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CS PROFESSIONAL

DRAFTING

ALL INDIA RANKERS

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Unique Academy For Commerce

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CS Executive

All India Rankers

Chiraag Agarwal

S Swathi

Khushi Mehta

(CS Professional)

MANAV SHINGARI

HARSH CHAUDHARY

ISHIKA BASU

VAISHNAVI BIYANI

ASHITA GOYAL

EKTA

SAUMYA S

SHYAM RAJPUROHIT

MAYANK

AKASH OSWAL

ASHISH RAGHUWANSHI

KARAN GOYAL

NIDHI SURANA

PRAJAKTA KAMBLE

SUREKHA LIMBURDE

GIRIJA CHAVAN

HAMDIYA FATIMA

MANSI SSINGH

MANSI R

& Many More...

• OUR TOP SCORED STUENTS •

MARKS 561 — S SWATHI

MARKS 522 — MANAV SHINGARI

MARKS 503 — SAUMYA S

MARKS 499 — ASHISH RAGHUWANSHI

MARKS 475 — MANSI R

MARKS 455 — TIKSHA LOHIT

MARKS 435 — ANJALI

MARKS 426 — HARSHALA MAYAVANSHI

MARKS 426 — DIKSHA MISHRA

MARKS 426 — AAYUSHI PORWAL

MARKS 416 — SIDDHI SINGH

MARKS 410 — PRAGATI SINGH

MARKS 407 — DIVYA

MARKS 402 — JAYA TYAGI

MARKS 403 — SIMONA AGRAWAL

MARKS 402 — AISHWARYA VERMA

Dil se… ❤️❤️

Unique Academy For Commerce has been the pioneer of quality education propagating zero boundaries when it comes to hard work, and a result oriented classroom approach. This institution has guided thousands of students over the years in their professional journeys. Unique Academy For Commerce is an institute for all CA and CS aspirants. Over the years, the Academy has been successful in producing All India Rank holders at all the levels and tremendous results overall.

Unique Academy For Commerce is a place for grooming young talents. The Academy provides face to face and virtual classes for 11th & 12th Commerce, All levels of CA and CS courses. The faculty emphasizes on keeping the classes exam focused and does not compromise on the quality and conceptual clarity of the topics covered. The sole aim of the Academy and the teachers is to provide a versatile platform for the students to learn, get their queries resolved, take test series, participate in discussions and ultimately, be able to score the best in their exams. The team at Unique Academy For Commerce is working every minute to put out the best content for the students, and help them in cracking the exams. The classes and study material at the Unique Academy For Commerce are designed in such a manner that it ensures the students only get the relevant information and knowledge that they need to pass the exams.

At Unique Academy For Commerce it is not just about teaching a subject, solving questions, finding solutions, passing the exams. The goal is much bigger because the teachers keep in mind the bigger picture while taking every class. At Unique Academy For Commerce, the common belief is in delivering the right kind of education that today's generation needs to get ahead in life. It is made sure that no stone is left unturned when it comes to preparation for the exams.

Recently, Unique Academy For Commerce was able to create history with over 750+ students clearing the CS Executive level examinations. Out of these achievers, 250 students were able to get an exemption in Module-1, while over 150 students scored an exemption in the second module. To put a cherry on the top, the Academy produced more than 20 All India Rank holders in the Dec-21 CS Executive examinations, including AIR – 1, 2 and 3. These rank holders are a true inspiration for the hard working mentors at Unique Academy For Commerce and for all the potential trend setters.

The team at Unique Academy For Commerce wishes each and every student all the very best in their learning journeys and continuous guidance at every level of their examinations.

Happy Learning!

Unique Academy For Commerce

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LESSON NO 1
Types of Documents

INTRODUCTION

As per the general definition given in Collins Dictionary, A document is one or more official pieces of paper with writing on them. The term 'document' is so imperative and broad that many legislations have defined it differently befitting the intent of legislature behind the enactment of that statute.

General Clauses Act, 1897 has given an inclusive definition of document. According to section 3(18), "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

According to section 2(36) of the Companies Act, 2013 "document" includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form.

As per section 2(22AA) of Income-tax Act, 1961, "document" includes an electronic record as defined in section 2(1)(t) of the Information Technology Act, 2000 (IT Act). IT Act provides that "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche

Deeds

In legal sense, a deed is a solemn document. Deed is the term normally used to describe all the instruments by which two or more persons agree to affect any right or liability. To take for example Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed and so on.

A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title, or interest.

A deed is a writing –

- On paper, vallum (on wall for writing), parchment (where manuscript is written)
- Sealed
- Delivered whereby an interest, rights or property passes.

A deed is a present grant rather than a mere promise to be performed in the future. Deeds are in writing, signed, sealed and delivered. All deeds are instrument but all instruments are not deed.

DRAFTING OF AGREEMENTS

An agreement which is enforceable at law is called a contract. Generally, when a contract is reduced to writing, the document itself is called an agreement. Accordingly, there cannot be an agreement unless there are two or more parties that agree to perform certain acts or refrain from doing something.

Types of Agreements

1. Sale/Purchase Agreements: Sale and Purchase agreements are entered into by the parties for the purpose of transfer to property. These agreements ensure that the property legally transferred and conveyed to the other party without dispute.
2. Commercial Agency Agreements: Sometimes businesses are conducted by traders not directly with their counterparts but through the agency of independent agents appointed for the purpose. Such agents would locate customers for the principal's goods and in certain conditions, would have an implied authority to deal with the goods of the principal, allow credit terms to customers and receive payment from the customers on behalf of the principal. Commercial Agency Contracts are entered into by organisations for running businesses though this mode of business operation.

3. Collaboration Agreements: When two parties join hands for exchange of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and/or managerial services, they are said to be collaborating in a desired venture. Commercial Agency Contracts are used in such scenarios.

4. Arbitration Agreements: The 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined relationship whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

5. Hypothecation Agreement: Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass.

6. Outsourcing Agreements: Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. It differs from contracting in that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best - its core competencies

7. Agreement for Assignment: An assignment is a form of transfer of property and it is commonly used to refer the transfer of an actionable claim or a debt or any beneficial interest in movable property. An important aspect of intellectual property laws deals with

assignment agreements. A transfer of an actionable claim is usually called an assignment thereof. For e.g. Assignment of Patents, Assignment of Trade Marks, Assignment of Copyrights, Assignment of Business and Goodwill etc.

8. Shareholders' Agreements: Shareholders' agreements (SHA) are quite common in business. In India, shareholder's agreement have gained popularity and currency only lately with bloom in newer forms of businesses. There are numerous situations where such agreements are entered into – family companies, JV companies, venture capital investments, private equity investments, strategic alliances, and so on. Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how the company should be operated and the defining inter-se shareholders' rights and obligations.

9. Employment Agreements: They are entered into between parties for the purpose securing the availability of manpower for an organization

FORM OF A CONTRACT

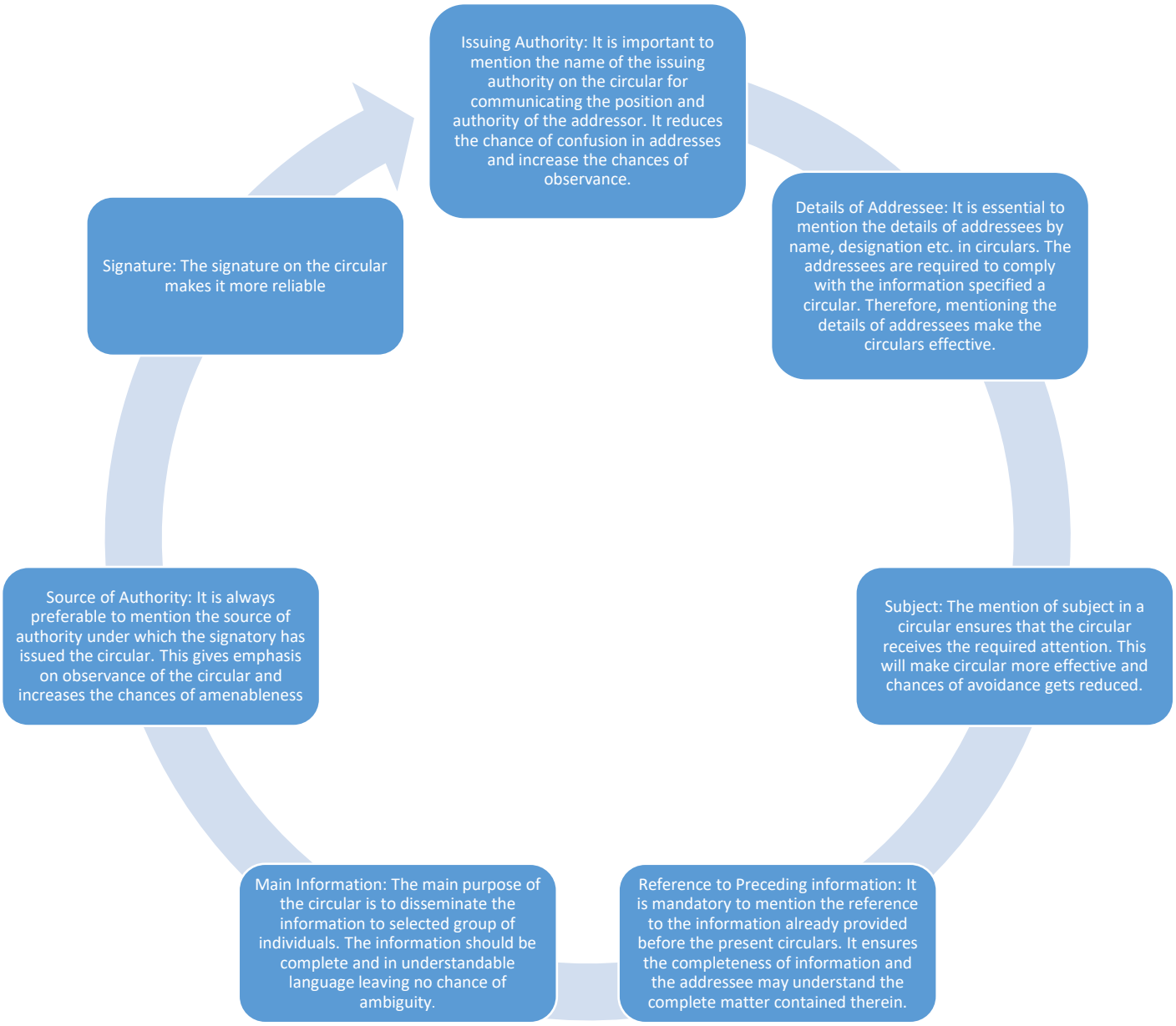
There is no particular form prescribed for the drawing up of trade contracts, except that they must fulfil all the essential requirements of a valid contract under the law applicable to the contract. If the law requires any particular category of contracts to be in writing or to be registered, these formalities must be complied with. A contract may be hand written, type written or printed. It may be as brief or as detailed as the circumstances of a particular trade transaction demand.

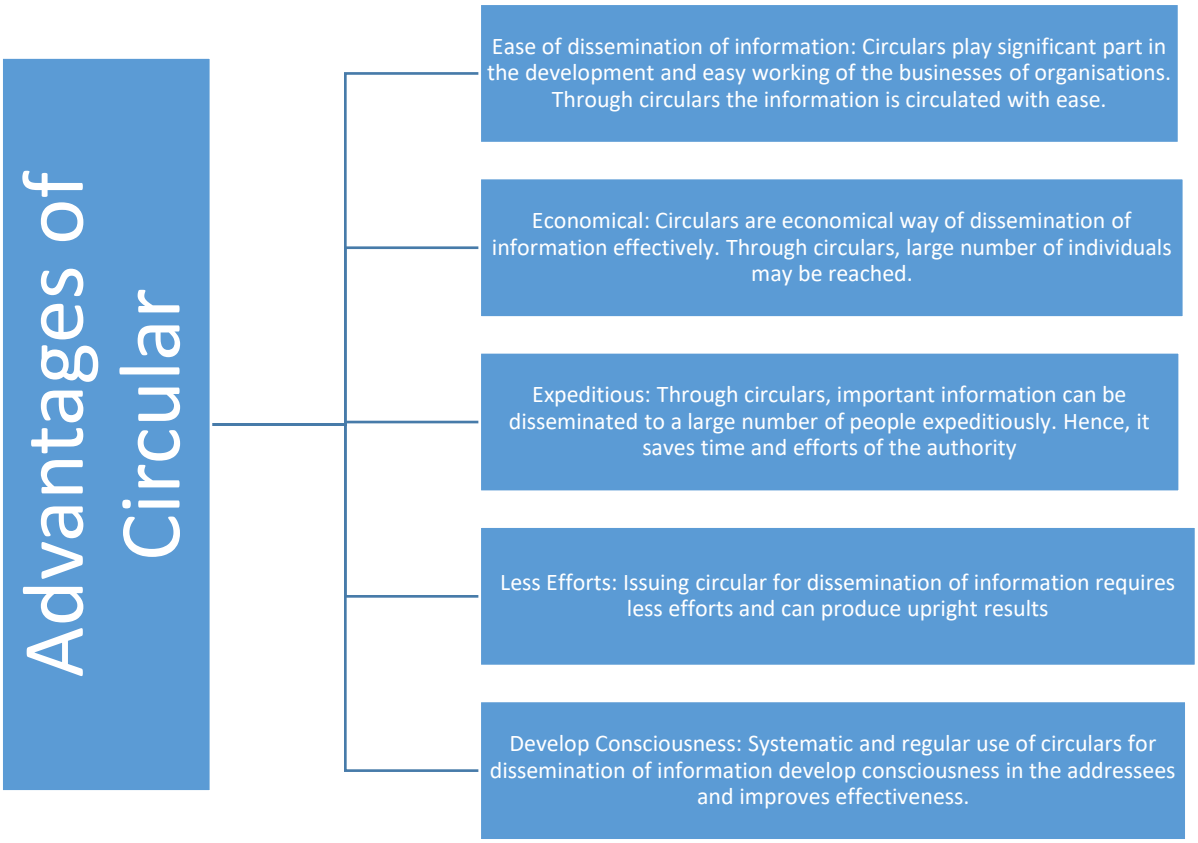
CIRCULAR

According to Cambridge dictionary, a circular is a letter or notice sent to a large number of people. The purpose of circulars is to disseminate the information to large number of individuals. Generally, circulars are in written form so as to create a permanent record of the information and the same may be accessed to by the individuals in present as well as in future. A circular may be issued and circulated in various modes but in present era, the prevalent mode in which circulars are issued are in electronic form such as by placing them at the website, sending them by emails etc. However, conventional method are still in operation such as circulating the written, typed or printed copies of circulars to individuals.

Circulars are issued by varied range of individuals and authorities. For example, A company may issue a circular to its employees for dissemination of a policy approved by the Board of Directors to be complied by the employees. Directors may issue a circular to the shareholders. Central Government may issue a circular for giving clarification on any point of Law or providing any other necessary information to public at large.

Important Points for drafting a circular


Issuing Authority: It is important to mention the name of the issuing authority on the circular for communicating the position and authority of the addressor. It reduces the chance of confusion in addresses and increase the chances of observance.
Details of Addressee: It is essential to mention the details of addressees by name, designation etc. in circulars. The addressees are required to comply with the information specified a circular. Therefore, mentioning the details of addressees make the circulars effective.
Subject: The mention of subject in a circular ensures that the circular receives the required attention. This will make circular more effective and chances of avoidance gets reduced.
Reference to Preceding information: It is mandatory to mention the reference to the information already provided before the present circulars. It ensures the completeness of information and the addressee may understand the complete matter contained therein.
Main Information: The main purpose of the circular is to disseminate the information to selected group of individuals. The information should be complete and in understandable language leaving no chance of ambiguity.
Source of Authority: It is always preferable to mention the source of authority under which the signatory has issued the circular. This gives emphasis on observance of the circular and increases the chances of amenableness
Signature: The signature on the circular makes it more reliable



PUBLIC NOTICES

Public notices are issued to convey information to large number of receivers that may called public. These are announcements made on a happening of a certain event of public interest. These may be issued by a Government Agency or by an individual including organisations. These are effective mode by which Public are informed about an important event. These may be issued for varied reasons such as providing information relating to , change in a law, Struck off the name of companies by Registrar of Companies, Status of Complaints by an authority, Call for Information regarding submission of information pertaining to 'Unclaimed Non-convertible Securities', Public Notices by companies etc. They are published though websites, newspapers or any other prevalent way. Public notices has gained admiration in present era due to public has become vigilant and technology is developed. They help the public being aware of recent developments and relevant information and as a result it improves transparency.

How to draft a Public Notice?

1. Name of the Issuer: A public notice should start from the name of organisation in order to be distinct, highlighted and attract attention.

2. Details of the Issuer: A public notice should also contain all the details of the organisation which a reader may require after reading. This will be helpful for the readers who wish to take necessary action or seek further details.

3. Title Heading: The heading of Public notice should be expressed in clear words so as to understand the purpose of issuing the public notice. This enables to attract the attention of the readers who are interested in the matter.

4.Comprehensive Details: The information is to be written in comprehensive manner. It is the duty of the draftsmen that it provides all the relevant details considering the available resources such as space foradvertisement and cost involved.

5. Statutory/Regulatory Requirement: If a Public Notice is published in compliance of a statutory requirement, it is necessary to give the reference of the particular statutory/Regulatory provision along with the name of statute.

6. Date and Place: It is imperative to mention the date and place for issue of Public Notice.

7. Designation of the issuer: The designation of the issuer should be mentioned in the public officer. The mention of the name of the authority can also be published.

Standard Bids and tenders

As per the Cambridge dictionary, tender is a written or formal offer to supply goods or do a job for an agreed price. It refers to an invitation to offer (bid) for a purpose. The process of inviting bids for tenders have been initiated frequently by the organisations for large projects. Tendering processes encourage the availability of goods or services on competitive prices. The tendering process becomes open for all the eligible bidders thereby ensuring the competitive prices. It also stimulates the availability of the resource required in a timely manner. The process of tendering is formal and legally binds the person entering into the contract after awarding of tender. The process of inviting tender empowers the Tender issuing authority to finalise the terms and conditions of the tender independently. However, the conditions of the tender should comply with the statutory, regulatory requirements, should not be unreasonable and arbitrary.

Important considerations for preparing a document for Tendering Process

1. Name and address of the organisation: The name and address of the organisation be mentioned on the initial page of the document.

2. Subject of the document: The subject of the tender documents to be mentioned in clear and comprehensive manner in order to attract the attention of the Bidder.

3. Index of the tender document: The index of the documents can make the document convenient for the prospective bidder.

4. Important dates and necessary information: The information such as Tender Publication Date, Last date and time for sending Pre-Bid Queries in writing, Cost of Tender, Earnest Money Deposit, Pre-Bid Meeting date, time & venue, Last Date & address of Submission of Bids, Date,

time & Venue of opening of Technical Bids and Financial Bids, contact details etc. should be provided in the tender document.

5. Disclaimer Clause: A disclaimer clause with respect to reservations or observation on the tender documents should be placed in the tender document.

6. Job Description: The job description in details should be mentioned in the tender document in order to acquaint prospective bidders with the requirements attached with the Job and evaluate and prepare their bids accordingly.

7. Division of tender documents in parts: The tender document be preferably prepared asking for Bid submissions in two parts i.e. Technical Bid and Financial Bids.

8. Fees and Deposits: The tender document should mention the fees and deposits commensurating the nature and quantum of work. The cost of the tender document may be required from the prospective bidder. Further, the provisions relating to Earned Money Deposit (EMD) and Security Deposit are also to be placed in the tender document.

9. Conditions for forfeitures of EMD: The clause providing for the circumstances in which EMD may be forfeited to be mentioned in the tender document. The general conditions in which EMD be forfeited are as under: i. If the bidder withdraws its bid; ii. the selected bidder delays or does not accept the Purchase / Work Order; iii. the selected bidder fails to supply goods / services as per the terms of the Tender or fails to execute Purchase / Work Order.

10. Pre Bid Meeting: Pre Bid Meetings be conducted in order to provide any clarification sought on the tender.

11. Scope of Work: The scope of work in details be mentioned in the tender documents.

12. Mention of Technical and administrative requirements: The technical and administrative requirement be mentioned comprehensively in order to prevent the halt in the Job at the later stage. The document should be clear and specific with respect to technical and administrative requirements for performing the Job.

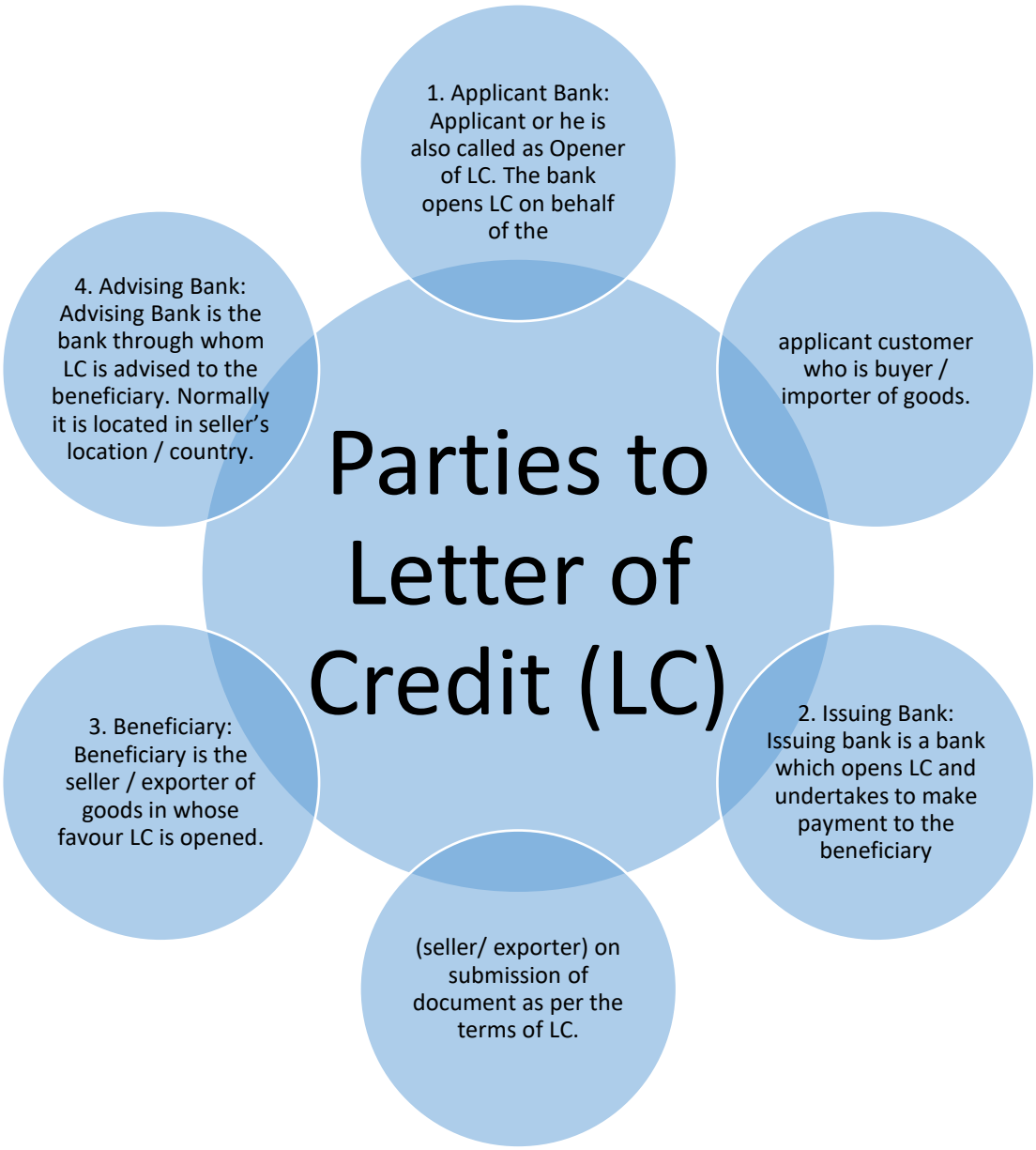
13. Eligibility Criteria: Essential Requirements are to be mentioned in the tender document.

14. Necessary forms and documents: Formats such as of Technical Bids, Financial bids, past experience of the bidder, Tender Acceptance Letter, Standard Terms and Condition of Agreement may be mentioned in the tender document. Further, a list of document required to be attached in the tender document may also be provided in the document.

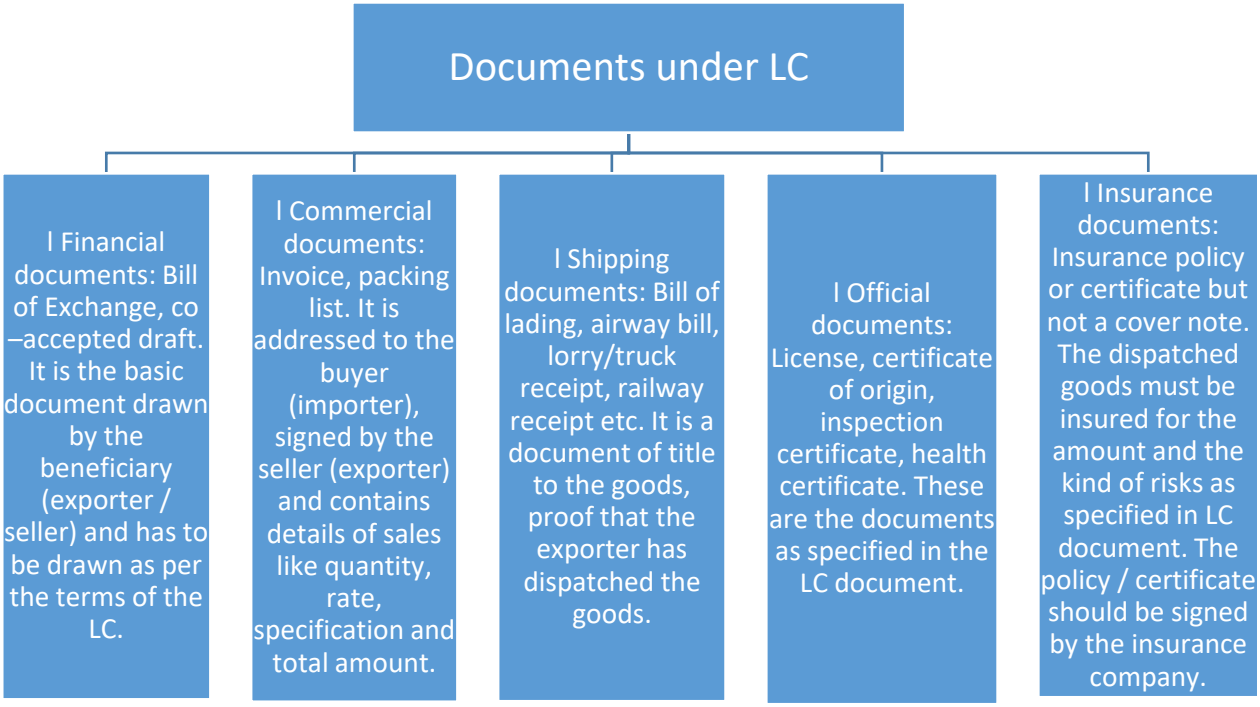
Letter of Credit

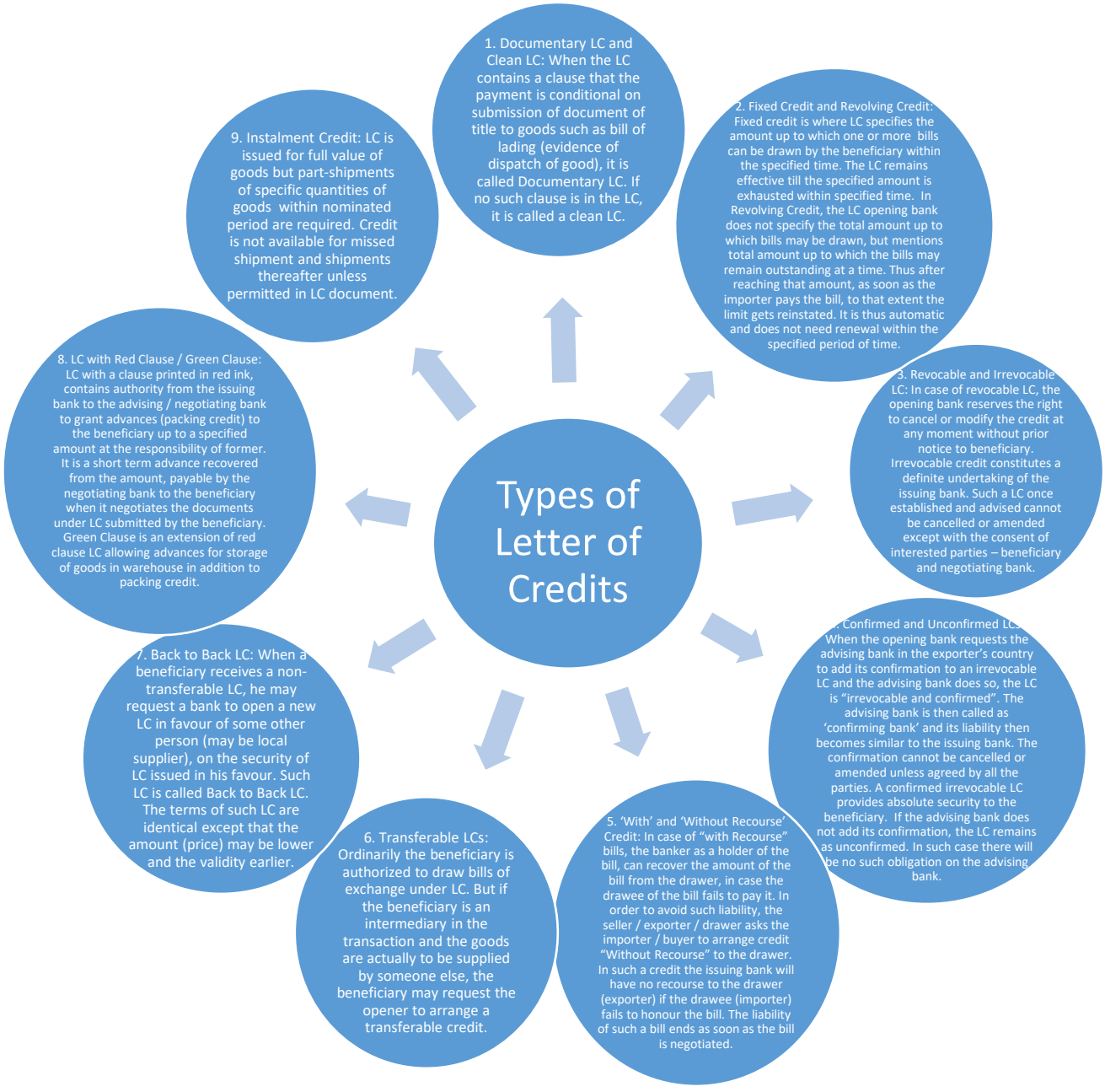
Letter of Credit ('LC'), also known as a documentary credit is a payment mechanism used specially in international trade. In an LC, buyer's bank undertakes to make payment to seller on production of documents stipulated in the document of LC. LC play an important role in the trade of a country, especially in its international trade. In most of the cases, the exporters (sellers) are personally not acquainted with the importers (buyers) in foreign countries. In such cases the exporters bear great risk, if they draw bills on importers, after having dispatched the goods as per their orders, because if the latter default in accepting the bills or

making the payment, the exporter will suffer heavy losses. To avoid such risks, the exporters ask the importers to arrange a letter of credit from their banker in favour of themselves, on the basis of which goods may be exported to the foreign importers




A. Confirming Bank: The bank which in addition to LC issuing bank, undertakes the responsibility of payment
under LC. This is required since the LC issuing bank may not be known to the exporter and he therefore
needs reputed bank from his country to add confirmation to the LC.
B. Negotiating Bank: The Bank that negotiates the documents under LC.
c. Paying Bank: Paying Bank or Nominated Bank is the bank nominated or authorized by the LC issuing bank to make payment under LC. In practice, the paying bank presents the documents received by it either to issuing bank or Reimbursing Bank for payment and transfers the proceeds to the beneficiary's account.
D. Reimbursing Bank: Bank with whom the LC issuing bank maintains foreign currency account (NOSTRO account). LC issuing bank authorizes the reimbursing bank to honor the LC reimbursement claim of negotiating bank.
In addition to above four parties, following parties may also be involved in LC transaction.


Documents under LC
l Financial documents: Bill of Exchange, co –accepted draft. It is the basic document drawn by the beneficiary (exporter / seller) and has to be drawn as per the terms of the LC.
l Commercial documents: Invoice, packing list. It is addressed to the buyer (importer), signed by the seller (exporter) and contains details of sales like quantity, rate, specification and total amount.
l Shipping documents: Bill of lading, airway bill, lorry/truck receipt, railway receipt etc. It is a document of title to the goods, proof that the exporter has dispatched the goods.
l Official documents: License, certificate of origin, inspection certificate, health certificate. These are the documents as specified in the LC document.
l Insurance documents: Insurance policy or certificate but not a cover note. The dispatched goods must be insured for the amount and the kind of risks as specified in LC document. The policy / certificate should be signed by the insurance company.


Types of Letter of Credits
1. Documentary LC and Clean LC: When the LC contains a clause that the payment is conditional on submission of document of title to goods such as bill of lading (evidence of dispatch of good), it is called Documentary LC. If no such clause is in the LC, it is called a clean LC.
2. Fixed Credit and Revolving Credit: Fixed credit is where LC specifies the amount up to which one or more bills can be drawn by the beneficiary within the specified time. The LC remains effective till the specified amount is exhausted within specified time. In Revolving Credit, the LC opening bank does not specify the total amount up to which bills may be drawn, but mentions total amount up to which the bills may remain outstanding at a time. Thus after reaching that amount, as soon as the importer pays the bill, to that extent the limit gets reinstated. It is thus automatic and does not need renewal within the specified period of time.
3. Revocable and Irrevocable LC: In case of revocable LC, the opening bank reserves the right to cancel or modify the credit at any moment without prior notice to beneficiary. Irrevocable credit constitutes a definite undertaking of the issuing bank. Such a LC once established and advised cannot be cancelled or amended except with the consent of interested parties – beneficiary and negotiating bank.
Confirmed and Unconfirmed LC: When the opening bank requests the advising bank in the exporter's country to add its confirmation to an irrevocable LC and the advising bank does so, the LC is "irrevocable and confirmed". The advising bank is then called as 'confirming bank' and its liability then becomes similar to the issuing bank. The confirmation cannot be cancelled or amended unless agreed by all the parties. A confirmed irrevocable LC provides absolute security to the beneficiary. If the advising bank does not add its confirmation, the LC remains as unconfirmed. In such case there will be no such obligation on the advising bank.
5. 'With' and 'Without Recourse' Credit: In case of "with Recourse" bills, the banker as a holder of the bill, can recover the amount of the bill from the drawer, in case the drawee of the bill fails to pay it. In order to avoid such liability, the seller / exporter / drawer asks the importer / buyer to arrange credit "Without Recourse" to the drawer. In such a credit the issuing bank will have no recourse to the drawer (exporter) if the drawee (importer) fails to honour the bill. The liability of such a bill ends as soon as the bill is negotiated.
6. Transferable LCs: Ordinarily the beneficiary is authorized to draw bills of exchange under LC. But if the beneficiary is an intermediary in the transaction and the goods are actually to be supplied by someone else, the beneficiary may request the opener to arrange a transferable credit.
7. Back to Back LC: When a beneficiary receives a non-transferable LC, he may request a bank to open a new LC in favour of some other person (may be local supplier), on the security of LC issued in his favour. Such LC is called Back to Back LC. The terms of such LC are identical except that the amount (price) may be lower and the validity earlier.
8. LC with Red Clause / Green Clause: LC with a clause printed in red ink, contains authority from the issuing bank to the advising / negotiating bank to grant advances (packing credit) to the beneficiary up to a specified amount at the responsibility of former. It is a short term advance recovered from the amount, payable by the negotiating bank to the beneficiary when it negotiates the documents under LC submitted by the beneficiary. Green Clause is an extension of red clause LC allowing advances for storage of goods in warehouse in addition to packing credit.
9. Instalment Credit: LC is issued for full value of goods but part-shipments of specific quantities of goods within nominated period are required. Credit is not available for missed shipment and shipments thereafter unless permitted in LC document.

