peasantry.

On the other hand, the agrarian structure became exploitative and land was getting concentrated in the hands of money lenders and other parasitic classes. Debt bondage laws favoured money lenders and it led to transfer of land from agriculturists to money lenders. Around 1830, the slavery was abolished in British Colonies and between 1834-37, 19000 workers migrated to Mauritius and Bourbon as indentured labour.

Considerable was out-migration to other regions within India during the period. Out migration from UP to Bengal, Assam and Bombay during the decades of 1911-1921 and 1921-1931 was around 5 to 6 lakhs persons in each decade (Mookherjee). The growing importance of plantations, particularly tea and coffee in North India (Assam, Bengal) and in Madras Presidency had opened up new avenues for employment. However, the peculiar requirement for settled labour on tea gardens coupled with poor transport facilities meant that the migration to tea gardens involved great deal of hardships and surrendering of freedom by workers. The contract system of recruitment and the need to retain labour-force on gardens in those days, as well as the indentured system created almost wholly bonded labour class to serve the needs of capitalist plantation enterprises (Ranjit Dasgupta).

Abolition of the Zamindari system had brought about a major structural change transferring the ownership rights to the peasants on an unprecedented scale in India. This change was brought about after independence and initiation of the process of planned economic development in India. However, the rapid growth of population and relatively limited shift of population from agriculture to non-agriculture sector, led to progressive decline in the size of land holdings and the increase in marginal farm households. It emerged as major feature of Indian agricultural structure. With the passage of time this began to manifest in the growth of casual labour class both in agriculture and in non-agricultural activities in India. The process was particularly marked on account of the slow growth of organised employment in India economy.

WORKERS' PROTECTION ISSUES

The establishment of the International Labour Organisation in 1917 was a watershed development for protecting the interest of the working class all over the world. The ILO brought new vision and new focus on issues which were affecting employment, working conditions, social security, rights of workers and employers, occupational health and safety. What is important is that ILO provided a tripartite forum for the concerned social partners in industry and through that forum, it encouraged meaningful dialogues which were backed by systematic and scientific studies on various issues affecting the labour.

The standard setting activities of the International Labour Organisation helped in bringing about measures of equity and equality consistent with socio-economic conditions in the countries. There are several aspects of workers' protection-wages and working conditions, occupational health and safety, right to unionise and collective bargaining and protection against arbitrary dismissal or removal from employment. It is the state of socio-economic development, growth of income, demand for labour, and education and skill of workers that the degree and effectiveness of these types of protection depends on. This degree and effectiveness also depends on the level of social enlightenment of the people. However, among these various aspects of workers' protection the critical aspect is the protection of employment or security of job. This is because it is the

security of employment that generally confers other benefits and measures of protection such as social securities like Provident Fund, Pension, health-care, paid leave, regulation of conditions of work and so on. Usually, there are institutional arrangements to regulate and manage these measures.

SIZE AND CHARACTERISTICS OF EMPLOYMENT WITH SECURITY

In the system of data collection and compilation the employment with security as a rule is referred to as "organised employment". The following lines define the coverage of such employment in terms of sectors and establishments:

Under the employment market information (EMI) scheme of the Ministry of Labour, Government of India, the information on employment is collected from all public sector establishments irrespective of size of establishment and from non-agricultural establishments in the private sector employing 25 or more persons on compulsory basis and from private establishments employing about 10-25 persons on voluntary basis on annual basis.

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1939 collects these data on employment under its provisions. However, the employment market information system does not cover defence establishments, self-employed persons and establishments in the private sector employing less than ten workers.

SIZE OF ORGANISED EMPLOYMENT

The organised employment in India was 28.25 million persons within which 4.64 million or 16% was the employment of women in 1997. Between 1991 and 1997 the total organised employment increased from 26.70 million to 28.25 million or by 5.8% in six years.

However, the employment of women during the same period increased from 3.78 million to 4.64 million or by 22.75%. The employment of women within the organised employment accounted for only 16% of the total in 1997; however it has grown much faster since then.

PUBLIC SECTOR AND PRIVATE SECTOR ORGANISED EMPLOYMENT

Out of the total of 28.25 million organised employment, 19.56 million or 69% was in the public sector.

ORGANISED EMPLOYMENT BY INDUSTRIAL SECTOR ACTIVITIES

Out of the total of 28.25 million, 11.20 million was in services, 6.9 million was in manufacturing, 5.2 million in transport and communication and about 2.0 million in mining and quarrying and construction. Agriculture and allied activities accounted for only 1.4 million organised jobs while trade and

commerce accounted for only 0.5 million jobs in 1997. The organised employment is covered by various Acts such as, Factories Act,1948; Shops and Commercial Establishments Act; Plantation Act and so on.

Total workforce in Indian economy: It is without any doubt that the organised employment or what we have termed as employment with a measure of security is just a fraction of the total.

According to the Census of India, 1991, the total workforce was as under:

- Male 221.66 million
- Female 64.27 million

TOTAL 285.93 million: The fact that women account for 22% in the total workforce will be seen. The distribution of the total workforce across industrial activities by sex is shown in Table-II. 67% of the total workers were engaged in agriculture and allied activities, 10-11% in manufacturing and services each, 7.44% in trade and commerce. In absolute terms, out of the total of 285.93 million workers 191.3 million were in agriculture and allied activities, 28.3 million in manufacturing and processing, 19.3 million in services, and 21.9 million in trade and commerce.

DEFINITION OF A WORKER IN THE CENSUS

The census defines worker in terms of 'time criteria without reference to income'. Hence, it defines a worker as the Main Worker (more or less a regular or full time) if he or she had worked for more than 183 days in the reference year. If the worker works for less than 183 days he or she is called "Marginal Worker" or underemployed worker.

The distribution of total workers and organised employment across various industrial activities and its status in 1997 is shown in Table-III. In 1991 the total organised employment accounted for 9.35 per cent of the total. The highest percentage was in mining and quarrying followed by services. In manufacturing and construction the percentage was about 22%. Between 1991 and 1997 the organised employment across industrial activities increased at a lower rate than the growth of workers, except in transport and manufacturing. As a result, the overall as well as across several activities the organised employment as percentage to the total decreased from 9.35 per cent in 1991 to 8.44 per cent in 1997.

LEGAL PROVISIONS ON EMPLOYMENT PROTECTION FOR REGULAR WAGE/ SALARIED EMPLOYEES

As has been noted above, we can study the legislative and judicial protection of employment for regular salaried employees in the organised sector from the perspective of employment in the public sector and employment in the private sector. The public sector here means employment in Government Debarments, various instrumentalities of the Government, Government Corporations, and other statutorily formed autonomous bodies.

A. *Direct government servants*: Security of employment of this class of employees is guaranteed by the constitution of India vide Article 309 & 311. These articles provide that no government servant can be dismissed by authority subordinate to that by which he was appointed and before dismissal, removal or reduction in rank, an enquiry in which the concerned employee has been informed of the charges against him and given a reasonable opportunity of representation in respect of the charges is given to him. In cases of disputes pertaining to employment of these class of employees they can approach the High Court or the Supreme Court under their writ jurisdiction for violation of the guarantee under articles 309 & 311 or for violation of fundamental rights as described under chapter III of the Constitution of India. Article 14 of the Constitution protects the citizens of India against arbitrary treatment by the State.
B. Employees of Government Corporation and other statutorily formed autonomous bodies. Employees who are not direct government servants but are in the employment of Corporations and other autonomous bodies the management and administration of which are controlled largely by the Government belong to this category. It is independent service rules which have statutory force that generally protect these employees. These statutory rules are enforceable against their employer *i.e.*, Government. Therefore though they do not have direct protection of the constitution itself, since they are employed by the "State", they are permitted to take recourse to the constitutional remedy of article 32 or 226 of direct approach to the High Court or the Supreme Court in cases of violation of their fundamental rights or under writ jurisdiction.
C. *Private sector employees:* Within this sector employees who are covered by the definition of workman under Industrial Disputes Act, 1947 get a measure of employment security against retrenchment, dismissal, discharge, closure or transfer of ownership of the Industrial Establishments, *etc.* To understand the nature of protection available to them it is necessary to understand the coverage of the terms "industry " and "workman".

Industrial

Section 2(j) of Industrial Disputes Act, 1947 provides the definition of industry. The section defines industry as any business, trade, undertaking, manufacture, or calling of employers and includes any calling service employment, handicraft or industrial allocation or occupation of workman.

The judicial interpretation of this term has crystalized in the judgement of Bangalore Water Supply and Sewerage Board v/s A. Rajappa (AIR 1978 SC 548). The liberal interpretation of the term industry according to this judgement includes any systematic activity carried on by direct and substantial co-operation between employer and his workman for the protection, supply or distribution

of goods or services, with a view to satisfy human wants or wishes not being purely spiritual or religious in nature. Any capital may be invested or not; there may be any motive of profit behind such activities or not. It is irrelevant. This term includes all types of economic activity except very few small scale professional and domestic services. The nature of ownership, whether public or private sector is not relevant in construction of the term industry. However, the sovereign functions of the state are exempt from coverage under industry. Whenever an activity is covered in the meaning of the term "industry" as discussed above the relationship of employment depends upon the scope of the term "employer" and "workman". The term 'workman' covers just employees getting the benefits and protection of employment under this legislation.

Workman

Under section 2(s) of I.D. Act,1947 the term workman means any person, including an apprentice, employed in any industry, to do any skilled, un-skilled, manual, technical, operational, clerical, or supervisory work for hire or reward whether the terms of employment be express or implied. Those employees who have been dismissed, discharged or retrenched in connection with industrial dispute are included in this definition. However, the employees covered by the Air Force Act, the Army Act, the Navy Act or employees in the police service or prison services are excluded from this definition.

If some persons work in a managerial or administrative capacity or supervisors drawing wages above ₹1600 a month exercising function mainly of managerial nature, they are not covered by the definition. The approach is functional and the designation of the employee is not important. When one person performs multiple function some of which are covered by the definition and some are not, then the main work of the employee will be considered for his inclusion within the meaning of the term and subsidiary duties will be ignored.

These categories of workers get a measure of protection,if the activity in which they are engaged fall within the definition of "industry " under the Industrial Disputes Act 1947 and they are covered by the term "workman".

Employer

It is under the act in an illustrative way (but not in an exhaustive way) that the term employer is defined. Section 2 (g) defines an employer in cases of Government Department or industry carried on by or under the authority of the government as head of the department or other authority prescribed by the concerned government. For local authority the Chief Executive Officer shall be treated as the employer. For the rest of the private sector industry employer has to be understood as the ordinary meaning of the term. The private or public sector employees covered by the definition of workman are granted security of employment under Industrial Dispute Act in cases of retrenchment, dismissal, discharge, lay off, closure or transfer of ownership of the industry. The employers have to seek prior permission before closure, transfer of ownership or

retrenchment of the employees under the provision of the act. Notice and payment of compensation before retrenchment, closure, *etc.*, are condition precedent under this law. In case of lay-off also the employees are entitled to benefit of compensation from the employer. However, this benefit is available to employees who have put in continuous service of minimum one year or have actually worked for more than 240 days in a year. It is 190 days for employees working in mines.

However, in the private sector regular salaried employees who are outside the definition of workman *i.e.*, supervisory staffs drawing salary exceeding ₹1600/-p.m. or managerial or administrative staff do not have specific legal protection of employment under any law. The Indian Contract Act regulates the situation of breach of contract of employment in cases of terminations of such employees. Under this law specific performance of the contract of personal service is not permitted and the employees can only ask for compensation or damages for breach of contract. That practically means that though these employees are in the organised employment, they do not get protection of employment as such but only have a right to claim compensation as damages.

Summary of Legal Protection of Employment Security for Regular Wage/salary Workers in India

The highest level of employment security is available to public sector employees which includes direct Government servants and employees of semi-government corporations or autonomous bodies as comparatively speedy justice dispensation system is accessible to them through writ jurisdiction of the High Court and the Supreme Court of India and also through well defined legislative and constitutional provisions about conditions of employment and security of employment.

The non-government sector employees get employment protection through their service rules as per the standing orders and under I.D. Act, 1947, if they fall within the definition of workman and are working within the meaning of activity defined as industry.

This protection is in the nature of:

- Compulsory notice before termination.
- Compensation on termination except punitive dismissal or discharge or retirement or termination on account of expiry of contract, or continued ill health.
- Fair and reasonable opportunity of hearing before termination before an un-biased authority as per rules of natural justice.

But for employees outside the purview of definition of workman and activity not amounting to industry under the act, the regular wage/salaried employees get a general protection against arbitrary treatment by the employer in termination matter through interpretation of article 14 of the Constitution of India providing for equality of treatment and extended interpretation of the right to life under article 21 to include right to livelihood as part of the fundamental rights of the

citizenships of India. Thus the rules like termination of service by simply giving one month notice without affording an opportunity of hearing (Delhi Transport Corporation v/s DC Majdoor Congress-AIR-1991-SC-101) or automatic termination for absence without leave or beyond period of certain number of days (D.K.Yadav v/s J.M.A.Industries Ltd.-1993-3SCC-259) are held as illegal by the Supreme Court.

The mere existence of legal remedies, even with employees covered by the term workman under I.D. Act, 1947, does not in practice imply actual access to these remedies. This is due to fact that under I.D. Act, 1947, the adjudicatory machinery can be operationalised only by the appropriate government. The decision of the Government to mobilise or not to mobilise the remedy available under the act for the workman for their grievances is discretionary and cannot be challenged except in some defined cases. Besides this, the problem of delays and non-implementation of awards and settlements has been affecting the labour adjudication in India.

Judicial Arrangements for Resolving Employment Disputes for Regular Wage/salaried Workman

The legal and constitutional security of employment is effectively protected by the judiciary and the judicial machinery. It is necessary to briefly discuss the judicial arrangements for redressal of grievances related to employment of this class of workman.

- *Direct government servants*: Under article 309 of the Constitution of India appropriate legislature is empowered to frame rules regulating recruitment and conditions of civil servants appointed to public services or posts in connection with the affairs of the union or any state. Under article 311 these class of employees are protected from arbitrary dismissal, removal or reduction in rank.

Administrative tribunals are set up by the parliament with the aim to redress the grievances of central government employees under Article 323-A of the Constitution. These tribunals have jurisdiction to conduct disputes about recruitment and condition of service of government employees. The legislature of the state as power to constitute such tribunals for state government employees for disputes concerning their employment.

Employees of higher rank of the state government can directly approach the High Court or the Supreme Court under their writ jurisdiction. The Central government employees belonging to higher grades can approach the Supreme Court directly. These employees can also approach the Civil Court for their disputes. However, the Civil Court cannot in service matters grant the relief of reinstatement or reemployment but can order only compensation by way of damages in case of loss of employment.

The approach to High Court or the Supreme Court is generally permissible in cases of violation of fundamental rights as per article 14 to 30 of the Constitution or, if there is no alternative remedy under any law or statutory

remedy like appeal. In case of violation of rules of natural justice or in case of grave urgency, direct approach to the High Court is permissible. The High Courts and the Supreme Court have wide powers under writ jurisdiction to issue different types of writs and stay the execution of orders passed by the subordinate judiciary.

For grievances of employees working in a specific activity in the public sector like educational institution, *etc.*, there are separate tribunals under state laws for dealing with their employment related disputes. The High Courts has supervisory and appellate jurisdiction over the decisions and awards of subordinate courts and tribunals under article 227. Under Article 136, the Supreme Court has supervisory/appellate jurisdiction of similar nature.

- Employees of Semi Government Corporations or Autonomous Bodies These bodies are covered by the term "State" under article 12 of the Constitution. Therefore employees belonging to this category can directly approach the High Court under article 226 or the Supreme Court under article 32 or 136. However, since they are not direct government servants will not get the protection of article 311 for matters relating to dismissal, removal or reduction in rank. Normally the employers in this category form their own service rules which have statutory force.

These employees can also approach the Civil Court but as explained earlier the Civil Courts cannot specifically enforce contract of employment being a personal service contract and therefore cannot grant reinstatement or re-employment in cases of dismissal.

These employees also have access to the statutorily formed tribunals for their service matters.

- *Private sector employees*: If there is any employment disputes, the employees covered by the definition of the term workman in this sector can approach the labour court industrial tribunal or national tribunal. However, approach to these judicial bodies is subject to a reference by the appropriate government. If the government does not make reference employees individually cannot directly approach these judicial bodies except in cases of dismissal or discharge.

The labour court and tribunals have powers to order reinstatement in appropriate cases. These employees can also approach the Civil Court. However, the power of Civil Courts in employment matters have limitation as discussed in earlier para No.1 & 2.

CONDITIONS OF EMPLOYMENT, HEALTH AND SAFETY–LEGAL PROVISIONS FOR REGULAR WAGE/SALARIED EMPLOYEES

Provisions about health and safety, employment conditions like working hours, leave rules, *etc.*, are provided for the following different categories of employees in the organised sector employment.

WORKERS EMPLOYED IN THE FACTORIES

The Factories Act,1948 provides for safety, health, welfare, working hours, restrictions on employment of young persons and woman in factories, annual leave with wages, *etc.*, for the workers employed in the factories sector.

A factory here means any premises including the precincts thereof wherein 10 or more workers are working or were working on any day of the preceding 12 months in which any manufacturing process is carried on with aid of power or where 20 or more workers are or were so working without aid of power.

This article defines 'worker' as any person employed directly by a contractor whether for remuneration or not in any manufacturing process or other works incidental to or connected with the manufacturing process. Manufacturing process includes large number of activities covering such processes as making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal.

This act provides for elaborate provisions related to safety of workers in hazardous process and imposes restriction on the occupier of the factories not to employ woman and young children during night hours and on hazardous processes. It also provides for welfare facilities like washing, sitting, first-aid, rest rooms, crèches or and welfare officers for workers. It lays down provisions related to weekly holiday, daily working hour, intervals for rest, over-time wages, *etc.*, for workers working in factory. This act requires the inspection machinery to get the proper implementation of this law carried out.

WORKERS EMPLOYED IN SHOPS, ESTABLISHMENTS, ETC

Various state legislations are enacted for regulating conditions of employment, safety, health, *etc.*, of workers who are employed in shops and commercial establishments and in other economic activities outside the coverage of the Factories Act, 1948. These acts provides for almost similar matter as under the Factories Act, 1948. Establishment under this law means a shop, commercial establishment, residential hotel, restaurants, eating house, theatres or other place of public amusements, *etc.*

Establishments which carry out any business, trade or profession are the element of commercial establishments. Commercial establishments also include a society registered under the Societies Registration Act, 1860 and a charitable or other trust carrying on any business trade, or profession. This act provides elaborately for working hours, intervals for rest, spread over, holidays, prohibition of employment of children, restriction on employment of young persons and women during night hours or in dangerous work, rules for payment of wages, cleanliness, ventilation, lighting, first-aid in the shops and establishments.