Advantages of LCs to the Exporter (seller) and the Importer (buyer)

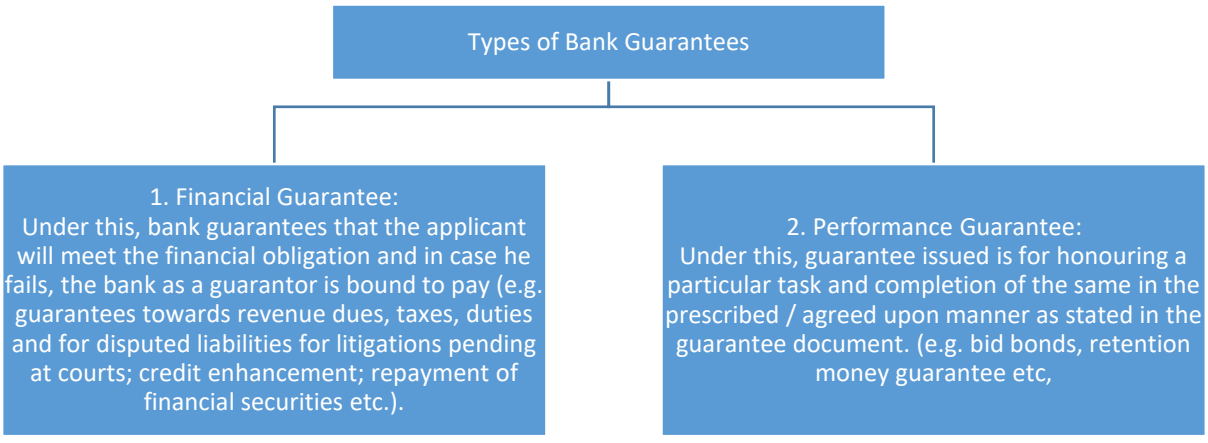
- Facilitates trade transactions between two parties who are not known to each other and located in two different countries.
- Beneficiary is assured of payment as long as it complies with the terms and conditions of LC.
- The credit risk is borne by the issuing bank and not the applicant (buyer).
- LC accelerates payment of receivables and helps beneficiary (seller) in minimizing collection time.
- The beneficiary's foreign exchange risk is eliminated with LC issued in the currency of seller's country. l On the basis of LC the exporter may obtain advance from the bank for procuring and processing or manufacturing goods to be exported.
- Buyer is enabled to import goods.
- LC assures importer that bills drawn under LC will be honoured only when they are strictly in accordance with the conditions stipulated in LC document and the documents are duly submitted.

Bank Guarantee

It is a non-fund-based facility required by the borrowers. Banks are often required to issue guarantees on behalf of their customers.

A bank guarantee ensures that the liabilities of the debtor will be met in the event he fails to fulfil his contractual obligations. It is an agreement between three parties – the bank, the beneficiary and the applicant who seeks the guarantee from the bank.

This agreement acts as an undertaking assuring the beneficiary that the bank would pay the specified amount, in the case of applicant's default in delivering the "financial" or "performance" obligation as mentioned in the guarantee.



Bye Laws

According to Collins' Dictionary, A bye law is a law which is made by a local authority and which applies only in their area. So, certain organisations frame their Bye Laws for effective functioning.

Bye-Laws are legal tools used to regulate a particular subject or area so as to achieve orderly development of that subject.

The nature of the Bye-Laws i.e. Mandatory or directory depends upon the subject matter for which they were made and the language used by the draftsmen in drafting the legislature empowering the making of Bye Laws.

The authority to frame the bye laws are generally provided by the legislative enactment that is mandatory for that organisation to comply.

The legal recognition of Bye Laws are as under: According to Article 13(3)(a) of the Constitution of India, "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

According to section 3(29) of General Clauses Act, 1897, "Indian law" shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution, had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act;

So, a Bye Law is also a Law recognized by the Constitution of India and also under various statutes.

When a Bye Law should be made

Section 22 of General Clauses Act, 1897 provides that where, by any Central Act or Regulation which is not to come into force immediately, on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Regulation, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, of with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

Examples of Bye Laws

- New Delhi Municipal Council Solid Waste Management Bye-Laws, 2017
- Bye Laws of National Stock Exchange of India Limited l Bye Laws of Bombay Stock Exchange
- Bye-laws of a Multi State Cooperative Society
- Bye- laws of ICSI Institute of Insolvency Professionals
- ICSI registered Valuers Organisation Bye Laws
- Bye Laws made by various bodies for Arbitration Proceedings

Show Cause Notice (SCN)

A show cause notice is a document delivered to other party to represent the matter. It summaries the alleged matter and grants the other party an occasion to explain themselves. SCN may be issued for varied reasons by various authorities such as by Courts, Government, Quasi-judicial Authorities, Employers, other authorities etc.

The issuance of SCN is preferred by authorities due to the observance of the principle of Natural Justice. It is based on the principle audi alteram partem (hear the other side) i.e. no one should be condemned unheard.

It requires that both sides should be heard before passing the order.

This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given opportunity to submit his explanation thereto.

SCN provides an opportunity to the receiver to counter a potentially harming claim.

SCN may be in any form depending upon the requirement for calling of the information and explanations.

Essentials of Show Cause

A show cause notice should inter alia address the following essentials:

1. SCN should contain the name of the issuer.

2. It should be issued in writing.

3. It should be written in clear language in order to avoid ambiguity.

4. It should mention the correct and brief facts.

5. If there is a violation of Law, it should be specifically mentioned.

6. Charges should be levelled specifically and they should be vague or in contradiction with the information contained in SCN.

7. Proposed action should also be mentioned in the SCN. For e.g. Penalty, Legal action, Suspension etc. 8. The time limits that have been provided to the receiver should be mentioned in the notice.

9. Adequate time limit should be given for the reply, unless otherwise specifically provided by any law

9. References and Annexures should be provided, wherever required.

10. The mode of representation warranted should be mentioned in SCN i.e. In person, Meeting (Online or face to face).

11. The address of the authority should be mentioned in SCN.

12. SCN should be dated.

Standing Orders

'Standing Orders' defines the conditions of recruitment, discharge, disciplinary action, holidays, leave, etc., go a long way towards minimising friction between the management and workers in industrial undertakings.

The Industrial Employment (Standing Orders) Act(said Act) requires employers in industrial establishments to clearly define the conditions of employment by issuing standing orders duly certified. It applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months.

Model standing orders issued under the Act deal with classification of workmen, holidays, shifts, payment of wages, leaves, termination etc.

The text of the Standing Orders as finally certified under the said act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed. The objects of standing orders is that the employer, once having made the conditions of employment known to his employed workmen cannot change them to their detriment or to the prejudice of their rights and interests.

The express or written conditions of employment, it is open for the prospective worker to accept them and join the industrial establishment.

Important aspects for issuing Standing Orders

1. The employer of the establishment submits to the Certifying Officer five copies of the draft Standing Orders proposed by him for adoption in that establishment.

2. Such draft Standing Orders shall be in conformity with the Model Standing Orders if any, and, shall contain every matter set out in the Schedule which may be applicable to the industrial establishment. 3. The draft Standing Orders shall be accompanied by a statement containing prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

4. It is the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders.

5. On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in such manner as may be prescribed, together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders. These objections are required to be submitted to him within 15 days from the receipt of the notice. On receipt of such objections he shall provide an opportunity of being heard to the workmen or the employer and will make amendments, if any, required to be made therein and this will render the draft Standing Orders certifiable under the Act and he will certify the same. A copy of the certified Standing Orders will be sent by him to both the employer and the employees association within seven days of the certification.

6. Certifying Officer files a copy of all the Standing Orders as certified by him in a register maintained for the purpose in the prescribed form. He shall furnish a copy of the same to any person applying therefor on payment of the prescribed fee.

7. Standing Orders comes into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives.

8. The text of the Standing Orders as finally certified under the said Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed.

Matters to be provided in standing order

- Classification of workmen, e.g., whether permanent, temporary, apprentices, probationers, or badlis.
- Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.
- Shift working.
- Attendance and late coming.
- Conditions of, procedure in applying for, and the authority which may grant, leave and holidays.
- Requirement to enter premises by certain gates, and liability to search.
- Closing and re-opening of sections of the industrial establishment, and temporary stoppages of work and the rights and liabilities of the employer and workmen arising therefrom.
- Termination of employment, and the notice thereof to be given by employer and workmen.
- Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
- Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.
- Any other matter which may be prescribed under the Industrial Employment (Standing Orders) Act, 1946.

BONDS

Bond means a formal document by which a person undertakes to perform a certain act. The bonds are of different types such as Surety Bond, bonds as financial instruments, judicial bonds, Guarantee bonds, saving bonds etc. The purpose of issuance of bonds also differs according to the requirements. For example: Surety Bonds are undertaken for the purpose of providing security if a certain act agreed has not been done. Financial Instruments bonds are evidence of a debt due on the organisation. A bail bond is an undertaking by an accused to appear for trial or to pay a sum of money stated therein on non-compliance. A bond is also included in the wide campass of the term deed. The purpose of undertaking a bond is secure the act or omission for which the bond is issued as a security.

LESSON 2
General principles of Drafting

Introduction

Importance of drafting and conveyancing for a company's executivecould be well imagined as the company has to enter into various types of agreements with different parties and have to execute various types of documents in favour of its clients, banks, financial institutions, employees and other constituents.

The importance of the knowledge about drafting and conveyancing for the corporate executives has been felt particularly for the threereasons viz.:

(i) for obtaining legal consultations;

(ii) for carrying out documentation departmentally;

(iii) for interpretation of the documents.

Drafting

Drafting may be defined as the synthesis of law and fact in a language form. Drafting is first thinking & second composing. Theprocess of drafting operates in two levels:

1. Conceptual
2. Verbal

Drafting, in legal sense, means an act of preparing the legal documents like agreements, contracts, deeds etc. Drafting requiresknowledge of facts and law for drafting.

In simple words, drafting is composing the available information intowriting with a legal meaning.

Drafting is required in varied fields such as documentations forbusiness, creating legal documents including agreements

Conveyancing

Art of drafting, deeds and documents whereby land or interest onland is transferred from one person to another is known as conveyancing.

Rights and interest is transferred by one person to another in the document prepared for conveyancing.

Example- sale deed, mortgage deed, lease deed

Distinguished Drafting and conveyancing:

DRAFTING	CONVEYANCING
It is defined as the Synthes is oflaw & fact in language form.	Art of drafting, documents, deeds, whereby land or interest on land is transferred.
It has a wider scope.	It has a narrow scope.
Example-agreement, application	Example-sale, mortgage, lease,deed
Drafting gives a general meaningto preparations of documents, which may include documents relating to transfer of property.	Conveyancing stresses upon transfer of property.

Distinction between conveyance and contract

CONVEYANCING	CONTRACT
No reciprocal promise and title in respect of property already passed.	It consists of reciprocal promise & each party is bound by that.
It doesn't create legal rights of action, it alters existing rights.	It treats rights of action in favour of parties.
It is art of drafting document relating to TOPA	It is an agreement enforced by law.
Governed by TOPA	Governed by INDIAN CONTRACT ACT, 1872

GENERAL PRINCIPLES OF DRAFTING ALL SORTS OF DEEDS AND CONVEYANCING AND OTHER WRITINGS

1. Fowlers' Five Rules of Drafting

1. Prefer the familiar word to the far-fetched (familiar wordsare readily understood).
2. Prefer the concrete word to the abstract (concrete words make meaning clearer and more precise)
3. Prefer the single word to the circumlocution (single word gives direct meaning avoiding adverb and adjective)
4. Prefer the short word to the long (short word is easily grasped).
5. Prefer the Saxon word to the Roman (use of Roman wordsmay create complications to convey proper sense to an ordinary person to understand).

2. Sketch or scheme of the draft document

According to him, it is always advisable to sketch or outline the contents of the document before drafting. It is suggested by MR. DAVIDSON. He says that whole design of draft should be conceived before drafting otherwise draft will be confusing and things which ought to be done may be left undone, also he maybe puzzled at every step of his progress in determining what ought to be inserted and what is to guide him in his decision because he does not know what his own object is.

3. Skelton draft and its self-appraisal

When scheme of drafting is ready, drafts-man should briefly note down the point which he intends to incorporate in his draft. It means he should frame points which he wants to addin his draft. This is skeleton draft. And then he should check (approve) that. Language is layman, there is no misinterpretation, no repetition, no ambiguity of facts.

4. Special attention to be given to certain documents

Special attention to special documents like document like transfer of immovable property (conveyancing), taking permissions under some laws like INCOME TAX ACT, COMPANIES ACT

5. Expert's opinion

- Document will not be perfect if it says too much or too little or if it is ambiguous.
- Texts of the documents should be provided into paragraphs.
- Schedules should be provided in the documents.
- Documents should be self-explanatory.
- The draft must be readily intelligible to a layman.
- Nothing is to be omitted or admitted at random on the document that is to say negative statement should generally be avoided
- The draftsman should begin by satisfying himself that he appreciates what he means to say in the document.
- Active voice to be preferred over passive voice.
- Use of juridical language should be made.
- The well drafted document should be clear to any person who has competent knowledge of the subject matter.

Some do's

- Reduce the group of words to a single word.
- Use simple verb for a group of words.
- Write shorter sentences.
- Choose the right word.
- Know exactly the meaning of word & sentences you are writing.
- Put yourself in place of reader.

Some don'ts

- Avoid unnecessary repetition.
- Avoid the use of words of some sound. Example-employerand employees.
- Negative in successive phases would be very carefully employed.
- Draftsman should avoid the use of words "less than" or"more than", instead he must use "not exceeding"
- If the draft has two positions, they should be separated bythe word "either", "either or both" to express the meaning.
- If any clause in the document is numbered then it will be convenient to refer it by its number subsequently.
- Avoid ground-about construction

Deeds

In legal sense, a deed is a solemn document. Deed is the term normally used to describe all the instruments by which two or more persons agree to affect any right or liability. To take for example Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed andso on.

A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title, or interest.

A deed is a writing –

- On paper, vallum (on wall for writing), parchment (where manuscript is written)
- Sealed
- Delivered whereby an interest, rights or property passes.

A deed is a present grant rather than a mere promise to beperformed in the future. Deeds are in writing, signed, sealed and delivered. All deeds are instrument but all instruments are not deed.

Document

It is defined under section 3(18) of GENERAL CLAUSE ACT ,1894 which means "any matter expressed or described upon any substance by means of letters, figures, marks or by one of those means". A writing is a document. Words printed, lithographed or photographed are documents. Also, a map or plan is a document.All deeds are documents but not all document are deeds.

Various kinds of deeds

1) **Good deed**- is one which conveys a good title, not one which is good merely in form.

2) **Good and sufficient deed**- It is also a marketable deed; this deed will pass a good title to the land it purports to convey.

3) **Inclusive deed**-it is a deed within which the designated boundaries lands which are expected from the operations of deed.

4) **Latent deed**- A latent deed is a deed kept for twenty years or more in man's escritoire or strong box.

5) **Voluntary deed**- It is the deed which is given without any "valuable consideration"

6) **Warranty deed**- This deed contains a covenant of warranty.

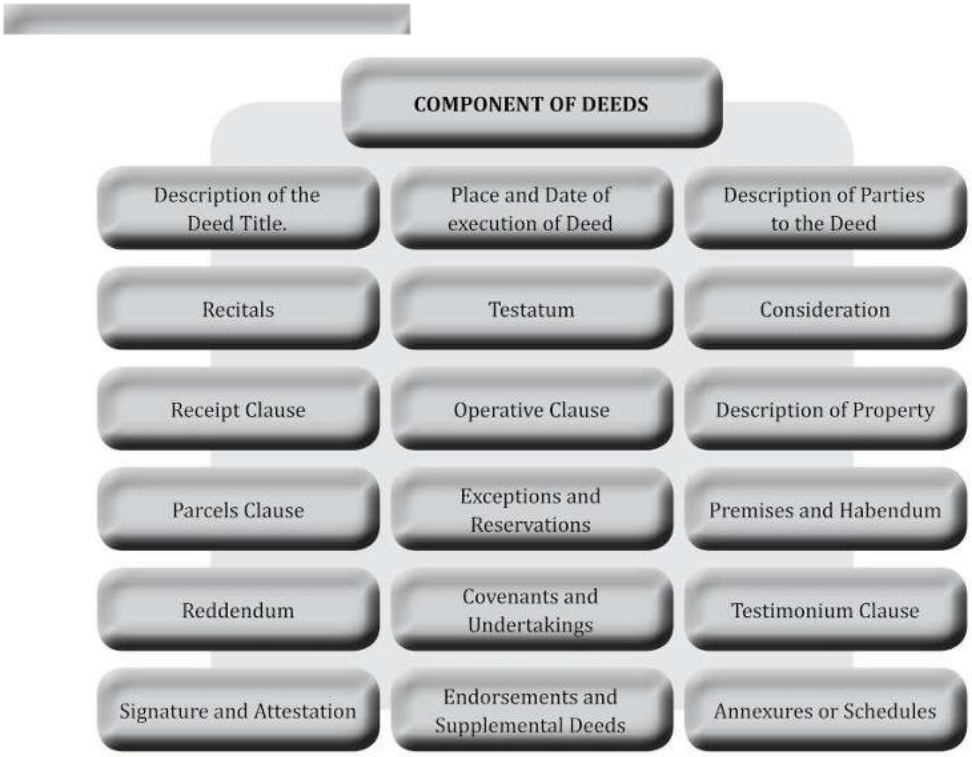
7) **Special warranty deed**- Which is in terms a general warranty deed, but warrants title only against those claiming by, through, or under the grantor, conveys the described land itself, and the limited warranty does not, of itself, carry notice of title defects.

Terms connected with deed are as follows:

1. **Deed pool**- Deed between two or more parties where as many copies are made as there are parties so that each party should have possession of a copy.
2. **Deed poll-** Where deed is made & executed by a single party. ex-power of attorney. It is called deed poll. It has a polled or clean-cutedge. It is drawn in first person usually
3. **Indenture** -There are those deeds where there are two or more parties. It is written in duplicate upon one piece of parchment andtwo parts were served so as to leave an indented or vary edge. Practise was to make as many copies or parts as there were partiesto it. This practice is no more used in England and at present indenture means a deed between two or more person.

4. **Cyrographum-** It is a type of indenture where words "cyrographum" is written between two or more copies or documents and a cut is made through this word. The practice of indenting deeds has been ceased long ago and now when two or more parties execute deed, this is only known as indenture.
5. **Deed escrow –** When deed is signed by one party & delivered to another it is an escrow and not a perfect deed and only mere writing unless signed by all the parties and dated when the last party signs it. The deed operates from the date it is last signed.

Components of deeds



IMPORTANT POINTS IN REGARD TO DRAFTING OF CONTRACTS

1. Description of Parties to the Contract

Full description with Name, status, address & registered office (ifco.). In case of an individual, father's name and in case of a company, the place where registered office is situated be also given. In case of firms and companies the particulars of personsrepresenting them be invariably given including details of particulars of the firm.

2. Legal Nature of the Contract

Whether it is a sale/purchase contract or a commercial agency contract or a contract for technical assistance and advice or building construction and erection contract, etc. so as to avoid any doubt as regards the nature of the contract and the legal position of the parties there under.

3. Licences and Permits

It is desirable to provide particularly in international trade contracts as to which party would be responsible for obtaining export/import licences and the effects of delay, refusal or withdrawal of a license by Government authority, etc. It is generally the commercial practice to provide that each party to the contract may obtain the requisite licenses in its own country.

4. Shipment of the Good

It is desirable to stipulate precise particulars regarding the rightsand duties of the parties towards shipment of the goods, i.e., thetime, date and port of shipment, name of the ship and other shipparticulars. It may also be stipulated as to whether and up to what time the shipment may be delayed by the seller.Sometimes a penalty is provided for delay in shipment accordingto the time of delay

5. Documentation

In modern business transactions, it is sometimes necessary for the seller to supply detailed specifications, literature, etc. relating to the goods particularly. If the goods are of scientific ortechnical nature. It is also desirable to provide that the technicaland confidential information contained in the documentation tobe kept confidential by the buyer and that it will not be transmitted by him to a third- party without the permission of the seller

6. Guarantee

Sometimes the goods sold are of such a nature that the buyer insists for guarantee regarding their use and performance for a particular period. Under a guarantee clause, the seller is held responsible for the defects appearing in the goods during the period of the guarantee. The seller is usually given an option to remove the defects in the goods either by replacement or by repair

7. Passing of the Property and Passing of the Risks

It is very important to provide for the exact point of time when the title or the property in the goods and the risk will pass from the seller to the buyer. This is important to ascertain as towhether the seller or the party will be responsible for the damage or loss to the goods during transit at a particular point oftime.

8. Amount, Mode and Currency of Payment:

Modes of payment may be on D/A or D/P basis or it may be a Letter of Credit or otherwise as per the agreement of the parties.One of the most important matter which needs to be provided in international contracts relates to the exchange rate.

9. Force Majeure

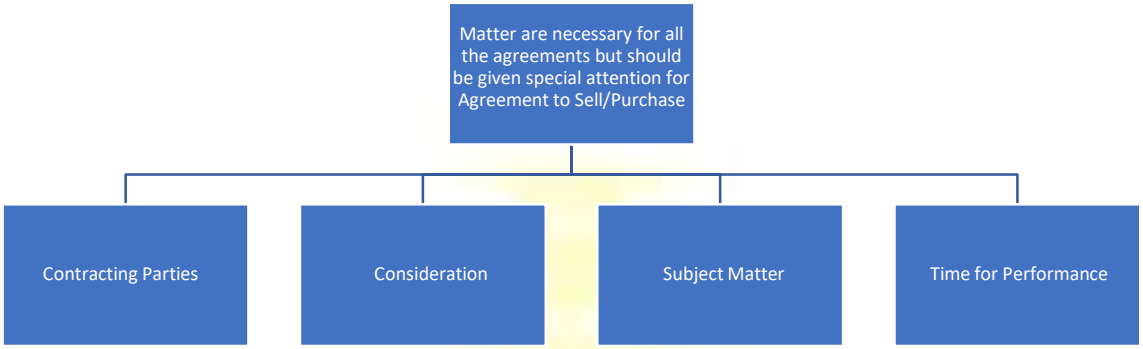
Majeure or excuses for non-performance. This provision definesas to what particular circumstances or events beyond the controlof the seller would entitle him to delay or refuse the performance of the contract, without incurring liability for damage. It is usual to list the exact circumstances or events, likestrike, lockout, riot, civil commotion.

10. Proper Law of Contract

When both the parties to a contract are resident in the same country, the contract is governed by the laws of the same country. However, in international contracts, the parties aresubject to different legal systems and, therefore, they have to choose a legal system which will govern the rights and duties of the parties. Therefore, it is desirable and necessary to stipulate the proper law of contract in international contracts.

11. Settlement of Disputes and Arbitration

The last, but not the least, important is the provision regarding settlement of disputes under the contract by arbitration or otherwise. It is usual to provide for an arbitration clause in the contract, particularly under the auspices of an arbitral institution. A suitable arbitration clause may be provided by the parties by mutual agreement. It is also desirable to provide for the mode of appointment of arbitrator and also for the venue ofthe arbitration in the arbitration clause.



Guidelines for use of word & phrases for drafting and conveyancing

- For general words, reference can be made to ordinary dictionary to check the meaning of word. Ex-oxford andwebsters dictionary.
- For legal terms, reference can be made to legal dictionary. Ex-Wharton's Law Lexicon.
- Current meaning of words should be used and if at any case,such words and cases are been used, reference of such case laws should be used.
- Technical words can be used only after ascertaining there meaning.
- Choice of words & phases can be made to convey theintention to the reader.
- Drafting can check the work of legal expert on interpretations of statues

Use of appropriate words and expressions

Meaning of some terms commonly used in drafting of deeds & documents is discussed as follows

- The term, ***"INSTRUMENT"*** Is interpreted by different judgements by court differently and it has to be understoodwith the reference to provisions of particular act.

  As per section2(b) of NOTARIES ACT 1952 and section2(14) of INDIAN STAMP ACT 1899, the word INSTRUMENT includesevery document by which any right or liability is, or purportsto be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

  As per GENERAL CLAUSE ACT, INSTRUMENT means formal legal writing like an order made by constitutional or statutory authority. INSTRUMENTS includes awards made by industrial courts. Will is an IMSTRUMENT. The word INSTRUMENT IS WIDER THAN DECREE.

AT, NEAR, ON-

AT signifies a place and it is a relative term. Where it is applied to a place it is less definite in meaning than "IN'' or "ON".

NEAR word is used describing the location of real estate, it signifies greater or less decree. The word ON is used when describing the location of land, means in the vicinity of.

ADJOINING, ADJACENT, CONTIGUOUS:

ADJOINING – {near something or close to something that is having a common point or line} It does not always import boundary of land conveyed with boundary of adjoining land.Because the real term for that word is Contiguous; commoncorner of two land will make it contiguous.

Adjacent- it is not synonymous. It implies contiguity but it means next to something else.

- **AND, OR**

  And implies conjunctive whereas OR implies alternative which means substitution

- **SUBJECT TO**

  It means a qualification i.e., condition.

INTERPRETATION OF DEEDS & DOCUMENTS

INFORMAL AGREEMENT

Agreement to be interpreted in the same sense in which parties use the words in question. If intentions are ambiguous then party can reasonably bear one of thosemeanings.

FORMAL AGREEMENT

Rule of interpretation are as follows:

- Document should contain all the terms & conditions and evidences can be admissible to explain any ambiguity.
- When words are clear and unambiguous, such words will prevail over hypothetical or supposed intentions.
- Courts must interpret words in popular, natural and ordinary sense.
- If certain words are employed in business or particular locality in a particular sense then it must be interpreted in that sense only.
- If a contract is completed in two parts i.e., preliminary and final, then two of final contract will prevail

Legal implications and requirements

Legal implications of drafting are as follows:

- Double and doubtful meaning of intentions can be given.
- Inherent ambiguity and difficulties can occur.
- Difficulties in implementations of objectives desired in documents.
- Increased litigation and loss of time, money and human resource.
- Interpretations of facts leading to wrongful judgements

Stamping of the deeds

- The draft of document is required to be approved by the parties.
- In case of companies it is approved by Board of Directors in their meeting or by a duly constituted committee of the boardfor this purpose by passing requisite resolution approving andauthorising of its execution.
- The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per Indian Stamp Act. In case document is drafted on plain paper but approved without any changes, it can be lodged with Collector of Stamps for adjudication of stamp duty, who will endorse certificate recording the paymentof stamp duty on the face of document and it will become ready for execution.

- E-stamping is a computer based application and a secured electronic way of stamping documents.
- The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. The Stock Holding Corporation of India Limited (SHCIL) is the Central Record Keeping Agency (CRA). E-Stamping is a computer based procedure and a secure manner for the state to pay non-judicial stamping duties.
- The prevailing system of physical stamp paper / franking is being replaced by E-Stamping system.
- E-stamping is beneficial for varied reasons such as E-stamps areless time-consuming; They are very easily accessible; They savecost; e-Stamp Certificate generated is tamper proof; e-Stamp Certificate generated has a Unique Identification Number; theyare Easily accessible; they are Secure and user friendly.

LESSON NO 3

Laws relating to Drafting and Conveyancing Laws relating to Drafting and Conveyancing

PART – A: INDIAN CONTRACT ACT, 1872

In order to understand, the critical aspects of Drafting and Conveyancing it is necessary to study the basicconcepts relating to formation of contracts viz. Offers, Communication, acceptance and revocation of proposals, Essentials of Contracts and Contingent Contracts.

COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

Proposals

Proposal – Sec 2(a) - When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make aproposal.

Essentials of a proposal

1. There should be at least 2 persons.
2. One person should express his willingness to do or abstain from doing an Act or abstinence.
3. The purpose should be to obtain the assent of the other on the same thing.

If all the above three conditions are present, there is a valid proposal. However, the proposal should not be forany illegal act or abstinence.

Types of offer –

1) General Offer - It is an offer to the whole world.

2) Specific offer - It is an offer made to a particular person or group of persons.

3) Express offer - It is an offer which is made by words either oral or in writing.

4) Implied offer - It is an offer which is made by conduct or gesture of the parties.

5) Counter offer - When a person to whom the offer is made does not accept the offer [as it is] he counters thecondition. This is called counter offer.

6) Cross offer - When two offers of same terms and conditions cross each other at same time, it is called crossoffer.

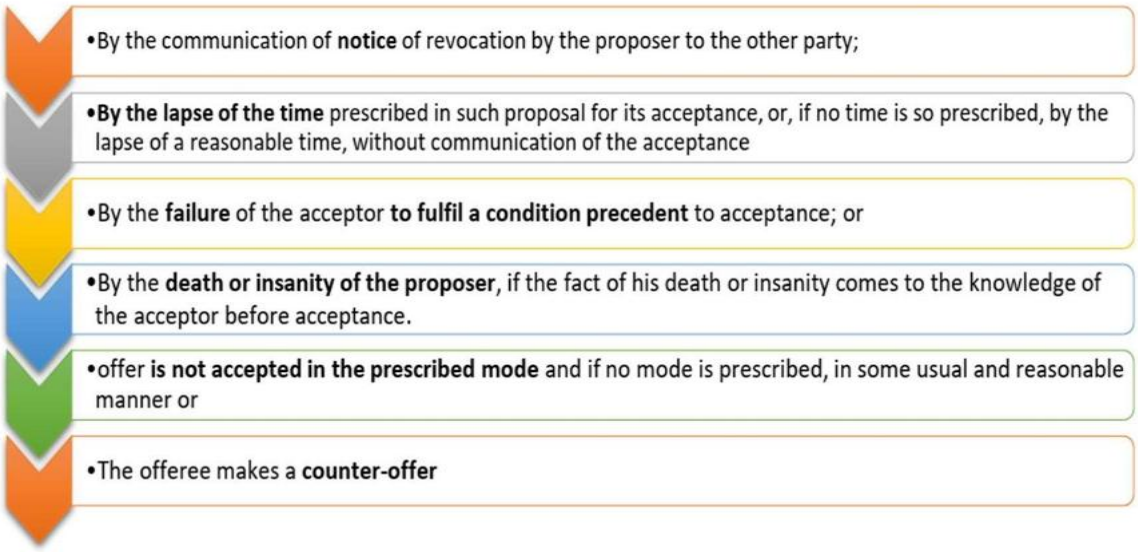
7) Standing offer - An offer is a standing offer if it is intended to remain open for a specified period

Rules governing Offers

A valid offer must comply with the following rules:

1. An offer must be clear, definite, complete and final. It must not be vague.
2. An offer must be communicated to the offeree.
3. The communication of an offer may be made by express words-oral or written- or it may be implied byconduct.
4. The communication of the offer may be general or specific

How an offer gets revoked?



Offer and invitation to offer

Invitation to offer is a communication to invite certain person(s) or public for making offer.

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

Communication

According to section 3 of the Indian Contract Act, 1872, the communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal,acceptance or revocation, or which has the effect of communicating it.

Essentials of section 3

1. The purpose of section 3 is to provide the provision relating to four incidents:

    1. Communication of the Proposal,
    2. Acceptance of the Proposal,
    3. Revocation of the Proposal, and
    4. Revocation of the Acceptance.

2. There must be an act or omission of the maker for acceptance and revocation.

3. The Act or Omission should intend to communicate such proposal, acceptance or revocation, or should havethe effect of communicating it.

Completion of Communication

1. **Proposal:** The communication of a proposal is complete when it comes to the knowledge of the person towhom it is made i.e. the offeree.
2. **Acceptance:** The acceptance completes for the Offeror and Offeree at different times.

    The communication of an acceptance is complete, –

    i) **As against the proposer,** when it is put in a course of transmission to him, so as to be out of thepower of the acceptor.

    ii) **As against the acceptor**, when it comes to the knowledge of the proposer.

3. **Revocation:** The revocation also takes place for the Offeror and offeree at different times.The communication of a revocation is complete,—

    i) **As against the person who makes it**, when it is put into a course of transmission to the person towhom it is made, so as to be out of the power of the person who makes it;

    ii) **As against the person to whom it is made**, when it comes to his knowledge.

When an acceptance or Proposal be revoked?

A proposal may be revoked at any time before the communication of its acceptance is complete as against theproposer.

An acceptance may be revoked at any time before the communication of the acceptance is complete asagainst the acceptor.

ACCEPTANCE

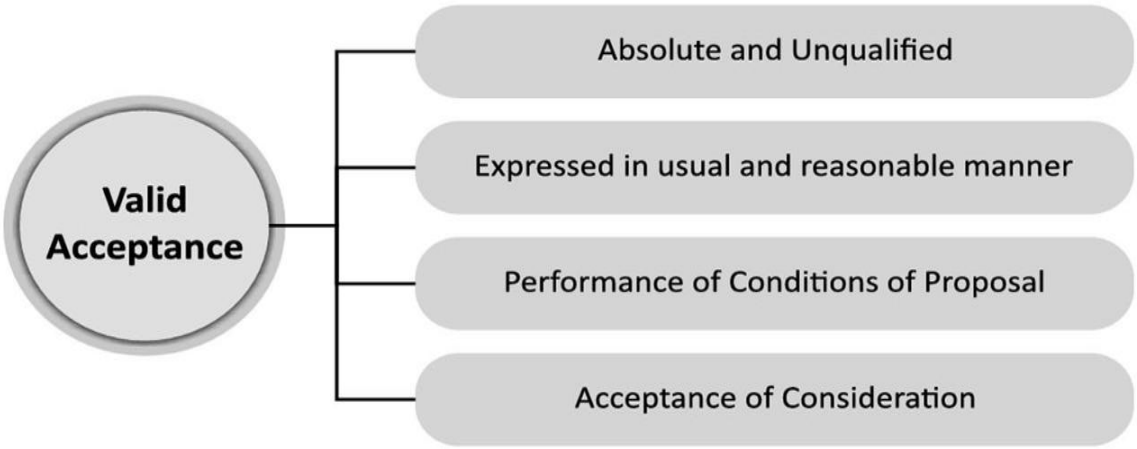
A proposal on acceptance becomes a promise. Every promise or set of promises forming consideration foreach other become agreement. Therefore, special relevance should be given to acceptance. According to section 7 of Indian Contract Act, 1872, in order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified;

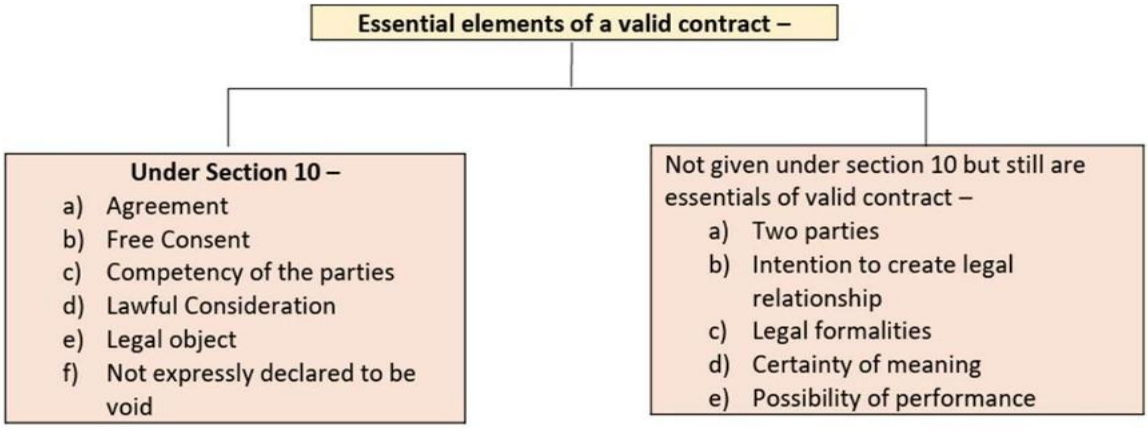
(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in whichit is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptanceis not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

According to section 8 of Indian Contract Act, 1872, performance of the conditions of a proposal, or theacceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

The below clarify the rules relating to a valid acceptance:



ESSENTIALS OF CONTRACT



FREE CONSENT OF THE PARTIES

Consequence of agreement being vitiated by Coercion, undue influence, fraud and misrepresentation

The agreement/contract is voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received anybenefit thereunder, upon such terms and conditions as to the Court may seem just.

If consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discoveringthe truth with ordinary diligence.

A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraudwas practised, or to whom such misrepresentation was made, does not render a contract voidable.

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as toa matter of fact.

Competence of Parties

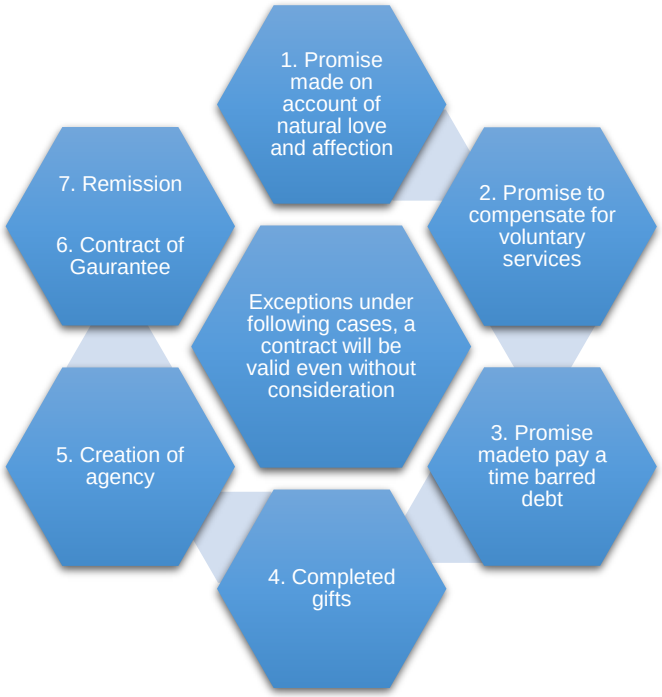
Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

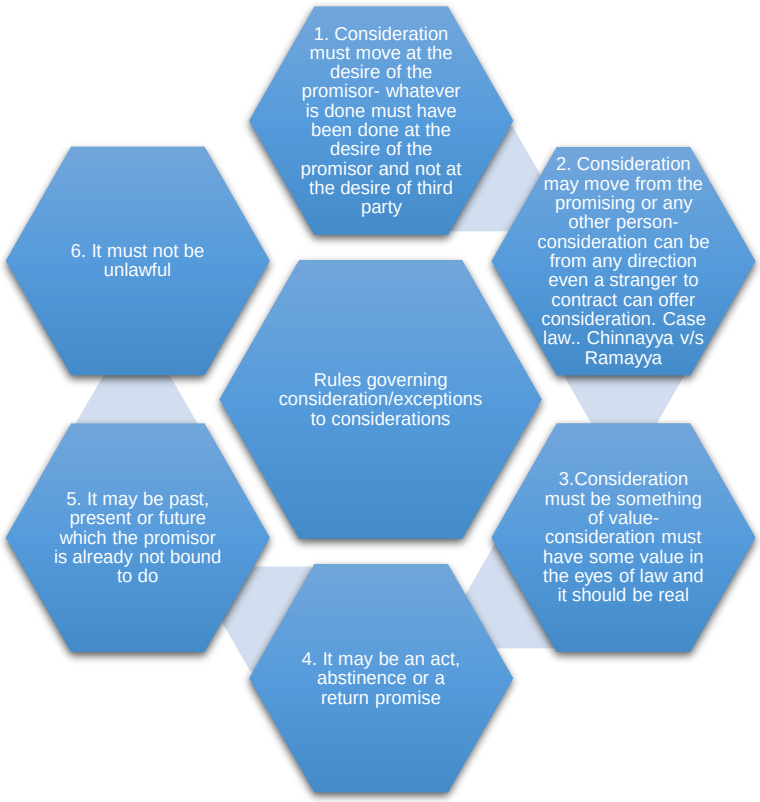
Accordingly, there may be three categories which are not competent to contract:

1. Persons who have not attained the majority (18 years as per IMA 1875 & 21 years if guardian)
2. Person of Unsound Mind (capable of understanding the contract)
3. Persons who are disqualified by any law. (Alien Enemies, Foreign Sovereigns and Ambassadors, Oudh)

Consideration (quid pro quo)

'When at the desire of the promisor, the promisee or any other person had 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 orpromise is called a consideration for the promise.'


1. Promise made on account of natural love and affection
2. Promise to compensate for voluntary services
3. Promise madeto pay a time barred debt
4. Completed gifts
5. Creation of agency
6. Contract of Gaurantee
7. Remission
Exceptions under following cases, a contract will be valid even without consideration


1. Consideration must move at the desire of the promisor- whatever is done must have been done at the desire of the promisor and not at the desire of third party
2. Consideration may move from the promising or any other person- consideration can be from any direction even a stranger to contract can offer consideration. Case law.. Chinnayya v/s Ramayya
3.Consideration must be something of value- consideration must have some value in the eyes of law and it should be real
4. It may be an act, abstinence or a return promise
5. It may be past, present or future which the promisor is already not bound to do
6. It must not be unlawful
Rules governing consideration/exceptions to considerations

The consideration or object of an agreement is lawful, unless- → It is forbidden (prohibited) by law, → or is of such a nature that, if permitted, it would defeat the provisions of any law → or is fraudulent; or involves or implies injury to the person or property of another; → or the court regards it as immoral, or opposed to public policy

Agreement not declared void

- a. Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract - Section 11
- b. Agreement made under a mistake of fact, material to the agreement on the part of both the parties - Section 20
- c. An agreement of which the consideration or object is unlawful - Section 23
- d. If any part of a single consideration for one or more objects, or any one or any part of any one of several consideration for a single object, is unlawful, the agreement is void - Section 24
- e. An agreement made without consideration subject to 3 exceptions provided in Secttion 25
- f. An agreement in restraint of marriage - Section 26
- g. An agreement in restraint of trade - Section 27
- h. An agreement in restraint of legal proceedings - Section 28
- i. Agreements, the meaning of which is not certain, or capable of being made certain - Section 29
- j. Agreement by way of wager - Section 30
- k. An agreement to enter into an agreement in the future
- l. An agreement to do an act impossible in itself - Section 56(1)

Contingent contract

It is a type of contract where performance is dependent on some conditions which may happen or may not happen

Section 31 defines contingent contract as follows - "a contract to do or not to do something if some event, collateral to such contract, does or does not happen".

Example - Vasuli bhai contracts to pay bappi bhai 5 lakh rupees if bappi bhai's house is burnt. This is a contingent contract.

PART – B: SPECIFIC RELIEF ACT, 1963

➢ Introduction and Objective: -

- Specific relief act 1963 was enacted to define and amend law relating to certain kinds of specific relief.
- This law has been amended and it came into effect from 1st October,2018.

➢ Recovery of possession of property: -

➢ Recovery of specific immovable property (Section 5)-

- According to Section 5 any person entitled to possession of specific immovable property may recover it in the manner provided by CPC 1908

➢ Suit by person dispossessed of immovable property (Section 6)-

- If any person is dispossessed without his consent of immovable property otherwise than in due course of law he may file suit for recovery of possession
- Suit under Section 6 cannot be brought

a) After expiry of 6month from the date of dispossession

b) Against the government

- There is no right of appeal and review from any order or decree passed under Section 6

➢ Recovery of specific movable property (Section 7)

- Any person entitle to possession of specific movable property may recover it in the manner provided by CPC 1908

➢ Liability of a person in possession not as owner to delivered to persons entitled to immediate possession (Section 8): -

➢ **If any person who is not the owner but having possession or control of particular article of movable property, may be compelled to deliver it in following cases:**

a) When things claimed is held by defendant as agent or trustee of plaintiff

b) When compensation in money is not adequate relief

c) It is difficult to ascertain actual damage

d) Thing is wrongfully transfer from the plaintiff

➢ Defenses Respecting suits for relief based on contract (Section 9): -

- According to Section 9 where any relief is claimed in respect of a contract. The person against whom relief is claimed can have a defence on any ground which is available to him under any law relating to contract.

➢ Cases in which specific performance of contract connected with trust enforceable (Section 11): -

- It provides that contract can be enforced specifically (specific performance) wholly or partly against trust
- But a contract made by trustee in excess of his powers or in breach of trust cannot be specifically enforced.

➢ Specific performance of part of contract (Section 12):-

- Court generally does not grant specific performance for part of contract. But court may direct specific performance of part of contract if:

a) Part left under performed is a small portion and can be compensated in money
b) If unperformed part is considerably large and plaintiff relinquished all claims to the performance of remaining part and all right to compensation

➢ Contracts not specifically enforceable (Section 14):

- Party to the contract has obtained substituted performance
- A contract where court cannot Supervise
- A contract which is dependent on personal qualification
- A contract which is determinable in nature

➢ Contract to sell or let property by one who has no title, not specifically enforceable (Section 17): -

- A contract to sell or let any immovable property cannot be specifically enforced in favour of vendor or lessor

a) Who knowingly himself not to have any title of property has contracted to sell or let
b) Who believe he had a good title but cannot give a free title to purchase or lessee afterwards

- These provisions apply to contract of sale or hire of movable property

➢ Who may obtain specific preformation (Section 15):

- Parties to the contract
- Representative in interest
- Any person beneficially entitled
- Reversioner
- Remainder men (who has remaining interest in property)

- Contract done by LLP but afterwards amalgamated than amalgamated LLP i.e., new LLP arising out of amalgamation can obtain specific performance
- Company→ same as LLP
- Pre-incorporation contract

➢ Person bars to relief (Section 16): -

- **Specific performance of contract cannot be enforced against a person: -**

1) Who has obtained substituted performance
2) Who has become incapable of performing
3) Who has violated any essential terms of contract
4) Who act in a fraudulent manner
5) A person who varies the terms and condition of contract in wrongful manner
6) A person who fails to perform his part of contract

NOTE: - In order to obtain specific performance plaintiff must prove his willingness to perform his part of contract.

➢ Person against whom contract may be specifically performed (Section 19): -

- Party
- Any person claiming under him by a title arising subsequently to the contract
- Amalgamated LLP
- Amalgamated company
- Pre-incorporation contract

➢ Substituted performance of contract (Section 20): -

- When contract is broken due to non-performance of promise by any party, Party who suffers (aggrieved party) have an option of substituted performance through a third party or his own agency and recover the expenses from the party committing such breach.
- Party who suffers breach have to give **30 days** notice to perform the contract, before availing substituted performance.

➢ Special provision for contract relating to infrastructure project (Section 20A): -

- No injunction shall be granted by a court in a suit under this act relating to infrastructure project
- **Section 20(B): -** State Government in consultation with chief justice of high court shall designate one or more civil court as special court in respect of contract relating to infrastructure project.
- **Section 20(C): -** Suit must be disposed with in 12months from the date of service of summon to defendant. Maximum extension of 6months can be granted by court.

➢ Declaratory decree (Section 34): -

- Declaratory decree is a decree which declares right as to any property or the legal character
- Declaration is asked for right to property only
- Plaintiff is not able to claim further relief other than declaration

➢ Effect of declaration (Section 35): -

- When a declaration decree is passed it is binding on following person:

1. Parties to the suit
2. Person claiming through them
3. Trustees

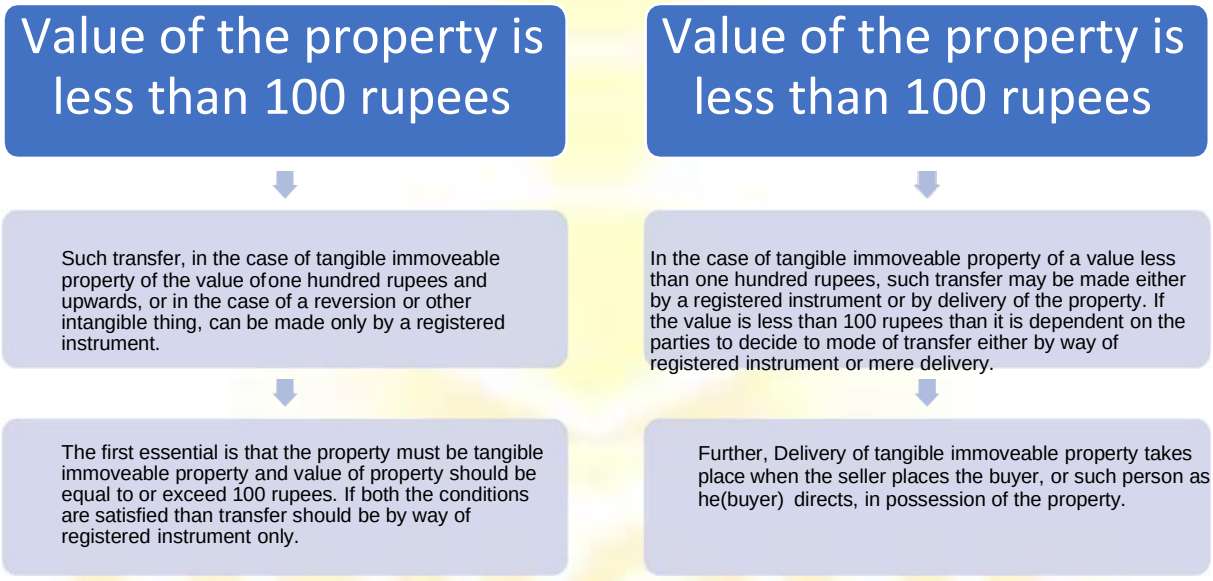
- Declaration is jus-in-personam and not jus-in-rem which means it is not binding on stranger

PART C: TRANSFER OF PROPERTY ACT, 1882

The Transfer of Property Act, 1882 (TPA) comprises the provisions relating to transfer of property. The law excludes the transfers by operation of law, i.e., by sale in execution, forfeiture, insolvency or intestate succession. The Act is limited to transfers inter vivos and excludes testamentary succession, i.e., transfers bywill.

SALE

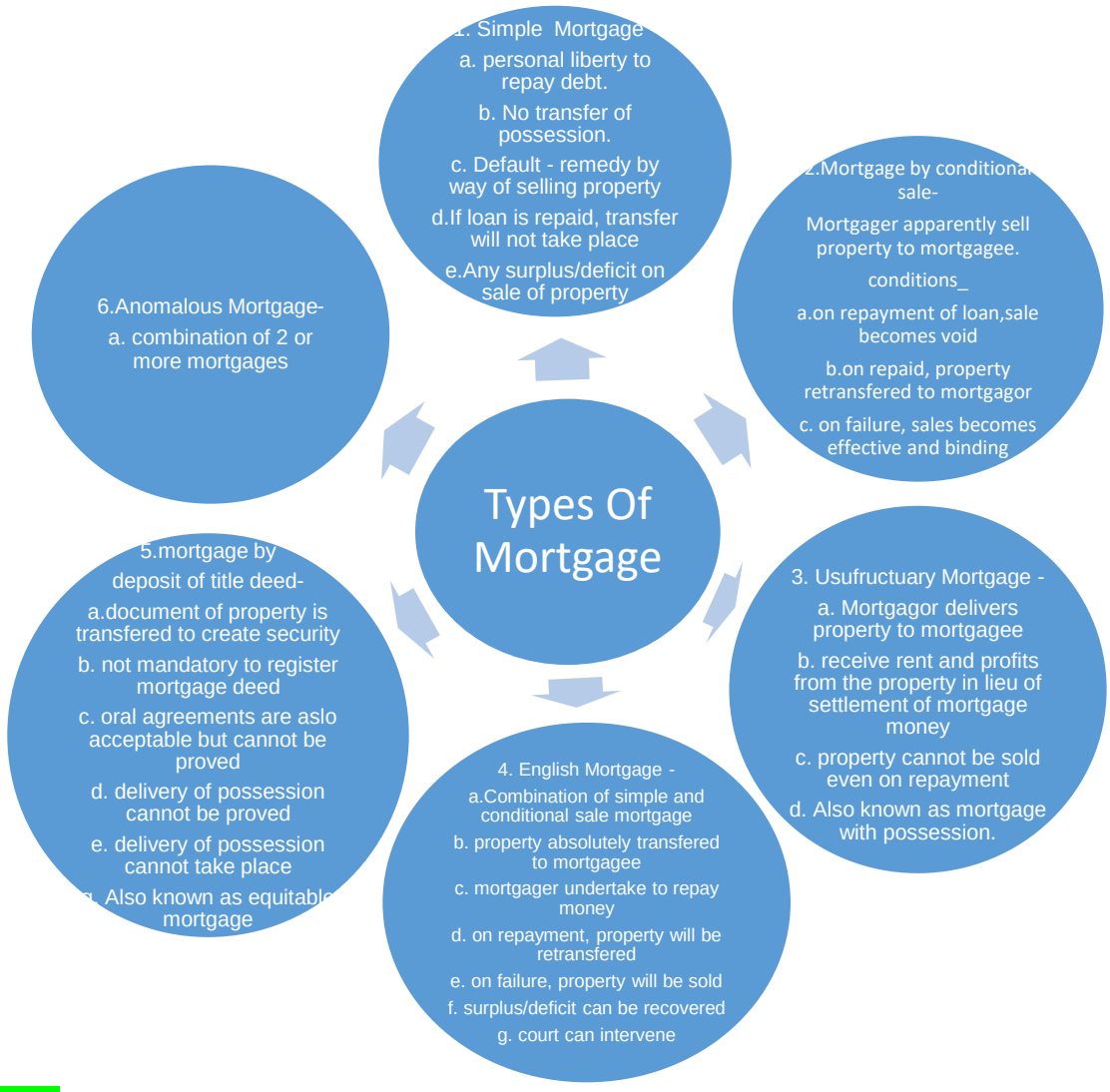
According to Section 54 of TOPA, it is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. In order a document be treated as Sale Document, ownership must be transferred from one person to the other person and the transaction must be supported by a consideration paid or promised or partly paid and partly promised.



Contract for sale: A contract for the sale of immoveable property is a contract that a sale of such property shalltake place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

Mortgage: -

- Transfer of Interest in immovable property for the purpose of securing payment of money advanced or to beadvanced.
- Transferor is called a Mortgagor.
- Transferee is called a Mortgagee.



Lease: -

- Transfer of a right to enjoy property in which possession is always given to the transferee.
- Lease can be made for certain period which may be definite no. of years, or Life or permanently.
- Transferor - Lessor
- Transferee – Lessee
- Lease can be terminated by any party.
- If contract does not contain termination period notice of 6 months is required in case of year to year leaseand 15 days in case of month to month lease.

❖ Mode of Leasing: -

- Lease > 1 year - Registered Instrument.
- Lease < 1 year – Oral agreement and must by delivery of possession.

Distinction between License and Lease

License	Lease
A personal non-heritable right.	A heritable right in rem.
Creates no interest in the guarantee	Interest created in the lessee.
Non assignable	Usually, assignable.
Always permissive and normally revocable.	Permissive but not normally revocable.
Not exclusive user	Exclusive user.
A positive right.	A positive right.
Denial of grantor's title does not necessarily result inforfeiture.	Denial of lessor's title results in forfeiture.
Remedy for breach is damages.	Specially enforceable.
No notice necessary to terminate relationship.	Notice necessary to terminate relationship.
Does not entitle licensee to sue strangers in his ownname.	Can sue in his own name.

GIFT

Gift has been defined under Section 122 of the Transfer of Property Act, 1882. Section 122 states that 'Gift' isthe transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the life time of the donor and while he is still capable of giving. If thedonee dies before acceptance, this gift is void.

Gift of immovable property must be affected by a registered instrument signed by or on behalf of the donorand attested by at least two witnesses.

Onerous Gift

Where a gift is in the form of a single transfer to the same person of several things of which one is and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.Where a gift is in the form of two or more separate and independent transfers to the same person of severalthings, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Besides, a done not competent to contract and accepting the property burdened by any obligation is not bound by his acceptance but if after becoming competent to contract and being aware of the obligation, heretains the property given, he becomes so bound, subject to these provision of Section 127 of the Act.

A company can make gift of its movable and immovable property provided it had been vested with requisitepower of doing so in objects clause in its Memorandum of Association and Articles of Association. It wouldrequire sanction of shareholders in general meeting under Section 181 of the Companies Act, 2013.

Actionable Claims

The transfer of an actionable claim whether with or without consideration shall be effected only by theexecution of an instrument in writing signed by the transferor or his duly authorised agent and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given ornot

However, every dealing with the debt or other actionable claim by the debtor or other person from oragainst whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

The transferee of an actionable claim may, upon the execution of such instrument of transfer asaforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

The transferee of an actionable claim shall take it subject to all the liabilities and equities to which thetransferor was subject in respect thereof at the date of the transfer.

Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of acontract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

However, nothing in the sections 130 to 136 of Transfer of Property Act, 1882, applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, orto any mercantile document of title to goods.

PART D: REGISTRATION ACT, 1908

Documents for which Registration is Compulsory [Sec. 17]

Section 17 provides that the following documents require compulsory registration:

1. Instruments of gift of immovable property.
2. Other non-testamentary instruments, which create, declare, assign, limit or extinguish, any right,title or interest of the value of Rs.100/- and above in immovable property.
3. Non-testamentary instruments, which acknowledge the receipt or payment of any consideration onaccount of creation, declaration, assignment, limitation or extinction, of any right, title or interest of the value of Rs.100/- and above in immovable property.
4. Non- testamentary instruments transferring or assigning any decree of a court or any award of anarbitrator when such decree or award declares, assigns, limits or extinguishes, of any right, title orinterest of the value of Rs.100/- and above in immovable property.
5. Lease Deeds of following leases of immovable property:

a) Lease from year to year basis;
b) Lease for the term exceeding 1 year; and
c) Lease which reserves a yearly rent.

Exemptions from section 17

1. any composition deed;
2. any endorsement upon or transfer of any debenture issued by any such Company
3. any grant of immovable property by Government
4. any instrument of partition made by a Revenue-Officer
5. any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securingthe repayment of a loan made under that Act
6. any certificate of sale granted to the purchaser of any property sold by public auction by a Civilor Revenue-Officer.

(THERE ARE MORE PLEASE REFER MODULE)

Documents for which Registration is Optional [Section 18]

Section 18 provides that in respect of the following documents, registration is optional:

1. Wills.
2. Other non-testamentary instruments which create, declare, assign, limit or extinguish, anyright, title or interest of the value less than Rs.100/- in immovable property.
3. Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of creation, declaration, assignment, limitation or extinction, of anyright, title or interest of the value less than Rs.100/- in immovable property.
4. Non- testamentary instruments transferring or assigning any decree of a court or any award ofan arbitrator when such decree or award creates, declares, assigns, limits or extinguishes, of any right, title or interest of the value less than Rs.100/- in immovable property.
5. Lease of immovable property for any term not exceeding one year and other leases notcovered under Section 17.
6. Instruments which create, declare, assign, limit or extinguish, any right, title or interest inmovable property.

TIME LIMIT FOR PRESENTATION OF DOCUMENT FOR REGISTRATION

Documents executed in India [Sections 23.24 & 25]

1. Section 23 of Registration Act, 1908 provides that the document must be presented before the Registrar for registration within four months of its execution. It can maximum be stretched upto 8months but on a payment of extra fee.
2. Section 24 provides that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within 4 months from the date ofeach execution.
3. Section 25 further provides that the Registrar has got the power to condone the delay in presentingthe document for registration up to a period of four months;, provided that the applicant satisfies theRegistrar that he has been prevented by sufficient cause or reasons beyond his control in presenting the documents for registration within the prescribed period of four months

Documents executed outside India [Section 26]

As per section 26 of the Registration Act, where the Registrar is satisfied that the document was executed outside India and it has been presented for registration within four months after its arrival inIndia, he may accept such documents for registration on payment of proper registration fees. A document executed outside India and which requires compulsory registration, is not valid unless it is registered in India. [Nain

Sukhdas v. Gowardhandas]

Time limit for presentation of Will [Section 27]

A will may be presented at any time for the purpose of registration.

PLACE OF REGISTRATION OF DOCUMENTS

Documents pertaining to Immovable Property [Section 28]

Section 28 of the Registration Act provides that the document relating to immovable property shall bepresented for registration: - In the office of Sub-Registrar within whose sub-district the whole or someportion of the relevant property is situated. OR - In the office of any Sub Registrar under the State Government which is desirable by all the executants.

EFFECTS OF REGISTRATION AND NON-REGISTRATION OF DOCUMENTS

No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to beregistered shall:

(a) affect any immovable property comprised therein, or
(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power, unless ithas been registered.

However, an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit forspecific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.

Every document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17, sub-section (1), andclauses (a) and (b) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

PART E: INDIAN STAMP ACT, 1899

Section 3: - Where Stamp Duty Is Payable .

- Instrument executed in India and property situated outside India.
- Instrument executed outside India and property situated in India.
- Bill of exchange and promissory note made and executed in India except payable on demand.

However Following Instrument Need Not To Be Pay Stamp Duty,

- Instrument executed by or on behalf of government .

➢ Sale , lease transfer of any ship or vassal .
➢ Bill of exchange and promissory note executed and acted out side India.
➢ Instrumented executed by or behalf of person or in favour of person in connection with SEZ.

Section 4: - Single Transaction Effected By Several Instrument

1. Where, in the case of any sale, mortgage or settlement, several instruments are employed forcompleting the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one rupee instead of the duty (if any) prescribed for it in that Schedule.
2. The parties may determine for themselves which of the instrument so employed shall, for thepurposes of sub-section (1), be deemed to be the principal instrument. However, the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.
3. Notwithstanding anything contained in sub-sections (1) and (2), in the case of any issue, sale ortransfer of securities, the instrument on which stamp-duty is chargeable under section 9A shallbe the principal instrument for the purpose of this section and no stamp-duty shall be charged on any other instruments relating to any such transaction.

Section 5: - Instrument relating to several distinct matter –

➢ Distinct matters means different transaction

➢ Several distinct matter in single transaction is called as multifarious instrument

➢ This instrument is chargeable with aggregate amount of duties for each separate instrumentrelating to one such matter .

➢ E.g.
1) dissolution deed and bond deed .
2) agreement for service and lease agreement .
3) signing of document in his personal capacity and also incapacity of executer.

However following matter are not considered as distinct

➢ Dispute clause in an agreement .
➢ Mortgager will pay taxes .
➢ Acknowledgement of receipt of other transaction
➢ Aggregate duty shall be payable .

Section 6: - Instrument Coming With Several Description.

➢ E.g. documents – bonds , promissory note .
➢ Signal transaction several description.
➢ Highest duty shall be chargeable .
➢ Subject to section 4 and section 5 .

Adjudication as to proper stamp (Section 31)

1- When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and not less than f fifty naya paise) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment, the instrument is chargeable.

2- For this purpose the Collector may require to be furnished with an abstract of the instrument, and also withsuch affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein, and may refuse to proceed upon any such application until such abstract and evidence have been furnished accordingly:

Provided that

(a) no evidence furnished in pursuance of section 31 shall be used against any person in any civil proceeding, except in an inquiry as to the duty with which the instrument to which it relates ischargeable; and
(b) every person by whom any such evidence is furnished, shall, on payment of the full duty withwhich the instrument to which it relates, is chargeable, be relieved from any penalty which he may have incurred under this Act by reason of the omission to state truly in such instrument any of the facts or circumstances aforesaid.

Certificate by Collector (Section 32)

1. When an instrument brought to the Collector under section 31 is, in his opinion, one of a descriptionchargeable with duty, and
   (a) the Collector determines that it is already fully stamped, or
   (b) the duty determined by the Collector under section 31, or such a sum as, with the duty already paid in respect of the instrument, is equal to the duty so determined, has been paid,the Collector shall certify by endorsement on such instrument that the full duty (stating the amount) with which it is chargeable has been paid.
2. When such instrument is, in his opinion, not chargeable with duty, the Collector shall certify in manneraforesaid that such instrument is not so chargeable.

3. Any instrument upon which an endorsement has been made under this section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped

However, nothing in this section authorizes the Collector to endorse—

(a) any instrument executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;
(b) any instrument executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or
(c) any instrument chargeable with a duty not exceeding ten naya paise, or any bill of exchange or promissory note, when brought to him, after the drawing or execution thereof, on paper not duly stamped.

Instruments not duly stamped inadmissible in evidence, etc. (Section 35)

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Provided that

a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;
b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;
c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;
d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure 1898;
e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act

Admission of instrument where not to be questioned (Section 36)

Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

Admission of improperly stamped instruments (Section 37)

The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

Revision of certain decisions of Courts regarding the sufficiency of stamps (Section 61)

1. When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (V of 1898), makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under section 35, the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.
2. If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.
3. When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.
4. The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under section 42, or in section 43, prosecute any person for any offence against the Stamp-law which the Collector considers him to have committed in respect of such instrument

Provided that:

(a) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such Court, was payable in respect of the instrument under section 35, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty; except for the purposes of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under section 42

Payment of Stamp Duty

Duties how to be paid

Except as otherwise expressly provided in Indian Stamp Act, 1899, all duties with which any instruments arechargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps:

(a) according to the provisions herein contained; or

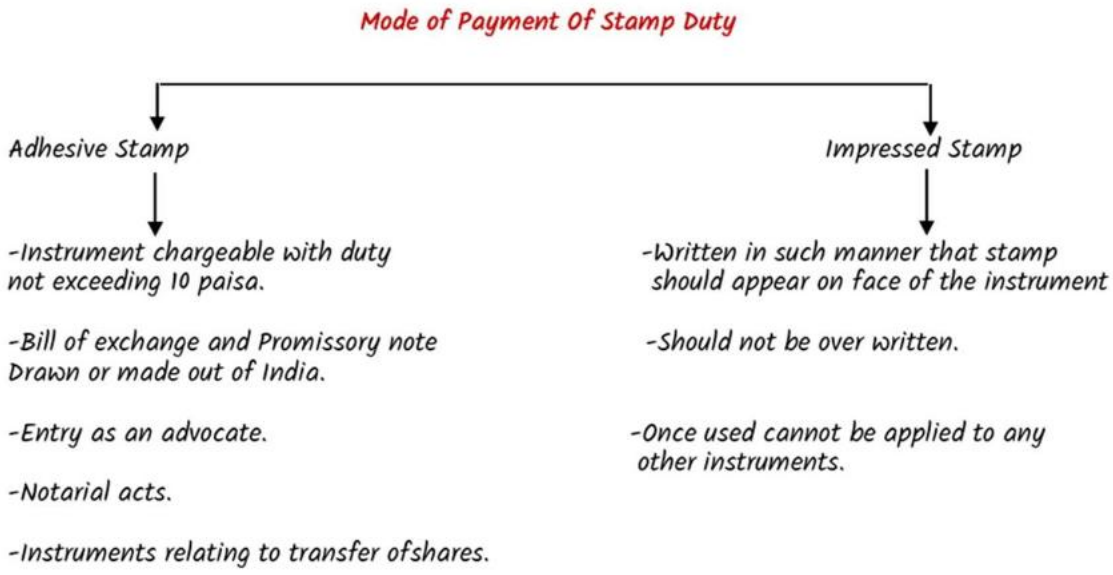
(b) when no such provision is applicable thereto – as the State Government may be rule direct.The rules made under sub-section (1) may, among other matters, regulate,

(c) in the case of each kind of instrument – the description of stamps which may be used;

(d) in the case of instruments stamped with impressed stamps – the number of stamps which may beused;

(e) in the case of bills of exchange or promissory notes the size of the paper on which they are written.The practical aspects with regard to the calculation and payment of stamp duty can be referred to

(a) from Paper 1: jurisprudence, interpretation & General Laws of Executive Programme.



How transfer in consideration of debt, or subject to future payment, etc., to be charged (Section 24)

Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whetherbeing or constituting a charge or incumbrance upon the property or not, such debt, money or stock is tobe deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty.

However, nothing in section 24 apply to any such certificate of sale as is mentioned in Article No. 18 ofSchedule I.

PART F: THE POWERS-OF-ATTORNEY ACT, 1882

In the originally enacted legislation, there was no express definition of power-of-attorney. This definition has been inserted as section 1A by Act 55 of 1982 and was retrospectively made applicable w.e.f. 22nd October, 1980. As per the definition, it includes any instrument empowering a specified person to act forand in the name of the person executing it. A Company is not a human being, it has to act through human beings. It is considered as a legal person which can enter into contracts, possess properties in its own name, sue and can be sued by others etc. Due to this, companies are required to execute power of attorney for various purposes. Not only companies, other form of entities and individuals are also requiredto execute power of attorney for various purposes such as in case of agencies, legal representation etc.

EXECUTION UNDER POWER-OF-ATTORNEY

The person assigning the authority is called donor and the in whose favour the power-of-attorney has been made is called the donee. The donee of a power-of-attorney can execute any instrument or do anything in and with his own name and signature, and his own seal, wherever required by the authority ofthe donor of the power. Every instrument and thing so executed and done is as effectual in law as if it hadbeen executed or done by the donee in the name and with the signature and seal of the donor thereof

The Act provides for the protection of action taken by donee in good faith. Any person making or doing any payment or act in good faith, in pursuance of a power-of-attorney cannot be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become of unsound mind, or insolvent, or had revoked the power, if the fact of death, unsoundness of mind, insolvency or revocation was not, at the time of the payment or act, known to the person making or doingthe same. However, this does not affect any right against the “payee of any person” i.e. receiver, interested in any money so paid. That person has the like remedy against the

payee as he would have had against the payer, if the payment had not been made by him.

Procedure for Deposit of original instruments creating Powers-of-Attorney provided under section 4

The procedure for Deposit of original Powers-of-Attorney is provided under Section 4 of the Powers-of-Attorney Act, 1882.

It provides that:

(a) An instrument creating a power-of-attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court or District Court within the local limits of whose jurisdiction the instrument may be.

(b) A separate file of instruments so deposited shall be kept; and any person may search that file, and inspect every instrument so deposited; and a certified copy thereof shall be delivered out to him on request.

(c) A copy of an instrument so deposited may be presented at the office and may be stamped or marked as a certified copy, and, when so stamped or marked, shall become and be a certified copy.

(d) A certified copy of an instrument so deposited shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court or District Court.

(e) The High Court may, from time to time, make rules for the purposes of section 4, and prescribing, with the concurrence of the State Government, the fees to be taken under clauses (a), (b) and (c).

Power-of-attorney of married women According to section 5,

A married woman of full age shall, by virtue of Powers-of-Attorney Act, have power, as if she were unmarried, by a non-testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do.