Local authority and state government are entrusted with the enforcement and inspection of this law. The term employee under this law means a person wholly or principally employed, whether directly or through any agency and whether for

wages or other consideration, in or in connection with any establishments and includes an apprentice but does not include member of the family of the employer.

According to this law, employer is a person owning or having ultimate control over the affairs of the establishments. Where such employer is a firm or other association of individuals, any one of the individual partners or members may be treated as an employer. Where the employer is a company any one of the directors and in case of private company any one of the share holder can be held accountable as employer.

This is a very comprehensive law which regulates wide range of economic activities carried on in various non-factory sector units irrespective of the size of the establishment or the nature of ownership.

WORKERS IN MOTOR TRANSPORT UNDERTAKINGS

A special law called Motor Transport Workers Act, 1961 is applicable for matters related to the condition of work, health, welfare, limitation of employment of children and adolescents, rules for payment of wages, *etc.* According this law, an undertaking engaged in carrying a passenger or goods or both by road for hire or reward and includes a private carrier is referred to as a Motor Transport Undertaking.

A motor transport worker means a person employed in such undertaking directly or through an agency, whether for wages or not, to work in a professional capacity on a transport vehicle or to attend to duties in connection with the arrival, departure, loading or unloading of such transportation vehicles and includes driver, conductor, cleaner, station staff, line checking staff, booking clerk, cash clerk, depot clerk, time keeper, watchman or attendant. However, this definition excludes workers employed in factories or in shops and commercial establishments.

According to this act, employer is a person who or the authority which has the ultimate control over the affairs of the undertaking. Where the affairs are entrusted to any other person called manager or managing director or managing agent or any other one such other person is treated as employer.

This act provides for welfare facilities like canteens, restaurants, uniforms, medical facilities, first aid facilities, hours of work for adult and adolescents worker, rest interval, spread over, prohibition of employment of children and payment of wages including over time wages and annual leave with wages for the workers in such undertakings.

WORKERS IN PLANTATION

The Plantations Labour Act,1951, provides for conditions of service and health and welfare facility as well as leave with wages for the worker of the plantations in India.

It applies to tea, coffee, rubber, cinchona, cardamom plantation admeasuring five hectares or more and in which fifteen or more persons are employed or were employed on any day of preceding twelve months.

Employer in this act means the same as under the Motor Transport Workers Act, 1961. Plantation in this act includes actual plantation and offices, hospitals, dispenseries, schools and any other premises used for the purpose of plantation but does not include any factory under the Factories Act,1948.

Worker here means a person employed for hire or reward, directly or through any agency, to do any work, skilled, un-skilled, manual or clerical but does not include a medical officer, person employed in managerial capacity or person temporarily employed for work relating to construction, development or maintenance of building, roads, bridges, drains or canals or person whose monthly wages exceed ₹750/-. This act also provides for health and welfare facilities like drinking water, latrine and urinals, medical facilities, canteens, crèches, educational and housing facilities, liability for accident resulting from collapse of houses, welfare officers, hours of work and the restriction on employment of women and children, leave with wages, sickness and maternity benefits, *etc.*

WORKERS EMPLOYED IN MINES

The Mines Act of 1952 provides for conditions of employment as well as health and safety, hours of work and limitation on employment of young persons and women in mine. Under this law mine means any excavation where any operation for the purpose of searching for all obtaining minerals has been or is being carried on and includes oil wells, power station, open cast workings, workshops, conveyers or aerial rope-ways, premises used for depositing sand or other materials, *etc.*

An employee under this law means a manager or any person working under the appointment made by the owner, agent or manger of the mine or with the knowledge of the managers, whether for wages or not in any mining operation, in operation relating to the development of mine, in operating, servicing, maintaining or repairing, any part of the machinery used in the mine, loading for despatch of minerals, in the office of mine, in the welfare, health, sanitary or conservancy services to be provided for under this law or any work which is preparatory or incidental to or connected with mining operations.

The various liability under this law with respect to occupational health survey, safety, medical supervision of persons engaged in a mine in dangerous occupation, drinking water, conservancy, medical appliances, *etc.*, are to be borne by the owner or manager of the mine.

A person who is the immediate proprietor or lessee or occupier of the mine is the owner of the mine. But it does not include person who merely receives royalties, rent or fine from the mine or who is merely owner of the soil or one who is the proprietor subject to any lease grant or licence of the working of the mine and is not entrusted in the minerals of the mine.

The act provides for hours of work, days of rest, over time wages, limitation on employment of young children and women, leave with wages, *etc.*., There are separate provisions in the act for accidents during mining operations and

medical facilities to be provided by the owner in case of accidents or occupational dangers. Similar act also exists for regulation of employment of Dock workers under Dock Workers (Regulation of Employment) Act, 1948. So far as the safety aspects of workers in industrial sector is concerned, Workmen's Compensation Act, 1923, provides for liability of employers in cases of injuries and accident during the course of employment.

This law has preventive effects on accidents occurring in industries as compared to punitive provisions for accidents in hazardous processes. It provides for medical treatment, compensation for injuries caused in the course of employment resulting in death or disablement, occupational diseases, *etc.*

This Act entitles even the dependents of the deceased workers to receive compensation in cases of death of the worker. This act is applicable to large section of workers working in activities covered by both the organised as well as unorganized sector.

From the above discussion it is evident that within the organised sector employment all the dominant categories of wage/salaried employees working in factories, shops, commercial establishments, mines, plantations, motor transport undertaking, *etc.*, are from legal point of view are well protected with respect to their conditions of employment, health and safety provisions and welfare facilities. It is practically difficult to implement the regulatory provisions through the inspectorate machinery.

EMPLOYMENT STATUS OF WORKERS

The employment status of the persons in the organised sector is "employees" or salaried/wage paid jobs. However, it is not the case with the rest of the working population which is 91 per cent of the total and which is outside the ambit of the organised nature of employment.

The striking feature of employment of the working population in India is that self-employment and casual labour are the two main forms of employment or class of workers. Employment status of workers by gender and rural-urban.

ORIGIN IN INDIA

The striking feature of employment status of the working population in India is that self-employment and casual labourers are two main forms or class of workers among males as well as females and in rural and urban areas in India.

RURAL MALES

Out of 1000 usually employed rural males in India, 576 were self-employed, 339 were casual labourers and 85 were regular employees. While there was some fall in the number of those who were either self-employed or regular employed during the five year period, there was rather significant increase in the number of casual labour force. The casual labour grows as a class across rural-urban areas as well as among males and females.

RURAL FEMALES

Among rural female workers 589 were self-employed, 386 were casual labourers, 25 were regular employed. Also, among the rural women workers, while there was a significant fall in the number of self-employed and regular employed, the number of casual labour has gone up sizably during 1987-88 to 1993-94.

URBAN MALES

In urban areas the regular employed class, particularly for male workers, is as important as the class of self-employed. Out of 1000 usually employed male workers, 416 were self-employed, 422 were regular employed, while 162 were casual labourers. What is of concern, however, that while the number of self-employed and regular employed is falling there is a growth of casual labour even among urban male workers.

URBAN FEMALES

The number of regular employed among urban women workers increased from 275 in 1987-88 to 292 in 1993-94. The number of self-employed has fallen while the number of casual labourers has remained steady. As a single class self-employment among urban women workers remains as a predominant category. In Indian experience of services the visible and meaningful distinction of employment status is made in the above categories of self-employed, regular employed and casual labour. The main characteristics which can distinguish a self-employed is the ownership of means of production and relative autonomy and control towards the work process. It is for the purpose of data collection that the self-employment within the household enterprises or establishments is defined in economic census.

SELF-EMPLOYED IN HOUSEHOLD ENTERPRISES

Persons who operate their own farm or non-farm enterprises or are engaged independently in a profession or trade on own-account or with one or a few partners are self-employed in household enterprises. The essential feature of self-employment is that the remuneration is determined wholly or mainly by sales or profits of the goods or services which are being produced. The self-employed persons are further categorised into three groups.

OWN-ACCOUNT WORKERS

They are the self-employed persons who operate their enterprises on their own account or with one or a few partners and who during the reference period by and large, run their enterprise without hiring any labour. They may, however, have unpaid helpers to assist them in the activity of the enterprise. Legally this class may fall in the self employed entrepreneur (independent contractor) class or home based workers (dependent entrepreneur).

Employers

The self-employed persons who work on their own account or with one or a few partners and by and large run their enterprise by hiring labour. Legally this consist of small scale enterprises where the number of workers generally fall below the legislative norm for being covered under various regulatory or protective labour laws.

Helpers in Household Enterprises

Helpers in household enterprises are mostly family members. These members keep themselves engaged in their household enterprises, working full or part time and do not receive any regular salary or wages in return for the work. They do not run the enterprise on their own, but assist the related person living in the same household running the enterprise. Here it is to be noted that a departure was made in the case of identifying 'helpers' from the earlier surveys. Persons who worked in the capacity of 'helpers' but had a share in their family earnings were not considered as 'helpers' in the earlier rounds, but are considered so in the present survey. Legally this class of workers does not fall in the category of either wage paid labour, self-employed independent workers or workers in triangular relationships (contract labour).

REGULAR SALARIED/WAGE EMPLOYEE

Persons working in other's farm or non-farm enterprises, both household and nonhousehold, and getting in return salary or wages on a regular basis (and not on the basis of daily or periodic renewal of work contract) are the regular salaried/ wage employees. Persons who get time wage and those persons who receive piece wage or salary as well as paid apprentices (both full time and part-time) fall in this category.

CASUAL LABOUR

A person casually engaged in other's farm or non-farm enterprises (both household and non-household) and getting in return wage according to the terms of the daily or periodic work contract is a casual labour. Depending on whether they are so employed in 'Public works' sponsored by Govt. agencies or local bodies or in other types of work, the casual workers are classified into the two groups *viz.* Casual labour in public works and casual workers in other types of work.

Legally the casual labour as a class form the bulk of informal sector workforce, the employment status of which fluctuates from temporary to badli to work charge and the contract labour who may not have direct employment relationship but are covered by the term "employees in triangular employment relationships". These workers do not have legal protection of employment or access to state supported social security measures. Given below are some other terms associated with the various types of labour.

Manual Work

Manual work is a job essentially involving physical labour. However, jobs essentially involving physical labour but also requiring a certain level of general, professional, scientific, or technical education are not termed manual work. On the other hand, jobs not involving much of physical labour and at the same time not requiring much educational background as above, are treated as manual work.

Thus engineers, doctors, *etc.*, are not considered as manual workers even though their jobs involve some amount of physical labour. But persons, chokidars, watchman, *etc.*, are considered as manual workers even though their work involve much less physical labour. In the NSS, the manual work is specifically defined a as work pursued in one or more of the following occupational groups of the National Classification of Occupations

Wage Paid Manual Labour

A person who does manual work in return for wages in cash or kind or partly in cash and partly in kind (excluding exchange labour) is a wage paid manual labour. If some persons are self-employed and do manual work, they are not treated as a wage paid manual labour.

AGRICULTURAL LABOUR

If a person follows one or more of the following agricultural occupations in the capacity of a wage paid manual labour, (whether paid in cash or kind or both), he or she is considered engaged in agricultural labour.

The operations are:

- Farming
- Dairy farming
- Production of any horticultural commodity
- Raising of livestock, bees or poultry
- Any practice performed on a farm as incidental to or in conjunction with farm operations (including forestry and timbering and the operation for market and delivery to storage or to market or to carriage for transportation to market of farm produce.

Carriage for transportation refers to the first state of the transport from farm to the first place of disposal. The person who is engaged in fisheries is not counted among agricultural labourers.

RURAL LABOUR

Manual labour, living in rural areas, working in agricultural and/or non-agricultural occupations in return for wages paid either in cash or in kind (excluding exchange labour) is considered as rural labour. Labour in rural areas includes both agricultural and other labour.

VOLUNTARY RETIREMENT SCHEME AND GOLDEN HANDSHAKE

In the competitive time of globalization and liberalization the system of Voluntary retirement with golden handshake is widely prevalent both in public and private sectors in order to reduce the surplus manpower which for most of public sector undertakings is a major cause of losses.

- *The Unorganised Sector*: Many employment and labour laws have also applicability to the unorganized sector. The unorganised sector can be defined as that part of the work force that have not been able to organise itself in pursuit of a common objective because of certain constraints such as casual nature of employment, ignorance or illiteracy, superior strength of the employer singly or in combination, *etc.*, *viz.* construction workers, labour employed in cottage industry, handloom/powerloom workers, sweepers and scavengers, bidi and cigar workers, *etc.* Under this category are laws like the Building and Construction Workers Act 1996, the Bonded Labour System (Abolition) Act 1976, The Interstate Migrant Workers Act 1979, The Dock Workers Act 1986, The Plantation Labour Act 1951, The Transport Workers Act, The Bidi and Cigar Workers Act 1966, The Child Labour (Prohibition and Regulation) Act 1986, and The Mine Act 1952.
- *Women labour and the law*: Though women lag behind men in terms of work participation and quality of employment, women constitute a significant part of the workforce in India. According to Government sources, out of 407 million total workforce, 90 million are women workers, largely employed (about 87 per cent) in the agricultural sector as labourers and cultivators. In urban areas, the employment of women in the organised sector in March 2000 constituted 17.6 per cent of the total organised sector. Besides the Maternity Benefit Act, almost all the major central labour laws are applicable to women workers. The Equal Remuneration Act was passed in 1976, providing for the payment of equal remuneration to men and women workers for same or similar nature of work. Under this law, no discrimination is permissible in recruitment and service conditions except where employment of women is prohibited or restricted by the law. The Central Ministry of Labour and the Central Advisory Committee regularly monitors the situation regarding enforcement of the provisions of this law.

  It was held by the supreme Court of India, in the case of Vishakha vs State of Rajsthan [(1997) 6 SCC 241] that sexual harassment of working women amounts to violation of rights of gender and equality. This judgement was in respect of occupational hazards concerning the safety of women at workplaces. As a logical consequence it also amounts to violation of the right to practice any profession, occupation, and trade. The judgement also laid down the definition of sexual harassment, the preventive steps, the complaint mechanism, and the need for creating

awareness of the rights of women workers. Employers had already begun to implement these guidelines by amending the rulers under the Industrial Employment (Standing Orders) Act, 1946.

- *Focus on elimination of child labour*: The Labour Ministry had elimination of child labour as one of its major focus areas. It took an initiative for framing an omnibus legislation prescribing 14 years as the minimum age for employment and work in all occupations except agricultural activity in family and small holdings producing for own consumption. The proposed legislation would also fix a minimum age of not less than 18 years to any type of employment and work which by its nature or circumstances is likely to jeopardize the health, safety or morals of young persons. As of date, employment of children has been prohibited in thirteen occupation and fifty-one processes in the country bringing the total to 64. Their number should be raised to seventy-three by notifying additional nine hazardous occupations and processes.

In 2006, the Central Government has amended the Child Labour (Prohibition and Regulation) Act, 1986 prohibiting employment of children below fourteen years of age even in non-hazardous industry like restaurants, motels and also as domestic servants.

To further augment resources for elimination of child labour, the Ministry of Labour signed a Memorandum of Understanding with the ILO extending International Programme on Elimination of Child Labour (IPEC) in India for another two years. India under the ILO's IPEC programme has taken up 154 action programmes on child labour covering more than ninety thousand children with direct funding by the ILO/Area Office to the NGOs.

THE REFORMS AND LABOUR LAW

Changes in labour laws has consistently been the subject of discussion in recent years. It is being advocated that all talk of liberalization is futile without squarely facing up to the imperative of labour reforms. These are an integral part of the economic reforms process itself. Other efforts at raising the standard of performance on the economic front to world class are apt to stall if those managing enterprises find themselves hamstrung by outdated trade union laws and dilatory methods of adjudication of industrial disputes.

For instance, the unwieldy number of adjudicating authorities—conciliation officers, conciliation boards, courts of enquiry, labour courts, industrial tribunals and the national industrial tribunal—under the Industrial Disputes Act and the complex procedures are out of sync with the essential pre-requisites for the success and even the survival of companies in a globally integrated economy.

Productivity, customer service, cost-effectiveness, keeping to delivery schedules, technological up gradation and modernization have emerged as the criteria for judging the quality of management of companies, and labour reforms hold the key to increased competitiveness and investment flows in all these

respects. The President and Prime Minister of the country downwards have no doubt from time to time emphasized the need for introducing labour market flexibility and simplifying labour laws.

The case for labour reforms could not have been argued better than in this extract from the Economic Survey of 2005-06: Indian Labour Laws are highly protective of labour, and labour markets are relatively inflexible. These laws apply only to the organised sector. Consequently, these laws have restricted labour mobility, have led to capital-intensive methods in the organised sector and adversely affected the sector's long-run demand for labour.

EMPLOYMENT REGULATIONS

There are various Acts, which regulate labour and employment in India.
Some of the Acts are:

- Apprentices Act, 1961
- Bidi Workers Welfare Fund Act, 1976
- Bonded Labour System (Abolition) Act, 1976
- Building and Other Construction Workers (Regulation of Employment Service) Act, 1996
- Child Labour (Prohibition and Regulation) Act, 1986
- Children (Pledging of Labour) Act, 1933
- Maternity Benefit Act, 1961
- Minimum Wages Act, 1948
- National Commission for Safai Karamcharis Act, 1993
- Payment of Bonus Act, 1965
- Payment of Gratuity Act, 1972
- Payment of Wages Act, 1936
- Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981
- Cine-workers Welfare Fund Act, 1981
- Contract Labour (Regulation and Abolition) Act, 1970
- Dangerous Machines (Regulation) Act, 1983
- Dock Workers (Regulation of Employment) Act, 1948
- Dock Workers (Safety, Health and Welfare) Act, 1986
- Employees Provident Fund and Miscellaneous Provisions Act, 1952
- Employees' State Insurance Act, 1948
- Employers' Liability Act, 1938
- Equal Remuneration Act, 1976
- Factories Act, 1948
- Industrial Disputes Act, 1947
- Industrial Employment (Standing Orders) Act, 1946
- Inter-State Migrant Workmen (Regulation of Employment and Condition of Service) Act, 1979
- Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Est.s) Act, 1988

- Pensions Act, 1871
- Sales Promotion Employees (Conditions of Service) Act, 1976
- Seamen's Provident Fund Act, 1966
- Trade Union Act, 1926
- Weekly Holidays Act, 1948
- Workmen's Compensation Act, 1923

ENGAGEMENT AND DISMISSAL

India is the country with the third largest pool of scientific and technical personnel in the world and the country serves as an important attraction for foreign investors. Most managerial and technical people, and many skilled workers, speak English, and many have studied or worked abroad. Unemployment and underemployment are high, providing an abundant supply of potential employees. Although there is a large pool of underemployed educated personnel, as in much of the developing world, illiteracy acts as a brake on labour productivity in the workforce as a whole. The current industrial policy provides for hiring of foreign technicians without prior government approval.

The RBI (Reserve Bank of India) has raised the remittable per-diem rate from USD 500 to USD 1000, with an annual ceiling of USD 200,000 for services provided by foreign technicians payable to a foreign firm. Technical personnel, through authorized exchange dealers, can remit up to 75 per cent of their monthly net income. Total duration of employment of a technician is limited to 12 months at a time. Employment in excess of 12 months requires clearance by the Ministry of Home Affairs.

A member of the International Labour Organisation (ILO), India sticks to 37 ILO conventions protecting the rights of workers. Industrial relations are governed by the Industrial and Disputes Act of 1947. The Act curbs unfair labour practices by employers, workers or trade unions through imposition of fines and imprisonment. Workers may form or join unions of their choice. Nevertheless, although unionized workers affiliated with national federations number more than seven million, their unions represent less than one fourth of the workers in the so called modern sector (subject to the Factories Act of 1948), primarily in state-owned concerns, and less than two per cent of the total work force.

Increases of wage are negotiated between unions and management where workers are unionised. Most unions are linked to political parties and their politicization has, in the past, created problems for domestic and foreign employers. Labour militancy has declined in recent years, however, even among the formerly strident Communist-Marxist unions of West Bengal. Workdays lost to strikes and lock-outs have declined every year since 1991. Indian law broadly protects worker rights.

Freedom of association and collective bargaining rights were established by the Industrial Disputes Act. The Factories Act regulates working conditions in mechanized factories employing more than 10 employees or non-mechanized

factories employing more than twenty, prescribing standards for working conditions, working hours, handling and storage of materials, *etc.* Other laws regulate employment of women and children and prohibit bonded labour. However these laws have been enforced imperfectly. And working conditions for workers not subject to the Factories Act are often quite poor. Payment of wages is governed by the Payment of Wages Act, 1936 and Minimum Wages Act, 1948. Industrial wages range from about USD 3 per day for unskilled workers, to over USD 150 per month for skilled 149 production workers. Retrenchment, closure and layoffs are governed by the Industrial Disputes Act, which requires prior government permission to carry out layoffs or closure of businesses employing 100 or more workers. In practice, permission is not easily obtained. Private firms however use voluntary retirement schemes for successful downsizing.

EMPLOYEES' RIGHTS AND REMUNERATION

India's labour laws are overlapping, potentially inconsistent and cumbersome, with more than 45 pieces of relevant legislation. Employers face particular difficulties in terminating employment and closing industrial establishments.

The Workmen's Compensation Act, 1923 provides for compensation to workers for industrial accidents and occupational diseases resulting in disability and death. The minimum compensation for death is ₹80,000 and for total disability ₹90,000. The maximum compensation for death is ₹456,000 and for total disability is ₹548,000.

The Payment of Wages Act, 1936, and the Minimum Wages Act, 1948 call for regular and timely payment of wages, industry wage boards to recommend the minimum wage and fix the wage-rate structure for each industry.

The Industrial Disputes Act, 1947 covers layoffs, retrenchment compensation, labour-management disputes and unfair labour practices. The Act also addresses reinstatement of workers by a labour court or tribunal order that the employer can appeal to a higher court. A reinstated worker is entitled to 100% of wages while the decision of the higher court is pending.

Industrial establishments with 100 or more workers are required by the Act to draw up standing orders that specify working conditions such as hours, shifts, holidays, vacation, sick pay, termination rules and grievance procedures. These orders must meet minimum state standards, and they may be changed only with the consent of the workers or the unions and only to augment benefits. The code of discipline in industry adopted by the Standing Labour Committee (a type of national India International Tax and Business Guide conference held by the Ministry of Labour) defines the rights and responsibilities of employees and workers, and it provides for a grievance procedure and the settlement of disputes by voluntary arbitration.

The Industrial Employment (Standing Orders) Act, 1959 requires employers in industrial establishments to define conditions of employment. The Maternity Benefit Act, 1961 covers mandatory maternity benefits. The Payment of Gratuity

Act, 1972 requires employers to pay a gratuity to workers earning less than a certain limit upon termination of service. The Equal Remuneration Act, 1976 prohibits job and wage discrimination based on sex, except for prohibiting or restricting the employment of women in certain categories of work.

The Essential Service Maintenance Act, 1981 empowers the government to prohibit strikes in any industry that is declared essential. The Child Labour (Prohibition and Regulation) Act, 1986 prohibits child labour in hazardous occupations and regulates it in non-hazardous occupations. The Trade Unions Act, 1926 provides for registration of trade unions.

By way of amendment in 2001, it reduced the multiplicity of trade unions. The Indian government continues to oppose the linking of international trade with labour standards, but it is a signatory to 39 International Labour Organisation (ILO) conventions. Useful information about employment law and many other subjects, to better understand Indian investment climate, can be found online at:

WORKING HOURS

The Factories Act 1948 established a 48-hour working week; in practice, however, office employees normally work a five-day week of 37-38 hours. Factory workers have on average a six-day week of 43-48 hours. The Factories Act was amended in 2005 to allow women to work on night shifts (10 pm-6 am), as long as employees provide adequate safeguards for them. In most places, any work beyond nine hours per day (up to ten hours, including rest intervals) is counted as overtime, usually paid at double the normal wage. Night and Sunday work do not command a premium unless they result in overtime. Holiday work generally requires double pay, although workers may opt for a substitute paid holiday. For blue-collar staff, overtime is limited to four hours at a stretch.

PENSIONS

The Employees Provident Fund (EPF) finds applicability to most establishments employing at least 20 workers. Contributions are compulsory for employees earning up to ₹6,500 per month and voluntary for those who earn more than this amount. Employers and employees each contribute 12% (10% for certain industries) of the basic wage and dearness allowance of the employee.

From the employer's contribution, 8.33% of the wage is taken out and diverted to the Pension Fund. For the purpose of the contribution to the Pension Fund, if the pay of any employee exceeds ₹6,500 per month, the contribution payable by the employer will be limited to the amount payable on the first ₹6,500 only. The employee's contribution does not go to the Pension Fund. Four main types of pension are offered: a monthly pension upon superannuation or disability; a monthly widows' pension for death while in service; a monthly children's pension; and a monthly orphan's pension. 180 industries and classes of establishments are regularized by the Employees Provident Fund Act.

TERMINATION OF EMPLOYMENT

Existing regulations require companies to obtain government permission to close an operation or lay off workers in firms with 100 or more employees (service-industry companies, such as IT firms, are exempt). The Industrial Disputes Act, 1947 requires employers wishing to close an establishment to apply for permission at least 60 days before the intended closing date. If the government does not convey its decision within 60 days of the application, approval is deemed granted. A rejection to the Industrial Tribunal can be appealed against by a company. Workers in an establishment that is closed illegally (that is, without approval) remain entitled to full pay and benefits. Dismissal for misconduct is allowed without notice under the Industrial Employment (Standing Orders) Act, 1959. Workers are entitled by the Payment of Gratuity Act 1972 to a gratuity of up to ₹350,000 after five years of continuous service.

Large companies find it usually difficult to dismiss staff. Retrenchments and layoffs require full explanation to and prior approval from the state government. (Retrenchment under an agreement specifying a termination date requires no prior notice.) The last-in, first-out principle is usually followed. Compelled by mounting competition to cut wage costs or consider moving out of high-wage locations such as Mumbai (Bombay), several companies have resorted to voluntary retirement schemes (VRSs) or redeployment. Beneficiaries under an approved VRS of a private-sector company are exempt from tax on monetary benefits of up to ₹500,000.

WAGES AND BENEFITS

Wages and fringe benefits of one industry, or company size or region are different from that of others. Wages have two components: the basic salary and an allowance ("dearness allowance") linked to the cost-of-living index. The allowance, paid as part of the monthly salary, may be at a flat rate or on a scale graduated by income group; it often adds 60% or more to base pay. Wages are supplemented by a mandatory bonus.

Time and piece rates are both used by companies. The former is more common in organised-factory industries, such as engineering, chemicals, cement, paper and glass. Rates may be per hour, day, week or month. Piece rates, which the government has encouraged in order to boost productivity, are usually paid monthly, although casual workers are paid on a daily basis. Some industries (especially metal extracting, metal rolling, electrical machinery and glass) pay production premiums.

In the organised sector, settlements reached between trade unions and management often set wages. The central government sets a general floor minimum wage and sets other, higher minimum wages for different industries. The state governments set different minimum wages for other industries, but these are not bound by the central government's floor wage. Fringe benefits normally add 40-50% to base pay. By law, women are entitled to remuneration equal to that of men for performing equivalent work.

The following are some of the mandatory fringe benefits:

- Bonus for workers earning `3,500 or less per month (minimum of 8.33% and maximum of 20% of annual wages in factories employing ten or more). The minimum bonus payable is `2,500 and the maximum bonus actually payable is `6,000.
- Dearness allowance (based on cost-of-living index) for all levels below management in firms employing 50 or more workers.
- Provident fund at 10% of wages (12% for a large number of industries and business establishments) for all workers earning ₹6,500 or less per month.
- One day of paid vacation for every 20 days worked (granted to every worker who has worked in a factory for a period of 240 days or more).
- Health insurance (employer contributes 4.75% of total wage bill) for those who earn ₹6,500 or less per month.
- Severance pay of 15 days of average salary for each complete year of continuous service.
- Sick leave of seven days annually at full pay; half pay for those covered under the Employees' State Insurance Act.
- Casual leave of seven to ten days for unforeseen circumstances.
- Maternity leave of 12 weeks at full pay.

6

Essential Elements of a Valid Contract

Section 10 of the Indian Contract Act, 1872 provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are nothereby expressly declared to be void".

The essential elements of a valid contract are:

(i) An offer or proposal by one party and acceptance of that offer by another party resulting in an *agreement-consensus-ad-idem.*
(ii) An intention to create legal relations or an intent to have legal consequences.
(iii) The agreement is supported by lawful consideration.
(iv) The parties to contract are legally capable of contracting.
(v) Genuine consent between !he parties.
(vi) The object and consideration of the contract is legal and is not opposed to public policy.
(vii) The terms of the contract are certain.
(viii) The agreement is capable of being performed Le., it is not impossible of being performed.

Therefore, to form a valid contract there must be (1) an agreement, (2) based on the genuine consent of the parties, (3) supported by consideration, (4) made for a lawful object, and (iv) between the competent parties.

OFFER OR PROPOSAL AND ACCEPTANCE

One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance.

Thus, when one party (the offeror) makes a definite proposal to another party (the offeree) and/the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties, and a contract comes into being, assuming that all other elements are also present.

What is an *Offer or* a *Proposal?* An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in- return for a promise, act or forbearance. Section 2(a) defines proposal or offer as "when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

RULES GOVERNING OFFERS

A valid offer must comply with the following rules:

(a) An offer must be clear, definite, complete and final. It must not be vague. For example, a promise to pay an increased. Price for a horse if it proves lucky to promiser, is too vague and is not binding.

(b) An offer must be communicated to the offeree. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.

(c) The communication of an offer may be made by express words-oral or written-or it may be implied by conduct. A offers his car to B for Rs. 10,000. It is an express offer. A bus plying on a definite route goes along the street.
This is an implied *offer* on the part of the owners of the bus to carry passengers at the scheduled fares for the various stages.

(d) The communication of the offer may be general or specific. Where an offer is made to a specific person it is called *specific offer* and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals Le. the world at large, it is a *general offer* and can be accepted by any member of the general public by fulfilling the condition laid down in the offer. The leading case on the subject is *Carlill* v. *Carbolic Smoke Ball Co.* The company offered by advertisement, a reward of £ 100 to anyone who contacted influenza after using their smoke ball in the specified manner. Mrs. Carlill did use smoke ball in the specified manner, but was attacked by influenza. She claimed the reward and it was held that she could recover the reward as general offer can be accepted by anybody. Since this offer is of a continuing nature, more than one person can accept it and can even claim the reward. But if the offer of reward is for seeking some information or seeking the restoration of missing thing, then the offer can be accepted by one individual who does it first of all. The condition is that the claimant must have prior knowledge of the reward before doing that act or providing that information.

Example: A advertise in the newspapers that he will pay rupees one thousand to anyone who restores to him his lost son. B without knowing of this reward ”finds A’s ost son and restore him to A. In this case since B did not know of the reward, he cannot claim it from A even though he finds A’s lost son and restores him to A. In India also, in the case of *Harbhajan Lal* v. *Harcharan Lal* (AlA 1925 All. 539), the same rule was applied. In this case, a young boy ran away from his father’s home. The father issued a pamphlet offering a reward of As. 500 to anybody who would bring the boy home. The plaintiff saw the boy at a railway station and sent a telegram to the boy’s father. It was held that the handbill was an offer open to the world at large and was capable to acceptance by any person who fulfilled the conditions contained in the offer. The plaintiff substantially performed the conditions and was entitled to the reward offered.

An Offer must be Distinguished from:

(a) *An invitation to treat or an invitation to make* an *offer: e.g.*, an auctioneer’s request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self-service store or a shopkeeper’s catalogue of prices are invitations to an offer.

(b) A *mere statement of intention: e.g.*, an announcement of a coming auction sale. Thus a person who attended the advertised place of auction could not sue for breach of contact if the auction was cancelled *(Harris* v. *Nickerson* (1873) L.A. 8 QB 286).

(c) A *mere communication of information in the course of negotiation: e.g.*, a statement of the price at which one is prepared to consider(negotiating the sale of piece of land *(Harvey* v. *Facey* (1893) A.C. 552).

An offer that has been communicated, properly continues as such until it lapses, or until it is revoked by the offeror, or rejected or accepted by the offeree.

LAPSE OF OFFER

Section 6 deals with various modes of lapse of an offer. It states that an offer lapses if:

(a) It is not accepted within the specified time (if any) or after a reasonable time, if none is specified.

(b) It is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, *e.g.*, by sending a letter by mail when early reply was requested

(c) The offeree rejects it by distinct refusal to accept it;

(d) Either the offerer or the offeree dies before acceptance;

(e) The acceptor fails to fulfill a condition precedent to a acceptance.

(f) The offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

REVOCATION OF OFFER BY THE OFFEROR

An offer may be revoked by the offeror at any time before acceptance. Like any offer, revocation must be communicated to the offeree, as it does not take

effect until it is actually communicated to the offeree. Before its actual communication, the offeree, may accept the offer and create a binding contract. The revocation must reach the offeree before he sends out the acceptance.

An offer to keep open for a specified time(option) is not binding unless it is supported by consideration.

ACCEPTANCE

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under Section 2(b) of the Contract Act when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise.".

Rules Governing Acceptance:

(a) Acceptance may be express Le. by words spoken or written or implied from the conduct of the parties.

(b) If a particular method of acceptance is prescribed offer must be accepted in the prescribed manner.

(c) Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.

(d) A counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, *e.g.*, where a horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990, the offer lapses by rejection.

(e) Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Where the offeree merely intended to accept but does not communicate his intention to the offeror, there is no contract. Mere mental acceptance is not enough.

(f) Mere silence on the part of the offeree does not amount to acceptance. Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree as an acceptance. In other words, the offeror can prescribed the mode of acceptance but not the mode of rejection. In *Felthouse* v. *Bindley* (1865), F offered by letter to buy his nephew's horse for £ 30 saying: "If I hear no more about him I shall consider the horse is mine at £ 30". The nephew did not reply, but he told an auctioneer who was selling his horses not to sell that particular horse because it was sold to his uncle. The auctioneer inadvertently sold the horse. *Held:* F had no claim against the auctioneer because the horse had not been sold to him, his offer of £ 30 not having been accepted.

(g) If the offer is one which is to be accepted by being acted upon, no communication of acceptance to the offeror is necessary, unless communication is stipulated for in the offer itself. Thus, if a reward is offered for finding a lost dog, the offer. is accepted by finding the dog after reading about the offer,. And it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.

(h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.

An acceptance *never* precedes an offer. There can be no acceptance of an offer which is not communicated. Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance. Thus in *Lalman Shukla* v. *Gauri Duff* (1913) where a servant brought the boy without knowing of the reward, he was held not entitled to reward because he did not know about the offer.

STANDING OFFERS

Where a person offers to another to supply specific goods, up to a stated quantity or in any quantity which may be required, at a certain rate, during a fixed period, he makes a standing offer. Thus, a tenderto supply goods as and when required, amounts to a standing offer. A standing offer or a tender is of the nature of a continuing offer. An acceptance of such an offer merely amounts to an intimation that the offer will be considered to remain open during the period specified and that it will be accepted from time to time by placing order during the period specified quantities. Each successive order given, while the offer remains in force, is an acceptance of the standing offer as to the quantity ordered, and creates a seperate contract. It does not bind either party unless and until such orders are given. Where P tendered to supply goods to L upto a certain amount and over a certain period, L's order did not come up to the amount expected and P sued for breach of contract *Held:* Each order made was a separate contract and P was bound to fulfill orders made, but there was no obligation on L to make any order to all *(Percival Ltd.* v. *L.C.C. (1918).*

TICKETS

Tickets purchased for entrance into places of amusement, or tickets issued by railways or bus companies, clock-room tickets, and many other contracts set out in printed documents contain numerous terms, of many of which the partly receiving the ticket or document is ignorant. If a passenger on a railway train receives a ticket on the face of which is printed this ticket is issued subject to the notices, regulations and conditions contained, in the current timetables of the railway", the regulations and conditions referred to are deemed to be communicated to him and he is bound by them whether or not he has read them. He is bound even if he is illiterate and unable to read them. But it is important that the notice of the conditions is contemporaneous with the making of the contract and not after the contract has been made.