LESSON 4

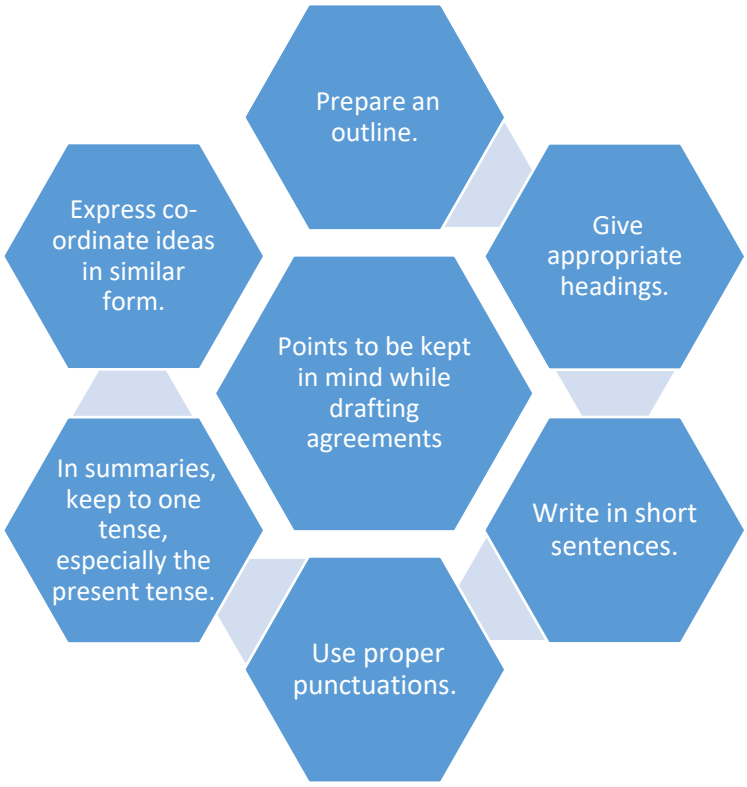
Drafting of Agreements, Deeds and Documents

INTRODUCTION

The skill of drafting is one's ability to express one's thought process in writing. Probably no other profession demands this ability more than the legal profession. The language and tone of every commercial agreement must be clear and unambiguous. Therefore, it has to be carefully crafted so as to protect your client's interest to the utmost, be legally compliant and understandable to all who come across the document

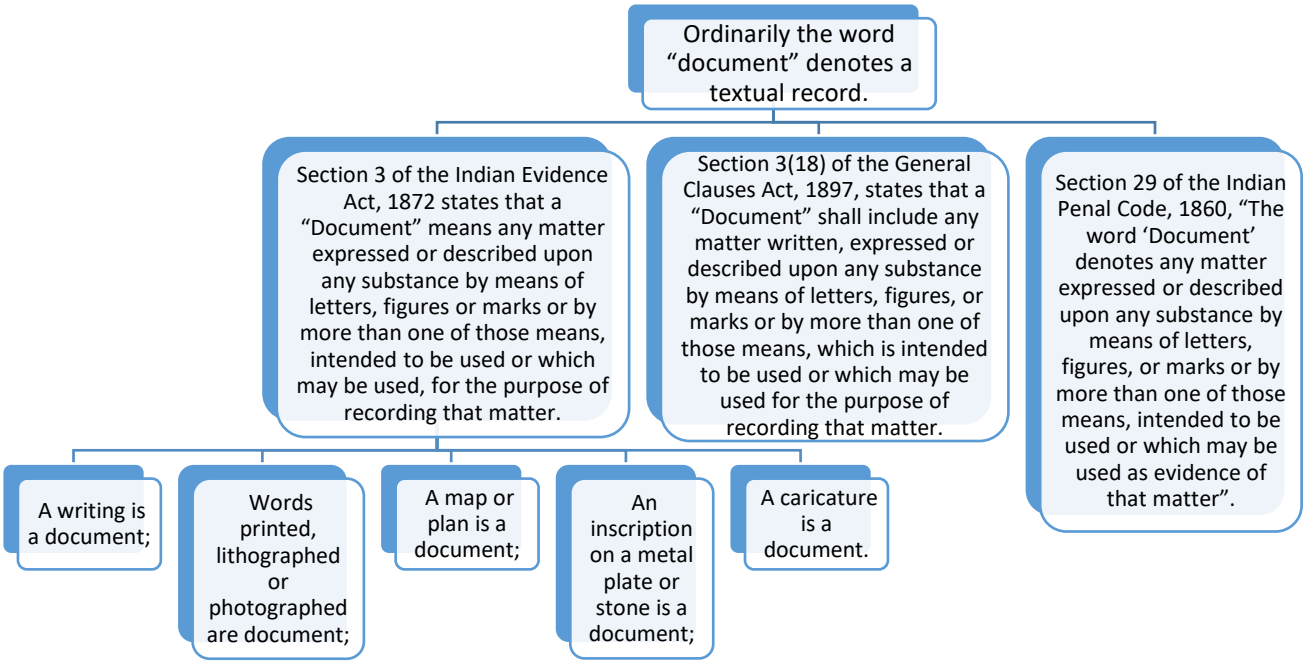
Some of the benefits of having a written contract are:

- The process of writing down the contract's terms and signing the contract forces both parties to think about and be precise about the obligations they are undertaking. With an oral contract, it is too easy for both parties to say "yes" and then have second thoughts.
- With an oral contract, the parties may have different recollections of what they agreed on (just as two witnesses to a car accident will disagree over what happened).
- A written agreement eliminates disputes over who promised what. l Some types of contracts must be in writing to be enforced. The Copyright Act, 1957 requires a copyright assignment or exclusive license to be in writing.
- If you have to go to court to enforce a contract or get damages, a written contract will mean less dispute about the contract's terms as the burden of proof lies with you.

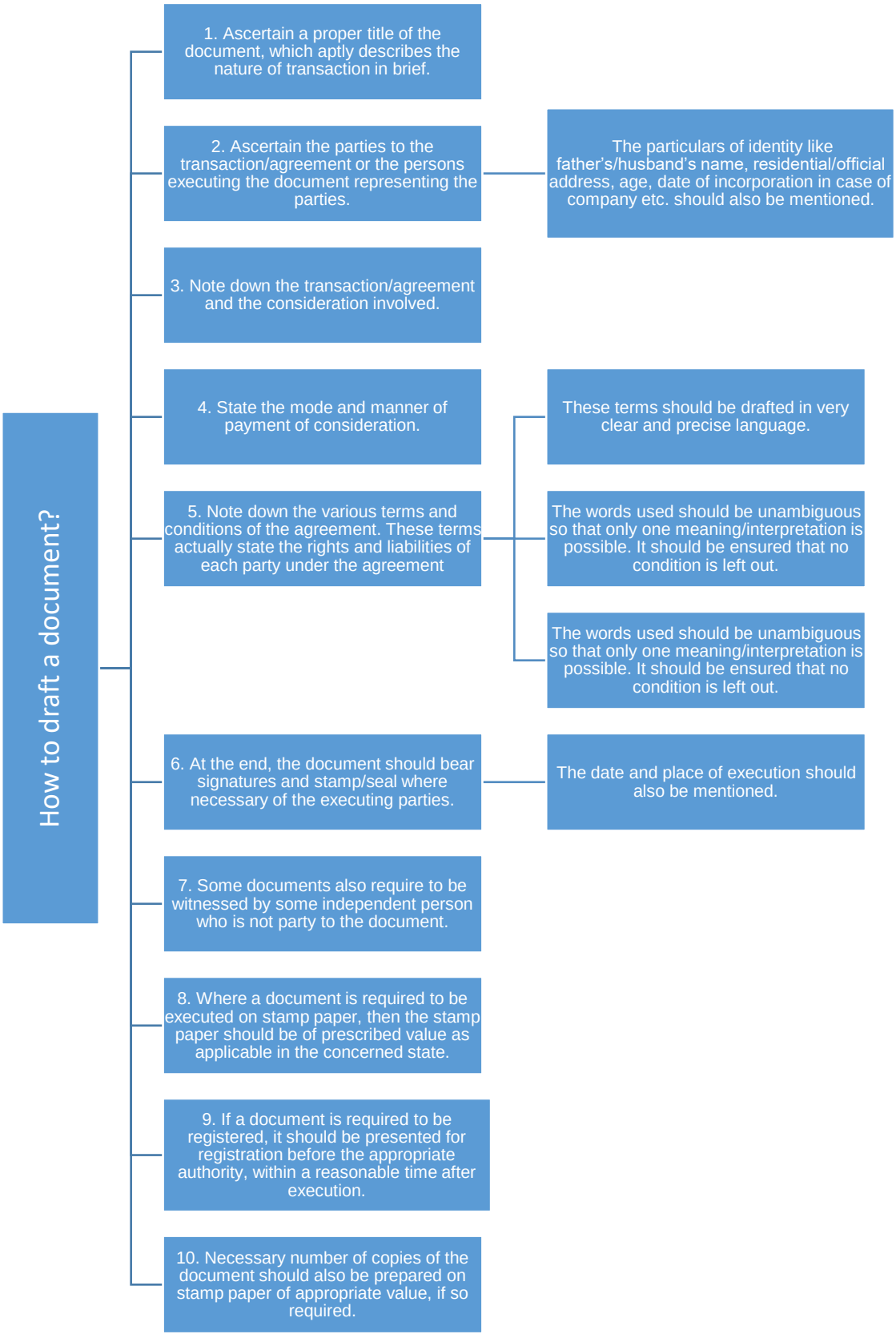


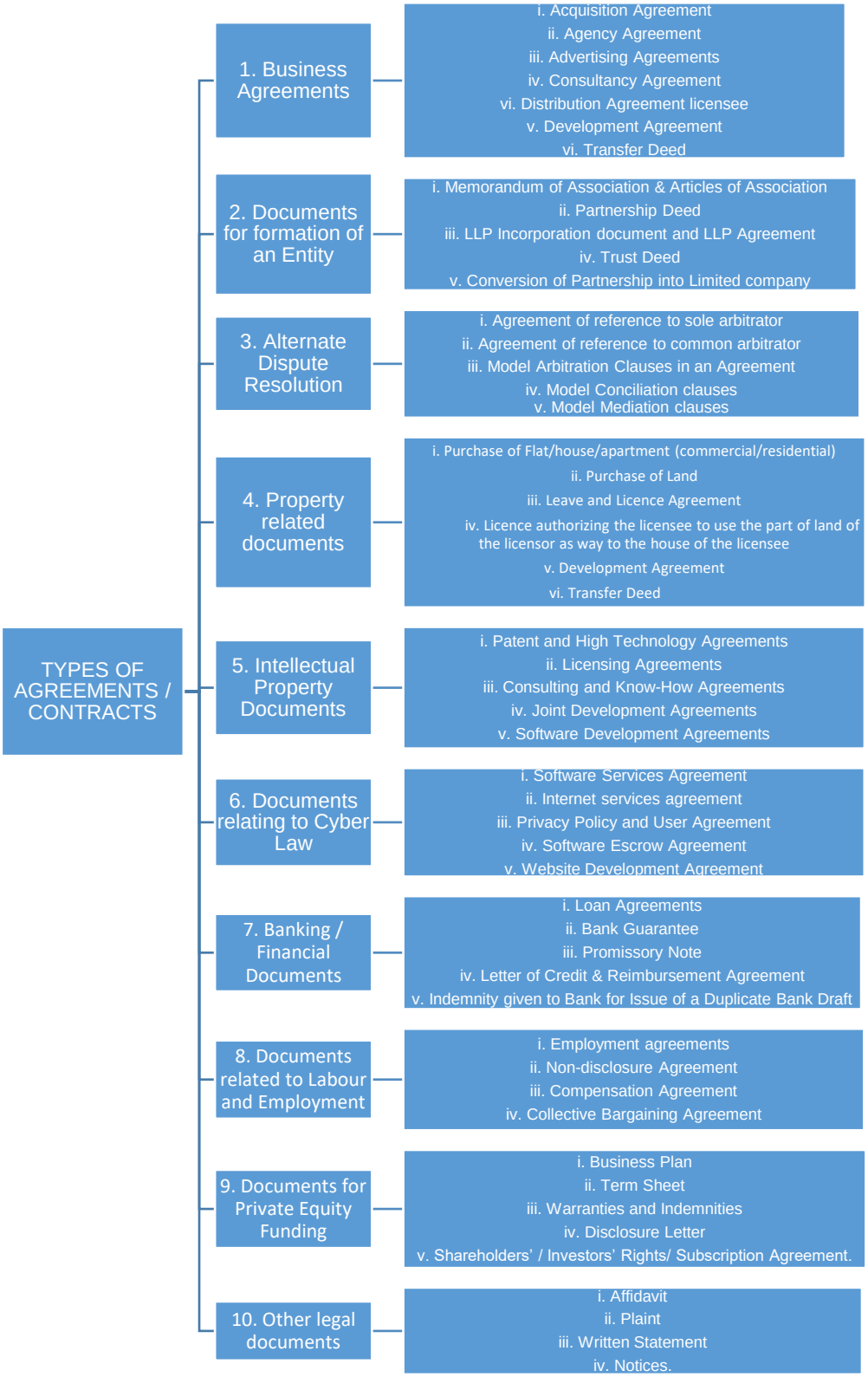
(REFER MODULE FOR MORE POINTS)

Document – MEANING



Thus the word “Document” has been used in a wide sense and it includes instruments, deeds, agreements etc. Documents will also include Electronic records.




TYPES OF AGREEMENTS / CONTRACTS
1. Business Agreements
i. Acquisition Agreement
ii. Agency Agreement
iii. Advertising Agreements
iv. Consultancy Agreement
vi. Distribution Agreement licensee
v. Development Agreement
vi. Transfer Deed
2. Documents for formation of an Entity
i. Memorandum of Association & Articles of Association
ii. Partnership Deed
iii. LLP Incorporation document and LLP Agreement
iv. Trust Deed
v. Conversion of Partnership into Limited company
3. Alternate Dispute Resolution
i. Agreement of reference to sole arbitrator
ii. Agreement of reference to common arbitrator
iii. Model Arbitration Clauses in an Agreement
iv. Model Conciliation clauses
v. Model Mediation clauses
4. Property related documents
i. Purchase of Flat/house/apartment (commercial/residential)
ii. Purchase of Land
iii. Leave and Licence Agreement
iv. Licence authorizing the licensee to use the part of land of the licensor as way to the house of the licensee
v. Development Agreement
vi. Transfer Deed
5. Intellectual Property Documents
i. Patent and High Technology Agreements
ii. Licensing Agreements
iii. Consulting and Know-How Agreements
iv. Joint Development Agreements
v. Software Development Agreements
6. Documents relating to Cyber Law
i. Software Services Agreement
ii. Internet services agreement
iii. Privacy Policy and User Agreement
iv. Software Escrow Agreement
v. Website Development Agreement
7. Banking / Financial Documents
i. Loan Agreements
ii. Bank Guarantee
iii. Promissory Note
iv. Letter of Credit & Reimbursement Agreement
v. Indemnity given to Bank for Issue of a Duplicate Bank Draft
8. Documents related to Labour and Employment
i. Employment agreements
ii. Non-disclosure Agreement
iii. Compensation Agreement
iv. Collective Bargaining Agreement
9. Documents for Private Equity Funding
i. Business Plan
ii. Term Sheet
iii. Warranties and Indemnities
iv. Disclosure Letter
v. Shareholders' / Investors' Rights/ Subscription Agreement.
10. Other legal documents
i. Affidavit
ii. Plaint
iii. Written Statement
iv. Notices.

(REFER MODULE FOR MORE EXAMPLES)

DEEDS OF POWER OF ATTORNEY

In terms of Section 1A of the Powers-of-Attorney Act, 1882 (7 of 1982) as amended by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982), a power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney.

Special power of attorney

A power of attorney executed for the purpose of a specific act is called a "special power of attorney". It is also called a "particular power of attorney".

A specific act is meant to imply either a specific act or acts related to each other as to form one judicial transaction, such as all the acts necessary to perfect a mortgage or a sale of a particular property.

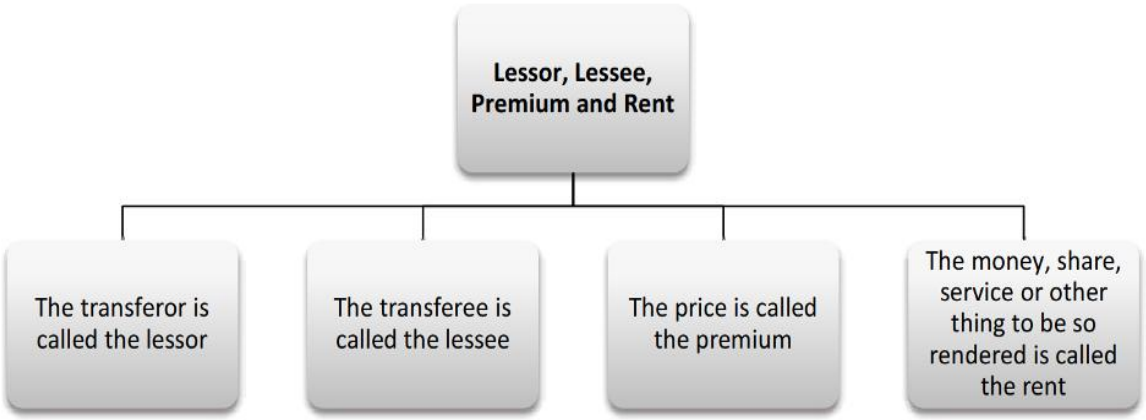
General power of attorney:

A power of attorney executed for the purpose of generally representing another person, or for performing more than one act, is called a 'general power of attorney'.

LEASE DEED & LICENSE DEED

LEASE – Meaning

According to Section 105 of the Transfer of Property act, 1882, a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

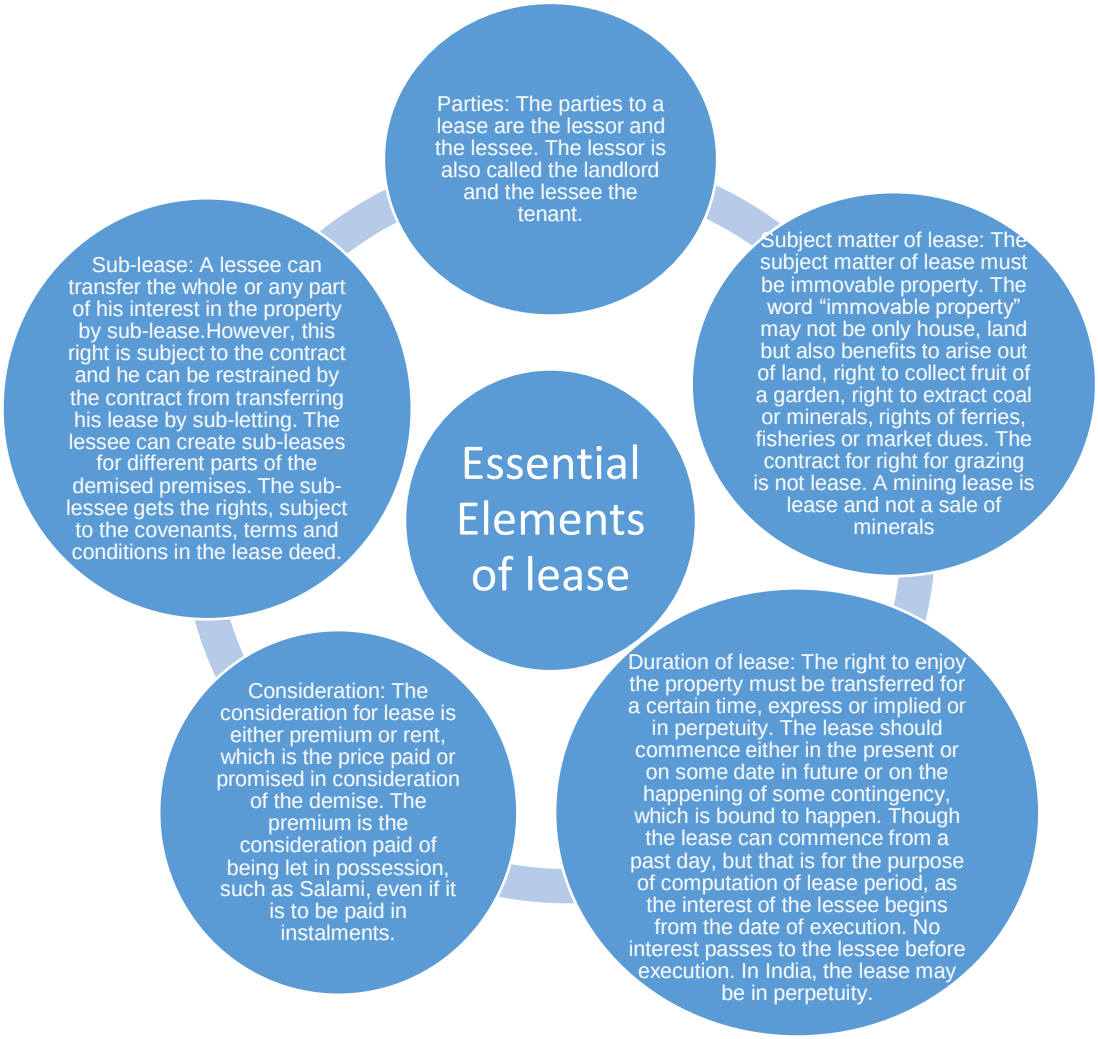


How lease is made ?

A lease of immovable property from year to year, or for any term exceeding one-year or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument binds both lessor and the lessee.



LEAVE AND LICENCE

There are two ways in which one can rent out property: either execute a lease deed or make out a leave-and licence agreement.

From the legal point of view, while a lease agreement is the safest for tenants, landlords prefer a leave-and licence agreement. This is because a licence does not create any interest in the property for the licensee. The licensee merely gets the right to enter, occupy and use the premises. Technically, the right to occupy premises under a lease agreement is governed

by the provisions of section 105 of the Transfer of Property Act, whereas the right to occupy licensed premises is governed by section 52 of the Indian Easement Act.

The Transfer of Property Act creates an interest in the property for the lessee for the duration of the lease. This enhances a lessee's chances of holding on to the property even after the expiry of the lease term. On the other hand, the Indian Easement Act creates no titles or interest for the licensee. The licensee merely gets the right to enter and use the premises for a limited period without acquiring any interest in it for even the duration of the licence agreement. The licence can be terminated at will at the discretion of the licensor.

A Licence is defined under Section of 52 of the Indian Easements Act, 1882, which reads as under: "Where one person grants to another, or to a definite number of other persons, right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right be unlawful and such right does not amount to an easement or an interest in property, the right is called Licence".

The essential distinction between a Lease and a Licence is that in a Lease, there is transfer of interest in the

property while in the case of licence, there is no such transfer although the licensee acquires only a personal right to occupy the property. This principle has been confirmed by number of various High Courts and Supreme Court judgments.

Licence is a grant of a right to do something upon an immovable without creating interest in the property. It is therefore, distinguishable from an allied grant such as a lease or an easement. Both lease and easement create an interest in the property.

Licence is only a permission to do something on an immovable property like occupation, or enjoying fruit thereof, or using it for some other purpose.

A licence is notionally created where a person is granted the right to use the premises without becoming entitled to the exclusive possession of them or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no legal interest.

If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control. A licence is a personal right given to the licensee and, therefore, Section 56 of the Easements Act, 1882 provides that licence cannot be transferred by the licensee or exercised by his servants and agents.

MORTGAGE DEEDS COVERED IN PREVIOUS CHAPTER

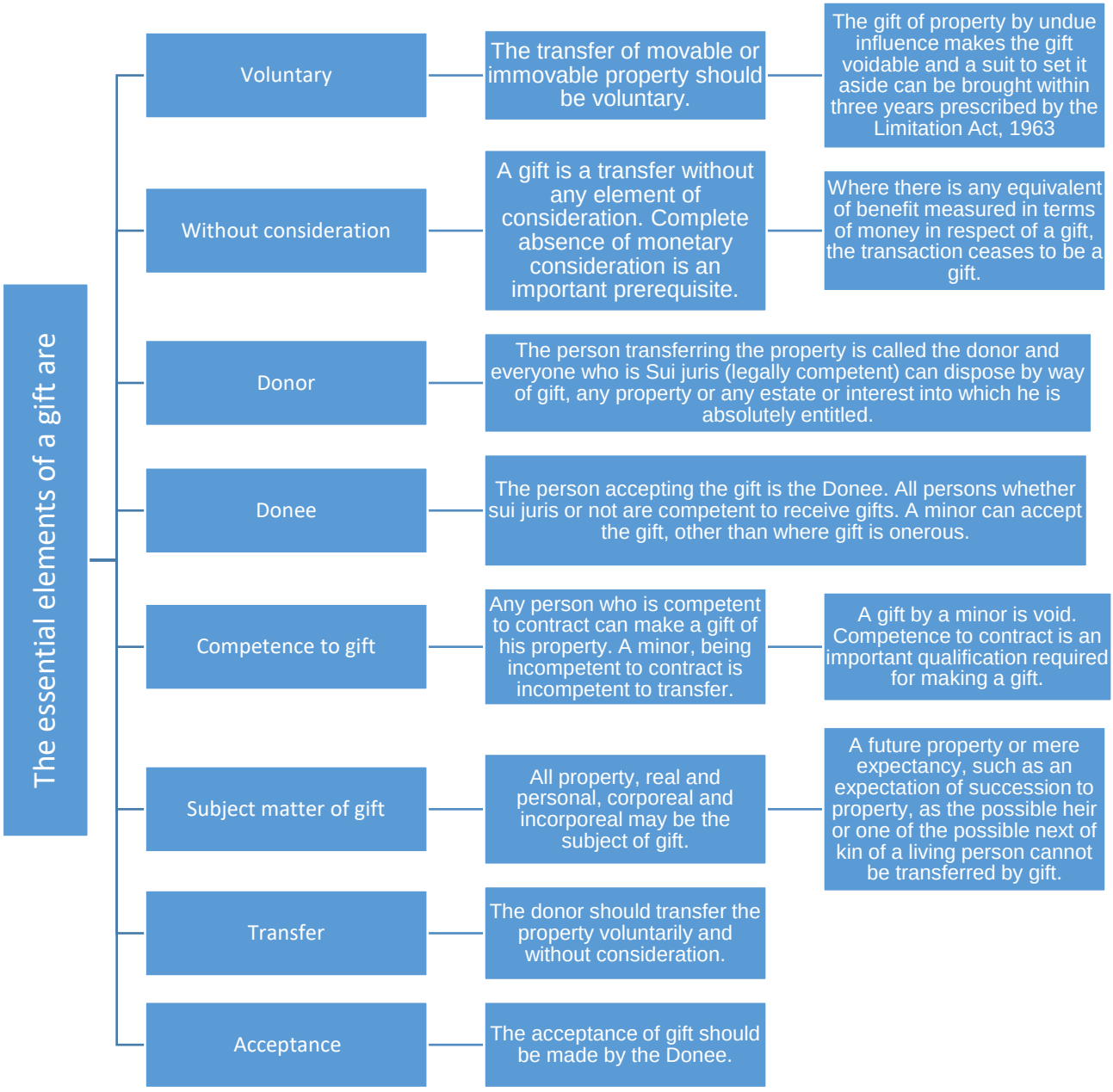
GIFT DEED

According to Section 122 of The Transfer of Property Act, 1882, "Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without

consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the done."

In simple words

It is the transfer of certain existing moveable or immoveable property by one person to another. The transfer should be made voluntarily and without consideration. The person transferring the property is called the donor. The person to whom the property is transferred is referred to as the donee. The donee must accept the property during the lifetime of the donor and while he is still capable of giving. In case the donee dies before acceptance, the gift is void.



How gift of transfer is effected?

For the purpose of making a gift of immoveable property, the transfer should be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered. Hence gift of immovable property is compulsorily registerable under the Registration Act, 1908.

Gift of movable property

Gift of movable property can be made by alternative modes of transfer namely, registered deed and delivery of possession.

In case of delivery, the donor should have done all that he can, to put the subject matter of the gift within the power of the donee to obtain possession. A valid gift must ordinarily be followed by possession.

Gift deeds transferring actionable claims like shares, insurance policies have been held to be valid.

Mere entries in accounts books in favour of the wife or where money is deposited in bank but the certificate is retained by the donor is not gift as there is no delivery of the subject matter of gift, but a transfer from the account of the donor to that of the donees will make it a valid gift.

SALE DEED AND AGREEMENT TO SELL

A sale deed acts as the main legal document for evidencing sale and transfer of ownership of property in favour of the buyer, from the seller. Further, it also acts as the main document for further sale by the buyer as it establishes his proof of ownership of the property.

The sale deed is executed subsequent to the execution of the sale agreement, and after compliance of various terms and conditions detailed in the sale agreement as agreed upon between the buyer and the seller.

The sale deed is the main document by which a seller transfers his right on the property to the purchaser, who then acquires absolute ownership of the property. It is also referred to as the conveyance deed.

The buyer should ensure the title of the seller before the execution of the sale deed. It should be checked whether there is any charge or encumbrance on the property and whether the purchaser is purchasing the property subject to such encumbrance. If not, then the seller needs to repay the loan and get the property papers cleared of the encumbrances. The purchaser should verify the encumbrance status from the registrar’s office.

Further, subject to the agreement between the parties, all statutory payments like cess, property tax, water charges, electricity charges, society charges, maintenance charges etc should be paid by the seller before the execution of the sale deed. The seller should obtain the requisite clearances, approvals and permissions to transfer or sell the property prior to execution of the sale deed.

On completion of all formalities, a sale deed is prepared. This is the main document for transfer of ownership of property. The deed is executed by all the parties concerned. All pages of the deed are to be signed. The deed should be witnessed by at least two witnesses giving their full names, signatures and addresses. The sale deed of immovable property needs compulsory registration at the jurisdictional sub registrar office.

Generally, ADR uses neutral third party who helps the parties to communicate, discuss the differences and resolve the dispute.

It is a method which enables individuals and group to maintain co-operation, social order and provides opportunity to reduce hostility.

Alternative Dispute Resolution (ADR) Mechanisms

ADR is a mechanism of dispute resolution that is non adversarial, i.e. working together co-operatively to reach the best resolution for everyone.

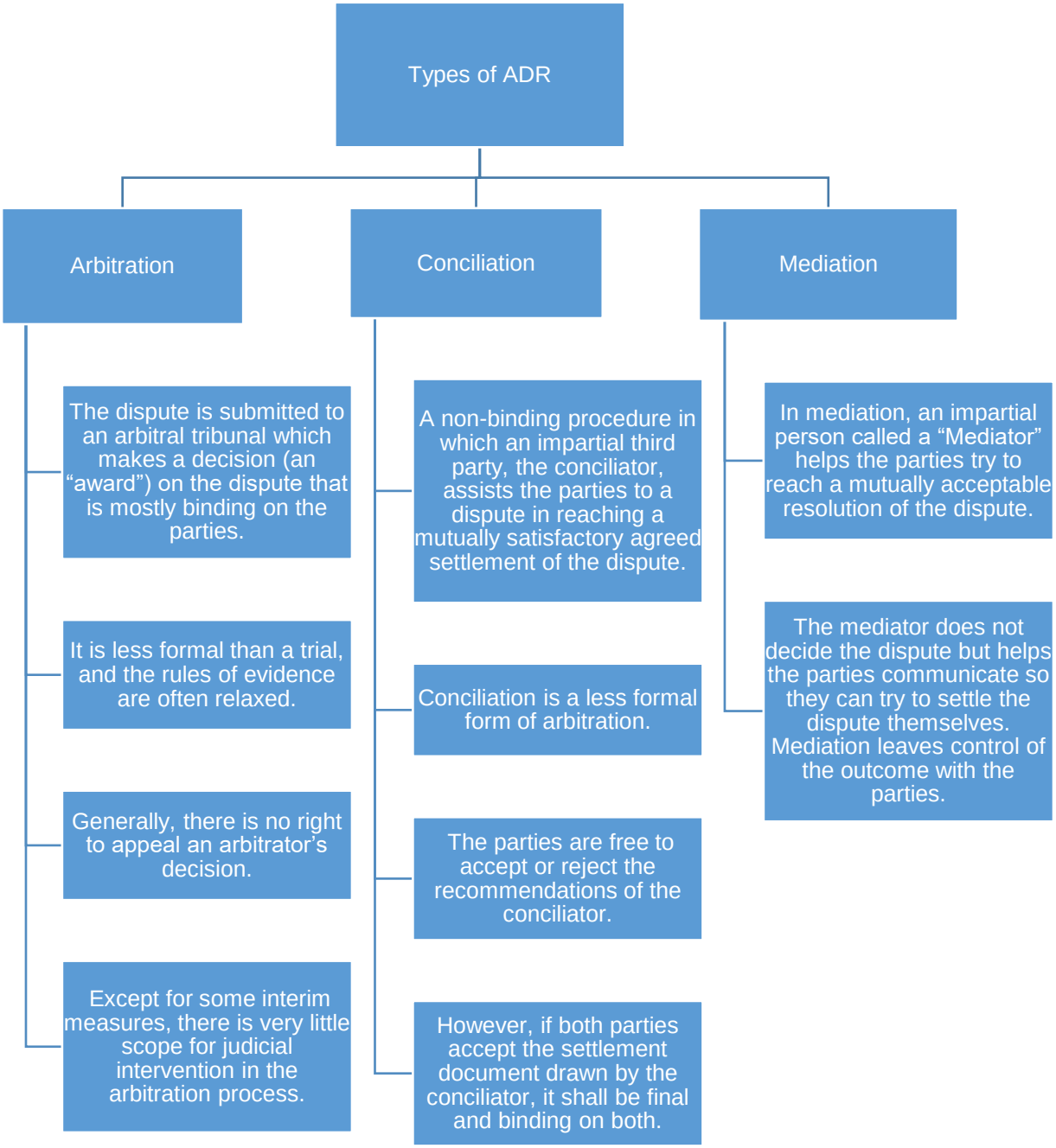
ALTERNATE DISPUTE RESOLUTION (ADR) AGREEMENTS

The process by which disputes between the parties are settled or brought to an amicable result without the intervention of Judicial Institutions and without any trail is known as Alternative Dispute Resolution (ADR).

ADR offers to resolve all type of matters including civil, commercial, industrial and family etc., where people are not being able to start any type of negotiation and reach the settlement.

ADR can be instrumental in reducing the burden of litigation on courts, while delivering a well-rounded and satisfying experience for the parties involved.