CONTRACTS BY POST

Contracts by post are subject to the same rules as others, but because of their importance, these are stated below separately:

(a) An offer by post may be accepted by post, unless the offero(indicates anything to the contrary.

(b) An offer is made only when it actually reaches the offeree and not. Before, *i.e.*, when the letter containing the offer is delivered to the offeree.
(c) An acceptance is made as far as the offeror is concerned, as soon as the letter containing the acceptance is posted, to offeror's correct address; it binds the offeror, but not the acceptor. An acceptance binds the acceptor only when the letter containing the acceptance reaches the offeror. The result is that the acceptor can revoke his acceptance before it reaches the offeror.
(d) An offer may be revoked before the letter containing the acceptance is posted. An acceptance can be revoked before it reaches the offeror.

CONTRACTS OVER THE TELEPHONE

Contracts over the telephone are regarded the same in principle as those negotiated by the parties in the actual presence of each other. In both cases an oral offer is made and an oral acceptance is expected. It is important that the acceptance must be audible, heard and understood by the offeror. If during the conversation the telephone lines go, "dead" so that the offeror does not hear the offeree's word of acceptance, there is no contract at the moment. If the whole conversation is repeated and the offeror hears and understands the words of acceptance, the contract is complete *(KanhaiyalaJv. Dineshwarchandra* (1959) AIR, M.P. 234).

INTENTION TO CREATE LEGAL RELATIONS

The second essential element of a valid contract is that there must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship. As such they are not contracts. A proposal or an offer is made with a view to obtain the assent to the other party and when that other party expresses his willirness to the act or abstinence proposed, he accepts the offer and a contract is made between the two. But both offer and acceptance must be made with the intention of creating legal relations between the parties. The test of intention is objective. The Courts seek to give effect to the presumed intention of the parties. Where necessary, the Court would look into the conduct of the parties, for much can be inferred from the conduct. The Court is not concerned with the mental intention of the parties, but rather with what a reasonable man would say, was the intention of the parties, having regard to all the circumstances of the case. For example, if two persons agree to assist each other by rendering advice, in the pursuit of virtue, science or art, it cannot be regarded as a contract. In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. But this presumption is rebuttable which means that it must be shown that the parties did not intend to be legally bound.

CONSIDERATION

Need for Consideration: Consideration is one of the essential elements of a valid contract. The requirement of consideration stems from the policy of extending the arm of the law to the *enforcement of mutual promises of parties. A mere promise is not enforceable at law. For example, if A promises to make a gift of Rs. 500 to B, and subsequently changes his mind, B cannot succeed against A for breach of promise, as B has not given anything in return. It is only when a promise is made for something in return from the promisee, that such promise can be enforced by law against the promisor. This something in return is the consideration for the promise.*

DEFINITION OF CONSIDERATION

Sir Fredrick Pollock has defined consideration "as an act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought." It is "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" *(Currie* v. *Misa* (1875) L.R. 10 Ex. 153).

Section 2(d) of the Indian Contract Act, 1872 defines consideration thus: "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, 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". The fundamental principle that consideration is essential in every contract, is laid down by both the definitions but there are some important points of difference in respect of the nature and extent of consideration and parties to it under the two systems of law:

(a) *Consideration at the desire of the promisor:* Section 2(d) of the Act begins with the statement that consideration must move at the desire or request of the promisor. This means that whatever is done must have been done at the desire of the promisor and not voluntarily or not at the desire of a third party. If A rushes to B's help whose house is on fire, there is no consideration but a voluntary act. But if A goes to B's help at B's request, there is good consideration as B did not wish to do the act gratuitously.

(b) *Consideration may move from the promisee or any other person:* In English law, consideration must move from the promisee, so that a stranger to the consideration cannot sue on the contract. A person seeking to enforce a simple contract must prove in court that he himself has given the consideration in return for the promise he is seeking to enforce.

In Indian law, however, consideration may move from the promisee or any other person, so that a stranger to the consideration may maintain a suit. In *Chinnaya* v.*Ra,maya* (1882) 4 Mad. 137, a lady by a deed of gift made over certain property to her daughter directing her to pay an annuity to the donor's brother as had been done by the donor herself before she gifted the property. On

the same day, her daughter executed in writing in favour of the donor's brother agreeing to pay the community. Afterwards the donee (the daughter) declined to fulfil her promise to pay her uncle saying that no consideration had moved from him. The Court, however, held that the uncle could sue even though no part of the consideration received by his niece moved from him. The consideration from her mother was sufficient consideration.

PRIVITY OF CONTRACT

A stranger to a contract cannot sue both under the English and Indian law for want of privity of contract. The following illustration explains this point. In *Dunlop Pneumatic Tyre Co.* v. *Selfridge Ltd.* (1915) A.C. 847. D supplied tyres to a wholesaler, X, on condition that any retailer to whom X re-supplied the tyres should promise X, not to sell them to the public below D's list price. X supplied tyres to S upon this condition, but nevertheless S sold the tyres below the list price. *Held:* There was a contract between D and X and a contract between X and S. Therefore, D could not obtain damages from S, as D had not given any consideration for S's promise to X nor was he party to the contract between D and X. Thus, a person who is not a party to a contract cannot sue upon it even though the contract is for his Gift. A, who is indebted to B, sells his property to C, and C he purchaser of the property, promises to payoff the debt to B. In case C fails to pay B, B has no right to sue C for there is no privity of contract between B and C.

The leading English case on the point is *Tweddle* v. *Atkinson* (1861) 1 Band Section 393. In this case, the father of a boy and the father of a girl who was to be married to the boy, agreed that each of them shall pay a sum of money to the boy who was to take up the new responsibilities of married life. After the demise of both the contracting parties, the boy (the husband) sued the executors of his father-in-law upon the agreement between his father-in-law and his father. *Held:* the suit was not maintainable as the boy was not a party to the contract.

Exception to the doctrine of privity of contract: Both the Indian law and the English law recognize certain exceptions to the rule that a stranger to a contract cannot sue on the contract.

In the following cases, a person who is not a party to a contract can enforce the contract:

(i) A beneficiary under an agreement to create a trust can sue upon the agreement, though not a party to it, for the enforcement of the trust so as to get the trust executed for his benefit. In *Khawaja Muhammad* v. *Hussaini Begum,* (1910) 32 All. 410, it was held that where a Mohammedan lady sued her father-in-law to recover arrears of allowance payable to her by him under an agreement between him and her own father in consideration of her marriage, she could enforce the promise in her favour insofar as she was a beneficiary under the agreement to make a settlement in her favour, and she was claiming as beneficiary under such settlement.

(ii) An' assignee under an assignment made by the parties, or by the operation of law (*e.g.*, in case of death or insolvency), can sue upon the contract for the enforcement of his rights, title and interest. But a mere nominee (Le., the person for whose benefit another has insured his own life) cannot sue on the policy because the nominee is not an assignee.

(iii) In cases of family arrangements or settlements between male members of a Hindu family which provide for the maintenance or expenses for marriages of female members, the latter though not parties to the contract, possess an actual beneficial right which place them in the position of beneficiaries under the contract, and can therefore, sue.

(iv) In case of acknowledgement of liability, *e.g.*, where A receives money from B for paying to C, and admits to C the receipt of that amount, then A constitutes himself as the agent of C.

(v) Whenever the promisor is by his own conduct stopped from denying his liability to perform the promise, the person who is not a party to the contract can sue upon it to make the promisor liable.

(vi) In cases where a person makes a promise to an individual for the benefit of third party and creates a charge on certain immovable property for the purpose, the third party can enforce the promise "though, he is stranger to the contract.

KINDS OF CONSIDERATION

Consideration may be:

(a) *Executory or future* which means that it makes the form of promise to be performed in the future, *e.g.*, an engagement to marry someone; or

(b) *Executed* or present in which it is an act or forbearance made or suffered for a promise. In other words, the act constituting consideration is wholly or completely performed, *e.g.*, if A pays today Rs. 100 to a shopkeeper for goods which are promised to be supplied the next day, A has executed his consideration but the shopkeeper is giving executory consideration - a promise to be executed the following day. If the price is paid by the buyer and the goods are delivered by the seller at the same time, consideration is executed by both the parties.

(c) Past which means a past act or forbearance, that is to say, an act constituting consideration which took place and is complete (wholly executed) before the promise is made.

According to English law, a consideration may be executory or executed but never past. The English law is that past consideration is no consideration. *The Indian law recognizes all the above three kinds of consideration.*

Rules Governing Consideration:

(a) Every simple contact must be supported by valuable consideration otherwise it is formally void subject to some exceptions.

(b) Consideration may be an act of abstinence or promise.

(c) There must be mutuality Le., each party must do or agree to do something. A gratuitous promise as in the case of subscription for charity, is not enforceable. For example, where A promises to subscribe Rs. 5,000 for the repair of a temple, and then refuses to pay, no action can be taken against him.
(d) Consideration must be real, and not vague, indefinite, or illusory, *e.g.*, a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.
(e) Although consideration must have some value, it need not be adequate Le., a full return for the promise. Section 25 (Exp. II) clearly provides that "an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate." It is upon the parties to fix their own prices. For example, where A voluntarily agreed to sell his motor car for Rs. 500 to S, it became a valid contract despite the inadequacy of the consideration.
(f) Consideration must be lawful, *e.g.*, it must not be some illegal act such as paying someone to commit a crime. If the consideration is unlawful, the agreement is void.
(g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration. For example, if a seaman deserts his ship so breaking his contract of service and is induced to return to his duty by the promise for extra wages, he cannot later sue for the extra wages since he has only done what he had already contracted for: *Stilk* v. *Myrick* (1809).

WHEN CONSIDERATION' NOT NECESSARY

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian Contract Act lays down certain exceptions which make a promise without consideration valid and binding.

Thus, an agreement without consideration is valid:

1. If it is expressed in writing and registered and is made out of natural love and affection between parties standing in a near relation to each other; or
2. If it is made to compensate a person who has already done something voluntarily for the promisor, or done something which the promisor was legally compliable to do; or
3. If it is a promise in writing and signed by the person to be charged therewith, or by his agent, to pay a debt barred by the law of limitation.
4. Besides, according to Section 185 of the Indian Contract Act, consideration is not required to create an agency.
5. In the case of gift actually made, no consideration is necessary. There needn't be nearness of relation and even if it is, there need not be any natural love and affection between them. .

The requirements in the above exceptions are noteworthy. The first one requires written and registered promise. The second may be oral or in writing and the third must be in writing.

Illustrations:

A, for natural love and affection, promises to give his son B Rs. 10,000. A put his promise to 8 into writing and registered it. This is a contract. A registered agreement between a husband and his wife to pay his earnings to her is a valid contract, as it is in writing, is registered, is between parties standing in near relation, and is for love and affection *(Poonoo Bibi* v. *Fyaz Buksh,* (1874) 15 80m LA. 57). But where a husband by a registered document, after referring to quarrels and disagreement between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was held that the promise was unenforceable, as it was not made for love and affection *(Rajluckhy Deb* v. *Bhootnath* (1900) 4 C.W.N. 488).

WHETHER GRATUITOUS PROMISE CAN BE ENFORCED

A gratuitous promise to subscribe to a charitable cause cannot be enforced, but if the promises is put to some detriment as a result of his acting on the faith of the promisee and the promisor knew the purpose and also knew that on the faith of the subscription an obligation might be incurred, the promisor would be bound by promise *(Kedar Nath* v. *Gorie Mohan 64).*

It may be noted that it is not necessary that the promisor should benefit by the consideration, it is sufficient if the promisee does some act from which a third person is benefited and he would not have done that act but for the promise of the promisor. For example, Y requests X for loan, who agrees to give loan to Y if S gives guarantee of repayment of the loan. S gives such a guarantee of repayment by Y. Thereupon X gives loan to Y. Here S will be promisor and X the promisee, but from X's action, benefit is derived by Y and not by S. X would not have given the loan to Y had S not given the guarantee of repayment of loan. Thus the benefit conferred on Y by X at the request of S is a sufficient consideration on the part of X as against the promise of S to replay the loan. Alternatively, it may be said that the detriment which X suffered by giving loan to Y at the request of S is sufficient consideration on the part of X in respect of the promise of S to repay the loan.

Consideration therefore, is some detriment to the promisee or some benefit to the promisor. Detriment to one person and benefit to the other are the same things looked from two angles. Ordinarily a promisor is not bound by his promise, unless some consideration is offered by the promisee.

TERMS MUST BE CERTAIN

It follows from what has been explained in relation to offer, acceptance and consideration that to be binding, an agreement must result in a contract. That is to say, the parties must agree on the terms of their contract. They must make their intentions clear in their contract. The Court will not enforce a contract the

terms of which are uncertain. Thus, an agreement to agree in the future (a *contract to make* a *contract)* will not constitute a binding contract *e.g.*, a promise to pay an actress a salary to be *"mutually agreed between us"* is not a contract since the salary is not yet agreed: *Loftus* v. *Roberts (1902).*

Similarly, where the terms of a final agreement are too vague, the contract will fail for uncertainty. Hence, the terms must be definite or capable of being made definite without further agreement of the parties. The legal maxim, therefore, is "a *contract to contract is not* a *contract"*. If you agree "subject to contract" or "subject to agreement", the contract does not come into existence, for there is no definite or unqualified acceptance.

RESUME

Thus a contract is always based upon:

(i) Agreement *(consensus ad item)* an unqualified acceptance of a definite offer;
(ii) An intent to create legal obligations; and
(iii) Consiideration.

FLAWS IN CONTRACT

There may be the circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement.

Where there is no real agreement, the law has three remedies:

Firstly: The agreement may be treated as of no effect and it will then be known as void agreement.

Secondly: The law may give the party aggrieved the option of getting out of his bargain, and the contract is then known as voidable.

Thirdly: The party at fault may be compelled to pay damages to the other party.

VOID AGREEMENT

A void agreement is one which is destitute of all legal effects. It cannot be enforced and confers no rights on either party. It is really not a contract at all, it is non-existent. Technically the words 'void contract' are a contradiction in terms. But the expression provides a useful label for describing the situation that arises when a 'contract' is claimed but in fact does not exist. For example, a minor's contract is void.

VOIDABLE CONTRACT

A voidable contract is one which a party can put to an end. He can exercise his option, if his consent was not free. The contract will, however be binding, if he does not exercise his option to avoid it within a reasonable time. The consent of a party is not free and so he is entitled to avoid the contract, if he has given misrepresentation, fraud, coercion or undue influence.

ILLEGAL AGREEMENT

An illegal agreement is one which, like the void agreement has no legal effects as between the immediate parties. Further transactions collateral to it also become tainted with illegality and are, therefore, not enforceable. Parties to an unlawful agreement cannot get any help from a Court of law, for no polluted hands shall touch the pure fountain of justice. On the other hand, a collateral transaction can be supported by a void agreement.

For example, one party may have deceived the other party, or in some other way there may be no genuine consent. The parties may be labouring under a mistake, or one or both the parties may be incapable of making a contract. Again, the agreement may be illegal or physically impossible. All these are called "the *FLA WS* in contract or the *VICES* of contract".

The chief flaws in contract are:

(i) Incapacity
(ii) Mistake
(iii) Misrepresentation
(iv) Fraud
(v) Undue Influence
(vi) Coercion
(vii) Illegality
(viii) Impossibility.

(i) *Flaw in Capacity - Capacity and Persons:* In law, persons are either natural or artificial. Natural persons are human beings and artificial persons are corporations. Contractual capacity or incapacity is an incident of personality.

The general rule is that all natural persons have full capacity to make binding contracts. But the Indian Contract Act, 1872 admits an exception in the case of:

(i) Minors,
(ii) Lunatics, and
(iii) Persons disqualified from contracting by any law to which they are subject.

These persons are not competent to contract. Section 11 provides that every "person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. "A valid agreement requires that both the parties should understand the legal implications of their conduct. Thus both must have a mature mind.

The legal yardstick to measure maturity, according to the law of contract is, that both should be major and of sound mind and if not, the law would presume that the maturity of their mind has not reached to the extent of visualising the pros and cons of their acts, hence, a bar on minors and lunatics competency to contract. The contractual capacity of a corporation depends on the manner in which it was created.

MINOR'S CONTRACT

According to the Indian Majority Act, 1875, a minor is a person, male or female, who has not completed the age of 18 years. In case a guardian has been appointed to the minor or where the minor is under the guardianship of the Court of Wards, the person continues to be a minor until he completes his age of 21 years. According to the Indian Contract Act, no person is competent to enter into a contract who is not of the age of majority. It was finally laid down by the Privy Council in the leading case of *Mohiri Bibee* v. *Dharmodas Ghose,* (1903) 30 Cal. 539, that a minor has no capacity to contract and minor's contract is absolutely void. In this case, X, a minor borrowed Rs. 20,000 from Y, a money lender. As a security for the money advanced, X executed a mortgage in V's favour. When sued by Y, the Court held that the contract by X was void and he cannot be compelled to repay the amount advanced by him. Indian Courts have applied this decision to those cases where the minor has incurred any liability or where the liabilities on both sides are outstanding. In such cases, the minor is not liable. But if the minor has carried out his part of the contract, then, the Courts have held, that he can proceed against the other party. The rationale is to protect minor's interest. According to the Transfer of Property Act, a minor cannot transfer property but he can be a transferee (person accepting a transfer). This statutory provision is an illustration of the above principle.

The following points must be kept in mind with respect to minor's contract:

(a) A minor's contract is altogether void in law, and a minor cannot bind himself by a contract. If the minor has obtained any benefit, such as money on a mortgage, he cannot be asked to repay, nor can his mortgaged property be made liable to pay.

(b) Since the contract is void *ab initio,* it cannot be ratified by the minor on attaining the age of majority.

(c) Estoppel is an important principle of the law of evidence. To explain, suppose X makes a statement to Y and intends that the latter should believe and act upon it. Later on, X cannot resile from this statement and make a new one. In otherwords, X will be stopped from denying his previous statement. But a minor can always plead minority and is not stopped from doing so even where he had produced a loan or entered into some other contract by falsely representing that he was of full age, when in reality he was a minor.

But where the loan was obtained by fraudulent representation by the minor or some property was sold by him and the transactions are set aside as being void, the Court may direct the minor to restore the property to the other party.

For example, a minor fraudulently overstates his age and takes delivery of a motor car after executing a promissory note in favour of the trader for its price. The minor cannot be compelled to pay the amount to the promissory note, but the Court on equitable grounds may order the minor to return the car to the trader, if it is still with the minor.

Thus, according to Section 33 of the Specific Relief Act, 1963 the Court may, if the minor has received any benefit under the agreement from the other party require him to restore, so far as may be such benefit to the other party, to the extent to which he or his estate has been benefited thereby.

(d) A minor's *estate* is liable to pay a *reasonable price* for necessaries supplied to him or to anyone whom the minor is bound to support (Section 68 of the Act).
The necessaries supplied must be according to the position and status in life of the minor and must be things which the minor actually needs. The following have also been held as necessaries in India.
Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy; costs incurred in defending him in a prosecution; and money advanced to a Hindu minor to meet his marriage expenses have been held to be necessaries.

(e) An agreement by a minor being void, the Court will never direct specific performance of the contract.

(f) A minor can be an agent, but he cannot be a principal nor can he be a partner.
He can, however, be admitted to the benefits of a partnership.

(g) Since a minor is never personally liable, he cannot be adjudicated as an insolvent.

(h) An agreement by a parent or guardian entered into on behalf of the minor is binding on him provided it is for his benefit or is for legal necessity. For, the guardian of a minor, may enter into contract for marriage on behalf of the minor, and such a contract would be good in law and an action for its breach would lie, if the contract is for the benefit of the minor *(Rose Fernandez* v. *Joseph Gonsalves,* 48 Bom. L. R. 673) *e.g.*, if the parties are of the community among whom it is customary for parents to contract marriage for their children. The contract of apprenticeship is also binding.

However, it has been held that an agreement *for service,* entered into by a father on behalf of his daughter who is a minor, is not enforceable at law *(Raj Rani* v. *Prem Adib,* (1948) 51 80m. L.R. 256).

Lunatic's Agreement (Section 2): A person of unsound mind is a lunatic. That is to say for the purposes of making contract, a person is of unsound mind if at the time when he makes the contract, he is incapable of understanding it and of forming rational judgment as to its effect upon his interests. A person unsound mind cannot enter into a contract. A lunatic's agreement is therefore void. But if he makes a contract when he is of sound mind, *i.e.*, during lucid intervals, he will be bound by it.

A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests cannot contract whilst such delirium or state of drunkenness

lasts. A person under the influence of hypnotism is temporarily of unsound mind. Mental decay brought by old age or disease also comes within the definition.

Agreement by persons of unsound mind are void. But for necessaries supplied to a lunatic or to any member of his family, the lunatic's estate, if any, will be liable. There is no personal liability incurred by the lunatic. If a contract entered into by a lunatic or person of unsound mind is for his benefit, it can be enforced (for the benefit) against the other party (Jugal Kishore v. Cheddu, (1903) I All. L.J 43).

PERSONS DISQUALIFIED FROM ENTERING INTO CONTRACT

Some statues disqualify certain persons governed by them, to enter into a contract. For example, Oudh "Land Revenue Act provides that where a person in Oudh is declared as a 'disqualified proprietor' under the Act, he is incompetent to alienate his property.

ALIEN ENEMIES

A person who is not an Indian citizen is an alien. An alien may be either an alien friend or a foreigner whose sovereign or State is at peace with India, has usually contractual capacity of an Indian citizen.

On the declaration of war between his country and India he becomes an alien enemy. A contract with an alien enemy becomes unenforceable on the outbreak of war. For the purposes of civil rights, an Indian citizen of the subject of a neutral state who is *voluntarily* resident in hostile territory or is carrying on business there is an alien enemy. Trading with an alien enemy is considered illegal, being against public policy.

FOREIGN SOVEREIGNS AND AMBASSADORS

Foreign sovereigns and accredited representatives of foreign states, *i.e.*, Ambassadors, High Commissioners enjoy a special privilege in that they cannot be sued in Indian Courts, unless they voluntarily submit to the jurisdiction of the Indian Courts.

Foreign Sovereign Governments can enter into contracts through agents residing in India. In such cases the agent becomes personally responsible for the performance of 'the contracts.

PROFESSIONAL PERSONS

In England, barristers-at law were prohibited by the etiquette of their profession from suing for their fees. So also are the Fellow and Members of the Royal College of Physicians and Surgeons. But they can sue and be sued for all claims other than their professional fees. In India, there is no such disability and a barrister, who is in the position of an advocate with liberty both to act and plead, has a right to contract and to sue for his fees *(Nihal Chand* v. *Oilawar Khan,* 1933 All. L.R. 417).

CORPORATIONS

A corporation is an artificial person created by law, *e.g.*, a company registered under the Companies Act, public bodies created by statute, such as Municipal Corporation of Delhi. A corporation exists only in contemplation of law and has no physical shape or form.

The Indian Contract Act does not speak about the capacity of a corporation to enter into a contract. But if properly incorporated, it has a right to enter into a contract. It can sue and can be sued in its own name. There are some contracts into which a corporation cannot enter without its seal, and others not at all. A company, for instance, cannot contract to marry. Further, its capacity and powers to contract are limited by its charter or memorandum of association. Any contract beyond such power in *ultra vires* and void.

MARRIED WOMEN

*I*n India there is no difference between a man and a woman regarding contractual capacity. A woman married or single can enter into contracts in the same ways as a man. She can deal with her property in any manner she likes, provided, of course, she is a major and is of sound mind.

Under the English law, before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, a husband was responsible for his wife's contracts but since 1935 this liability no longer arises unless the wife is acting as the husband's agent. Now, therefore, even in England a married woman has full contractual capacity, and can sue and be sued in her own name.

FLAW IN CONSENT

The basis of a contract is agreement, *i.e.*, mutual consent. In other words, the parties should mean the something in the same sense and agree voluntarily. It is when there is consent, that the parties are said to be *consensus ad idem i.e.*, their minds have met. Not only consent is required but it must be a free consent. Consent is not free when it has been caused by coercion, undue influence, misrepresentation, fraud or mistake. These elements if present, may vitiate the contract'.

When this consent is wanting, the contract may turn out to be void or voidable according to the nature of the flaw in consent. Where there is no consent, there can be no contract as in the case of mutual mistake. Where there is consent, but it is not free, a contract is generally voidable at the option of the party whose consent is not free. In the case of misrepresentation, fraud, coercion, undue influence, the consent of one of the parties is induced or caused by the supposed existence of a fact which did not exist.

Mistake (Sections 20 and 21): The law believes that contracts are made to be performed. The whole structure of business depends on this as the businessmen depend on the validity of contracts. Accordingly, the law says that it will not aid anyone to evade consequences on the plea that he was mistaken.

On the other hand, the law also realises that mistakes do occur, and that these mistakes are so fundamental that there may be no contract at all. If the law recognises mistake in contract, the mistake will render the contract *void.*

EFFECT OF MISTAKE

A mistake in the nature of miscalculation or error of judgement by one or both the parties has no effect on the validity of the contract. For example, if A pays an excessive price for goods under a mistake as to their true value, the contract is binding on him *(Leaf* v. *International Galleries* (1950) 1 All E.R. 693). Therefore, mistake must be B *"vital operative mistake", i.e.*, it must be a mistake of fact which is fundamental to contract.

To be operative so as to render the contract void, the mistake must be:

(a) Of fact, and not of law or opinion;
(b) The fact must be essential to agreement, *i.e.*, so fundamental as to negative
(c) The agreement; and
(d) Must be on the part of both the parties.

Thus, where both the parties to an agreement are under a mistake as to a matter of fact essential agreement, the agreement is void (Section 20). Such a mistake prevents the formation of any contract at all and the Court will declare it void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The agreement is void.

MISTAKE OF LAW AND MISTAKE OF FACT

Mistakes are of two kinds: (i) mistake of law, and (ii) mistake of fact. If there is a mistake of law of the land, the contract is binding because everyone is deemed to have knowledge of law of the land and ignorance of law is no excuse *(ignorantia juris non-excusat).* But mistake of foreign law and mistake of private rights are treated as mistakes of fact and are excusable. The law of a foreign country is to be proved in Indian Courts as ordinary facts. So mistake of foreign law makes the contract void. Similarly, if a contract is made in ignorance of private right of a party, it would be void, *e.g.*, where A buys property which already belongs to him.

MUTUAL OR UNILATERAL MISTAKE

Mistake must be mutual or bilateral, Le., it must be on the part of both parties. A unilateral mistake, Le., mistake on the part of only one party, is generally of no effect unless (i) it concerns some fundamental fact and (ii) the other party is aware of the mistake. For this reason, error of judgement on the part of one of the parties has no effect and the contract will be valid.

MUTUAL OR COMMON MISTAKE AS TO SUBJECT-MATTER

A contract is void when the parties to it assume that a certain state of things exist which does not actually exist or in their ignorance the contract means one thing to one and another thing to the other, and they contract subject to that

assumption or under that ignorance. There is a mistake on the part of both the parties. Such a mistake may relate to the existence of the subject matter, its identity, quantity or quality.

(a) *Mistake as to existence of the subject matter:* Where both parties believe the subject matter of the contract to be in existence but in fact, it is not in existence at the time of making the contract, there is mistake and the contract is void. In *Couturier* v. *Hastie* (1857), there was a contact to buy cargo described as shipped from port A to port B and believed to be at sea which in fact got lost earlier unknown to the parties and hence not in existence at the time of the contract. *Held,* the contract was void due to the parties mistake.

(b) Mistake as to identity of the subject matter: Where the parties are not in agreement to the identity of the subject matter, *i.e.*, one means one thing and the other means another thing, the contract is void; there is no consensus ad idem.
In *Raffles* v. *Wichelhous* (1864), A agreed to buy from B a cargo of cotton to arrive "ex Peerless form Bombay". There were two shows called "Peerless" sailing from Bombay, one arriving in October and the other in December. A meant the earlier ship and B the latter. *Held,* the contract was void for mistake.

(c) *Mistake* as *to quantity of the subject matter:* There may be a mistake as to quantity or extent of the subject matter which will render the contract void even if the mistake was caused by the negligence of a third-party. In *Henkel* v. *Pape* (1870), P wrote to H inquiring the price of rifles and suggested that he might buy as many as fifty. On receipt of a reply he wired "send three rifles". Due to the mistake of the telegraph clerk the message transmitted to H was "send the rifles". H despatched 50 rifles. *Held,* there was no contract between the parties.

(d) Mistake as to quality of the subject-matter or promise: Mistake as to quality raises difficult questions. If the mistake is on the part of both the parties the contract is void. But if the mistake is only on the part of one party difficulty arises.

The general rule is that a party to a contract does not owe any duty to the other party to discloses all the facts in his possession during negotiations. Even if he knows that the other party is ignorant of or under some misapprehension as to an important fact, he is under no obligation to enlighten him. Each party must protect his own interests unaided. In contract of sale of goods, this rule is summed up in the maxim *caveat emptor* (Let the buyer beware.) The seller is under no duty to reveal the defects of his goods to the buyer, subject to certain conditions.

UNILATERAL MISTAKE AS TO NATURE OF THE CONTRACT

The general rule is that a person who signs an instrument is bound by its terms even if he has not read it. But a person who signs a document under a fundamental mistake as to its nature (not merely as to its contents) may have it avoided provided the mistake was due to either-

(a) The blindness, illiteracy, or senility of the person signing, or
(b) A trick or fraudulent misrepresentation as to the nature of the document.

In *Fosterv. Mackinnon* (1869), M, a senile man of feeble sight, endorsed a bill of exchange for £ 3,000 thinking it was a guarantee. Held, there was no contract and no liability was incurred by the signature. But if M knew that the document whereon he put his signature was a bill of exchange, he cannot avoid it on the ground that he believed that the bill was for £ 30 only. In the former case, he was mistaken as to the nature or the latter case he was mistaken as to the contents of the document. In the latter case he was mistaken as to the contents of the document.

UNILATERAL MISTAKE AS TO THE IDENTITY OF THE PERSON CONTRACTED WITH

It is a rule of law that if a person intends to contract with A, B cannot give himself *any right under it. Hence, when a contract is made in which personalities of the contracting parties are or may be of importance, no other person can interpose and adopt the contract. For example, where M intends to contract only with A but enters into contract with B believing him to be A, the contract is vitiated by mistake as there is no consensus ad idem.*

Mistake as to the identity of the person with whom the contract is made will operate to nullify the contract only if:

(i) The identity is for material importance to the contracts; and
(ii) The mistake is known to the other person, *i.e.*, he knows that it is not intended that he should become a party to the contract.

In *Cundy* v. *Lindsay* (1878), one Blenkarn posing as a reputed trader Blankiron placed an order for some goods with *Mis* Lindsay and Co. The company, thought that it is dealing with Blankiron and supplied the goods. Blenkarn sold the goods to Cundy and did not pay to Undsay. The latter sued Cundy. The Court held that there was contract between Lindsay and Blenkarn and therefore Cundy has no title to the goods.

Misrepresentation (Section 18): The term "misrepresentation" is ordinarily used to connote both "innocent misrepresentation" and "dishonest misrepresentation". Misrepresentation may therefore, be either (i) Innocent misrepresentation, or (ii) Wilful misrepresentation with intent to deceive and is called fraud.

INNOCENT MISREPRESENTATION

If a person makes a representation believing what he says is true he commits innocent misrepresentation. Thus, any false representation, which is made with an honest belief in its truth is innocent.

The effect of innocent misrepresentation is that the party misled by it can avoid the contract, but cannot sue for damages in the normal circumstances. But in order to avoid a contract on the ground of misrepresentation, it is necessary to prove that:

(i) There was a representation or assertion,
(ii) Such assertion induced the party aggrieved to enter into the contract.
(iii) The assertion related to a matter of fact (and not of law as ignorance of law is no excuse).
(iv) The statement was not a mere opinion or hearsay, or commendation (i.e, reasonable praise). For example an advertisement saying, washes whiter" than the whitest".
(v) The statement which has become or turned out to be untrue, was made with an honest belief in its truth.

DAMAGES FOR INNOCENT MISREPRESENTATION

Generally the injured party can only avoid the contract and cannot get damages for innocent misrepresentation. But in the following cases, damages are obtainable:

(i) From a promoter or director who makes innocent misrepresentation in a company prospectus inviting the public to subscribe for the shares in the company;
(ii) Against an agent who commits a breach of warranty of authority:
(iii) From a person who (at the Court's discretion) is estopped from denying a statement he has made where he made a positive statement intending that it should be relied upon and the innocent party did rely upon it and thereby suffered damages;
(iv) Negligent representation made by one person to another between whom a confidential relationship, like that of a solicitor and client exists.

Wilful Misrepresentation or Fraud (Section 17): Fraud is an untrue statement made knowingly or without belief in its truth or recklessly, carelessly, whether it be true or false with the intent to deceive. The chief ingredients of a fraud are:

(i) A false representation or assertion;
(ii) Of fact (and not a mere opinion),
(iii) Made with the intention that it should be acted upon,
(iv) The representation must have actually induced the other party to enter into the contract and so deceived him,
(v) The party deceived must thereby be damnified, for there is no fraud without damages, and
(vi) The statement must have been made either with the knowledge that it was false or without belief in its truth Oi recklessly without caring whether it was true or false.

It is immaterial whether the representation takes effect by false statement or with concealment. The party defrauded can avoid the contract and also claim damages. Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless silence is in itself equivalent to speech, or where it is the duty of the person keeping silent to speak as in the cases of contracts *uberrimae fidei* - (contracts requiring utmost good faith).

CONTRACTS UBERRIMAE FIDEI

There are contracts in which the law imposes a special duty to act with the utmost good faith Le., to disclose all material information. Failure to disclose such information will render the contract voidable at the option of the other party.

Contracts uberrimae fidei are:

(a) *Contract of insurance of all kinds:* The assured must disclose to the insurer all material facts and whatever he states must be correct and truthful.

(b) *Company prospectus: When a company invites the public to subscribe for its shares, it is under statutory obligation to disclose truthfully the various matters set out in the Companies Act. Any person responsible for non-disclosure of any of these matters is liable to damages. Also, the contract to buy shares* is voidable where there is a material false statement or non-disclosure in the prospectus.

(c) *Contract for the sale of land:* The vendor is under a duty to the purchaser to show good title to the land he has contracted to sell.

(d) *Contracts of family arrangements:* When the members of a family make agreements or arrangements for the settlement of family property, each member of the family must make full disclosure of every material fact within his knowledge.

Difference between Fraud and Innocent Misrepresentation:

1. Fraud implies an intent to deceive, which is lacking if it is innocent misrepresentation.
2. In case of misrepresentation and fraudulent silence, the defendant can take a good plea that the plaintiff had the means of discovering the truth with ordinary diligence. This argument is not available if there is fraud (Section 19-exception).
3. Misrepresentation may lead to avoidable of contract. In fraud, the plaintiff can claim damages as well.
4. If there is fraud, it may lead to prosecution for an offence of cheating under the Indian Penal Code.

COERCION

Coercion as defined in Section 15 means "the committing or threatening to commit any act forbidden by the Indian Penal Code, or unlawful detaining or threatening to detain, any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement".

Simply stated, the doing of any act forbidden by the Indian Penal Code is coercion even though such an act is done in a place where the Indian Penal Code is not in force. If A at the point of a pistol asks B to execute a promissory note in his favour and B to save his life does so he can avoid this agreement as his consent was not free. Even a threat to third-party, *e.g.*, where A compels B to sign a document threatening to harm C, in case B does not sign would also amount to coercion. It has been held that mere threat by one person to another

to prosecute him does not amount to coercion. There must be a contract made under the threat and that contract should be one sought to be avoided because of coercion *(Ramchandra* v. *Bank of Kohlapur,* 1952 Bom. 715). It may be pointed out that coercion may proceed from any person and may be directed against any person, even a stranger and also against goods, *e.g.*, by unlawful detention of goods.

UNDUE INFLUENCE

Under Section 16 of the Indian Contract Act, 1872, a contract is said to be produced by undue influence "where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other"

The elements of undue influence are (i) a dominant position, and (ii) the use of it to obtain an unfair advantage. The words "unfair advantage" do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. In the words of Lord Kingston, "the principle applies to every case where influence is acquired and abused where confidence is reposed and betrayed."

Sub-section (2) of Section 16 provides that a person is deemed to be in a position to dominate the will of another:

(a) Where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other, *e.g.*, minor and guardian; trustee and beneficiary; solicitor and client. There is, however, no presumption of undue influence in the relation of creditor and debtor, husband and wife (unless the wife is a *parda-nishin* woman) and landlord and tenant. In these cases the party has to prove that undue influence has been exercised on him, there being no presumption as to existence of undue influence.