It provides the opportunity to “expand the pie” through creative, collaborative bargaining, and fulfil the interests driving their demands



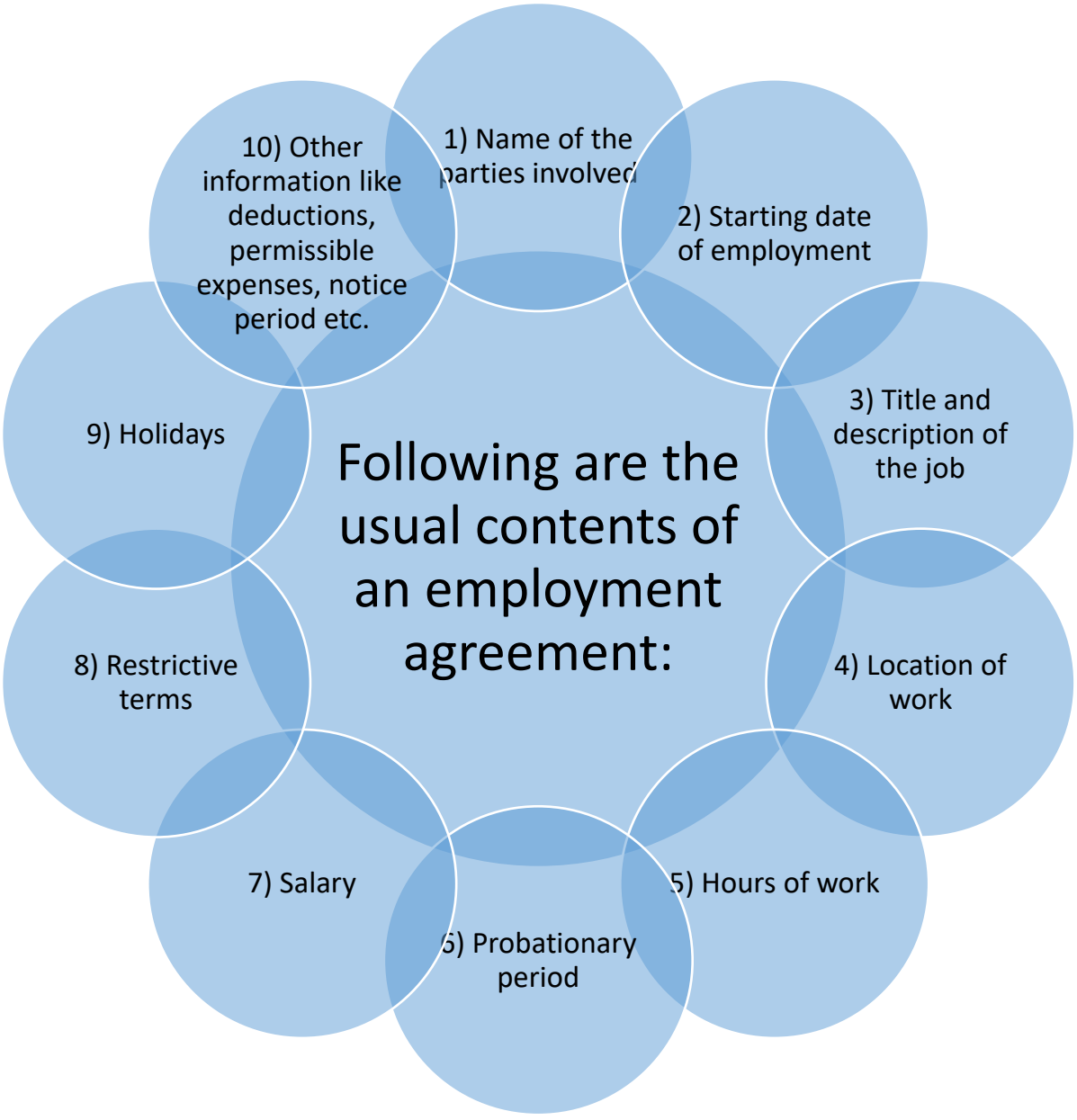
EMPLOYMENT CONTRACTS

Employment agreement is an agreement that is entered into between two parties, i.e. the employer and employee. It is a document that describes the responsibilities and duties expected of an employee. It also describes the profile of the job and the title. The document ensures that the employee knows his place in the organisation and what is expected of him.

Employment agreements should be created in a way that is just and fair for all the employees. If this is followed, employees will do their tasks and responsibilities well and without any negative emotions toward their employers. Usually employment contracts

contain only vague references to the “policies and procedures to which the employee will be bound”.

The employer should provide the employee with all of the company policies and other documents that relate to the contract or are referred to in the contract.

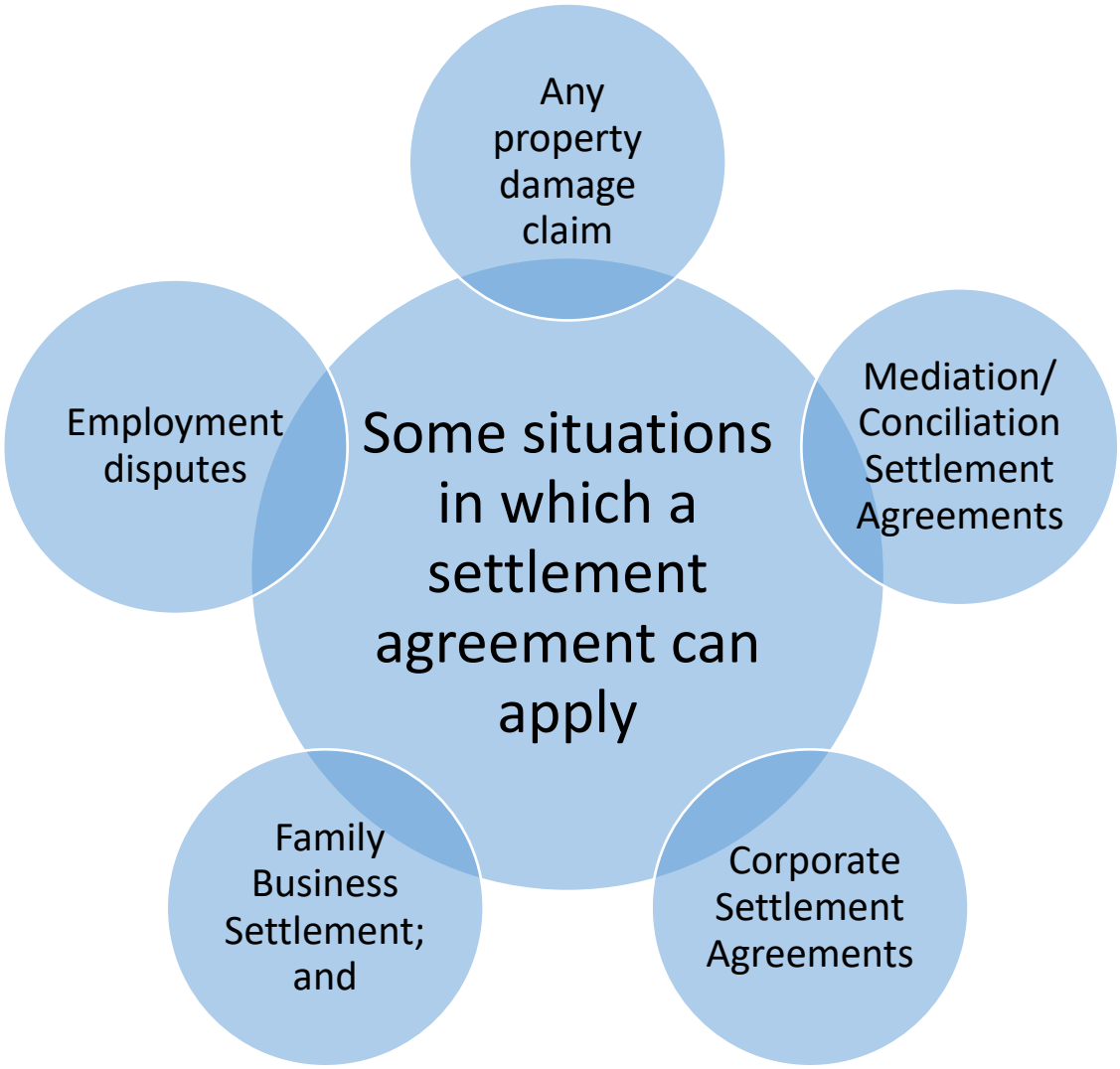


SETTLEMENT AGREEMENTS

A settlement agreement is a legal contract that resolves the disputes among all parties by coming to an agreement. It is a legal document where all parties in a court case, in civil law, agree to an outcome of any judgment being made in advance.

Usually, in settlement agreements, there is no need for a long court case which saves the clients both time and money. Settlement agreements are formed through mediation rather than through a trial. However, the judge will ultimately make the decision to approve the

settlement after one is reached. Settlement agreements allow all parties to be hard and be satisfied with the outcome.



With any settlement agreement, there first needs to be negotiations in order to agree on certain provisions. A mediator is useful to agree on a factual account of the situation if necessary. In some corporate settlements, one party may only agree to settle if no wrongdoing or liability must be admitted. Some settlement agreements may also have conditions, such as how long a party has to fulfil his or her contractual obligations. Therefore, you must agree on whether all current and future claims are resolved by this agreement or whether it fulfils only a single claim or lawsuit.

DRAFTING OF BYE-LAWS OF SOCIETIES

Society

A society may be defined as an association of persons united together by mutual consent to deliberate, determine and act jointly for same common purpose.

When a charitable organisation intends to have an open participation of large number of people in its functioning and decision making, it must be registered as a Society. Societies have been envisaged as welfare and charitable associations of people having a broad based membership and comparatively more democratic and transparent set up as compared to such set ups as public charitable trusts.

According to Section 20 of the Societies Registration Act, 1860, the following societies can be registered under the Act: 'charitable societies, military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collection of natural history, mechanical and philosophical inventions, instruments or designs.' The main instrument of any society is the memorandum of association and rules and regulations. All promoters should sign each page of the memorandum and the signature should be witnessed by competent officers/professionals with their rubber/official stamp and complete address.

The Memorandum should contain name, registered office, area of operation, objects, name of members of governing body and names of promoters. The Rules and Regulations should include all the provisions that would regulate functioning of the proposed Society; it should comprise membership, powers and responsibilities of office-bearers, meetings, quorum of meetings, termination of membership, operation of bank account and financial year, procedure of dissolution or merger of Society if so required, and other general rules required to manage the society.

According to the provisions of Societies Registration Act, 1860, minimum seven or more adult persons can form a Society. For a national level Society eight persons from seven different states would be required as promoters. An authorised person from among the promoters must apply to the concerned Registrar with preferably three alternative names of the proposed Society so as to avoid any inconvenience if the envisaged name has already been allotted to some other Society. Individuals (excluding minors but including foreigners), partnership firms, companies and registered societies are eligible to form a Society.

Registration can be done either at the state level (i.e., in the office of the Registrar of Societies) or at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies).

A society registered under the Act enjoys the status of a legal entity apart from the members constituting it. A society so registered is a legal person just as an individual but with no physical existence. As such it can acquire and hold property and can sue and be sued. The society should be registered under the Act to acquire the status of juridical person.

When the society is registered, it and its members become bound to the same extent, as if each member had signed the memorandum. A society, registered under this Act, must confine its activities to the sphere embraced by its objects. An unregistered society cannot claim benefits under the Income-tax act.

All societies in India have to be registered under the Societies Registration Act 1860. By and large, the registration and filing procedures are similar in all the states. The only difference is that in some states there is a little more paperwork than the others.

DRAFTING OF STANDING ORDERS

The Act makes it obligatory for employers of an industrial establishment where 100 or more workers are employed to clearly define the conditions of employment, by way of standing orders/services rules and to make them known to the workmen employed. However in the N.C.T. of Delhi, the Act applies to an industrial establishment where 50 or more workmen are employed or were employed in the preceding 12 months.

The employer is required to prepare draft standing order, which he propose to adopt and submit the same to the Certifying Officers for certification. The employer is required to act in conformity with the certified standing orders in dealing with the day today affairs of the workmen. Certified standing orders have the force of the law like any other enactment.

ADMINISTRATIVE MACHINERY

All Deputy Labour Commissioners of the Labour Department have been appointed Certifying Officers for the purpose of certification of the proposed standing orders of the respective areas under their control. Industrial Tribunal-I is the Appellate authority under the Act.

PENALTY

The Act provides that in case the employer fails to submit the draft standing orders, a fine up to Rs. 5,000/- can be imposed and in case of contravention of the standing orders, a fine up to Rs. 100/- and in case of continuance of the offence, further fine up to Rs. 25/- for each such day can be imposed.

REPLY OF SHOW CAUSE NOTICES

Show Cause Notice by Court (Reply)

If the Court sends a Show Cause Notice, the person to whom such notice is given must give it the highest priority. The show cause notice must not be taken lightly and its seriousness should be understood. The reason being that by sending a reply to the show cause notice, he/she can avoid criminal charges put on him and also the liabilities which arise from them. Points to be kept in mind while writing a reply to show cause notice:

1. A proper explanation has to be provided at the earliest. .

2. It should be kept as brief as possible.

3. It must be written in such a manner that the Court is satisfied with the fact that he/she is aware of the gravity of the situation.

Some more points to be kept in mind

When you are filling a reply to a show cause notice it must always be kept in mind that you must give a reasonable excuse. Any individual must draft his/her reply in such a way that if any layman would read it he should find the same as reasonable. Moreover, always sound humble in your reply and also sound sorry for the same. Lastly, be always very careful to file the reply within the specified time limit mentioned in the notice.

NOTICES UNDER THE NEGOTIABLE INSTRUMENTS ACT

According to Section 138 of Negotiable Instruments Act, 1881, where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both.

Provided that nothing contained in section 143 shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.– For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.

LESSON 5

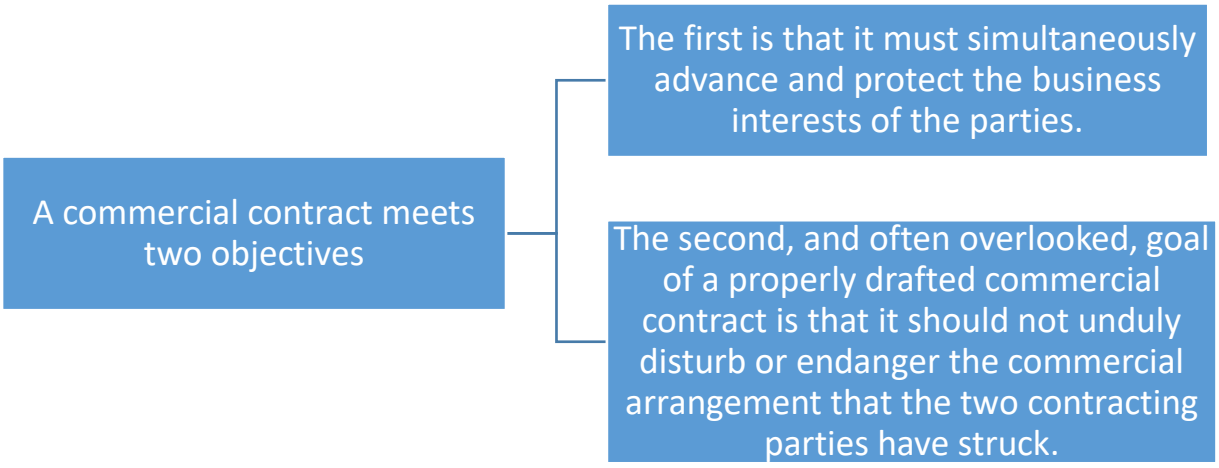
Drafting of Commercial Contracts

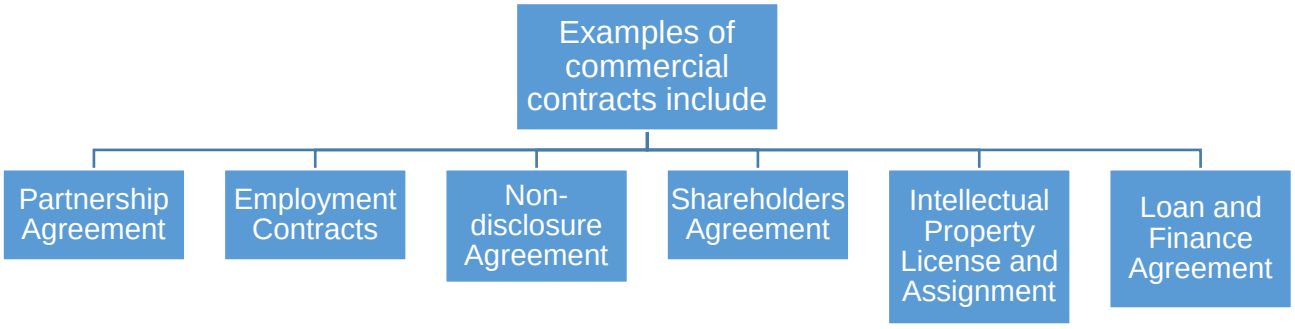
INTRODUCTION

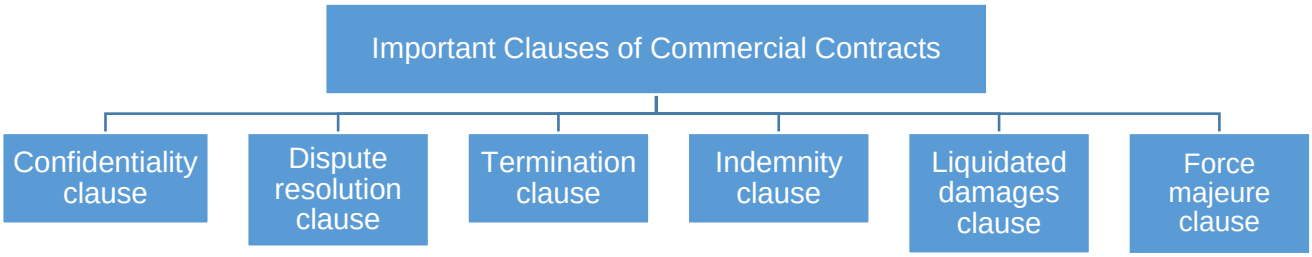
When your business starts to make agreements with other businesses for supply or sale of goods and services, then a proper commercial contract is required to record these agreements and protect the parties in case of a dispute.

Commercial contracts are legally enforceable agreements between two or more parties. They are agreements used to govern commercial activity(s) and involve with the commercial aspects of a product or service. They guarantee that parties follow their word and streamline transaction flow.

The terms of a commercial agreement are usually quite formal and vary for each organisation and transaction.

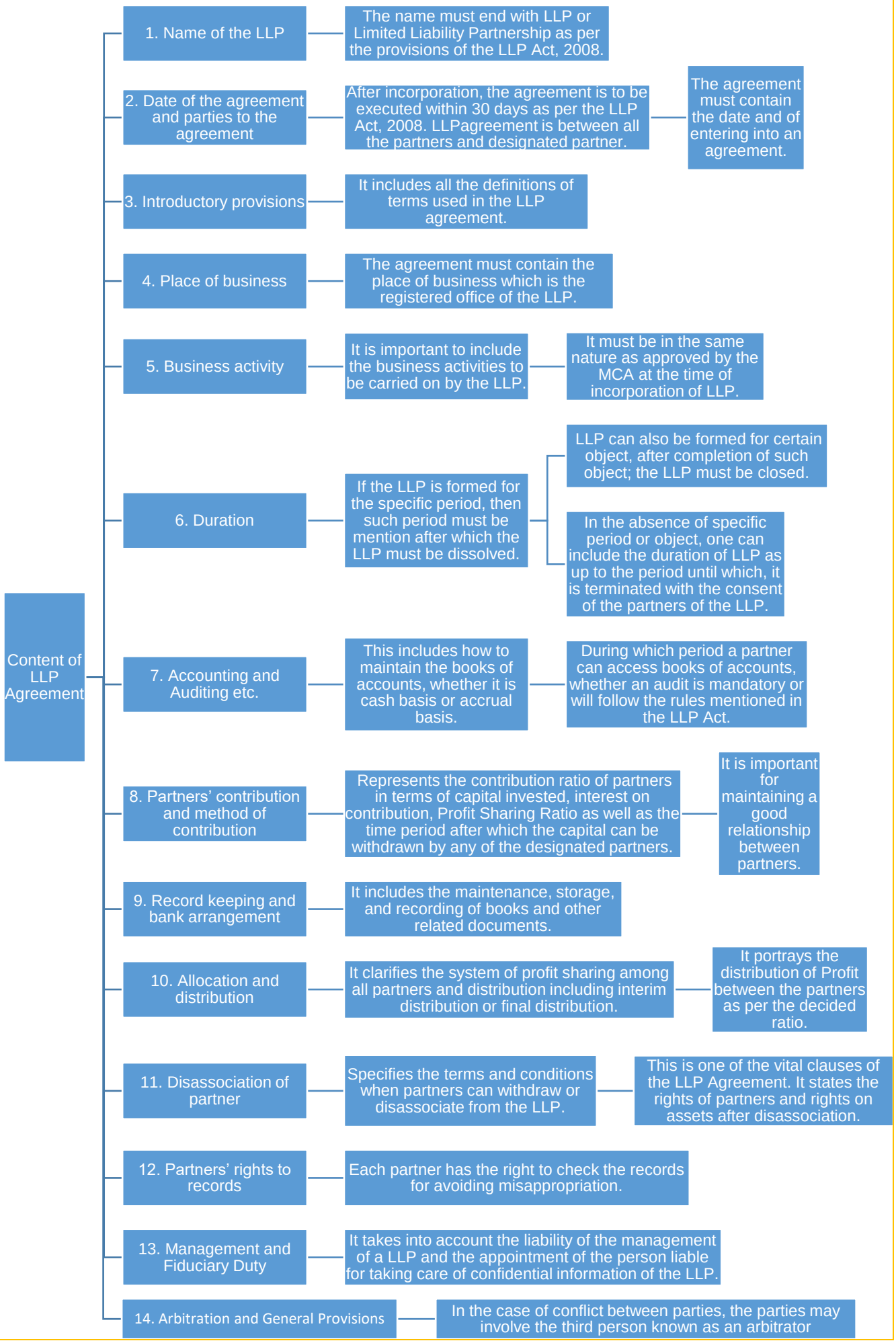






LIMITED LIABILITY PARTNERSHIP AGREEMENT

Limited Liability Partnership is governed by Limited Liability Partnership Act, 2008 which came into force on April 1, 2008. LLP Agreement is a written contract between the partners of the LLP or between the LLP and its designated partners. It establishes the rights and a duty of the designated partners toward each other as well toward the LLP. It is compulsory to execute and file the LLP agreement with MCA within 30 days of the incorporation of LLP. It creates the foundation for the smooth running of Limited Liability Partnership. It defines the outlook and set well define concepts for decision making, adding a new partner and leaving of existing partners or change in roles.


Content of LLP Agreement
1. Name of the LLP
The name must end with LLP or Limited Liability Partnership as per the provisions of the LLP Act, 2008.
2. Date of the agreement and parties to the agreement
After incorporation, the agreement is to be executed within 30 days as per the LLP Act, 2008. LLPagreement is between all the partners and designated partner.
The agreement must contain the date and of entering into an agreement.
3. Introductory provisions
It includes all the definitions of terms used in the LLP agreement.
4. Place of business
The agreement must contain the place of business which is the registered office of the LLP.
5. Business activity
It is important to include the business activities to be carried on by the LLP.
It must be in the same nature as approved by the MCA at the time of incorporation of LLP.
6. Duration
If the LLP is formed for the specific period, then such period must be mention after which the LLP must be dissolved.
LLP can also be formed for certain object, after completion of such object; the LLP must be closed.
In the absence of specific period or object, one can include the duration of LLP as up to the period until which, it is terminated with the consent of the partners of the LLP.
7. Accounting and Auditing etc.
This includes how to maintain the books of accounts, whether it is cash basis or accrual basis.
During which period a partner can access books of accounts, whether an audit is mandatory or will follow the rules mentioned in the LLP Act.
8. Partners' contribution and method of contribution
Represents the contribution ratio of partners in terms of capital invested, interest on contribution, Profit Sharing Ratio as well as the time period after which the capital can be withdrawn by any of the designated partners.
It is important for maintaining a good relationship between partners.
9. Record keeping and bank arrangement
It includes the maintenance, storage, and recording of books and other related documents.
10. Allocation and distribution
It clarifies the system of profit sharing among all partners and distribution including interim distribution or final distribution.
It portrays the distribution of Profit between the partners as per the decided ratio.
11. Disassociation of partner
Specifies the terms and conditions when partners can withdraw or disassociate from the LLP.
This is one of the vital clauses of the LLP Agreement. It states the rights of partners and rights on assets after disassociation.
12. Partners' rights to records
Each partner has the right to check the records for avoiding misappropriation.
13. Management and Fiduciary Duty
It takes into account the liability of the management of a LLP and the appointment of the person liable for taking care of confidential information of the LLP.
14. Arbitration and General Provisions
In the case of conflict between parties, the parties may involve the third person known as an arbitrator

PROVISIONS REGARDING MATTERS RELATING TO MUTUAL RIGHTS AND DUTIES OF PARTNERS AND LIMITED LIABILITY PARTNERSHIP AND ITS PARTNERS APPLICABLE IN THE ABSENCE OF ANY AGREEMENT ON SUCH MATTERS

1. The mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and its partners shall be determined, subject to the terms of any limited liability partnership agreement or in the absence of any such agreement on any matter, by the provisions in this Schedule.

2. All the partners of a limited liability partnership are entitled to share equally in the capital, profits and losses of the limited liability partnership.

3. The limited liability partnership shall indemnify each partner in respect of payments made and personal liabilities incurred by him—
(a) in the ordinary and proper conduct of the business of the limited liability partnership; or
(b) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership.

4. Every partner shall indemnify the limited liability partnership for any loss caused to it by his fraud in the conduct of the business of the limited liability partnership.

5. Every partner may take part in the management of the limited liability partnership.

6. No partner shall be entitled to remuneration for acting in the business or management of the limited liability partnership.

7. No person may be introduced as a partner without the consent of all the existing partners.

8. Any matter or issue relating to the limited liability partnership shall be decided by a resolution passed by a majority in number of the partners, and for this purpose, each partner shall have one vote. However, no change may be made in the nature of business of the limited liability partnership without the consent of all the partners.

9. Every limited liability partnership shall ensure that decisions taken by it are recorded in the minutes within thirty days of taking such decisions and are kept and maintained at the registered office of the limited liability partnership.

10. Each partner shall render true accounts and full information of all things affecting the limited liability partnership to any partner or his legal representatives.

11. If a partner, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.

12. Every partner shall account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning

the limited liability partnership, or from any use by him of the property, name or any business connection of the limited liability partnership.

13. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

14. All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.

JOINT VENTURE

A joint venture (JV) means a strategic arrangement between two or more businesses, where resources are pooled, to work together on a specific project or an ongoing basis.

Joint ventures are a useful way of collaborating with other businesses and to combine different areas of expertise for targeted or general business purposes.

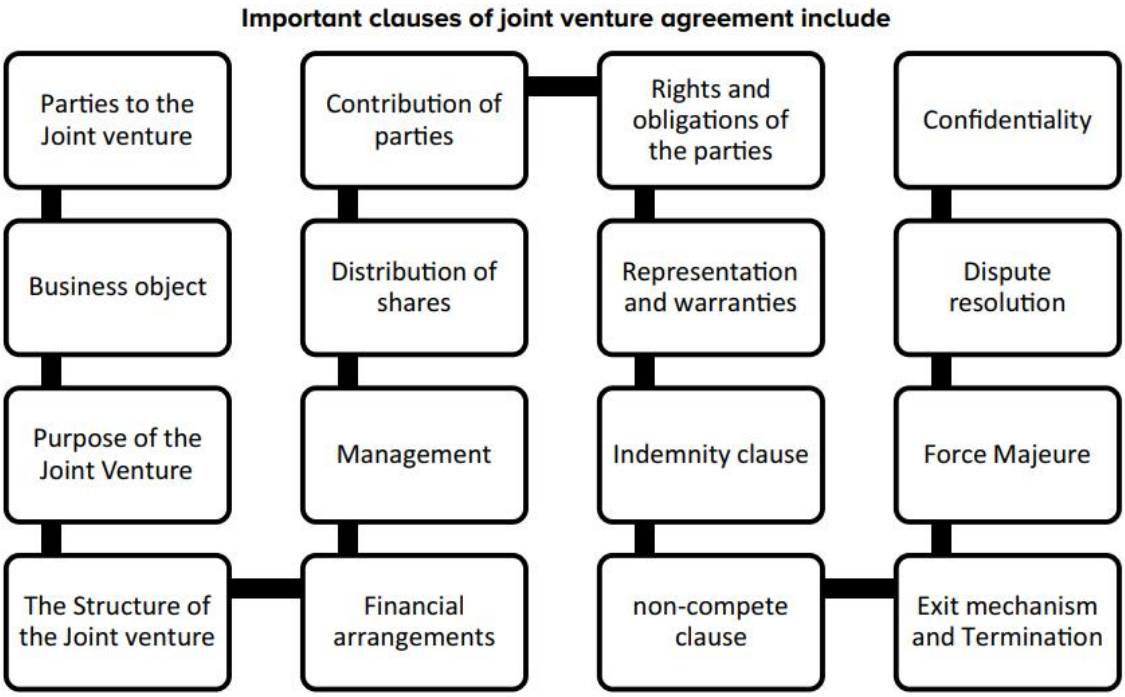
Each of the participants in a JV is responsible for profits, losses, and costs associated with it.

However, the venture is its own entity, separate from the participants' other business interests.

It is important that the parties to the joint venture define their respective roles and responsibilities early on and how the parties will work together to achieve the joint venture's targets.

There are several types of ways to structure a joint venture. Before taking too many steps towards a joint venture it is important to note whether the deal is for a short or long-term arrangement, whether a separate company should be set up for the purpose, whether it is purely a loose collaboration agreement or whether there is a view to a merger or acquisition in the future.

Among the categories of JV Agreements Contractual Joint Venture can take the form of two or more parties coming together to collaborate on a specific project, share the costs of R&D act or share knowledge and expertise on an ongoing basis, Partnership where two or more parties start working together and carry on a business in common with a view to profit they will form a de facto partnership, even if the parties are unaware of this and Limited Liability Company involve a high-cost project, e.g. developing a new product or service, and both parties will put capital into the venture, they may decide to form a new company for this purpose (sometimes called a 'special purpose vehicle/SPV').



FOREIGN COLLABORATION AGREEMENTS

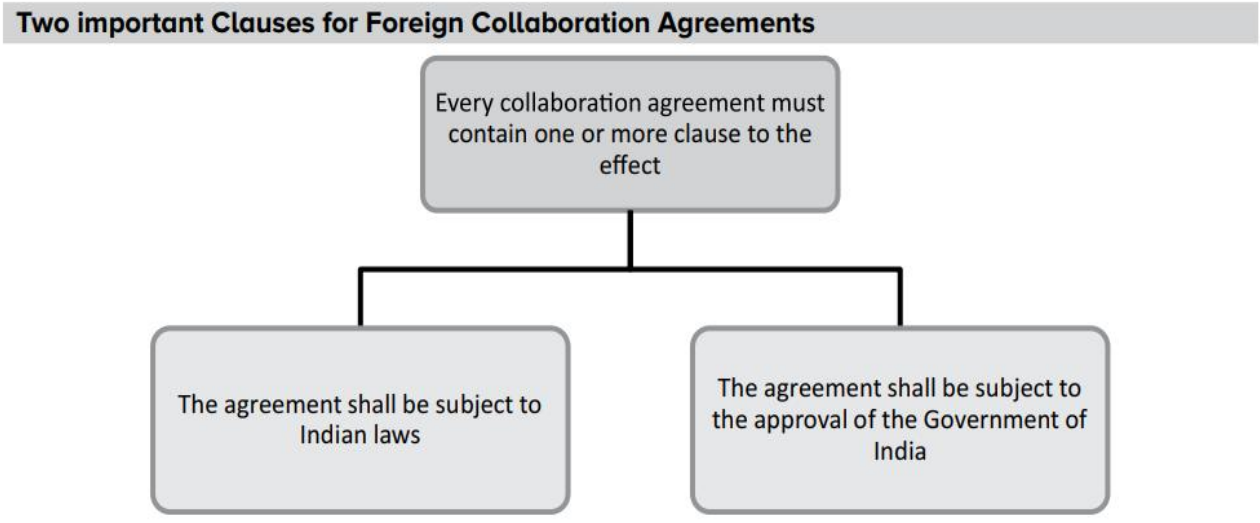
When two parties enter in contract for technical know–how, technical design, drawings, training of technical personnel, research or development or such other things, they are said to be collaboration in a desired venture.

In general, the word collaboration means a co-operation agreement between a party within India and a party situated abroad. Such agreements are also known as foreign collaboration Agreements.

Guidelines for entering into Foreign Collaboration Agreements:

1. **Investments**
   Value of shares to be acquired by the parties involved in collaboration.
2. **Lump sum payment**
   - 1/3rd to be paid after the agreement has been approved by the CG
   - 1/3rd transfer of technical documents
   - 1/3rd on the commencement of commercial production.
3. **Royalty**
   On the basis of (net ex-factory selling price – excise duty & cost of imported components), rate of royalty may be 3% to 5%, depending on the nature & extent of the technology involved.
4. **Duration of agreement**

5. **Renewal or extension of agreement**
   Extension of its period on merit.
6. **Remittances**
   On the basis of prevailing exchange rates.
7. **Sub licensing** need not to normally impose any restriction subject to the CG's approval.
8. **Exports**
   No foreign collaboration agreement shall be allowed to contain any restriction on the free export to all countries.
9. **Procurement of cap. Goods etc.**
   The Indian collaborator must be free to have control over pricing facility and selling arrangements.
10. **Technicians**
    As approve by the Reserve Bank of India.
11. **Training**
    Adequate facilities for training of Indian technicians for R&D.
12. **Consultancy**
    It should be from Indian co. At least prime consultant should be an Indian company in special circumstances.
13. **Brand name**
    No insistence on the use of foreign brand names on products from sale in India, no objection for use of name on products to be exported to other countries.
14. **Applicable Law**
    For resolving the disputes, which may arise.
15. Approval of Central Government.



JOINT DEVELOPMENT RIGHTS AGREEMENT

Present is the age of collaborative science, where the resources of different agencies are collaborated and put together for harnessing the expertise of different agencies.

For development of real estate, model of joint development arrangement has emerged as a popular model wherein land owner and developer combine their resources and efforts. In a Joint Development Agreement (JDA), a landowner contributes his land for the construction of a real estate project and the developer undertakes the responsibility for the development of property, obtaining approvals, launching, and marketing the project.

This agreement should be registered in the court of law under Section 53A of the Transfer of Property Act. The agreement bounds the landowner and the developer in an agreement for the construction of new projects. In return for the land provided by the former, the latter agrees to provides to some provisions. The developer agrees to provide lump sum consideration, percentage of sales revenue, or a certain percentage of the newly constructed project on the said piece of land.

This depends on the terms and conditions, mutually agreed upon by the parties. In this manner, the resources and efforts of land owner and developer are pooled together so as to bring out the maximum productive result. The cost of land in a real estate project entails substantial part of total cost of the project. In such arrangement, developer is not required to make investment for acquiring land at the initial stage and he can utilize his expertise of project development with limited resources in a much efficient manner.

On the other hand, land owner, who may not be having requisite experience and expertise for developing the project, gets better price for his land in comparison to what he would have got in the case of outright sale of land. Thus, it creates a win-win situation for both the parties. In fact, it can be said that the joint development arrangement is a commercial arrangement of convenience where in both the parties try to exploit their respective resources in the best possible manner and without much financial investment. However, the area of Joint development agreement is not restricted to Real Estate only. With the expansion of technology, a joint development agreement can be for a new product or technology. In these types of agreements, prominence is on the research and development of Intellectual Property Rights. A Joint development agreement is also called a strategic alliance agreement.

Drafting of Joint Development Agreement

1. In what manner and at what point of time, ownership rights of the land are transferred by the land owner to the developer so as to decide the capital gain tax liability in the hands of the land owner.

2. Whether possession of the land is handed over to the developer in a manner so as to grant license to enter upon and possess land only for the development or the developer enjoys the possession of the land beyond that. Whether there is transfer of ownership/beneficial rights in the land in terms of the provisions of the Transfer of Property Act, 1882.

3. Whether exclusive rights to sell the developed real estate units and enter into buyers' agreement with the customer are granted to the developer under Joint Development agreement or as per other document executed between the land owner and the developer.