(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress *e.g.*, doctor and patient.

ILLUSTRATION

A, having advanced money to his son B, during his minority, upon B's coming of age obtains, by misuse of parental influence a bond upon B for a greater amount than the sum due in respect of the advance. A employs undue influence.

A, a man enfeebled by disease or age is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. 8 employs undue influence.

A parent stands in a fiduciary relation towards his child and any transaction between them by which any benefit is procured by the parent to himself or to a third party, at the expense of the child will be viewed with jealousy by Courts of Equity and the burden will be on the parent or third-party claiming the benefit of showing that the child in entering into the transaction had independent advice,

that he thoroughly understood the nature of transaction and that he was removed from all undue influence when the gift was made (Marim Bibi v. Cassim Ebrahim (1939) 184 I.C. 171 (1939) A.I.A. 278).

Where there is a presumption of undue influence, the presumption can be rebutted by showing that:

(i) Full disclosure of all material facts was made,
(ii) The consideration was adequate, and
(iii) The weaker party was in receipt of independent legal advice.

TRANSACTION WITH PARDA-NISHIN WOMEN

The expression *'parda-nishin' denotes* complete seclusion. Thus, a woman who goes to a Court and gives evidence, who fixes rents with tenants and collects rents, who communicates when necessary, in matters of business with men other than members of her own family, could not' be regarded as a *parda-nishin* woman *(Ismail Musafee* v. *Hafiz Boo* (1906) 33 Cal. LR 773 and 33 I.A. 86). The principles to be applied to transactions with *parda-nishin* woman are founded on *equity and good conscience* and accordingly a person who contracts with *parda-nishin* woman has to prove that no undue influence was used and that she had free and independent advice, fully understood the contents of the contract and exercised her free will. "The law throws around her a special cloak of protection" *(Kali Baksh* v. *Ram Gopal (1914)* L.R. 41 I.A. 23, 28-29, 36 All 81, 89).

Unconscionable transactions: An unconscionable transaction is one which makes an exorbitant profit of the other's distress by a, person who is in a dominant position. Merely the fact that the rate of interest is very high in a money lending transaction shall not make it unconscionable. But if the rate of interest is very exorbitant and the Court regards the transaction unconscionable, the burden of proving that no undue influence was exercised lies on the creditor. It has been held that urgent need of money on the part of the borrower does not itself place the lender in a position to dominate his will within the meaning of this Section *(Sunder Koer* v. *Rai Sham Krishen* (1907) 34 Cal. 150, C.R. 34 I.A. 9).

LEGALITY OF OBJECT

One of the requisites of a valid contract is that the object should be lawful. Section 10 of the Indian Contract Act, 1872, provides, "All agreements are contracts if they are made by free consent of parties competent to contract fur a *lawful consideration and with* a *lawful object...* " Therefore, it follows that where the consideration or object for which an agreement is made is unlawful, it is not a contract.

Section 23 of the Indian Contract Act, 1872 provides that the consideration or object of an agreement is lawful unless it is:

(i) Forbidden by law; or,
(ii) It is. of such nature that if permitted it would defeat the provisions of law; or
(iii) Is fraudulent; or

(iv) Involves or implies injury to the person or property or another; or
(v) The Court regards it an immoral or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. *Every agreement of which the object or consideration is unlawful is void.*

Illustration:

(i) X, Y and Z enter into an agreement for the division among them of gains acquired by them by fraud. The agreement is void as its object is unlawful.
(ii) X promises to obtain for Y an employment in the Government service and Y promises to pay Rs. 1,500 to X. The agreement is void, as the consideration for it is unlawful.
(iii) X promises to Y to drop a prosecution which he has instituted against Y for robbery, and Y promises to restore the value of the things taken. The agreement is void as its object is unlawful.
(iv) A who is B's *mukhtr* promises to exercise his influence, as such, with B in favour of C and C promises to pay Rs. 1,000 to A. The agreement is void because it is immoral.
(v) A agrees to let her daughter to hire to. B for concubinage. The agreement is void because it is immoral though, the letting may not be punishable under the India Penal Code.
(vi) An agreement by the proprietors of a newspaper to indemnify the printers against claims arising from libels printed in the newspaper is void as it implies or involves injury to the person of another.

VOID AND ILLEGAL CONTRACTS

A void contract is one which is destitue of legal effects altogether. An illegal contract too has no legal effect as between the immediate parties to the contract, but has the further effect of tainting the collateral contracts also with illegality. For instance A borrows from B to Rs. 1,000 for lending to C a minor. The contract between A and C is void, but B can nevertheless recover the money from A, On the other hand, if A had borrowed Rs. 1,000 from B to buy a pistol to shoot C, the question whether B can recover the money hinges on whether B was aware of the purpose for which money was borrowed. If B had knowledge of the illegal purpose, he cannot recover. Therefore, it may be said that all illegal agreements are valid but all void agreements are not necessarily illegal.

Consequence of Illegal Agreements:

(i) An illegal agreement is entirely void;
(ii) No action can be brought by a party to an illegal agreement. The maxim is *'Ex turpi cause non-oritur actio'* - from an evil cause, no action arises;
(iii) Money paid or property transferred under an illegal agreement cannot be recovered. The maxim *is in parti delicto potier. est conditio defendeties* - In cases of equal guilt, more powerful is the condition of the defendant;

(iv) Where an agreement consist of two parts, one part legal and other illegal, and the legal parts is separable from the illegal one, then the Court will enforce the legal one. If the legal and the illegal parts cannot be separated the whole agreement is illegal; and

(v) Any agreement which is collateral to an illegal agreement is also tainted with illegality and is treated as being illegal, event though it, would have been lawful by itself *(Film Pratapchand* v. *Firm Kotri Re.* AIR (1975) S.C. 1223).

EXCEPTION TO GENERAL RULE OF NO RECOVERY OF MONEY OR PROPERTY

In the following cases, a party to an illegal agreement may sue to recover money paid or property transferred:

(a) Where the transfer is not in *pari delicto* (equally guilty) with the detendant, Le. the transferee. For example, where A is induced to enter into an illegal agreement by the fraud of B, A may recover the money paid if he did not now that the contract was illegal.

(b) If the plaintiff can frame a cause of action entirely dependent of the contract.

(c) Where a substantial part of the illegal transaction *was* not been carried out and the plaintiff is truly and genuinely repentant. *(Bigos* v. *Bonstead* (1951), All E.R. 92).

IMMORAL AGREEMENTS

An agreement is illegal if its object is immoral or where its consideration is an act of sexual immorality, *e.g.*, an agreement for future illicit co-habitation, the agreement is illegal and so unenforceable. Similarly, where the purpose of the agreement is the furtherance of sexual immorality and both the parties know this, it, is illegal. Where A let a taxi on hire to B, a prostitute, knowing that it was to be used for immoral purposes, it was held that A could not recover the hire charges. *(Pearce* v. *Brookes* (1866) L.R.1 Exch 213).

AGREEMENTS VOID AS BEING OPPOSED TO PUBLIC POLICY

The head "public policy" covers a wide range. Agreements may offend public policy by tending to the prejudice of the State in times of war, by' tending to the abuse of justice or by trying to impose unreasonable and inconvenient restrictions on the free choice of individuals in marriage, or their liberty to exercise lawful trade or calling. The doctrine of public policy is a branch of Common Law and like any other branch of Common Law it is governed by the precedents *[Cherumal Parakh* v. *Mahadeodas Maiya* (1959) 2 S.C.R. (Suppl.) 406; AIR 1959 S.C. 781]. The doctrine of public policy is not to be extended beyond the classes of cases already covered by it and no Court can invent a new head of public policy *Lord Halsbury, Janson* v. *Driefontien Consolidated Mines* (1902) A.C. 484, 491. It has been said by the House of Lords that public policy is

always an unsafe and treacherous ground for legal decisions. Even if it is possible for Courts to evolve a new head of public policy, it should be done under extraordinary circumstances giving rise to incontestable harm to the society.

The following agreement are void as being against public policy but they are not illegal:

(a) *Agreement in restrain of parental rights:* An agreement by which a party deprives himself of the custody of his child is void.

(b) *Agreement in restraint of marriage:* An agreement not to marry at all or not to marry any particular person or class of persons is *void* as it is in restraint of marriage.

(c) *Marriage brocage or brokerage Agreements:* An agreement to procure marriage for reward is *void.* Where a purohit (priest) was promised Rs. 200 in consideration of procuring a wife for the defendant, the promise was held *void* as opposed to public policy, and the purohit could not recover the promise sum.

(d) *Agreements in restraint of personal freedom are void:* Where a man agreed with his money lender not to change his residence, or his employment or to part with any of his property or to incur any obligation on credit without the consent of the money lender, it was held that the agreement was *void.*

(e) *Agreement in restraint of trade:* An agreement in restraint of trade is one which seeks to restrict a person from freely oxidising his trade or profession.

TYPES OF CONTRACTS

On the basis of validity:

1. *Valid contract*: An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.
2. *Void contract [Section 2(g)]*: A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may be valid and binding on the parties. It may subsequently become void. – There are many judgments which have stated that where any crime has been converted into a "Source of Profit" or if any act to be done under any contract is opposed to "Public Policy" under any contract—than that contract itself cannot be enforced under the law-
3. *Voidable contract [Section* 2(i)*]: An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract. If the essential element of free consent is missing in a contract, the law confers right on the aggrieved party either to reject the contract or to accept it. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.*

4. *Illegal contract*: A contract is illegal if it is forbidden by law; or is of such nature that, if permitted, would defeat the provisions of any law or is fraudulent; or involves or implies injury to a person or property of another, or court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void-ab-initio. "All illegal agreements are void agreements but all void agreements are not illegal."
5. *Unenforceable contract*: Where a contract is good in substance but because of some technical defect cannot be enforced by law is called unenforceable contract. These contracts are neither void nor voidable.

On the basis of formation:

1. *Express contract*: Where the terms of the contract are expressly agreed upon in words (written or spoken) at the time of formation, the contract is said to be express contract.
2. *Implied contract*: An implied contract is one which is inferred from the acts or conduct of the parties or from the circumstances of the cases. Where a proposal or acceptance is made otherwise than in words, promise is said to be implied.
3. *Quasi contract*: A quasi contract is created by law. Thus, quasi contracts are strictly not contracts as there is no intention of parties to enter into a contract. It is legal obligation which is imposed on a party who is required to perform it. A quasi contract is based on the principle that a person shall not be allowed to enrich himself at the expense of another. examples
   - Claim for necessaries supplied to person incapable of contracting or on his account
   - Reimbursement of person paying money due to another, in payment of which he is interested
   - Obligation of person enjoying benefit of non gratuitous act
   - Responsibility of finder of goods
   - Liability of person to whom money is paid or thing delivered.

On the basis of performance:

1. *Executed contract*: An executed contract is one in which both the parties have performed their respective obligation.
2. *Executory contract*: An executory contract is one where one or both the parties to the contract have still to perform their obligations in future. Thus, a contract which is partially performed or wholly unperformed is termed as executory contract.
3. *Unilateral contract*: A unilateral contract is one in which only one party has to perform his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time of the contract or before the contract comes into existence.
4. *Bilateral contract*: A bilateral contract is one in which the obligation on both the parties to the contract is outstanding at the time of the formation of the contract. Bilateral contracts are also known as contracts with executory consideration.

OFFER

Proposal is defined under section 2(a) of the Indian contract Act, 1872 as "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtain the assent of that other to such act or abstinence, he is said to make a proposal/offer". Thus, for a valid offer, the party making it must express his willingness to do or not to do something. But mere expression of willingness does not constitute an offer. The rules regarding the offer are The offer must show an obvious intention on the part of the offerror. For example "if "A" jokingly offers "B" his scooter for Rs.10/- and "B" knowingly that "A" is not serious, says "I accept "A"s proposal". This does not constitute an offer. Secondly, the terms of offer must be defenite, un ambigious, not loose and vague. For example "A" says to "B". "I will sell you a car" "A" owns three different cars. The offer is not defenite. Third thing regarding offer is, mere declaration of intention and announcement is not an offer. A declaration by a person that he intends to do something, gives no right of action to another. Such a declaration only means that an offer will be made or invited in future and not an offer is made now. An advertisement for a concern for auction sale does not amount to an offer to hold such concern for auction sale. For example an auctioneer advertised in a news paper that a sale of office furniture would be held. A broker came from a distant place to attend the auction, but all the furniture was withdrawn. The broker thereupon sued the auctiioner for his loss of time and expenses. It was held that, a declaration of intention to do something did not create a binding contract with those acted upon it and hence the broker could not recover damages. An offer should be made to obtain the assent of the other. The offer should be communicated to the offeree. Unless an offer is communicated to the offeree by the offerer or his duly agent, there can be no acceptance. The offer must be made with a view to obtain the assent of the other party addressed and not merely with a view to disclose the intention to make an offer. The offer should not contain a term that, the non compliance of which would amount to acceptance. For example, "A" writes to "B", "i will sell you my horse for Rs.10,000/- and if you do not reply I shall assume you have accepted the offer". There is no contract if "B" does not reply. However if "B" is in possession of "A"s horse and he continues possession thereafter, "B"s silence and his continued use amounts to valid acceptance. A statement of price is not an offer. A mere statement of price is not an offer to sell. For example three telegrams were exchanged between "A" and "B". communication by "B" to "A"- " will you sell your car?". Communication by "A" to "B". "The price of the car is one lakh rupees". Communication from "B" to "A"- "I agree to buy the car". These 3 communications does not make a valid offer.

Classification of Offer:

1. *General Offer*: Which is made to public in general.
2. *Special Offer*: Which is made to a definite person.
3. *Cross Offer*: Exchange of identical offer in ignorance of each other.
4. *Counter Offer*: Modification and Variation of Original offer.

5. *Standing, Open or Continuing Offer*: Which is open for a specific period of time. The offer must be distinguished from an invitation to offer. *Invitation to offer* "An invitation to offer" is only a circulation of an invitation to make an offer, it is an attempt to induce offers and precedes a definite offer. Acceptance of an invitation to an offer does not result in formation of a contract and only an offer emerges in the process of negotiation. A statement made by a person who does not intend to bound by it but, intends to further act, is an invitation to offer.

ACCEPTANCE

According to Section 2(b), "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted."

Rules:

1. Acceptance must be absolute and unqualified. If the parties are not in ad idem on all matters concerning the offer and acceptance, there is no valid contract. For example "A" says to "B" "I offer to sell my car for Rs.50,000/-. "B" replies "I will purchase it for Rs.45,000/-". This is not acceptance and hence it amounts to a counter offer.
2. It should be Communicated to the offeror. To conclude a contract between parties, the acceptance must be communicated in some prescribed form. A mere mental determination on the part of offeree to accept an offer does not amount to valid acceptance.
3. Acceptance must be in the mode prescribed. If the acceptance is not according to the mode prescribed or some usual and reasonable mode (where no mode is prescribed) the offeror may intimate to the offeree within a reasonable time that acceptance is not according to the mode prescribed and may insist that the offer be accepted in the prescribed mode only. If he does not inform the offeree, he is deemed to have accepted the offer. For example "A" makes an offer to "B" says to "B" that "if you accept the offer, reply by voice. "B" sends reply by post. It will be a valid acceptance, unless "A" informs "B" that the acceptance is not according to the prescribed mode.
4. Acceptance must be given within a reasonable time before the offer lapses. If any time limit is specified, the acceptance must be given within the time, if no time limit is specified it must be given within a reasonable time.
5. It cannot proceed an offer. If the acceptance proceeds an offer it is not a valid acceptance and does not result in contract. For example in a company shares were allotted to a person who had not applied for them. Subsequently when he applied for shares, he was un aware of the previous allotment. The allotment of share previous to the application is not valid.
5. Acceptance by the way of conduct.
6. Mere silence is no acceptance. Silence does not per-se amounts to communication- Bank of India Ltd. Vs. Rustom Cowasjee- AIR 1955

Bom. 419 at P. 430; 57 Bom. L.R. 850- Mere silence cannot amount to any assent. It does not even amount to any representation on which any plea of estoppel may be founded, unless there is a duty to make some statement or to do some act

7. Offree and offerer must be consent
8. Acceptance must be unambiguous and definite.

PERFORMANCE OF CONTRACTS

The promise under a contract can be performed, as the circumstances may permit, by the promisor himself, or by his agent or his legal representative.

1. *Promisor himself:* "The contracts which involve the exercise of personal skill must be performed by the promisor himself.
2. *Agent:* "Where personal skill is not required, the promisor may appoint his agent to perform it.
3. *Representatives:* "On the death of the promisor, the legal heirs of the promisor must perform the contract unless a contrary intention appears in the contract.
4. *Third persons:* "When a promisee accepts performance from a third person, he cannot afterwards enforce it against promisor".
5. *Joint promisors:* "When two or more persons have made a joint promise, all such persons must jointly fulfil the promise, unless a contrary intention appears from it". A contract may be discharged by performance, by agreement or consent, by impossibility, by lapse of time, by operation of law or by breach of contract. When both parties fulfill their respective obligation arising under the contract, within the time and manner prescribed in such case the parties are discharged. A contract may also be discharged by further agreement or consent. A contract may also discharge by lapse of time.

AGENCY

In law, the relationship that exists when one person or party (the principal) engages another (the agent) to act for him, *e.g.*, to do his work, to sell his goods, to manage his business. The law of agency thus governs the legal relationship in which the agent deals with a third party on behalf of the principal. The competent agent is legally capable of acting for this principal vis-a-vis the third party.

Hence, the process of concluding a contract through an agent involves a twofold relationship. On the one hand, the law of agency is concerned with the external business relations of an economic unit and with the powers of the various representatives to affect the legal position of the principal. On the other hand, it rules the internal relationship between principal and agent as well, thereby imposing certain duties on the representative (diligence, accounting, good faith, *etc.*). Under section 201 to 210 an agency may come to an end in a variety of ways:

(i) By the principal revoking the agency – However, principal cannot revoke an agency coupled with interest to the prejudice of such interest. Such Agency is coupled with interest. An agency is coupled with interest when the agent himself has an interest in the subject-matter of the agency, *e.g.*, where the goods are consigned by an upcountry constituent to a commission agent for sale, with poor to recoup himself from the sale proceeds, the advances made by him to the principal against the security of the goods; in such a case, the principal cannot revoke the agent's authority till the goods are actually sold, nor is the agency terminated by death or insanity.
(ii) By the agent renouncing the business of agency;
(iii) By the business of agency being completed;
(iv) By the principal being adjudicated insolvent (Section 201 of The Indian Contract Act. 1872)

The principal also cannot revoke the agent's authority after it has been partly exercised, so as to bind the principal (Section 204), though he can always do so, before such authority has been so exercised (Sec 203).