4. In what manner sale consideration of the land is determined and paid by the developer to the land owner. Whether sale consideration is determined in monetary terms or in kind or as combination of both and how the timing of the payment of the consideration is settled between them.

5. Whether rights and authority to mortgage the land is granted to the developer to avail the credit facilities from the banks against the security of the land.

6. In what manner and at what point of time, legal title or ownership right of the developed unit is acquired by the customers.

7. Along with the JDA, what kind of other documents, e.g. Power of Attorney, Supplementary Agreement, Memorandum of Understanding, etc. are required to be executed between the land owner and the developer determining or altering their rights & obligations and tax liability under the Income-tax Act and various other laws.

8. Whether the terms provided in Joint Development Agreement may result into creation of a separate legal entity or joint venture in the form of Association of Persons (AOP) or otherwise.

9. Whether any kind of principal-agent relationship or partners' relationship is created between the parties so that the action of one party may affect the rights and obligations of the other party.

10. Applicability and planning of liability under other tax laws, e.g. GST, Service Tax, VAT, Stamp Duty etc.

11. Whether the terms of Joint Development Agreement result into conversion of the land in the hands of the land owner from capital asset to business asset which may alter the chargeability of tax liability in his hands altogether.

12. Whether there are adequate terms in Joint Development Agreement providing dispute resolution mechanism and exit route to both the parties in case the real estate project does not take off in the desired manner.

SERVICE AGREEMENTS

Contents of a service contract

Service contracts are drafted in the same way as other agreements. The terms of employment should be definitely fixed and clearly expressed and nothing should be left to presumptions. They are required to be both affirmative (describing the acts and duties to be performed) as well as negative (putting restrictions on the acts of the employee during and/or after the term of employment).

It is therefore necessary to make provision for

- The time or period of employment;
- The remuneration and other perquisites, if any, including pay, allowance commission, rent-free house, conveyance, etc;
- Duties of employment;
- Powers of the employee;
- Leave and the terms on which it will be granted;
- Modes and grounds of determining the employment during the term;
- Restrictive covenants, if any.

Period of Service

This may be definite or indefinite. If no period is fixed or an indefinite period is stated, e.g., "so long as the parties respectively please", the contract is terminable by a reasonable notice on either side. What is a reasonable notice varies in different cases, according to the characters of the employment and the general custom, from 15'days to six months, When no term is fixed, it is always proper to provide for determination by notice, In such a case, and also in case option of determination is reserved during the term, the period of notice should be settled and expressed in the agreement

Remuneration

Remuneration may be fixed monthly salary, or fees or commission, or salary as well as fees or commission. Sometimes in business firms, employees are allowed a share in the profits in addition to a fixed salary. All these should be clearly provided.

Leave:

Conditions and grounds on which, and the period for which leave may be granted as well as allowance payable during leave should be stated. In the case of Government servants engaged on contract, the leave rules applicable to permanent Government Servants in general may be applied but as there are different rules for different classes of Government Servants those applicable should be clearly referred to, or if they are not lengthy, they may be embodied in the agreement in the form of a covenant.

Determination of employment

The grounds for determination of employment should be clearly expressed in the agreement. The grounds on which the employment may be determined during the term are generally misconduct, negligence, or want of medical fitness.
Restrictive Covenants: It is usual to include restrictive covenants in the agreement such as that the employer will not undertake any other work or service or that he will not divulge the employer's secrets or make improper use of his trade secrets or information about the employer's affairs.

Effect of Labour Laws:

Many Acts have been passed by the Central or State legislatures relating to the conditions of employment of teachers and other employees of aided schools and colleges and of universities, and of workers in factories and commercial establishments, for e.g. the Factories Act, the Industrial Employment (Standing Orders) Act, the Payment of Wages Act, the Workmen's Compensation Act etc. In drawing up a service contract for such an employee, the provisions of the relevant Acts must be kept in view. Any term of contract contrary to the statutory provisions will be null and void, as it is not open to an employee to contract out of the safeguards provided by the legislature for his protection.

ELECTRONIC CONTRACTS (E-CONTRACTS)

Ecommerce is the selling and purchasing of goods and services using technology. These are basically the contracts analyzed with e – commerce and other transactions taking place in the digital environment.

The principles and remedies as are applicable to traditional contracts are also applicable to e – contracts. These are born out of the need for speed, convenience and efficiency. In the electronic age, the whole transaction can be completed in seconds, with both the parties simply affixing their digital signatures to an electronic copy of the contracts.

The contracts formed through electronic media are treated as the general contracts and their formation and acceptance are governed as per Indian contract Act, 1872. Similarly, the Indian evidence act, 1872 deals with the presumption as to e-records, providing the electronic records as evidence in the disputed matter.

However, the conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts and thus in India the information Technology Act solves some of the peculiar issues that arise in the formation and authentication of electronic contracts.

Essentials of E- contracts

a) An offer or proposal by one party and acceptance of that offer by another party resulting in an agreement consensus-ad- idem.
b) An intention to create legal relations or an intent to have legal consequences.
c) The agreement is supported by lawful consideration.
d) The parties to contract are legally capable of contracting.
e) Genuine consent between the parties.
f) The object and consideration of the contract is legal and is not opposed to public policy.
g) The terms of the contract are certain.
h) The agreement is capable of being performed i.e.; it is not impossible of being performed.

TYPES OF E-CONTRACTS

1. The Click-wrap or Web-wrap Agreements.
2. The Shrink-wrap Agreements.
3. The Electronic Data Interchange or (EDI).

CLICK WRAP AGREEMENT

These are the agreements, which we generally come across while surfing internet such as “I AGREE” to the terms or “I DISAGREE” to the above conditions. A click-wrap agreement is mostly found as part of the installation process of software packages. It is also called a “click through” agreement or click-wrap license.

TYPES OF CLICK WRAP AGREEMENT

1. **Type and Click** where the user must type “I accept” or other specified words in an on-screen box and then click a “Submit” or similar button. This displays acceptance of the terms of the contract. A user cannot proceed to download or view the target information without following these steps.

2. **Icon Clicking** where the user must click on an “OK” or “I agree” button on a dialog box or pop-up window. A user indicates rejection by clicking “Cancel” or closing the window. Upon rejection, the user can no longer use or purchase the product or service. A click wrap contract is a “take-it-or-leave-it” type of contract that lacks bargaining power.

The Shrink-wrap Agreements

Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product like CD ROM of software. The terms and conditions are printed on the cover of CD ROM. Sometimes additional terms are imposed when in such licenses appear on the screen when the CD is downloaded to the computer. The user has right to return if the new terms and conditions are not to his liking.

Electronic Data Interchange

These contracts used in trade transactions which enables the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgement of export and other official documents, leading eventually to the shipment of the goods) can be processed with virtually no paperwork. Here unlike the other two, there is exchange of information and completion of contracts between two computers and not an individual and a computer.

On-Line Shopping Agreement

Suppose Kerry Ltd. wants to offer online shopping services to its customers. Kerry would tie-up with manufacturers of books, toys, clothes, etc., and offers their products for sale through its website.

- Some of the products could be stocked in Noodle's warehouses while others could be stocked with the manufacturers.
- Additionally, visitors can post reviews, comments, photos etc on the Kerry website.
- Kerry would need to enter into a contract with all its potential customers "before" they place an order for a product using Kerry services.

This contract must serve the following purposes:

1. Outline the scope of services provided by Kerry Ltd.
2. Restrict Kerry's liabilities in case there is any defect in the products sold through the Kerry website.
3. Outline the duties and obligations of the customer.
4. Grant suitable licence to the customer to use the Kerry website.
5. Restrict Noodle's liabilities in case of loss or damage suffered by the customer as a direct or indirect result of the Kerry website.

IMPORTANT POINTS IN REGARD TO E-CONTRACTS

These are as under :

1. **Customer's relationship with Kerry**

The contract must specify that by using the Kerry website, the customer becomes subject to the terms of a legal agreement between the customer and Noodle. Customers must be informed that they must be of legal age to enter into the contract.

2. **Acceptance of the terms of the contract**

The contract must clearly lay down that a customer cannot use the Kerry website unless he agrees with the terms of the contract. The customer can usually indicate his acceptance by clicking on an "I Accept" link or checking an "I Accept" checkbox.

3. **Copyright**

The contract should clearly state that all content included on the Kerry website, such as text, graphics, logos, button icons, images, audio clips, digital downloads, data compilations, and software, is the property of Kerry Ltd.

4. **Customers duties and obligations**

The contract should clearly lay down the duties and obligations of the customer.

5. **Amongst others, the customer must:**

i Not overload Noodle's systems
ii Not download or modify the Kerry website.
iii Collect and use any product listings, descriptions, or prices.
iv Download or copy account information by data gathering and extraction tools.
v Not frame or utilize framing techniques to enclose any trademark, logo, or other proprietary information (including images, text, page layout, or form).
vi Not use any meta tags or any other "hidden text" utilizing Noodle's name or trademarks.

Kerry must retain the right to terminate the contract under the following circumstances:

1. The customer breaches any provision of the contract.
2. The customer acts in a manner that clearly shows his intention to breach a provision of the contract.
3. Kerry is required by law to terminate the contract.
4. The provision of the services to the customer is no longer commercially viable.

DEALERSHIP AGREEMENT, DISTRIBUTORSHIP AGREEMENT & FRANCHISE AGREEMENT

Dealership Agreement

A dealership agreement is a legal document that outlines the terms of the contract between a distributor or a vendor and a dealer. A dealer agreement can also govern the business relationship between a general dealer and a vendor. These agreements can get more complex and lengthier depending on the size of the manufacturer and dealers involved in the agreement. A dealership agreement with a larger manufacturer can

include obligations of a dealer such as requirements of the facilities, rules around the dealer's employees and personnel selling and requirements for statements and sales reporting.

Common sections included in Dealership Agreements are:							
Purpose of the agreement.	**Tenure of the Agreement.**	**The obligation of the parties, which may include.**	**The procedure of supply and return of goods.**	**Promotion and training.**	**Invoices and the mode of payment.**	**Any restrictions upon the parties.**	**Termination of the dealership.**

Distributorship Agreement

A distributorship agreement is a legally binding contract between a supplier and a distributor in which the distributor purchases and sells items from the supplier in order to sell them to retailers and/or consumers directly. As a result, the distributor does not hold any stock in the firm.

The distributorship agreement describes the parties' rights, expenses, area, and obligations in respect of product distribution The agreement confers on the distributor the right to supply the manufacturer's goods within a region or regions.

The basic elements of a distributorship agreement include the term (time period for which the contract is in effect), terms and conditions of supply and the sales territories covered by the agreement. Matters such as remuneration to be paid, insurance; transportation and related risk, duration of the distributorship, legal matters are mentioned in a distributorship agreement.

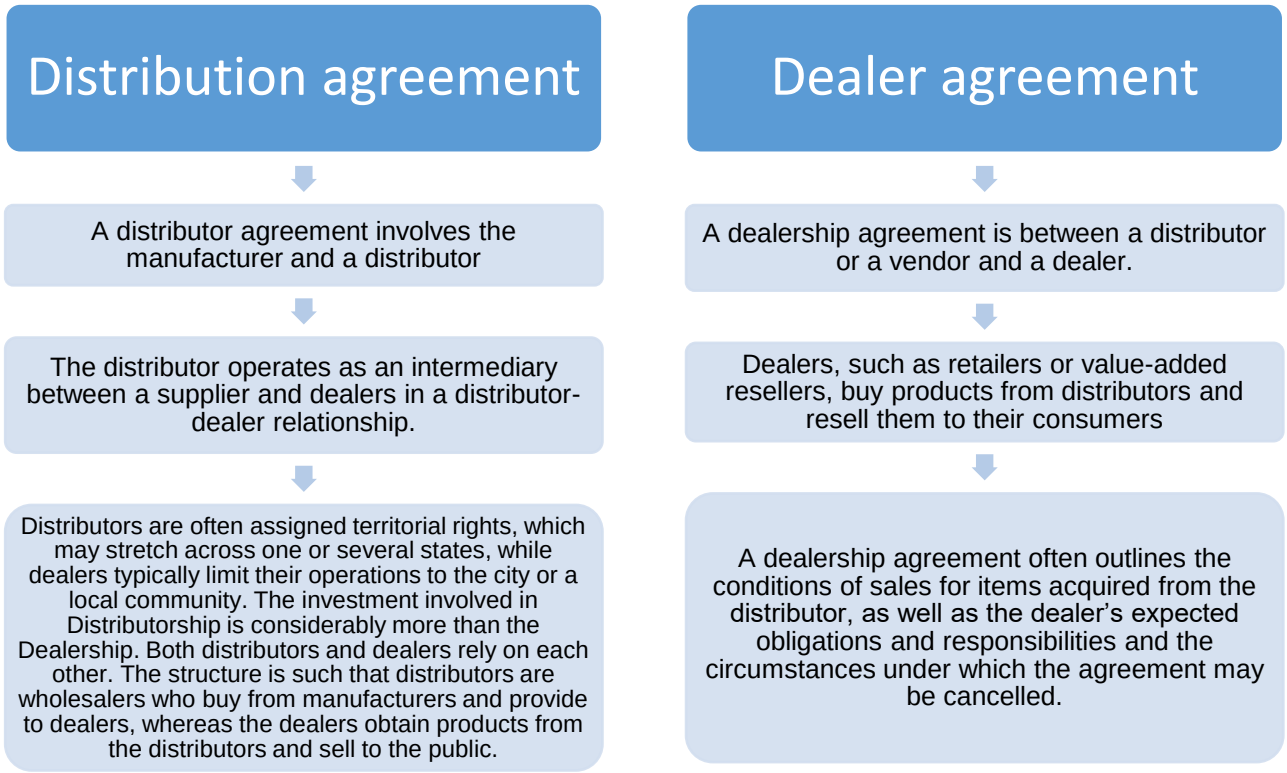
The manufacturer or vendor must also determine whether the distributorship agreement will be exclusive or nonexclusive. In an exclusive agreement, the specified distributor will be the sole distributor with the right to sell the product within a particular

The following is a checklist of factors to be considered when drafting a distribution contract:

- **Exclusive Distributor/ Distributors.**
- **Terms and conditions of sale.**
- **Term for which the contract is in effect.**
- **Duration of the agreement.**
- **Marketing rights.**
- **Trademark licensing.**
- **Geographical territory covered by the agreement.**
- **Performance.**
- **Reporting.**
- **Returned goods credits and costs.**
- **Defects and returns provisions.**
- **Circumstances under which the contract may be terminated.**

geographic region or within multiple regions. If the arrangement is nonexclusive, the manufacturer or vendor may supply other distributors, sometimes competing in the same market.

Difference between a distribution agreement and a dealer agreement



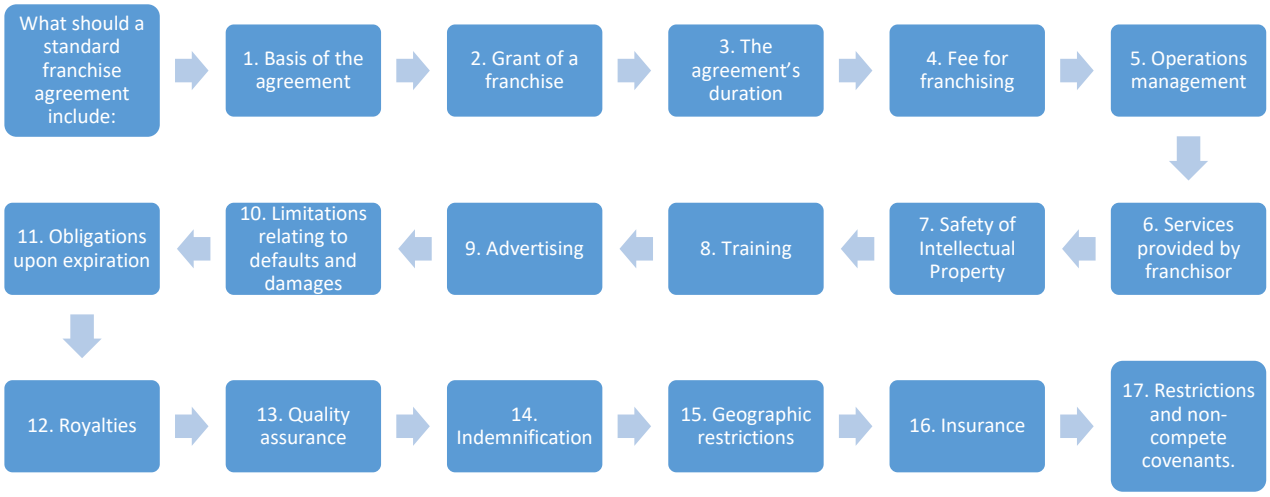
Franchise Agreement

A franchise agreement is a legally enforceable contract between a franchisor and a franchisee. These agreements authorise a franchisee to open a franchise site while also granting the ability to use franchise specific resources such as branding, business methods, and supplier sources.

A franchise agreement, like any other contract, is intended to define precise conditions for the parties' relationship. These agreements provide safeguards and duties that benefit both parties. Franchise agreements define the limitations within which franchisees can operate and clarify any financial commitments they have to their franchisors.

They also often provide greater safeguards to franchisors than to franchisees. Typically, these types of agreements are unilateral in nature. One of the primary goals of a franchise

settlement is to protect the franchise system as a whole. This includes the brand, the integrity of the operating system, and the conduct of franchisees within the mix.



Difference between a Distributorship Agreement and a Franchise Agreement

Diffrence areas	*Franchise Agreement*	*Distributorship Agreement*
The method of operation	The franchisee is allowed and encouraged to use the franchisor's trademarks and brand name in ordinary business procedures under the terms of the franchise agreement. To aid the franchisee's success, the franchisor also gives advertising and training assistance. To retain the franchisor's brand identity, a franchisee must follow precise criteria while promoting and selling items.	A distributor is not allowed to use the company's trademarked name when distributing its items. Instead, the distributor does business under its own identity. It serves as a product reseller, but it does not conduct business on behalf of the firm that manufactures the things.
The degree of control	Franchisor has far more influence over the franchisee and the franchisee's management of the franchised firm. An excellent example is a franchisor maintaining continuous quality control over its franchisees, frequently through an operations manual, marketing strategies, inspections, and other processes to guarantee brand standards are maintained across the network.	The supplier has less influence over the operations of a distributor.
Payments	A franchisee pays an initial fee and a continuing royalty to the franchisor in exchange for the right to operate the business under the franchisor's name.	A distributor pays for the items purchased from the supplier.

OUTSOURCING AGREEMENTS

Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. It differs from contracting in that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best - its core competencies.

Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing (BPO). BPO includes outsourcing related to accounting, human resources, benefits, payroll, and finance functions and activities. Knowledge Process outsourcing (KPO) includes outsourcing related to legal, paralegal, and other highly skilled activities.

A good outsourcing agreement is one, which provides a comprehensive road map of the duties and obligations of both the parties - outsourcer and service provider. It minimizes complications when a dispute arises.

Before finalizing an outsourcing agreement, the terms should be thoroughly discussed and negotiated to avoid any misunderstanding at a later stage. It is advisable to consult a lawyer before finalizing any outsourcing agreement.

Before signing an outsourcing agreement, the following factors must be properly addressed:

outsourcing agreement, the terms should be thoroughly discussed and negotiated to

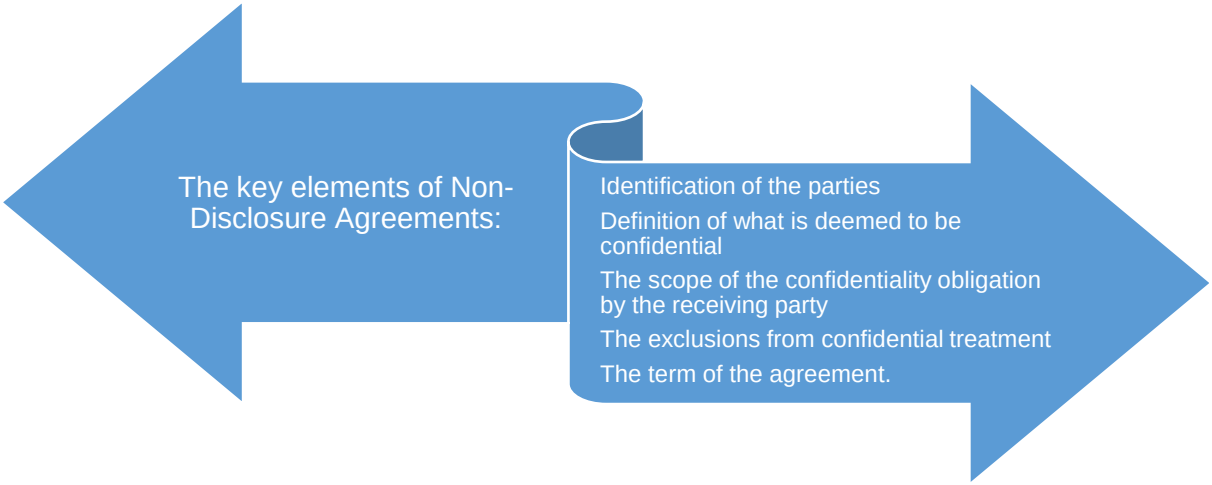
- Duties and obligations of Outsourcer
- Duties and obligations of service receiver
- Security and confidentiality
- Legal compliance
- Fees and payment terms
- Proprietary rights
- Auditing rights
- Applicable law to outsourcing agreement
- Term of the Agreement
- Events of Defaults and Addressing
- Dispute Resolution Mechanism
- Time limits
- Location of Arbitration
- Number of Arbitrators
- Interim measures/Provisional Remedies
- Privacy Agreement
- Non-compete Agreement
- Confidentiality Agreement

- Rules Applicable
- Appeal & Enforcement
- Be aware of local peculiarities
- Survival terms after the termination of the outsourcing agreement

Every outsourcing agreement should be modified as applicable under different circumstances

NON-DISCLOSURE AGREEMENT

A non-disclosure agreement (NDA) which is sometimes also referred to as a "Confidentiality Agreement" is a legally binding contract that establishes a confidential relationship. The party or parties signing the agreement agree that confidential/sensitive information they may obtain will not be made available to any others. An NDA may also be referred to as a confidentiality agreement. The NDA serves a purpose in a variety of situations e.g. NDAs are generally required when two companies enter into discussions about doing business together but want to protect their own interests and the details of any potential deal. In this case, the language of the NDA forbids all involved from releasing information regarding any business processes or plans of the other party or parties.



LESSON 6

Documents under Companies Act 2013

DEEDS OF AMALGAMATION OF COMPANIES: TRANSFER OF UNDERTAKINGS

An amalgamation may be defined as an arrangement whereby the assets of two companies become vested in, or under the control of one company, which may or may not be one of the original two companies. Such a company has as its shareholders all, or substantially all, the shareholders of the two companies.

An amalgamation is effected by the shareholders of one or both of the amalgamation companies exchanging their shares either voluntarily or as a result of operation of law, for shares in the other or a third company.

The arrangement is frequently effected by means of a take-over offer by one of the companies for the shares of the other, or of a take-over offer by a third company for the shares of both.

COMPROMISE AND ARRANGEMENTS

The various terms used for reorganization are arrangement, reconstruction, amalgamation, merger, take-over, etc.

The expression arrangement is of wider import and include reconstruction and amalgamation.

Arrangement" has been defined in explanation to section 230(1) of Companies Act, 2013 as including a reorganization of the company's share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods.

A reconstruction normally entails the transfer of an undertaking to another company, consisting substantially of the same shareholders with a view to its being continued by the transferee company, and usually resorted to for achieving one or more of the following objects:

(a) For the purpose of raising fresh capital by issuing partly paid shares in the new company in exchange for fully shares in the old company, and calling up the balance on new shares as and when required;

(b) For extending the company's objects;

(c) For reorganising or rearranging the capital structure and the rights of members as between themselves; and

(d) For effecting a compromise with creditors, or the allotment to them of shares or debentures in settlement of their claims.

Debenture Trust Deeds

An issue of debentures is usually secured by a trust deed, whereunder movable and immovable properties of the company are mortgaged in favour of the trustees for the benefit of the debenture holders.

The trust deed so created, as in the case of a trust, should specify all the details which have been mentioned earlier.

In addition, the usual important conditions of debenture trust deeds may be stated as follows:

1. The trust deed usually gives a legal mortgage on block capital and a floating security on the other assets of the company in favour of the trustee on behalf of the debenture holders.
2. The trust deed gives in detail the conditions under which the loan is advanced.
3. The trust deed should specify in some detail the remuneration payable to the trustee, their duties and responsibilities in relation to the trust property.
4. It also gives in detail rights of debenture holders to be exercised through the trustees in case of default by the company in payment of interest and principal as agreed upon.

The stamp duty varies from State to State. But when a trust-deed accompanying a series of debentures is duly stamped, no stamp is necessary to be affixed on the debentures if they are expressed to be issued in terms of the said trust deed.

The debenture trust deed is registrable and can be registered with the Registrar of Assurances at the place where the registered office of the company is situated or at the place where a part of the immovable property proposed to be given in the mortgage is situate or at the metropolitan cities, namely, Delhi, Bombay, Calcutta and Madras.

Kindly refer the module for drafts of draft debenture trust deed.

Share Purchase Agreement

A share purchase agreement is defined as a legal contract between a seller and a buyer of shares. They may be referred to as the vendor and purchaser in the contract. The specific

number of shares are listed in the contract at the stated price. This agreement proves that the sale and the terms of it were agreed upon mutually.

Share Purchase Agreement is an agreement entered into between the buyer and seller(s) of shares of a target company. Usually Share Purchase Agreements entail that the buyer would be taking over whole or significantly whole of the undertaking of the company. In such a scenario, the buyer would not only be taking over the assets but also the liabilities of a company.

Prior to drafting a Share Purchase Agreement, the parties should negotiate and draw up a term sheet which would address the key terms of the Share Purchase Agreement. This would help ease the drafting and negotiations of the Share Purchase Agreement as all the material terms would already be agreed to between the parties.

A share purchase agreement sets out specific rights and liabilities related to the purchase and sale of shares in a particular entity. It is important to set out the requirements related to a share purchase agreement. Usually a share purchase agreement would be typically used in the mergers and acquisitions processes. A particular entity would purchase about 50% or more of the share capital of the target company


Key Contents of Share Purchase Agreement
Details of the buyer, seller and the company.
The liabilities and obligations of both parties.
The permissions, authorisations, etc. need to be taken before the transfer or sale of shares by the shareholder.
Details of the number of shares and kind of shares purchased.
Information about the pricing at which the shares are sold by the company.
The rights that are given to the shareholder.
Dispute resolution and arbitration process in cases of legal disputes arising.
Jurisdiction of the court and law applicable in case of a legal dispute.

Share-holders Agreement

A shareholders' agreement is a contract between the shareholders of a company and the company itself. It ties the shareholders to rules to preempt issues that might become contentious in the future. A shareholders' agreement mentions the shareholders' rights and obligations, regulates the ownership of shares, privileges, the management of the company, voting and various other insulative provisions for shareholders.

It is a known fact that the Articles of Association (hereinafter 'AoA') act as the Constitution for a company and thus they are mandatory and standard in nature. AoA ties a company and its shareholders in their capacity as shareholders and further mentions the responsibilities of the directors, the means by which the shareholders exert control over the board of directors and the kind of business to be undertaken.

When it comes to a shareholders' agreement the protection of the shareholders is given more importance. Even though a shareholders' agreement may include certain terms from the AoA, it has no specific format i.e., the shareholders' agreement can be as flexible and extensive as required by the shareholders according to their needs. While AoA is a public document, the shareholders' agreement is a private document because it contains confidential internal information of a company. A shareholders' agreement is an affordable option to reduce the risk of possible business disputes because it specifies how decisions must be made regarding certain disputes including the provision of a framework and procedures for dispute resolution.

The AoA and a shareholders' agreement must be complementary to each other. However, a shareholders' agreement may contain a supremacy clause to ensure that it overrides the AoA in case there is any inconsistency so that the shareholders can amend the AoA as required.

Underwriting and Brokerage Agreements

Underwriting is one of the most important functions in the financial world wherein an individual or an institution undertakes the risk associated with a venture, an investment, or a loan in lieu of a premium. Underwriters are found in banking, insurance, and stock markets.

The nomenclature e'underwriting' came about from the practice of having risk takers to write their name below the total risk that she/he undertakes in return for a specified premium in the early stages of the industrial revolution.

In the securities market, underwriting involves determining the risk and price of a particular security. It is a process seen most commonly during initial public offerings, wherein investment banks first buy or underwrite the securities of the issuing entity and then sell them in the market. This ensures that the issuers of the security can raise the full amount of capital while earning the underwriters a premium in return for the service.

Investors benefit a lot from the underwriting process as the information provided by an underwriting agency can help them take a more informed buying decision. An underwriter who holds a large chunk of the securities of a particular company or is the market maker for such a security provides the core liquidity for the security and enhances price stability and distribution.

Underwriters in the banking sector perform the critical operation of appraising the credit worthiness of a potential customer and whether or not to offer it a loan. They appraise the credit history of the customer through their past financial record, statements, and value of collaterals provided, among other parameters.

In the insurance world, underwriters determine whether an insurance agency should undertake the risk of insuring a client. They determine the risk and exposure of clients and also how much insurance should be granted to a client, how much they should pay for it and whether or not to offer an insurance policy to the client in the first place.

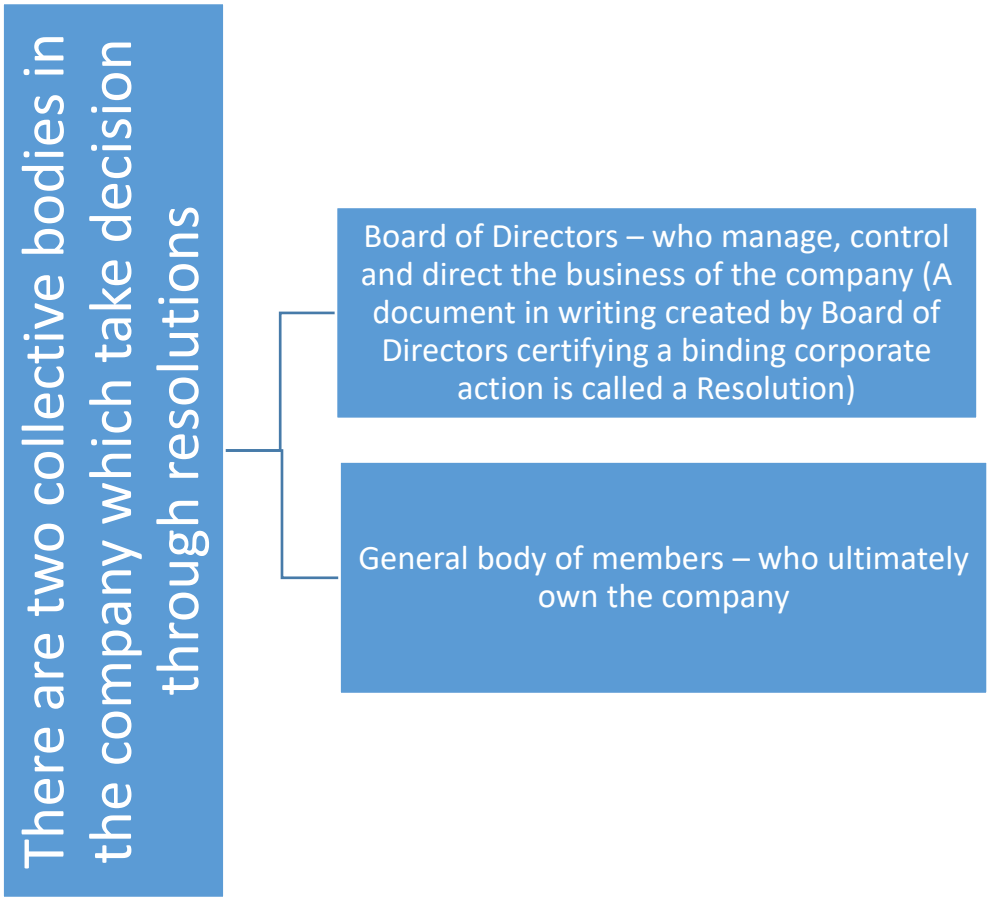
The Underwriting Agreement sets forth the terms and conditions pursuant to which the underwriters will purchase the offered securities and distribute them to the public. Both the issuer's and underwriters' legal counsel play critical roles in negotiating key provisions of the underwriting agreement that have significant effects on the offering.

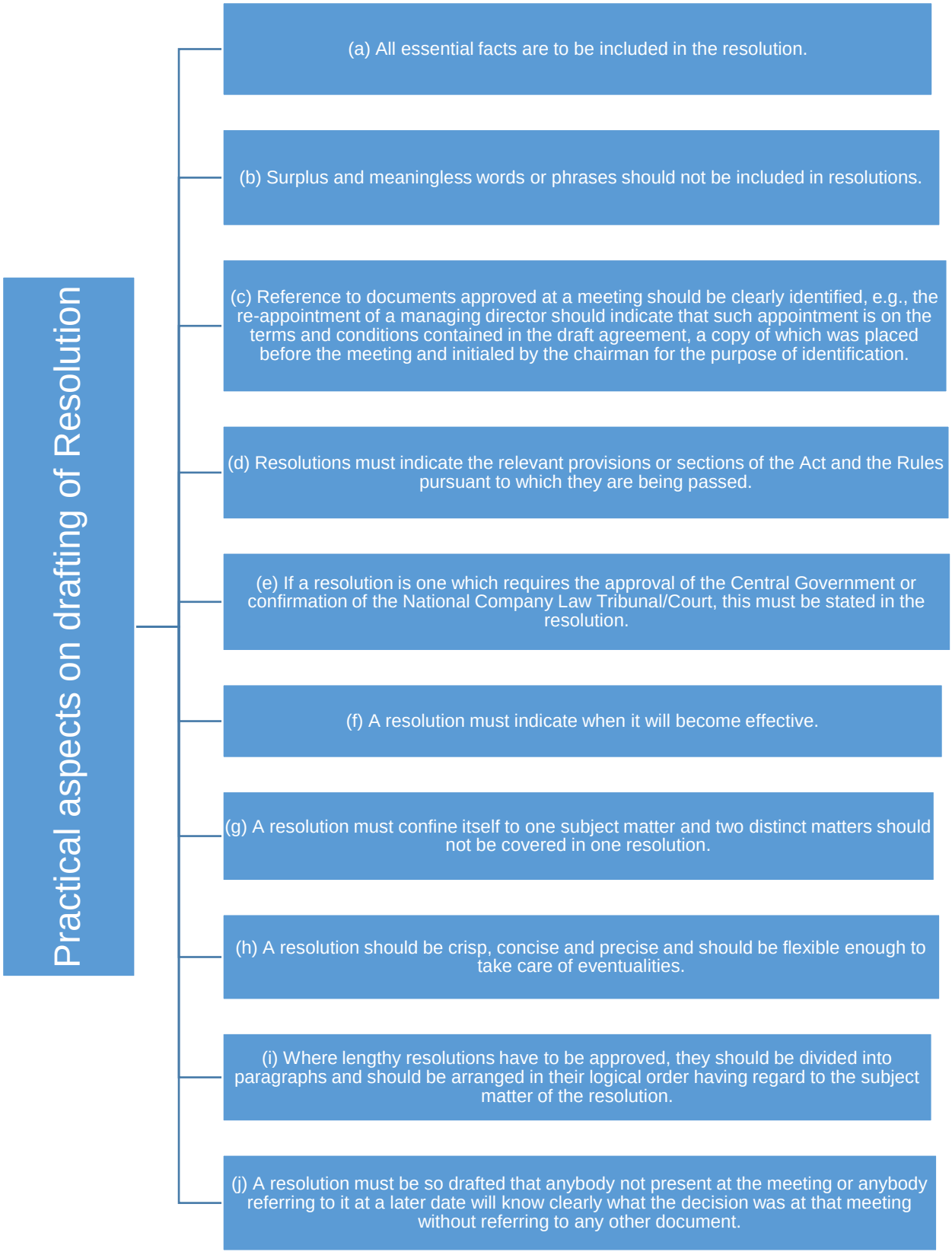
COLLECTIVE DECISION MAKING PROCESS IN COMPANIES- "RESOLUTION"

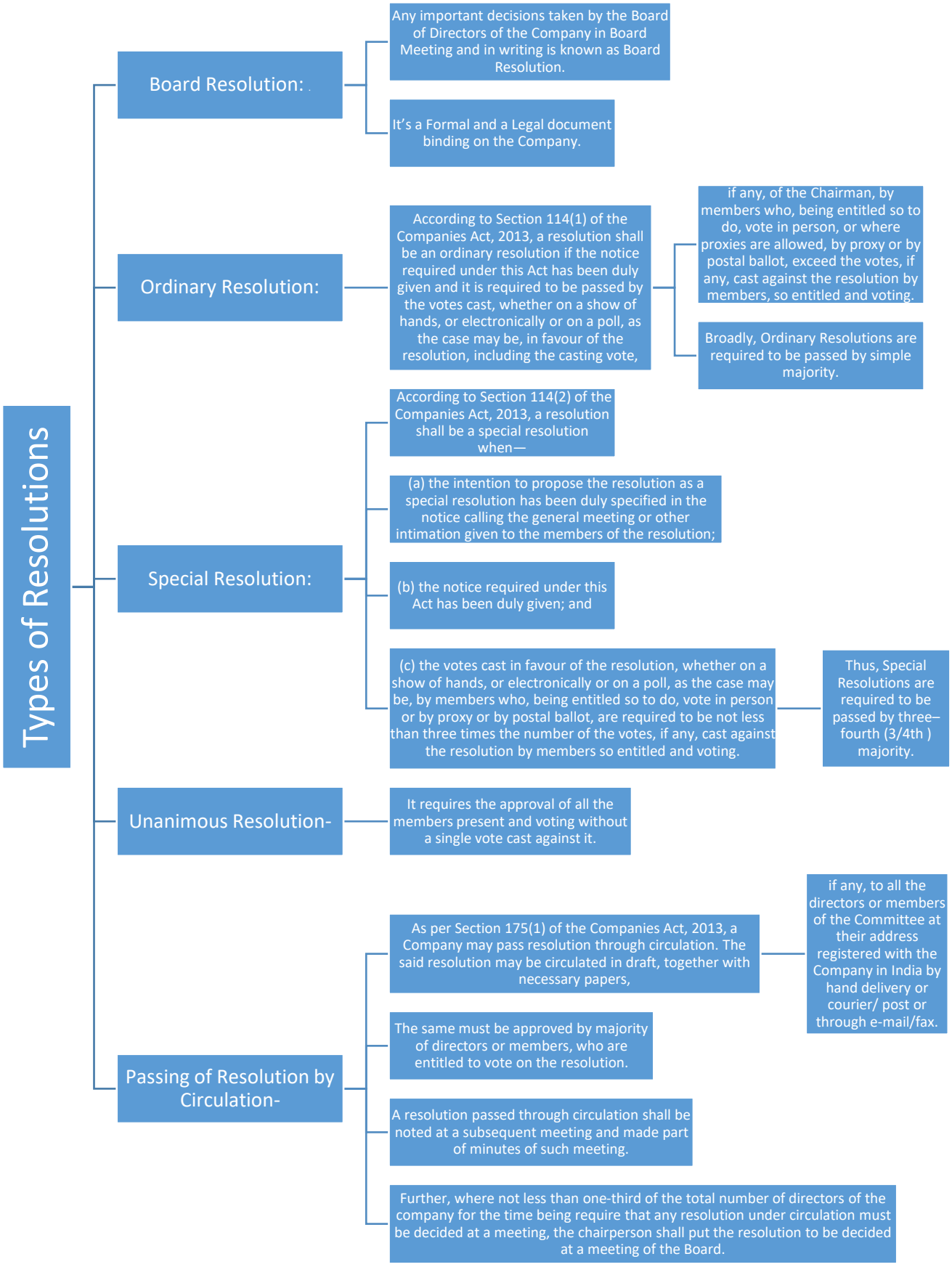
Resolution as per Cambridge Dictionary means "an official decision that is made after a group or organization has voted".

It is a decision or agreement made by the directors and shareholders of the company. When a resolution is proposed it is called motion. After passing a resolution company is bound to act according to it.

A company is an artificial judicial person created by law having its own distinct entity form and capable of entering into contracts. Though company is bestowed with the characteristic of separate legal entity but it cannot take decision on its own. It is capable of acting in its own name, entering into contracts. It is capable of owning and holding property in its own name, sue others and to be sued by others in its name. Despite all these powers, since it is not a natural person, it expresses its will or takes its decisions through natural persons (i.e. directors or members) collectively which is known as “resolutions.”




Practical aspects on drafting of Resolution
(a) All essential facts are to be included in the resolution.
(b) Surplus and meaningless words or phrases should not be included in resolutions.
(c) Reference to documents approved at a meeting should be clearly identified, e.g., the re-appointment of a managing director should indicate that such appointment is on the terms and conditions contained in the draft agreement, a copy of which was placed before the meeting and initialed by the chairman for the purpose of identification.
(d) Resolutions must indicate the relevant provisions or sections of the Act and the Rules pursuant to which they are being passed.
(e) If a resolution is one which requires the approval of the Central Government or confirmation of the National Company Law Tribunal/Court, this must be stated in the resolution.
(f) A resolution must indicate when it will become effective.
(g) A resolution must confine itself to one subject matter and two distinct matters should not be covered in one resolution.
(h) A resolution should be crisp, concise and precise and should be flexible enough to take care of eventualities.
(i) Where lengthy resolutions have to be approved, they should be divided into paragraphs and should be arranged in their logical order having regard to the subject matter of the resolution.
(j) A resolution must be so drafted that anybody not present at the meeting or anybody referring to it at a later date will know clearly what the decision was at that meeting without referring to any other document.


Types of Resolutions
Board Resolution:
Any important decisions taken by the Board of Directors of the Company in Board Meeting and in writing is known as Board Resolution.
It's a Formal and a Legal document binding on the Company.
Ordinary Resolution:
According to Section 114(1) of the Companies Act, 2013, a resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote,
if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.
Broadly, Ordinary Resolutions are required to be passed by simple majority.
Special Resolution:
According to Section 114(2) of the Companies Act, 2013, a resolution shall be a special resolution when—
(a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
(b) the notice required under this Act has been duly given; and
(c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.
Thus, Special Resolutions are required to be passed by three–fourth (3/4th) majority.
Unanimous Resolution-
It requires the approval of all the members present and voting without a single vote cast against it.
Passing of Resolution by Circulation-
As per Section 175(1) of the Companies Act, 2013, a Company may pass resolution through circulation. The said resolution may be circulated in draft, together with necessary papers,
if any, to all the directors or members of the Committee at their address registered with the Company in India by hand delivery or courier/ post or through e-mail/fax.
The same must be approved by majority of directors or members, who are entitled to vote on the resolution.
A resolution passed through circulation shall be noted at a subsequent meeting and made part of minutes of such meeting.
Further, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

LESSON 7

ART OF WRITING OPINIONS

A legal opinion is a written statement by a judicial officer or a legal expert based on giver's professional understanding of a particular aspect of any matter based on legal principles.

CASE FOR OPINION WRITING

Some of the common purposes for which legal opinion are sought are as follows:

1. Lawfulness of an action: Opinion letters are given when one wants to know if an action is lawful.
2. Legal consequences: Sometimes a party entering into a transaction obtains legal opinion to ascertain if the action will lead to desired legal consequences.
3. Answer questions: A client may be confused about an issue and they want professional guidance in the area.
4. Regulatory requirements: Sometimes legal opinion has to be sought because it is mandated by law to get the opinion of outside legal expert.
5. Compliance: A legal opinion can be sought for assessing the requirements of the regulatory regime so that the querist can meet the compliance requirement.
6. Protective shield: Clients sometimes desire the protection of an expert's legal opinion to be used as evidence of lack of mens rea in certain proceedings.
7. Designed to mislead: Sometimes promoters of unscrupulous schemes obtain as many opinions from different experts as is possible and use the one which is favourable to their scheme of things.
8. To satisfy contractual requirements: Sometimes a clause in commercial contracts require the opinion of an expert.
9. Due Diligence: Lawyers and clients often cite due diligence as the principal reason for requesting opinion letters in business transactions.

TYPES OF LEGAL OPINION

1. **Advices on Transaction**: Due diligence is the principal reason for opinion letters in business transactions. An opinion letter may be one component of a party's due diligence, but it is not normally a substitute for due diligence performed by the

opinion recipient and its counsel.

2. **Advices on Law:** Sometimes the client would want to know how the law will apply to a given situation. Without in-depth knowledge of law and legal research one cannot give an opinion to the satisfaction of the client. The proper way is to start with the cases and work through to reach a deduction as to the principle of law that covers the situation.

3. **Opinions on Facts**: The third type of opinion is one which is predominantly related to facts. One is given a series of statements and documents and asked whether on that material there are reasonable prospects of prosecuting or defending the claim.

4. **Advices on Evidence:** A special type of opinion is a brief to advice on evidence. When advising on fact or law one should not be too positive. In relation to advices on quantum of damages one can never be sure so it is advisable to not give a precise figure but a range.

QUALITY OF WRITING

The primary purpose of a legal opinion is communication of advice to either a lay or professional client. It is therefore of the utmost importance that it is clear and in plain, understandable English. Every word of the legal opinion should be chosen because it communicates precisely the advice which the writer intends to covey. It is important to write in plain English wherever possible. Perfect grammar, punctuation and precision of language are essential.

FORM AND ELEMENTS OF THE OPINION LETTER

1. **Introductory Matters**

   i. Title: It should be entitled OPINION or ADVICE and contain the title of the case in the heading

   ii. Date. The opinion speaks as of the date mentioned on the opinion letter and need not state separately the effective date of the opinion

   iii. Addressee. The opinion is normally addressed to a specified party in an individual capacity, to a party as representative of a larger group, or to an identified class of person

2. **Introduction:** The first paragraph should serve as an introduction to the legal opinion, laying out the salient facts and what the expert has been asked to advise about. An opinion must set out the questions on which it is sought very clearly and

unambiguously.

3. **Definitions.** For purposes of brevity and clarity, it is advisable to define the principal terms used in the opinion

4. **Understanding facts of the case** The obligation of an opinion giver to exercise diligence in determining the factual and legal bases for an opinion is implicit in every opinion letter. The first rule is always to commence the opinion by setting out the facts that have been given or have been presumed from the instructions given. Adopting the practice of commencing opinion by outlining the facts upon which one is advising serves another purpose as well. It crystallises those facts in one's mind, visualises any gaps as to which one may need to take further instructions or make assumptions and, where issues of fact are involved, suggests areas which need attention. Facts should be stated in a manner which brings out the materials that will become material for answering questions, whether with an "yes" or a "no". The advantage of listing down the facts is that if the ultimate conclusion is wrong, or inapposite, because the facts are wrong, the fault will be that of the client for giving the wrong data or at least the error may be veiled by the failure of the client or solicitor to adapt opinion to the true facts.

5. **Research on Relevant Case Laws** An easy way of analysing is to first set out the law and the provisions of the law (or laws) that are applicable. Then go on to summarize the binding precedents (judgments of the Supreme Court and the High Court of the State exercising jurisdiction over the subject matter) with full citations. If the choice of extracts is precise enough, the ultimate opinion will almost automatically appear from the extracts of the judgments that have been quoted.

6. **Expression of the Opinion** Once the facts are organised, a legal framework needs to be constructed into which these facts can be logically slotted. The opinion can be in the form of summary statement of conclusions or, where a series of discrete questions have been asked, precise answers to the particular questions asked. If the argument has been properly conducted these answers may well be monosyllabic. "Yes", "no", or "does not arise

7. **Qualifications**. In practice, opinions are frequently subject to qualifications that narrow their apparent scope. Some opinions may be qualified by assumptions or exceptions. Opinions also may be qualified as to scope, particularly when the opinion covers a specialized area of the law.

8. **Special Matters**

   a) Foreign Law and Reliance on Local Counsel: The principal opinion giver for a party in a business transaction typically renders an opinion covering the laws of the state and applicable central laws and sets forth this limitation in the text of the opinion. The opinion giver may also be requested to furnish

an opinion on matters governed by the laws of some other country.

b) Reliance on Opinion of 'Special' Counsel: Considerations similar to those arising in the selection and use of local counsel apply in the retention of special counsel. A lawyer who has no expertise in a specialized matter should not render an opinion in the specialized area, and should refer the matter to a lawyer qualified in that field.

9. Signature The procedure typically followed by most law firms is for the opinion letter to be manually signed in the name of the firm. Some law firms follow different practices, such as "XY&Z by A, a partner" or "A on behalf of XY&Z."

10. Usual disclaimers: Disclaimers can save the opinion giver from being reported for malpractice if the opinion is wrong

THINGS TO BE KEPT IN MIND WHILE PREPARING FOR OPINION LETTER

1) **Opinions That Are Not Cost-Effective** Opinion givers are held to certain standards of skill and care in rendering legal opinions. Although the nature and extent of the applicable standards of care are not defined, the opinion giver is obligated to avoid misleading opinion recipients about the scope and depth of any investigation undertaken.

2) **Inappropriate Scope** In a business transaction a number of opinions would be considered inappropriate because their scope is not reasonably within the competence of the opinion giver or they are not cost-justified.

3) **Confirmations of Fact**; Negative Assurance Opinion givers should take care that the opinion letter makes a clear distinction between those portions that constitute actual opinions on matters of law and other portions (including confirmations of a purely factual nature) that do not.

4) **Opinions Regarding Issues of Significant Legal Uncertainty** A fourth common area of disagreement involves legal issues that, although potentially appropriate for inclusion in an opinion, are subject to significant legal uncertainty. If the uncertainty extends only to one of the opinions expressed, the question is frequently resolved by a "qualification" to that opinion. The "qualification" may be a statement that the particular opinion does not cover the effect of a certain law or laws or may identify the uncertainty. Such qualifications are usually acceptable if they relate to demonstrable legal uncertainties.

5) **Fraudulent or Misleading Opinions and the Limits of Professional Competence** A lawyer should not render an opinion that the lawyer knows would be misleading. In addition, a lawyer should not render an opinion based on factual assumptions if the lawyer knows that the assumptions are false or that reliance on those facts is

unreasonable. In addition, a lawyer should not be asked to render opinions on matters that are outside his or her area of professional competence.

6) **The Time to prepare Opinion Letter** Sometimes one may be faced with the necessity of giving an urgent opinion or one when the time is not available to allow one to perform the depth of research one would wish. Sometimes the reason for urgency might be of one's own making. Even in these circumstances one should not make the mistake of giving a half baked, half thought out opinion over the telephone and promising the written advice at a later date. If the opinion giver is wrong not only will he face considerable embarrassment in correcting his informal opinion but if his client has acted on the faith of it, the opinion giver will have no defence to a claim for damages.

STANDARDS APPLICABLE TO PREPARATION OF AN OPINION

1) **Generally**:

A lawyer is expected to be well informed and to exercise such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. When a matter falls within a recognized area of legal specialty, such as tax or securities law, it is advisable to take that assignment only if it falls within the competence of the professional.

2) Customary Practice:

An attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.

3) **Fraudulent or Misleading Opinions**

An opinion giver may be liable for an opinion that constitutes fraudulent misrepresentation. A lawyer owes a duty to non-clients to refrain from fraudulent misrepresentation. It is generally understood that, regardless of compliance with other standards, and even if an opinion is technically correct, a lawyer should not render an opinion that the lawyer recognizes would be misleading to the opinion recipient.

4) Ethical Issues Relating to the Provision of Opinions to Non-clients

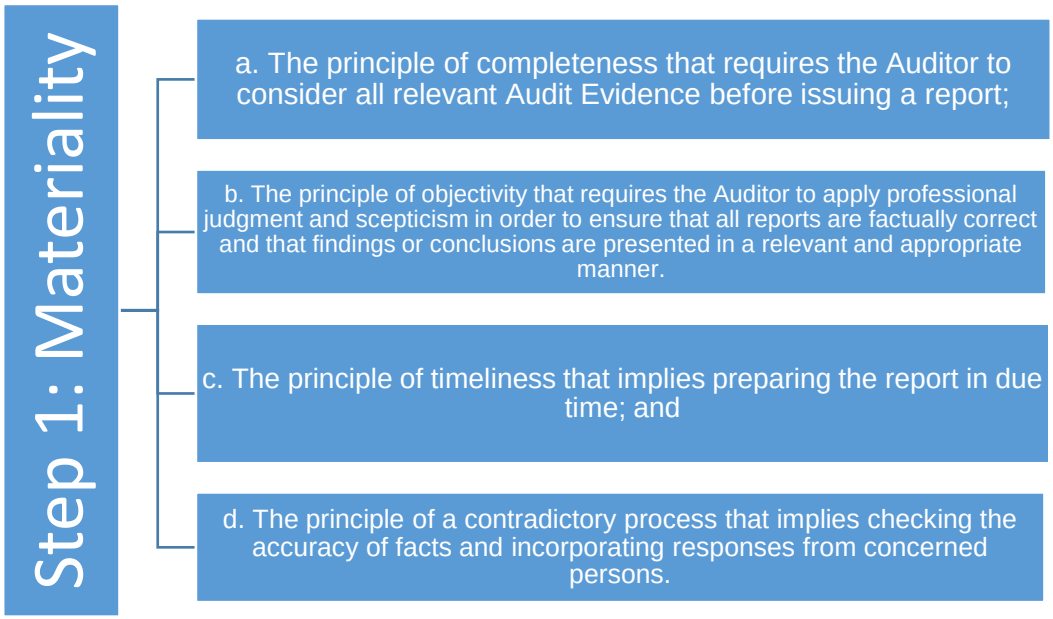
A lawyer delivering an opinion letter to a non-client should also consider ethical principles. For example, rendering an opinion to a non-client may conflict with the

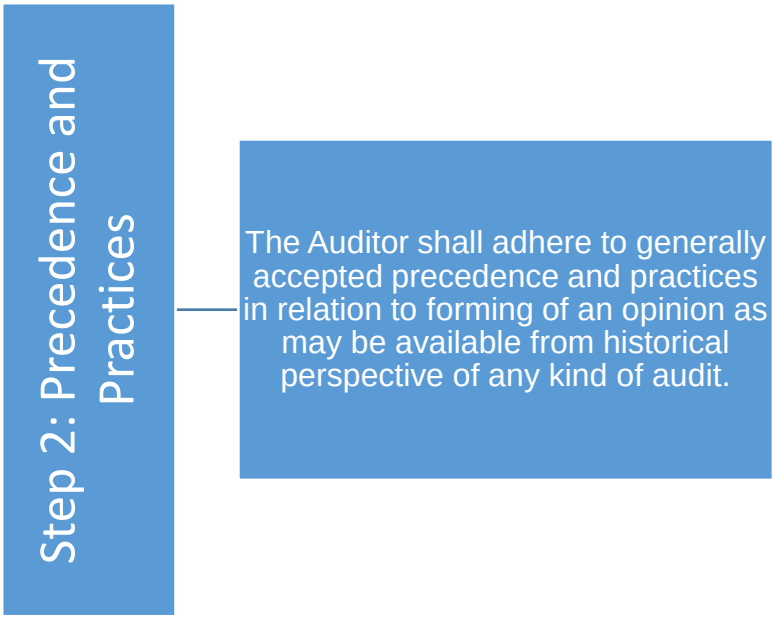
opinion giver's ethical obligations to maintain the confidences of its client. He should decline to give legal opinion in such cases.

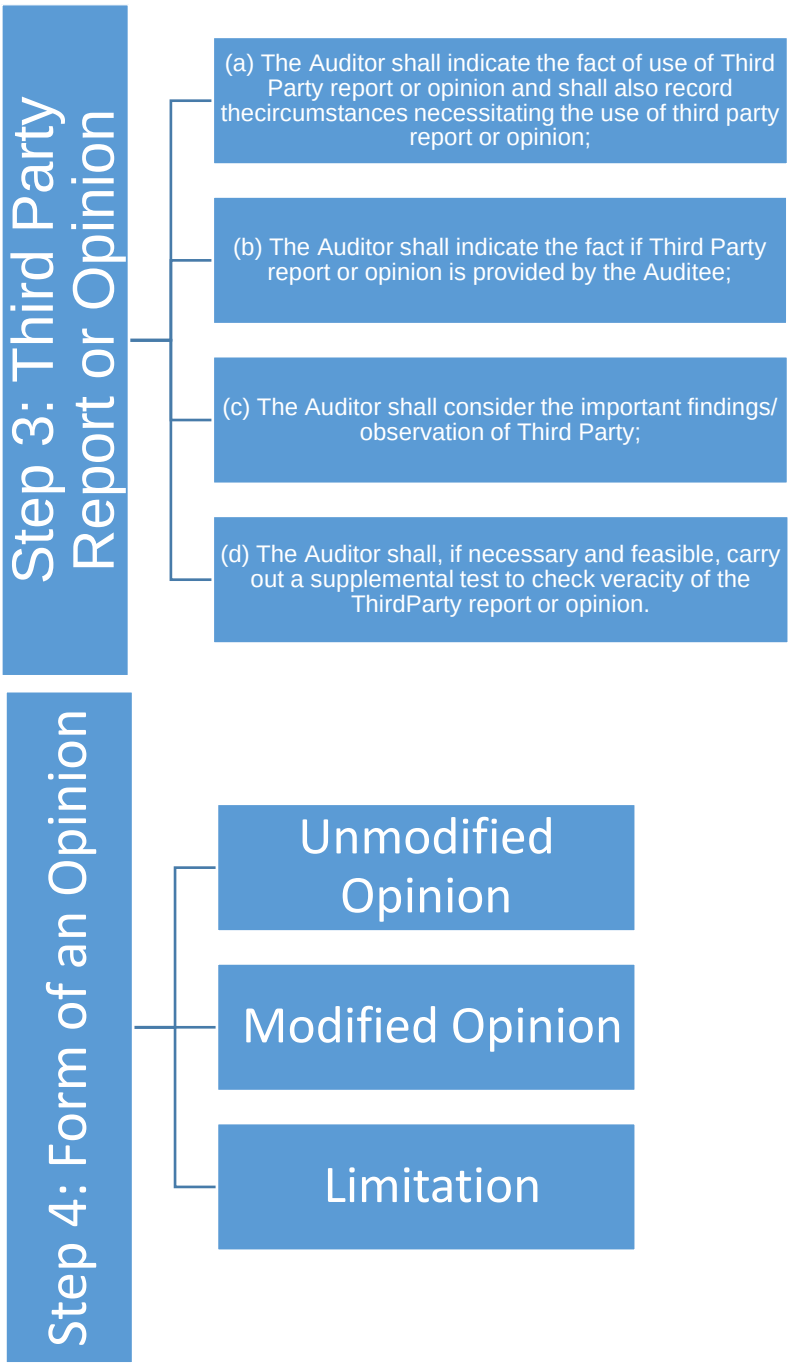
COMPANY SECRETARY AUDITING STANDARD ON OPINION WRITING

The Company Secretaries Auditing Standard (CSAS-3) is applicable to the Auditor undertaking Audit under any statute. The Standard deals with basis and manner for forming Auditor's opinion on subject matter of the audit. The objective of CSAS-3 is to enable the Auditor to lay down the basis and manner for evaluation of the conclusions drawn from the Audit Evidence obtained and express the opinion through written report.

Process of forming an opinion under CSAS-3







1. Unmodified Opinion The Auditor shall express an unmodified opinion when based on Audit Evidence, the Auditor concludes that:

a. there is due compliance with the applicable laws in terms of timelines and process; and

b. the Records as relevant for the audit verified by him as a whole are free from Misstatement and maintained in accordance with the applicable laws.

2. Modified Opinion

The Auditor shall express modified opinion when the Auditor concludes that:

(a) based on the Audit Evidence obtained, there is non-compliance with the applicable laws in terms of timelines or process; or

(b) based on the Audit Evidence obtained, the Records as a whole are not free from Misstatement; or are not maintained in accordance with applicable laws; or

(c) he is unable to obtain sufficient and appropriate Audit Evidence to conclude that there is due compliance with the applicable laws in terms of timelines and process; or

(d) he is unable to obtain sufficient and appropriate Audit Evidence to conclude that the Records as a whole are free from Misstatement; or are maintained in accordance with applicable laws. Whenever the Auditor expresses a modified opinion or disclaims an opinion, the text of the opinion shall be either in italics or bold letters.

3. Limitation

If, after accepting the Audit Engagement, the Appointing Authority imposes a limitation on the scope of the audit which, in the opinion of the Auditor, is likely to result in the need to express a modified opinion or to disclaim an opinion, the Auditor shall request the Appointing Authority to remove the limitation.

If the Appointing Authority refuses or fails to remove the limitation, the Auditor shall communicate the matter to the Management and determine whether it is possible to perform alternative procedure to obtain sufficient and appropriate Audit Evidence.

If the Auditor is unable to obtain sufficient and appropriate Audit Evidence, the Auditor shall determine the implications as follows:

a. If the Auditor concludes that the possible effects of unavailable Audit Evidence could be non-material, the Auditor shall modify the opinion; or
b. If the Auditor concludes that the possible effects of unavailable Audit Evidence could be material, the Auditor shall express disclaimer of opinion.

Step 5: Auditor's Responsibility

The Auditor's Report shall include a section with the heading "Auditor's Responsibility". Auditor's Report shall state that the responsibility of the Auditor is to express opinion on the compliance with the applicable laws and maintenance of records based on audit. The Auditor's Report shall also state that the audit was conducted in accordance with applicable Standards. The Auditor's Report shall also explain that those Standards require that the Auditor comply with statutory and regulatory requirements and plan and perform the audit to obtain reasonable assurance about compliance with applicable laws and maintenance of Records. Auditor's Report shall also state that due to the inherent limitations of an audit including internal, financial and operating controls, there is an unavoidable risk that some Misstatements or material non-compliances may not be detected, even though the audit is properly planned and performed in accordance with the Standards.

Step 6: Format of the Report

The report shall be addressed to the Appointing Authority unless otherwise specified in the Audit Engagement Letter or provided in the applicable law. The report shall be detailed enough to serve its intended purpose. Where specific formats are prescribed, those formats shall be followed for reporting. If any information cannot be appropriately placed within the paragraphs of the report, it shall be given in form of annexure(s). Signature block shall mention the name of the audit firm along with the registration number, if any, the name of the Auditor, certificate of practice number, the membership number of the Auditor, specifying whether associate or fellow member, as applicable. The Auditor shall clearly mention date and place of signing the report, in case report is signed by two different persons on different dates or different places; same shall be mentioned in the report

LESSON 8

Commercial Contract Management

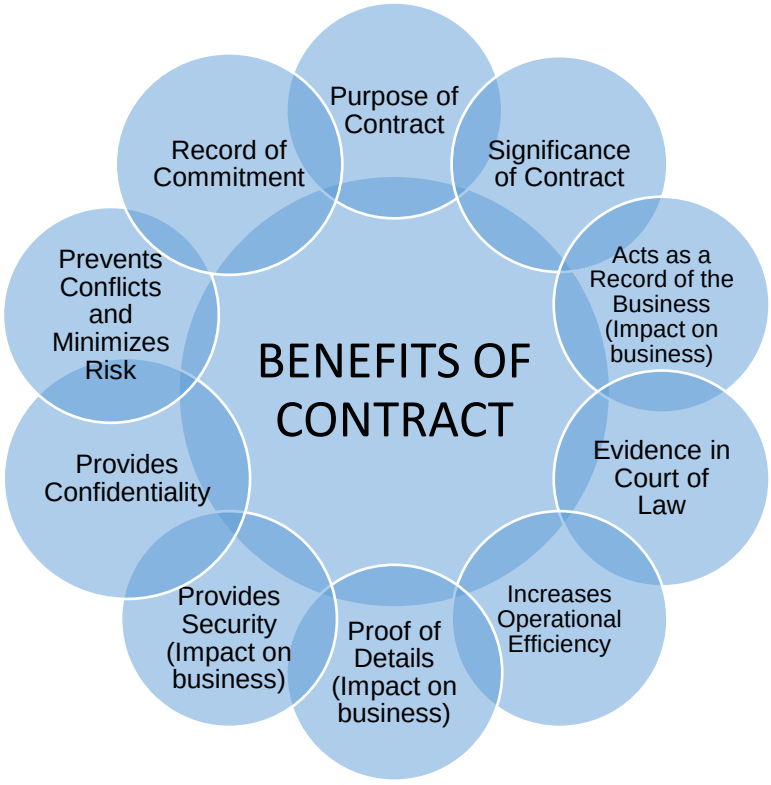
INTRODUCTION

Contracts are an essential deep rooted in civilized society and have gradually become an indispensable part of our lives. Right from buying milk and bread in the morning till ordering online food for dinner, all are one or other forms of contract.

Though in personal life, we instinctively enter into various contract and/or agreement, yet in commercial world, these contracts are quite significant and forms an integral part for the success of the business. Considering the significance of contract and necessity of its enforcement, law of contract is well established in the jurisdiction.

In India, inter-alia, there is Indian Contract Act, 1872 and other legal provisions, which substantiate contracts and its enforceability more specifically for the growth of business. Moreover, it is important to note that law enforces the conditions of a contract, hence it becomes imperative understand what criteria of a good contract and what the general and special conditions a commercial contract shall carry.

Accordingly, this project inter-alia aims to understand the criteria of good contract and the general and special conditions, imperative for good contract.



BUSINESS/COMMERCIAL CONTRACTS: A BRIEF

A commercial contract forms an integral and critical part of any business venture, as such arrangements detail the rights and obligations, commercial terms discussed and agreed upon between the parties including recourse in case of any dispute. Additionally, commercial contracts are documents that cover a combination of legal and commercial factors. To be concise commercial contracts define and regulate business relationships, whether a standard employment agreement or more complex agreements like merger and acquisition contracts.

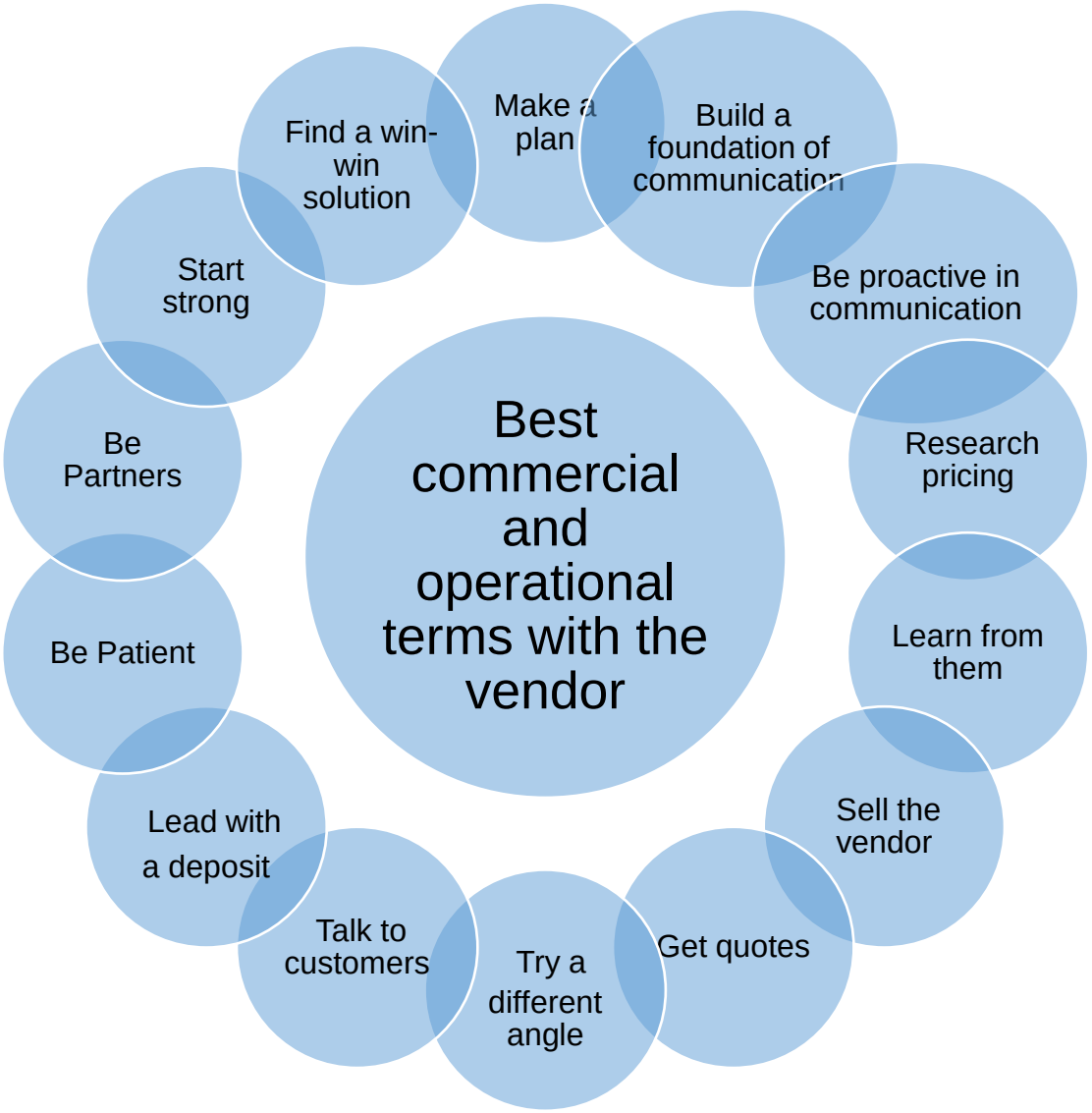
In its simplest form, a commercial contract is a legally binding agreement between two or more parties. Commercial contracts are most often written documents. Commercial contracts spell out exactly what each party must do for the contract to remain legitimate, as well as the consequences of any of the terms and conditions are not followed. It's for the companies and organizations, and one of its main requirements is that legal agreements enable the contract's maximum benefits to be realized. Therefore, it is extremely crucial to ensure that the terms mentioned in the contract are drafted in a manner that protects the interests of the parties to the contract.

Now, the term "contract" is defined under Section 2(h) of the Indian Contract Act, 1872 as an agreement enforceable by law. Commercial contracts are primarily governed by the Contract Act and; the Specific Relief Act, 1963 ("SRA"). It also provides the grounds which are necessary to claim damages and indemnity from a defaulting party in case of breach or violation of any provisions or obligations under the contract. On the other hand, the SRA provides for remedies to persons whose contractual rights have been violated such as the recovery of possession of the property, specific performance of the contracts, rescission of contracts, rectification of instruments etc. Under this background, let us understand some important features of Commercial Contracts in detail.

NEGOTIATION OF BEST COMMERCIAL AND OPERATIONAL TERMS WITH VENDOR

Negotiation is a skill that can benefit business owners every single day, whether they're dealing with vendors or landlords, employees or clients. Negotiating with vendors is vital for improving an overall vendor contract. The negotiation process can help you understand the needs of each party and determine a contract that benefits both sides of the transaction.