Further, as per section 205, if the agency is for a fixed period, the principal cannot terminate the agency before the time expired, except for sufficient cause. If he does, he is liable to compensate the agent for the loss caused to him thereby. The same rules apply where the agent, renounces an agency for a fixed period. Notice in this connection that want of skill continuous disobedience of lawful orders, and rude or insulting behaviour has been held to be sufficient cause for dismissal of an agent. Further, reasonable notice has to be given by one party to the other; otherwise, damage resulting from want of such notice, will have to be paid (Section 206). As per section 207, the revocation or renunciation of an agency may be made expressly or impliedly by conduct. The termination does not take effect as regards the agent, till it becomes known to him and as regards third party, till the termination is known to them (Section 208).

When an agent's authority is terminated, it operates as a termination of subagent also. (Section 210).

7

Law of Contract: Capacity to Contract

An agreement enforceable by law is a Contract. 'Capacity' is one of those often used terms while discussing about Law of Contract. In today's globalized era, it is of utmost importance for a party to have the capacity to contract in order to enter into commercial transactions. This article will be dealing with how one person is or is not competent to come into a valid contract with another, and will majorly revolve around the Indian Contract Act, 1872 (hereinafter 'the Act'), relating case laws, followed by a critical analysis of the subject in the Indian context. Moreover, every Indian aspect will be dealt along with its origin in English Law as well. The term 'capacity' under English Law refers to the ability of the contracting parties to come into legally binding relations with each other. If any party fails to comply by this condition, the subsequent contracts may be deemed to be invalid, relying on the facts and circumstances of the case. Since the Indian Contract Law is primarily based on the English Common Law, hence Capacity to Contract carries the same importance as under the latter law, and qualifies to be one of the most essential elements of a valid contract.

A person is considered as capable to enter into a valid contract if he satisfies three conditions under the Act, namely, person has to be major, he or she should not be of unsound mind, and lastly he or she should not be disqualified by any law from entering into a contract. However, it is pertinent to note that the subject of the contract should not be illegal or even void for the reasons of public policy.

RELEVANT LEGAL PROVISIONS

The Act lays down three provisions which makes capacity as its centre of attraction. The first in order is Section 10, which states the pre-requisites of a

valid contract. One of the conditions laid down is that, an agreement is a contract if they are made by the free consent of the parties who are competent to contract. Following this, Section 11 classifies the parties to contract into three categories who are competent to contract. And lastly, it is Section 12 which lays down the situations when a person is considered to be of unsound mind, in order to give clarity to Section 11.

The first factor is the age of majority. It provides that a minor *i.e.*, eighteen years old, is not competent to contract. It is presumed that a man is the best judge of his own interests, but this is inapplicable with respect to minors to protect themselves from fraud, unscrupulous traders, *etc.*

Hence, Minor contracts under the Act are generally considered to be void or voidable, barring exceptions. So, minor agreements, being void are not capable of being ratified after attainment of majority. Under common law, the contracts benefiting the minors are valid. For instance, if an infant enters into a contract in order to provide himself or herself with the means of self-support, then it shall be valid.

However, a guardian can step into the shoes of the minor to supplement for the minor's incapacity to contract. When contract is entered into, on behalf of the minor, such as contracts of marriage, then those contracts have been held to be valid on the ground of customs. Also, a contract which is completely executed from the minor's side can be enforced by the minor because there exists no liabilities and nothing needs to be done by him or her further, because it would end up as being for the benefit for the incapacitated persons. Furthermore, Section 68 of the Act is the provision which relates to the position of necessities supplied to the minor.

The second factor concerns with soundness of mind. Consent is considered to be an act of reason which has to be combined with deliberation. It is possible for a man to behave normally, but he may be incapable of understanding the transaction, and thus being unable to form a rational judgment, which results in unsoundness of mind. According to Section 12 of the Act, a person is considered to be one of a sound mind if he is capable of understanding and making a rational judgment at the time when he comes into a contract. This implies that a person who is usually of unsound mind and partially of sound mind, then he or she should come into a contract when he is of sound mind, and if it is vice-versa, then the person should avoid making a contract when he or she is of unsound mind. Unsoundness of mind goes on to further render the contract as a void one. But, sanity is presumed in favour of that person, which implies the capacity to understand and make rational decisions as to their interests. For instance, if a person alleges the other that the person has become incapable of understanding his business due to old age, then the onus is on the person to prove the unsoundness of mind of the other. Unsoundness of mind can be because of various reasons such as insanity, drunkenness, mental idiocy and old age.

The last factor is with respect to the persons disqualified by law to enter into a contract. These include several types of people. First is alien enemies *i.e.*,

according to Section 83 of Civil Procedure Code (hereinafter 'CPC'), no one is allowed to come into a contract with an alien if any war is subsisting, unless the government allows for the same.

The second is regarding the foreign sovereigns which is embodied under Section 86 of the CPC. The next is an insolvent person, who cannot be subject to any contractual agreement because when he is declared insolvent, his properties are with the official assignee and that he or she can only enter into a contract in correspondence with that property as per Section 141(1)(b) of the Insolvency and Bankruptcy Code, 2016.

And lastly, contracts with the government is also to be complied with some formalities, and if not done, then it would be deemed to be void. This is not the exhaustive list, but some of the categories which come under the ones who are disqualified by law.

Case Laws

Mohari Bibee v. Dharmadas Ghose [ILR (1903) 30 Cal]

In this case, the respondent was a minor who was the sole owner of an immovable property. His mother was the legal custodian. He misrepresented his age to a person and mortgaged his property. Later his mother clarified regarding his minority. But that person sought to enforce the contract of mortgage once he attained majority. The Calcutta High Court went on to hold that any contract entered into with a minor or an infant qualifies to be void-ab-initio. So, they held in the context of the case that the mortgage contract was void as it was entered into by the minor respondent.

Leslie v. Sheill [1914 3 KB 607]

Here, defendant was a minor who obtained a loan from the plaintiff by misrepresenting his age. Later, the plaintiff sued on the grounds that the minor is liable for fraud and he shall be compelled in equity to restore the money. But the court took a different view and held that making is compulsory for the minor to pay an equivalent sum out of his present and future resources would amount to enforcement of a void contract, and hence, it cannot be done even if the infant entered into the contract by fraud.

Raghava Chariar v. Srinivasa [ILR (1916) 40 Mad 308]

In this case, the issue which arose was, whether a mortgage which is in favour of minor who has advanced the mortgage money in full, is enforceable in the court of law by the minor or any other person on his behalf, or not. The Madras High Court came to a conclusion that a minor can enforce any contract which is of benefit to him or her, where there is no obligation to be borne by him or her.

Sirkakulam Subramanyam v. Kurra Subba Rao [AIR 1948 PC 25]

A guardian entered into a contract to purchase a certain immovable property, on behalf of the minor. Later, the minor sued the other party for specific performance in order to recover its possession. It was concluded that any contract can be specifically enforced by or against the minor if: it is for his or her benefit,

and if the guardian who has entered into the contract on behalf of the minor, is competent to do so. This case basically laid down the Doctrine of Maturity under the Contract Law of India.

Campbell v. Hooper [(1855) 3 Sm&G 153]

The mortgagee, in this case, obtained a decree to repay the debt. But there was evidence leading to a conclusion that the mortgagor was a lunatic at the time of entering the contract, and the mortgagee was unaware of the same. Under English Law, it was held that mere fact of lunacy cannot make a contract invalid, and if the other party had the knowledge of lunacy, then it would become voidable at the option of the lunatic. Thus, knowledge is an important factor under English Law.

Critical Analysis

After critically going through the legal provisions under the English and the Indian law, it was noticed that under the latter, it is not clearly specified in the statute as to whether a minor agreement is void or voidable. Though, Mohari Bibee case cleared it to an extent that it is void-ab-initio, but it has still attracted a lot of controversy on this point. But, meanwhile the law regarding the same is pretty clear in England, where it is provided that the minor can enter into a contract which would be deemed as voidable till the time he or she does not reach eighteen which implies that after attaining the majority, upon their will, they can either enforce the contract or terminate it. But in India, they cannot ratify in absence of some special circumstances. Again, there has been variety of judicial decisions on this point which makes the situation unclear. Further, it is pertinent to note that under English Law, an unsound person is competent to contract, but he can avoid the contract if he satisfies the court that he was incapable to understand and the other party was aware of it. In India, situation differs, and a contract by an unsound person is rendered as void *i.e.*, completely invalid.

COMPETENT TO CONTRACT

To make a contract, only certain people are eligible. The following are the people who have the capacity to contract:

- Those with a sound mind
- People who have crossed the majority age
- Those who can contract because they are qualified under the contracting law

INCOMPETENT TO CONTRACT

To make a contract, certain people are not eligible. The following are the people who do not have the capacity to contract:

- Those with an unsound mind
- Minors who have not crossed the majority age
- Those who cannot contract because they are disqualified under the contracting law

MINORS

Any person who is not of the age of majority is a minor. In India, 18 years is the age of majority. Below the age of 18 years does not have the capacity to enter into a contract. A contract or agreement with a minor is null from the beginning, and no one can sue them. The State provides the Minors with civil and criminal immunities. In addition to that, it takes custody of the well being and the property of the minor. These immunities do not let the minors to enter into a contract. But if a minor enters into a contract knowing his incapability, then such a contract shall work independently of any contract.

If a party is from India and another party from a foreign country, then there will more than one law that will be applicable in the contract. In such cases, the TNS Firm v. Muhammad Hussain has set specific guidelines. The age of the majority for ordinary mercantile transactions will depend upon the law of the country where they make the contract. The age of the majority for land transactions will depend upon the law where the land is located.

Effects of a Minor's Agreement

if a minor enters into a contract by misrepresenting the age, then no one can stop him or her from disclosing their age. The minor is not liable for inducing another party into a contract. Even if any mishaps take place, he is not responsible. But in certain mishaps, he will be liable to it. The minor to avoid a contract can plead his infancy. An agreement of a minor stands as a doctrine of restitution. Whereas if a minor purchases a property by hiding his age, then the purchased property will be returned. But, if he has converted or sold them, then the law cannot sue him.

Contracts Beneficial to Minors

One can bring a minor into a contract if he is beneficiary for the contract. The minor does not have a restriction to be a promisee or payee in a contract. Thus a minor can purchase an immovable property and also can sue for the possessions upon the tender of the money. One cannot order a specific performance against a minor.

Claim for Necessaries Supplied to Minors

Section 68 of the Indian Contract Act, 1872 states that if a person does not have the capacity of being in a contract receives necessaries from another person. He has the power to reimburse from the incapable person. Though section 68 makes minor liable for the necessaries, it does not define the necessaries. The necessaries will be decided upon the case. To have reimbursement for the necessaries the party supplying the necessaries must prove that the good and reasonable. They have also to confirm that the provided necessaries are the only support for the minor and that they do not have any sufficient supply with them.

Agents

The minor can become an agent. But he is not responsible to the principal. The contract of apprenticeship is a service contract, and it binds the minors by providing benefits to them. But such an apprenticeship contract is made by a parent or guardian.

Negotiable Instrument

The minor can draw, deliver, endorse and negotiate the negotiable instruments. This is to bind every party except him. Any person who receives any goods from the minor has to pay for it. A minor can avail the benefits of a partnership but cannot be a partner. A minor can register as a member to a fully paid shares of a company. If a minor owns the shares through transmission, then guardian of the minor's name will appear as a member.

PERSON OF UNSOUND MIND

The contract law refers to the medical dictionary for the definition of an unsound mind person. The mental incapacity prevents the person from understanding the transactions and also the awareness of its implications. An agreement or contract with an unsound mind person stays inoperative and void. But such a person cannot avail any benefits from the contract. The property of such a person is always liable. It is responsible for the necessaries he receives or to anyone he is bound legally to support. A person who is normally of unsound mind but occasionally of sound mind can contract when he is of sound mind. This is the lucid intervals.

Intoxication

It is a mental disorder if there is the incompetence of intoxication. The person who alleges it can only prove the intoxication. A person drinking or consuming any intoxicants cannot enter into a contract in such an unsound mind state.

PERSON DISQUALIFIED BY LAW

If the law does not accept any person, then he does not have the capacity to enter into a contract. The law should qualify a person for them to be a part of a contract.

Alien Enemies

The foreign country citizens living in India are the alien enemies. Such persons have the capacity to enter into a contract with the Indians only during peace times. Such a contract is also subject to the restrictions of the Government. If there is a war declaration between his country and India, then he will become an alien enemy, and so he does not have the capacity to enter into a contract. If the person from the foreign country enters into a contract before the declaration of the war, then the contract will stay suspended during the period of war. The contract can be revived after the end of the war if it has not barred the time limit.

Convict Serving Sentence

A person who is guilty and is serving imprisonment does not have the capacity to enter into a contract. He also cannot sue on the contracts that were before his conviction. After the expiry of his sentence, he is at liberty to suit.

Married Women

A married woman does not have the capacity to enter into a contract relating to the property of her husband. But the wife can be an agent for her husband and bind his property if he fails to provide her with the necessaries.

Insolvent

An adjudged insolvent has the capacity to enter into a contract of certain types. The insolvent can incur debts, be an employee and purchase a property, but he cannot sell the property.

He has certain disqualifications like he cannot be a magistrate, he cannot be a company's director, or he cannot be a local body's member. The insolvent person has the capacity of a contract except for his property. He becomes an ordinary citizen after the order of discharge.

Pardanashin Women

A person under the veil or parda and set out of the house, then she is under undue influence. She does not have an understanding of the implications of the contracts and so she does not have the capacity to contract.

Corporation Incorporated under a Special act and Joint Stock Company

Such a corporation or company will be an artificial person formed by the law. It does not have the capacity to contract outside the powers of the Memorandum of Association or the Special Act.

Judges, Legal Practitioners or Officers

The judges, legal practitioners or officers who have a connection with the business interest in actionable claims do not have the capacity to enter into a contract.

Officers and Employees of the Patent Office

The officers and the employees of the patent office do not have the capacity to take rights, obtain or take an interest in the patent issued by them during the period of appointment.

Foreign Sovereigns and Ambassadors

International laws extend diplomatic immunities to foreign consulate employees and ambassadors. Hence the Indian laws cannot enforce the contracts on them. They can sue the persons to implement the contracts with them, but

they cannot be sued without a sanction from the Central Government. Thus the ambassadors and the consulate employees are in a privileged position but are considered to be not competent to contract.

DETAILED EXPLANATION OF CAPACITY TO CONTRACT IN A BUSINESS

Given below is a thorough explanation of contractual norms to judge an individual's capacity to enter into a contract.

ATTAINING THE AGE OF 18

A minor does not hold the capacity of holding a contract in business. Any agreement made with a minor in business is void ab-initio, which means 'from the beginning'. If any person aged below 18 years enters into a contract, he cannot ratify the agreement even when he turns 18. This means that an invalid agreement can never be ratified.

Minor being a Beneficiary in a Contract.

Even though a minor is prohibited from entering a contract, he can register himself as a beneficiary of an agreement. Section 30 of the Indian Partnership Act, 1932 mentions that a minor cannot participate as a partner in the business, but he can enjoy the benefits earned by the firm.

A Minor Always Enjoys the Benefits of being a Minor

A minor gets to enjoy some extra benefits in business. This contractual benefit needs to be explained in terms of the capacity to contract with examples. For instance, if a minor pretends to be a major and enters into a contract, he can later plead the minority through some simple formalities. The rule of estoppel is not applicable to a minor.

Contract through the means of a Guardian

In some cases, a guardian can enter into a valid business contract on behalf of a minor individual. Here, the guardian has no right to bind a minor to buy any immovable property under the contract. However, with proper certification and approval, the minor's property can be sold when required.

Insolvency

According to business law, a minor cannot be declared insolvent at any point in time. Even if the minor owes some dues to the firm, he will not be held personally liable for it.

Mutual Contract by a Minor and an Adult Individual

When a joint contract is signed between a minor and major, it has to be done in the presence of the minor's guardian. In such contracts, the liability of the contract is held by the adult.

AN INDIVIDUAL HAS TO BE OF SOUND MIND

Section 12 of the Indian Contract Act (1872) necessitates a person to be of sound mind, have a complete understanding of the contract terms and conditions, and hold the ability to judge its impact on his interests.

Here, the capacity of parties to the contract also applies to an individual who is usually of unsound mind and occasionally in sound mind. However, in this case, the contract has to be signed when he is in a state of complete soundness. A contract made by an individual of unsound mind shall be considered as null and void according to capacity law definition. A person under the influence of any sort of intoxication is considered incapable of entering into a contract. Such individuals can make a contract only when they are sober and have a complete understanding of the contractual terms.

PEOPLE DISQUALIFIED UNDER LAW

Other than minors and people of unsound mind, some individuals might be restricted from entering into any contract as well. Such individuals do not hold the capacity to contract under valid business laws. Disqualification under contractual laws could include reasons related to politics, legal status, *etc.* This could also happen when a person is a foreign sovereign, national enemy, convict, or insolvent.

CAPACITY TO CONTRACT MEANS: EVERYTHING YOU NEED TO KNOW

Capacity to contract means a party has the legal ability to enter into a contract.3 min read:

1. Who Doesn't Meet Criteria for Capacity
2. Capacity of Companies
3. Civil Law Countries
4. Common Law Countries

Capacity to contract means a party has the legal ability to enter into a contract. Capacity also means a person has to be competent as defined by law. Someone's capacity is determined by whether or not they have reached the age of majority and if they are mentally capable of understanding the applicable contract terms.

A contract must contain these six elements:

- Offer
- Acceptance
- Consideration
- Capacity
- Intent
- Legality

WHO DOESN'T MEET CRITERIA FOR CAPACITY

Some people lack the capacity to enter into a legally binding contract:

- *Minors:* In general, anyone under 18 years old lacks capacity. If he or she does enter into a contract before they turn 18, there is usually the

option to cancel while he or she is still a minor. There are some exceptions to this rule, however. Minors are allowed to enter into contracts for purchasing various necessities like clothing, food, and accommodations. Some states allow people under 18 to obtain bank accounts, which often carry strict terms and stipulations.

- *Mental Incapacitation:* If a person is not cognitively able to understand his or her responsibilities and rights under the agreement, then they lack the mental capacity to form a contract. Many states define mental capacity as the ability to understand all terms of the contract, while a handful of others use a motivational test to discern whether someone suffers from mania or delusions.
- *Intoxication:* Someone who is under the influence of drugs or alcohol is generally believed to lack capacity. If someone voluntarily intoxicated themselves, the court may order the party to uphold the obligation. This is tricky because many courts have also agreed a sober party shouldn't take advantage of an intoxicated person.

Contracts made with people who don't have legal capacity are voidable. The other person has the right of rescission, the option to void the contract and all related terms and conditions. Courts may opt to void or rescind a contract if one of the parties lacked legal capacity. If the court voids the contract, it will attempt to put all parties back in the position they were in before the agreement, which may involve returning property or money when feasible.

CAPACITY OF COMPANIES

Companies also have to have capacity when entering into an agreement. If they don't, there can be serious consequences, particularly regarding guarantees. There are similarities across legal systems and jurisdictions when it comes to the general rules that govern the legal capacity of companies. For example, the legal theory that a business has a separate legal personality is recognized in both civil and common law jurisdictions. This means that as a defined legal person, a company has the capacity to enter into a contract with other parties and can be held liable for its actions.

CIVIL LAW COUNTRIES

The United States isn't the only country that recognizes this legal concept. For example, France, a civil law country, has also adopted this idea. Legal capacity regarding entities was recently reformed by Ordinance n°2016-131, which went into effect in 2016.

Under French Civil Code Article 1147, a company's lack of capacity is a grounds for relative nullity, a defense that can be invoked by the aggrieved party to void the contract. In this case, the aggrieved party would be the company. Furthermore, Article 1148 allows French companies who lack capacity to contract to legally enter into contracts that are day-to-day acts which are authorized by usage or legislation.

In Spain, there is a special relationship with church and state. As a result, the church is governed by elements of a specific concordat: Spanish Civil Code Article 37, which says that companies enjoy "civil capacity."

COMMON LAW COUNTRIES

In common law countries, a company's capacity is limited by the company's memorandum of association. This document contains the clause that describes the commercial activities the business is involved in, thereby delineating the company's capacity.

Under the ultra vires doctrine, a business cannot do anything beyond what is allowed by its statement of objects.

The ultra vires doctrine was initially seen as a necessary measure to protect a company's shareholders and creditors. This doctrine gave rise to what's known as the constructive notice rule, which states that any third party that entered into a contract with another company must have been knowledgeable of that business's objects clause.

If you need help with what capacity to contract means, you can post your legal need on UpCounsel's marketplace. UpCounsel only accepts the top 5 percent of lawyers to its site. Lawyers on UpCounsel come from law schools such as Harvard Law and Yale Law and average 14 years of legal experience, including work with or on behalf of companies like Google, Menlo Ventures, and Airbnb.

CAPACITIES OF PARTIES ENTERING INTO A CONTRACT

Almost every transaction around us is a result of a contract. When you buy vegetables from the seller, you promise to pay him money in exchange for vegetables. If you own a shop, you enter into two contracts; one with the manufacturer of the goods and second with the customer who will buy the goods from your shop. While buying vegetables we might not pay attention as to whether the seller is competent enough to enter into a contract. However, if you are a shopkeeper, you need to check and be sure that the manufacturer is legally capable of doing so. This becomes important for you to hold the manufacturer legally liable for any defaults committed by him during the terms of the agreement.

LEGAL REQUIREMENTS FOR A PERSON ENTERING INTO A CONTRACT

Sec.11 of the Indian Contract Act, 1872 lists down the qualifications which enable a person in India to enter into contracts:

- A person should have attained the age of majority as per the law of the country of which he is a citizen.

In India, the age of majority is governed by the Indian Majority Act, 1875. As per Sec. 3 of the Indian Majority Act, 1875, an Indian citizen is said to have

attained the age of majority upon completion of eighteen years of age. In the USA (the majority of the states) and the UK, the age of majority is 18 years as well.

However, if a person is below the age of 18 years and a guardian has been appointed for him, he shall attain majority at the age of 21 years.

- A person should be of sound mind at the time of entering into a contract.

As per Sec. 12 of the Act, a person can be said to be of sound mind when he can assess, understand his actions and realize the consequences of obligations imposed on him at the time of entering into a contract.

- A person should not be disqualified under any law to which he is subject.

DISQUALIFICATIONS FOR ENTERING INTO A CONTRACT

As per the Indian Contract Act, 1872 all persons who do not meet the criteria as per Sec. 11 of the act are incompetent to contract. Hence, we can deduce that the following category of persons do not possess the legal capacity to enter into a contract-

MINOR

In India, a minor is an Indian citizen who has not completed the age of eighteen years. A minor is incapable of understanding the nature of the liabilities arising out of an agreement.

Hence a contract with a minor is void ab initio (void from the beginning) and cannot be enforced in a court of law. The result is that a party cannot compel the minor to perform his part of obligations as enumerated in the agreement (plead specific performance of an agreement/rule against estoppel).

Mohori Bibee vs. Dharmodas Ghose

1. The respondent, Dharmodas Ghose, a minor, had mortgaged his property in favour of the moneylender, Brahmo Dutt for securing a loan amounting to INR 20,000/-.
2. Mr. Brahmo Dutt had authorized Kedar Nath to enter into the transaction through a power of attorney. Mr. Kedar Nath was informed of the fact that Dharmodas Ghose was a minor through a letter sent by his mother.
3. However, the deed of mortgage contained a declaration that Dharmodas Ghose was of the age of majority.
4. The respondent's mother brought a suit on the ground that the mortgage executed by his son is void on the ground that her son is a minor.
5. The relief sought by the respondent was granted and an appeal was preferred by the executors of Brahmo Dutt before the Calcutta high court. The same was dismissed.
6. *An appeal was then made to the Privy council. The Privy council held that:*

a. A contract with a minor is void-ab-initio.
b. Sec.7 of the Transfer of Property Act, 1882 states that a person competent to contract is competent to transfer a property.
c. Hence, the mortgage executed by the respondent is void.

However, if a minor enters into a contract and performs his part of obligations, the other party can be compelled to perform and fulfill its obligations, and, in such instances, the contract becomes legally enforceable.

A.T Raghava Chariar vs. O.A. Srinivasa Raghava Chariar

1. A minor entered into a contract for mortgage with a person of the age of majority.
2. The minor extended the monetary amount and performed his part of the obligations.
3. The other party refused to honor the agreement.
4. The full bench of the Madras High court had to decide "whether a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by any other person on his behalf."
5. The court ruled that-
   a. The agreement sought to be enforced is the promise of the mortgagor who is of full age to repay the money advanced to by the mortgagee.
   b. The mortgagee (the minor) has already advanced the money which was the consideration for the promise of the mortgagor and performed his part of the obligations. There is nothing pending from his side.
   c. Hence, the contract is enforceable.

Additionally, a minor cannot enter into a contract and provide his consent when he attains majority. This is because a minor's agreement is void from the beginning. A void agreement cannot be made legally valid by ratification.

Suraj Narain Dube vs. Sukhu Ahir

1. Suraj Narain lent money to Sukhu Ahir who was a minor. The minor executed a promissory note against the money borrowed.
2. After four years, when the minor attained majority, he and his mother executed a second promissory note in favour of Suraj Narain in respect of the original loan plus the interest accumulated over the years.
3. The court held-
   1. The first agreement entered into by the parties is void as a minor is incompetent to contract. The minor had no liability to pay under this agreement. However, the minor made a promise and provided the promissory note, amounting to consideration.
   2. A minor has no power to ratify the contracts entered into by him upon attaining the age of majority.
   3. In the second agreement executed by the parties, there was no consideration from the Plaintiff. The original advance was no consideration for a second agreement. The second agreement is void due to want of consideration.

In certain instances, a contract entered into by the minor or by the minor's guardian for his benefit is valid in the eyes of law:

1. A contract for marriage entered into by a minor/his guardian.
2. A partnership contract entered into with a minor admitting him to the benefits of a partnership. However, the minor cannot be held personally liable for the losses incurred.
3. A contract relating to the minor's property entered into by his guardian if it is for the benefit of the minor.
4. A contract of apprenticeship with a minor.
5. A contract supplying the minors with goods and services necessary for life.

Websites such as YouTube expressly mention in their terms and conditions that any minor while using its services represents that he has the permission of his parent/guardian to do so. Parents and guardians are held liable for the child's activity on such websites.

PERSON OF UNSOUND MIND

- Idiots- An idiot, in medical terms, is a condition of mental retardation where a person has a mental age of less than a 3-year-old child. Hence, idiots are incapable of understanding the nature of the contract and it will be void since the very beginning.
- Lunatic- A person who is of sound mind for certain duration of time and unsound for the remaining duration is known as a lunatic. When a lunatic enters into a contract while he is of sound mind, *i.e.*, capable of understanding the nature of the contract, it is a valid contract. Otherwise, it is void.
  Illustration- A enters into a contract with B for sale of goods when he is of sound mind. A later becomes of unsound mind. The contract is valid.
- People under the influence of the drug- A contract signed under the influence of alcohol/drug may or may not be valid. If a person is so drunk at the time of entering into a contract so that he is not in a position to understand the nature and consequences, the contract is void. However, if he is capable of understanding the nature of the contract, it will be enforceable.

Illustration- A enters into a contract with B under the influence of alcohol. The burden of proof is on A to show that he was incapable of understanding the consequence at the time of entering the contract and B was aware of his condition.

PERSONS DISQUALIFIED BY LAW

- Alien enemy- An alien enemy is the citizen of a country India is at war with. Any contracts made during the war period with an alien enemy are void. An Indian citizen residing in an alien enemy's territory shall be treated as an alien enemy under the contract law. Contracts made

before the war period either gets dissolved if they are against public policy or remain suspended and are revived after the war is over, provided they are not barred by limitation.

Illustration- A, of country X, orders goods from B, of country Y. The goods are shipped and before they could reach Y, country X declares a war with country Y. The contract between A and B becomes void.

- Convicts- A convict cannot enter into a contract while he is serving his sentence. However, he regains his capacity to enter into a contract upon completion of his sentence.

Illustration- A, is serving his sentence in jail. Any contract signed by him during this period is void.

- Insolvent- An insolvent is a person who is declared bankrupt/against whom insolvency proceedings have been filed in court/resolution professional takes possession of his assets. Since the person does not have any power over his assets, he cannot enter into contracts concerning the property.

Illustration- A enters into a contract for sale of goods with B. Before the sale takes place, an insolvency suit is filed against A. A sell the goods to B during pendency of insolvency proceedings. The contract is valid.

- Foreign sovereign- Diplomats and ambassadors of foreign countries enjoy contractual immunity in India. One cannot sue them in Indian courts unless they submit themselves to the jurisdiction of Indian courts. Additionally, sanction from the central government is also required in such cases. However, the foreign sovereign has the authority to enforce contracts against the third person in Indian courts.
- Body corporate- A company is an artificial person. The capacity of a company to enter into a contract is determined by its memorandum and articles of association.

COMPETENCY OF PARTIES TO ENTER INTO AN E-CONTRACT

A party can enter into an e-contract if it satisfies the legal requirements as per Sec. 11 and Sec. 12 of the Indian Contract Act, 1872.

COMPETENCY TO CONTRACT ON BEHALF OF ANOTHER

As per the Indian Contract Act, 1872 a person can employ another who shall enter into contracts with the third person on his behalf. The person in this instance is known as the principal and the other person so employed is known as the agent.

Any person may be employed as an agent. However, a minor or a person of unsound mind cannot be held liable for their acts to the principal.

An agent's authority may be either:

1. Express, *i.e.*, by word of mouth or documented in writing as in Power of Attorney
2. Implied, *i.e.*, it might be deduced from the facts and circumstances of the case

COMPANIES ENSURE COMPETENCY OF EACH OTHER WHILE ENTERING INTO A CONTRACT

Most companies while entering into contracts with one another want to make sure that the other party is competent enough to enter into a contract. This is required to avoid any legal complications in the future. This is mostly done through the inclusion of a representation clause in a contract stating that the company, as per its memorandum and articles of association, is capable of entering into a contract through its authorized representatives.

A copy of the articles of association may be annexed by both parties to confirm the representations made. If the memorandum and articles provide otherwise, a condition precedent clause is incorporated into the agreement stating that the company shall pass necessary board resolutions to alter its articles of association. A stipulated date called a long stop date is given to the other party to comply with the conditions precedent failing which the agreement shall stand terminated.

A party might be asked to produce a copy of board resolution so passed/ changes made in the articles of association to the other party to prove its compliance with the condition precedent.

It is expressly mentioned in the agreement that both the parties indemnify each other from any suits, proceedings, or liabilities arising from breach of the representation clause.

Conclusion

Competency of parties to contract is one of the most important requirements to make an agreement valid and enforceable in a court of law.

A contract made by a person who does not possess the mental capacity to understand the nature and consequences of the contract is void ab initio. On the other hand, contracts with lunatics, people under the influence of the drug may/ may not be void depending upon the circumstances surrounding the situation.

A person regains the legal capacity to contract upon removal of any of the disqualifications. Companies while entering into contracts with one another always try to safeguard their interests. Representation and indemnification are the most commonly used clauses to ensure that both the parties are competent to contract.

CAPACITY TO CONTRACT

According to Section 11, "*Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.*"

So, we have three main aspects:

1. Attaining the age of majority
2. Being of sound mind
3. Not disqualified from entering into a contract by any law that he is subject to

ATTAINING THE AGE OF MAJORITY

According to the Indian Majority Act, 1875, the age of majority in India is defined as 18 years. For the purpose of entering into a contract, even a day less than this age disqualifies the person from being a party to the contract. Any person, domiciled in India, who has not attained the age of 18 years is termed as a minor.

Let's look at certain laws governing a minor's agreement:

A Contract made with a Minor is Void

Since any person less than 18 years of age does not have the capacity to contract, any agreement made with a minor is void ab-initio (from the beginning).

Example, Peter is 17 years and 6 months old. He needs some money to go on vacation with his friends. He approached a moneylender and borrows Rs 25,000. As security, he signs some papers mortgaging his laptop and motorcycle. Six months later, when he attains the age of majority, he files a suit declaring that the mortgage executed by him when he was a minor is void and should be cancelled. The Court agrees and relieves Peter of all liability to repay the loan.

Also, if a minor enters into a contract, then he cannot ratify it even after he attains majority since the contract is void ab-initio. And, a void agreement cannot be ratified.

A Minor can be a Beneficiary of a Contract

While a minor cannot enter a contract, he can be the beneficiary of one. Section 30 of the Indian Partnership Act, 1932, also specifies that while a minor cannot become a partner in the partnership firm, the benefits of the firm can be extended to him.

Example, Peter lends some money to his neighbour, John and asks him to mortgage his house as security. John agrees and the mortgage deed is made favouring Peter's 10-year-old son – Oliver. John fails to repay the loan and Peter, as the natural guardian of Oliver, files a suit against John to recover his money. The Court holds the case since a minor can be a beneficiary of a contract.

A Minor is Always given the Benefit of being a Minor

Even if a minor falsely represents himself as a major and takes a loan or enters into a contract, he can plead minority. The rule of estoppel cannot be applied against a minor. He can plea his minority in defence.

Contract by Guardian

Under certain circumstances, a guardian of a minor can enter into a valid contract on behalf of the minor. Such a contract, which the guardian enters into, for the benefit of the minor, can also be enforced by the minor. However, guardians cannot bind a minor by a contract for buying immovable property. But, a contract entered into by a certified guardian of a minor, appointed by the Court, with approval from the Court for the sale of a minor's property can be enforced.

Insolvency

A minor cannot be declared insolvent as he cannot avail debts. Also, if some dues are pending from the properties of the minor and he is not personally liable for the same.

Joint Contract by a Minor and an Adult

In case of a joint contract between an adult and a minor, executed by the guardian on behalf of the minor, the liability of the contract falls on the adult.

PERSON OF SOUND MIND

According to Section 12 of the Indian Contract Act, 1872, for the purpose of entering into a contract, a person is said to be of sound mind if he is capable of understanding the contract and being able to assess its effects upon his interests.

It is important to note that a person who is usually of an unsound mind, but occasionally of a sound mind, can enter a contract when he is of sound mind. No person can enter a contract when he is of unsound mind, even if he is so temporarily. A contract made by a person of an unsound mind is void.

DISQUALIFIED PERSONS

Apart from minors and people with unsound minds, there are other people who cannot enter into a contract. *i.e.*, do not have the capacity to contract. The reasons for disqualification can include, political status, legal status, *etc.* Some such persons are foreign sovereigns and ambassadors, alien enemy, convicts, insolvents, *etc.*

CONTEMPORARY PERSPECTIVE ON LAW OF CONTRACT

The contemporary perspective on the law of contract reflects evolving legal principles and societal norms that shape contractual relationships in modern contexts. This perspective acknowledges the importance of contract law in facilitating economic transactions, promoting commercial certainty, and protecting parties' autonomy and expectations. Contemporary contract law emphasizes principles such as freedom of contract, fairness, and justice, while also recognizing the need to balance competing interests and address power imbalances between parties. Additionally, contemporary perspectives on contract law often incorporate considerations of public policy, social justice, and ethical standards, particularly in areas such as consumer protection, employment contracts, and international trade agreements. Furthermore, the rise of digital technology and globalization has led to new challenges and opportunities in contract law, such as issues related to electronic contracts, online transactions, and cross-border disputes. As a result, contemporary approaches to contract law seek to adapt and innovate to address these changing dynamics while upholding fundamental principles of contractual fairness, integrity, and enforceability within diverse legal systems and cultural contexts. The book on Contemporary Perspective on Law of Contract offers a comprehensive examination of evolving legal principles, societal trends, and emerging challenges shaping contractual relationships in modern contexts.

Dr. Mehak Rani is an Assistant Professor at Faculty of Law, Tantia University, Sri Ganganagar. She did her Bachelor's in Law from Baba Farid Law College, Faridkot, Punjab and LL.M. from Tantia University, Sri Ganganagar, Rajasthan. She also did her Ph.D. from Tantia University, Sri Ganganagar. She has published Research Papers in National & International Journals. She has participated and presented papers in number of National Seminars. She is supervising research work in the field of Law.

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4378/4-B, Murarilal Street, Ansari Road, Daryaganj, New Delhi-110002
Phone : +91-11-23281685, 41043100, Fax: +91-11-23270680
E-Mail: academicuniversitypress@gmail.com

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