From interest to length of contract to payment terms, your vendor contract is made of many facets that can be negotiated. One can negotiate with potential suppliers as well as existing vendor contracts, provided one follows the effective and result driven negotiation



CREATE, ANALYSE AND EXECUTE CONTRACTS

Creations of the Contracts: Essentials of a Valid Contract

(Already covered in previous chapter)

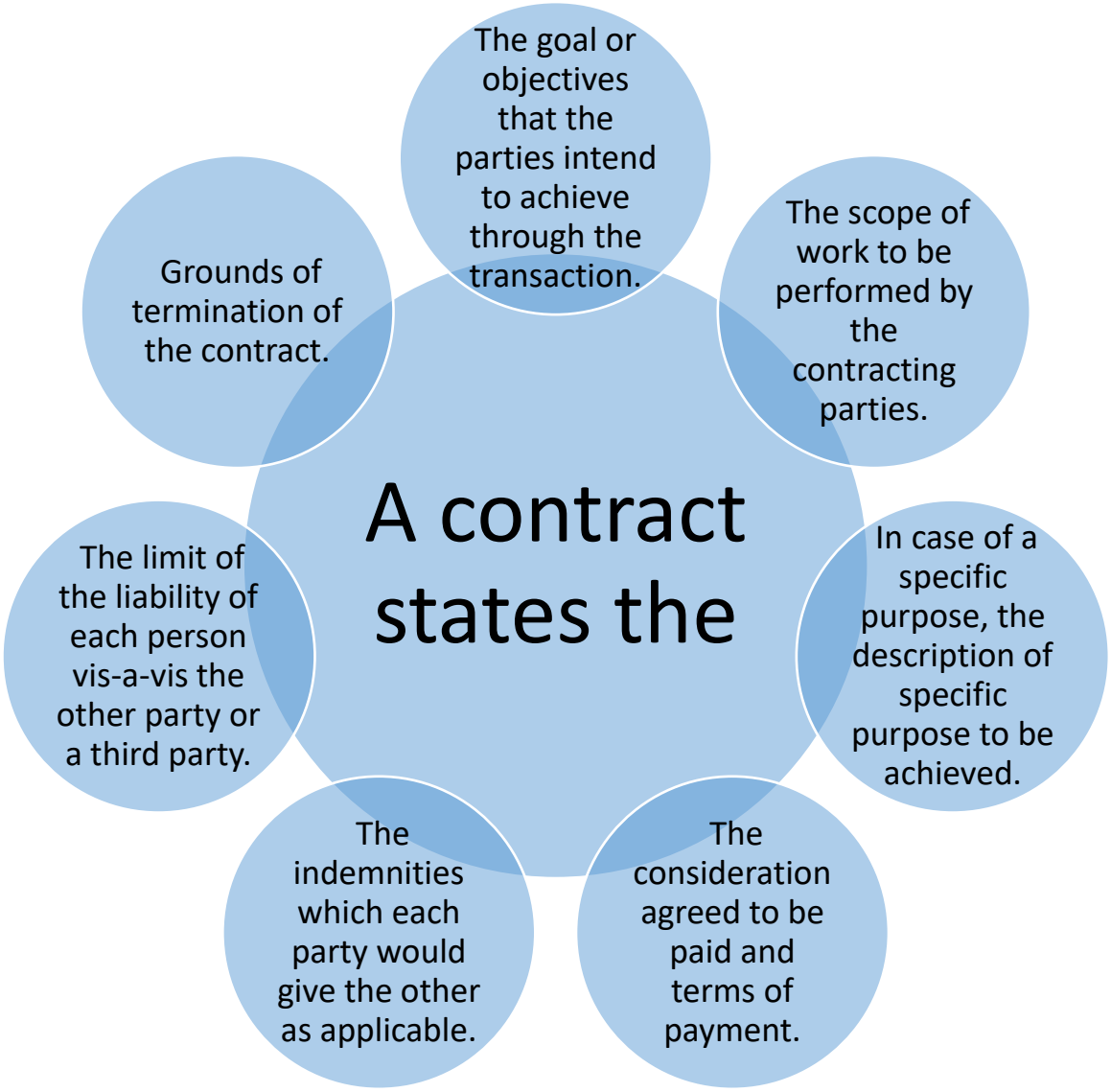
Good Contract: Analysis

Contracts gain such vital importance in our lives because they legally bind the parties in a relation. Any breach of a contract can be redressed, and the damages can be liquidated. Besides the basic feature, the contract also contains other vital legal aspects that boost the relationship between parties.

In general, a good contract is understandable and unambiguous. Contracts that clearly state their terms and condition are preferred over contracts that don't. All relationships require clear communication for healthy continuation and so do business relations. Contracts serve as an efficient communication tool that ensures that the relationship is a healthy one.

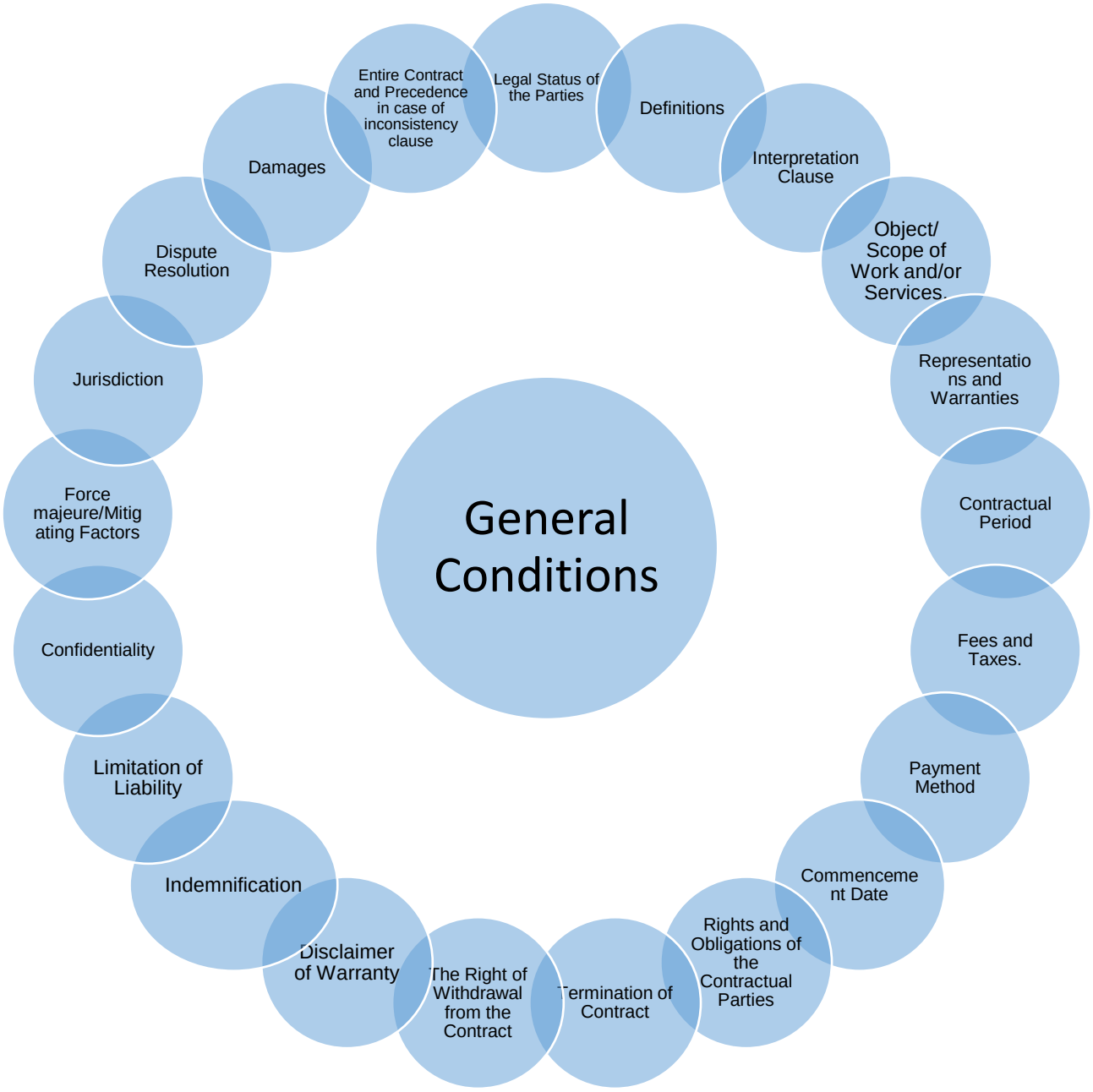
Contracts are by nature collaborative and relational. By clearly stating the important clauses for the parties they lead to transparency which enhances communication. A contract with convoluted language and imprecise terms is likely to cause a great deal of confusion between the parties. Further, well drafted contracts clearly capture the obligations of the parties. If a party tries to back out of its obligations, it can cause problems in the relationship. Hence, a good contract cuts down the likelihood of a breach.

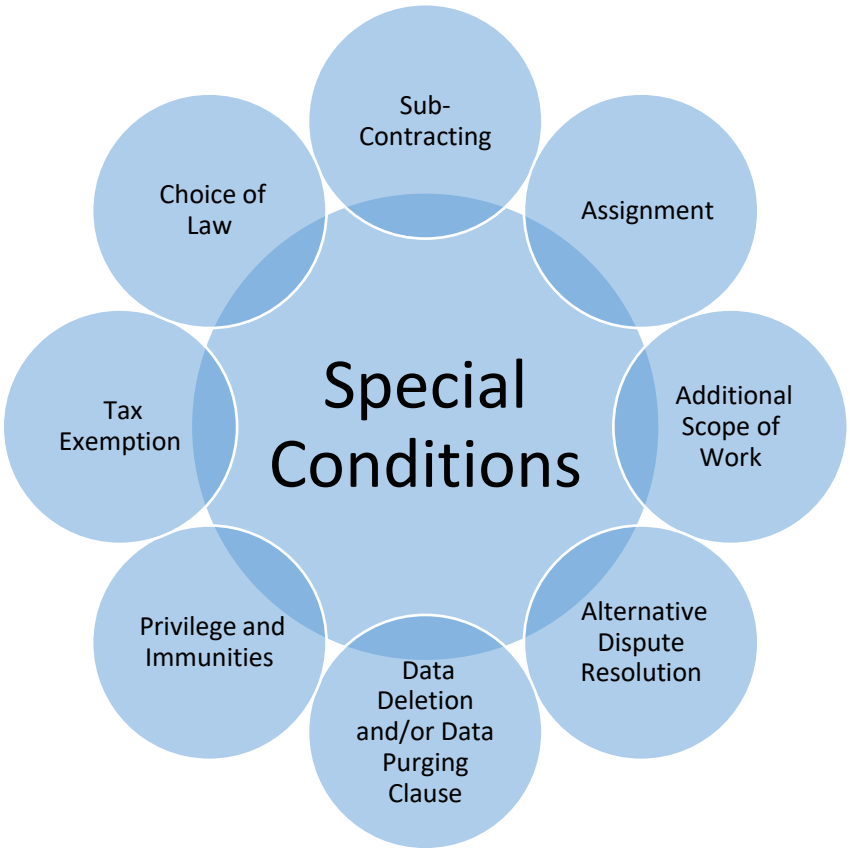
A well-drafted contract is likely to state every detail and the extent to which the parties are bound to each other. A contract defines the relationship between the parties. If a party breaches the obligation to which it is committed, the other party can approach the court.



General and Special Conditions of a Contract

Although, in the previous paras, we have already discussed in detail on contract, its meaning, significance, valid essentials of contract also the concept of commercial contracts. Yet, it is important to note that it is majorly the terms and conditions of the contract, which make the contract a good contract. It is always imperative that general and the specific terms are captured clearly in contract. This is not only making the agreement effectively enforceable but also minimize the risk of dispute between the parties.





Execution of Contracts

Contract execution is a system event in which all appropriate parties sign the contract and the contract becomes a legal entity. When the contract is signed, an internal user can record the execution and attach a scanned signed copy of a document to the contract. In short, executed contracts are agreements that have passed the signature stage and have been approved by all parties involved. An executed agreement establishes a contractual and enforceable relationship, and each party is now responsible for fulfilling the legal obligations stated in the agreement.

Significance of Executed Contract

Contract ambiguity: A successful contract execution uses clear language that is easy to understand by all parties. If contract terms are unclear, litigation may ensue or the agreement may not be enforceable. In addition, it could frustrate business partners or cause costly delays.

Unenforceable contracts: Unfinalized contracts turn out to be ineffective. The agreement cannot be enforced in court if this is the case. If the contract isn't properly executed, all the hard work will be for nothing. Costly litigation can result in severe financial losses, lost value, and lost resources.

After a contract is executed, no changes can be made to the contract language.

CONTRACT RELATED DOCUMENTS AND CORRESPONDENCE

Almost all the well drafted contracts keep the following clause in the contract:
"Documentation and Correspondence.

All documentation and correspondence to be delivered between the Parties pursuant to this Agreement shall be in the English language."

The clause itself confirms that there are plenty of correspondence and documents in a contract and each and every such documents and correspondence are vital to the contract. Hence this section deals with the common documents and correspondence related to a contract.

Contract Documents: Meaning and Significance

A contract document is a legally binding agreement between two or more parties. It captures:

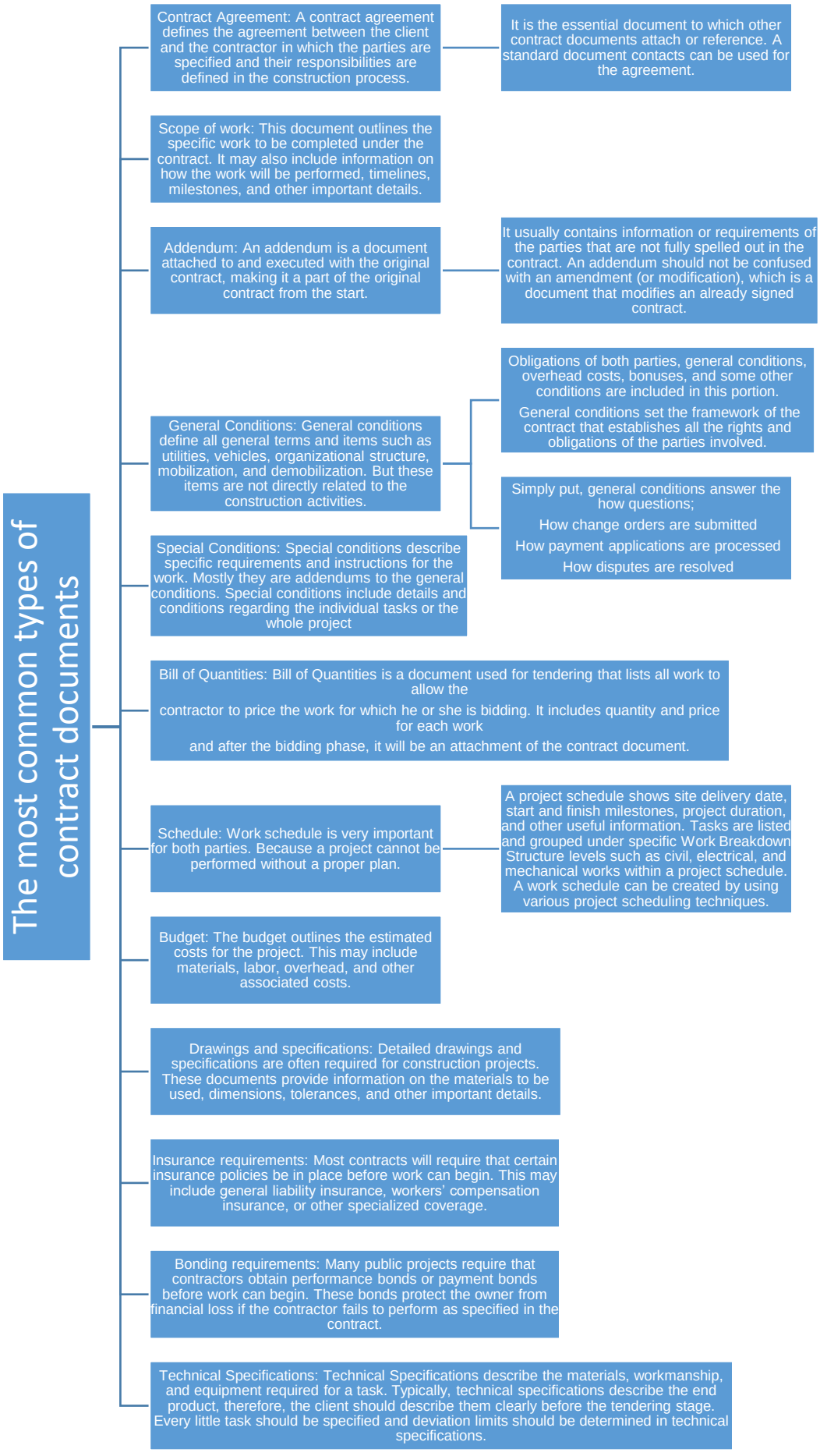
- the terms and conditions of the relationship between the parties of the contract, and
- sets forth the rights and obligations of each party.

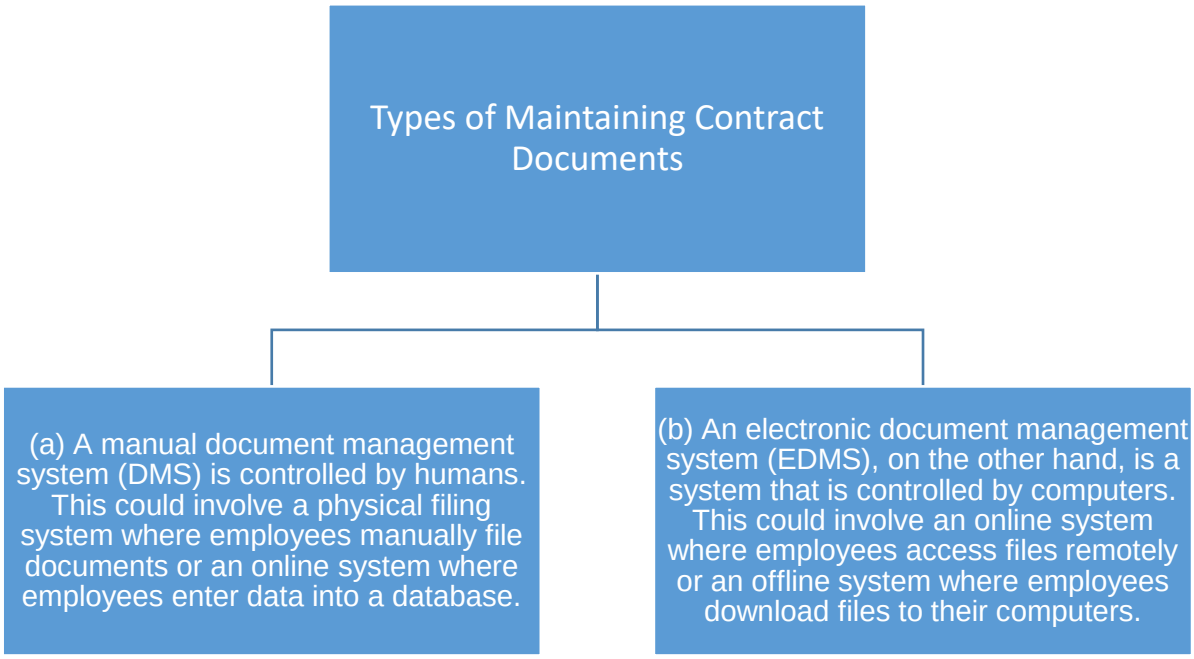
MAINTENANCE OF CONTRACT DOCUMENTS

Many people who have shred their calories in finding a specific document in a sea of paperwork, can easily understands the importance of document management. However, document management for contracts is much more hurricane and complex task entirely.

At the same time, it is equally important to maintain the contract documents, as this assists in the effective realization of contractual rights and also to execute it rights, if need so. It involves organizing and tracking documents. Maintenance of contract documents means creating and maintaining accurate records of all communications and correspondence with contracting parties.

It may or may not involve involves monitoring compliance with contract terms and keeping track of any changes or amendments that need to be made. Briefly, document management is simply the process of organizing and storing documents. This can include scanned documents, electronic files, or even physical paperwork.


The most common types of contract documents
Contract Agreement: A contract agreement defines the agreement between the client and the contractor in which the parties are specified and their responsibilities are defined in the construction process.
It is the essential document to which other contract documents attach or reference. A standard document contacts can be used for the agreement.
Scope of work: This document outlines the specific work to be completed under the contract. It may also include information on how the work will be performed, timelines, milestones, and other important details.
Addendum: An addendum is a document attached to and executed with the original contract, making it a part of the original contract from the start.
It usually contains information or requirements of the parties that are not fully spelled out in the contract. An addendum should not be confused with an amendment (or modification), which is a document that modifies an already signed contract.
General Conditions: General conditions define all general terms and items such as utilities, vehicles, organizational structure, mobilization, and demobilization. But these items are not directly related to the construction activities.
Obligations of both parties, general conditions, overhead costs, bonuses, and some other conditions are included in this portion.
General conditions set the framework of the contract that establishes all the rights and obligations of the parties involved.
Simply put, general conditions answer the how questions;
How change orders are submitted
How payment applications are processed
How disputes are resolved
Special Conditions: Special conditions describe specific requirements and instructions for the work. Mostly they are addendums to the general conditions. Special conditions include details and conditions regarding the individual tasks or the whole project
Bill of Quantities: Bill of Quantities is a document used for tendering that lists all work to allow the
contractor to price the work for which he or she is bidding. It includes quantity and price for each work
and after the bidding phase, it will be an attachment of the contract document.
Schedule: Work schedule is very important for both parties. Because a project cannot be performed without a proper plan.
A project schedule shows site delivery date, start and finish milestones, project duration, and other useful information. Tasks are listed and grouped under specific Work Breakdown Structure levels such as civil, electrical, and mechanical works within a project schedule. A work schedule can be created by using various project scheduling techniques.
Budget: The budget outlines the estimated costs for the project. This may include materials, labor, overhead, and other associated costs.
Drawings and specifications: Detailed drawings and specifications are often required for construction projects. These documents provide information on the materials to be used, dimensions, tolerances, and other important details.
Insurance requirements: Most contracts will require that certain insurance policies be in place before work can begin. This may include general liability insurance, workers' compensation insurance, or other specialized coverage.
Bonding requirements: Many public projects require that contractors obtain performance bonds or payment bonds before work can begin. These bonds protect the owner from financial loss if the contractor fails to perform as specified in the contract.
Technical Specifications: Technical Specifications describe the materials, workmanship, and equipment required for a task. Typically, technical specifications describe the end product, therefore, the client should describe them clearly before the tendering stage. Every little task should be specified and deviation limits should be determined in technical specifications.



Document Management	***Contract Management***
Document management includes maintaining, arranging and storing the documents for better tracking and retrieval, when necessary, but it does not include features like negotiation, risk management, and compliance.	Contract management includes elements of negotiation, risk management, and compliance.
Document management is simply the process of organizing and storing documents.	Contract management is the process of negotiating, drafting, executing, and managing contracts.
Document management helps businesses find specific documents quickly and easily.	Contract management helps businesses manage their contractual obligations effectively.
Document management is a sketchy solution that helps businesses organize and track documents.	Contract management is a more comprehensive solution that includes risk management, compliance, and the negotiation of contracts.
Document management is more beneficial for businesses that need to find specific documents quickly and easily.	Contract management is more beneficial for businesses that need to manage contractual obligations.

COMPLIANCE WITH LAWS

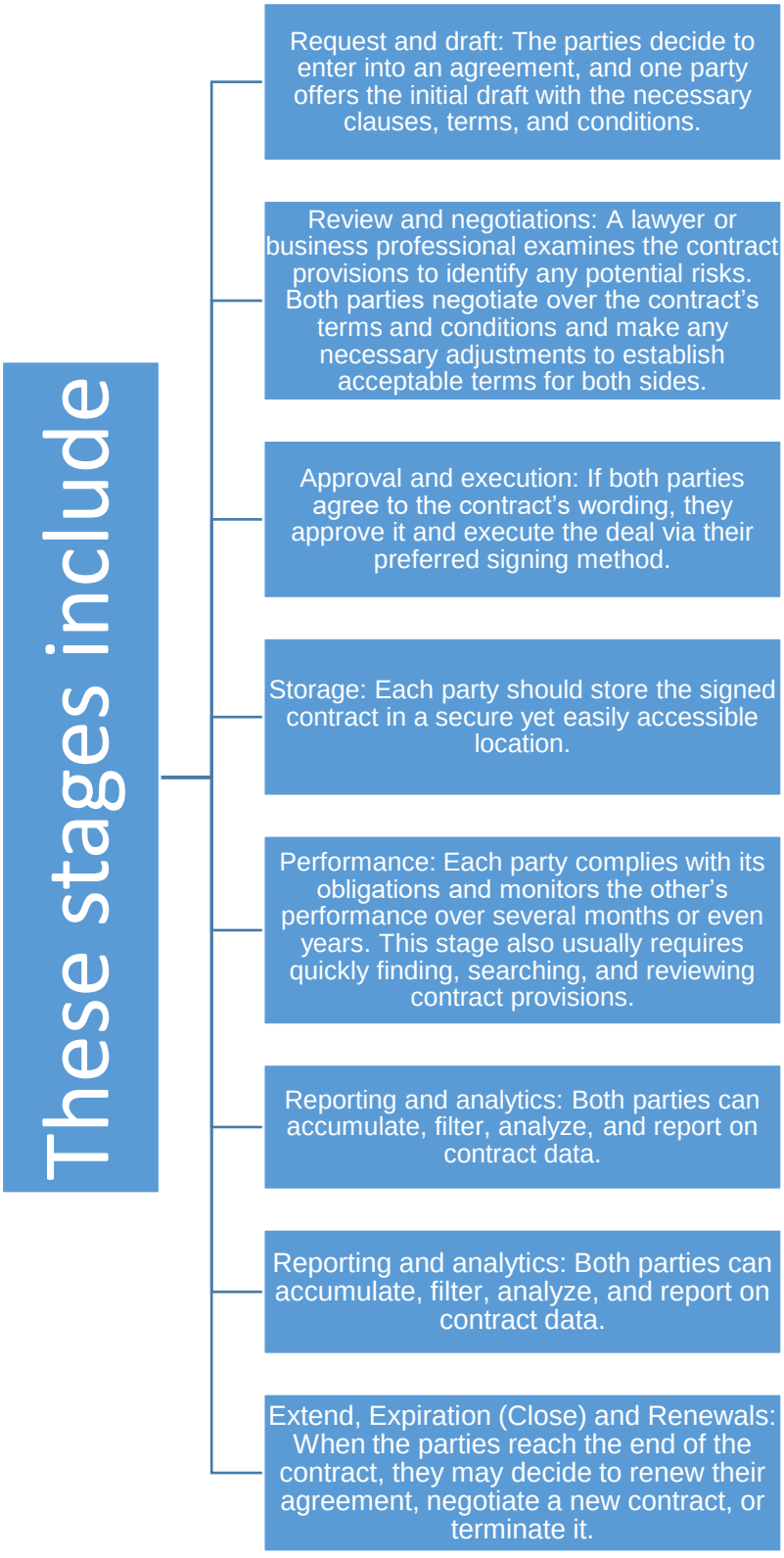
It is a well settled principle of law that no contract between the parties can oust the application of law. In short, every contract is subject to applicable laws and parties to the contract are bound to comply with the laws applicable on them as well as on transaction. In almost all the contracts, there is a clause confirming compliance with laws. For example: in a technology agreement the compliance of laws clause will read like the below

"Compliance with Laws: Each Party will comply with all applicable Laws and the Operating Regulations, governmental requirements, and industry standards, including those with respect to privacy, data protection, portability, or accountability, applicable to such Party or its personnel with respect to the Software, the Services, and the performance of its obligations under this Agreement; provided that All scripts will have no obligation to comply with any Operating Regulations unless such Operating Regulations are disclosed to it. Neither Party will, nor permit any third parties to, export, re-export, or release, directly or indirectly, any Controlled Technology to any country or jurisdiction to which the export, re-export, or release of any Controlled Technology (a)is prohibited by applicable Law or (b)without first completing all required undertakings (including obtaining any necessary export license or other governmental approval)

TRACKING OF CONTRACTS AND EXTEND, RENEW AND CLOSE

Contract tracking is the process whereby stakeholders in the contract lifecycle (particularly in legal or compliance) are able to know where a contract is alive or not, without having to investigate across multiple systems.

Contracts go through many stages to minimize an organization's financial, legal, and procurement risks.


These stages include
Request and draft: The parties decide to enter into an agreement, and one party offers the initial draft with the necessary clauses, terms, and conditions.
Review and negotiations: A lawyer or business professional examines the contract provisions to identify any potential risks. Both parties negotiate over the contract's terms and conditions and make any necessary adjustments to establish acceptable terms for both sides.
Approval and execution: If both parties agree to the contract's wording, they approve it and execute the deal via their preferred signing method.
Storage: Each party should store the signed contract in a secure yet easily accessible location.
Performance: Each party complies with its obligations and monitors the other's performance over several months or even years. This stage also usually requires quickly finding, searching, and reviewing contract provisions.
Reporting and analytics: Both parties can accumulate, filter, analyze, and report on contract data.
Reporting and analytics: Both parties can accumulate, filter, analyze, and report on contract data.
Extend, Expiration (Close) and Renewals: When the parties reach the end of the contract, they may decide to renew their agreement, negotiate a new contract, or terminate it.

GOLDEN RULES FOR TRACKING THE CONTRACT FOR RENEWALS, EXTENSION AND CLOSURE

Know the place/storage of contracts

The first thing you should do when preparing to track your contracts and their details is to be sure you know where all of your agreements are located. It might sound simple, but for far too many companies, contracts are not all stored in one location.

Wherever you choose to store your contracts - whether it's a filing cabinet, a shared drive, or using contract management software - establish a system for organizing your repository so you can quickly find any agreement when it needs to be referenced or reviewed. This is a crucial beginning step that will impact everything else you do with your contracts throughout the life of each agreement.

Determine the requirement of tracking

Once each new agreement has been executed. Consider documenting every piece of important data that needs to be monitored. One need to create a strategy through the time know that contract is expired and archived. Some of the common pieces of information to track and monitor during the contract lifecycle include:

- Deliverables and obligations
- End dates
- Opt-out/renegotiation windows
- Termination notice requirements
- High-risk clauses
- Compliance requirements
- Contract performance.

Be proactive, not reactive

Staying ahead of dates and deadlines and proactively looking for risks and opportunities during the contract monitoring process will help to remain in control of agreements and obligations. By regularly reviewing agreements marked as important or critical areas and the specific areas outlined in the previous section, one will have the best chance of catching any changes needed or corrections early rather than having to react to issues after they happen.

The reason it's so important for contract managers to track deadlines well in advance is so there's time to assess the situation before making a decision about next steps. For example, when you know a contract end date is coming weeks or months ahead of time, you can work with other stakeholders to make an informed decision about renewing, renegotiating, or terminating the agreement.

Keep stakeholders informed

Tracking and monitoring agreements is a critical part of the contract management process, but it has to be made sure that the information gets to the appropriate parties. Contract

management is a collaborative process, and effective contract managers communicate openly with stakeholders throughout the organization.

Approaching deadlines and deliverables might be the first things that come to mind in terms of what to share, but the importance of contract performance shouldn't be ignored. Every agreement - whether it's a buy-side or a sell-side contract - represents a financial impact to the company, which is why department leaders and decision makers need as much information as possible to determine whether each contract is performing as expected.

Streamline the process with contract management software

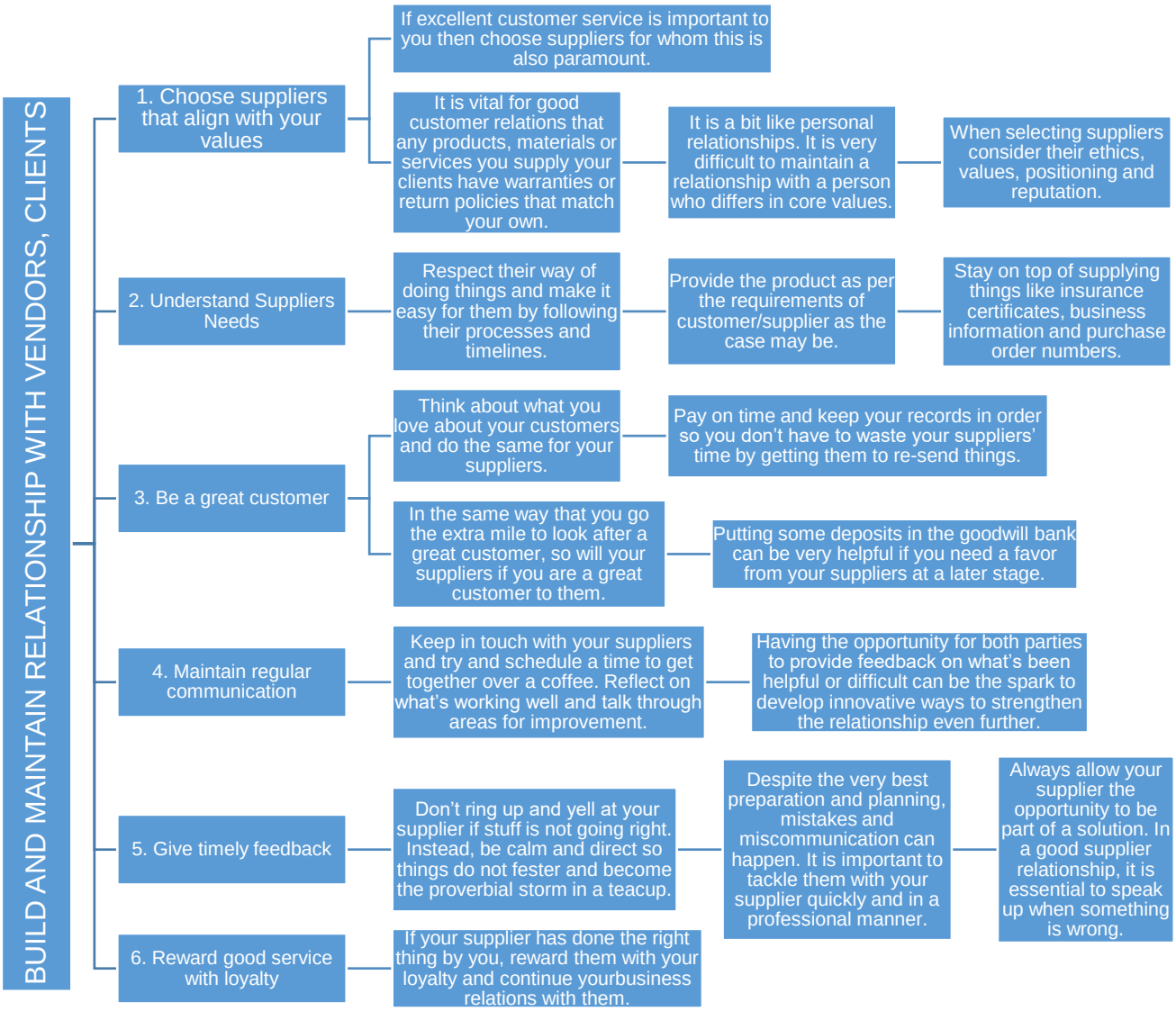
Tracking and monitoring corporate agreements becomes much simpler and more streamlined when you incorporate contract management software into your process. Here are some of the ways contract management software can help you accomplish the recommendations in the previous sections:

- A contract repository gives you a centralized place to store and organize your agreements so you can always find the documents you need quickly.
- Custom reporting tools allow you to report on any data points in your contract portfolio and automatically send those insights to various parties on a recurring basis.
- Alerts and notifications help you stay ahead of upcoming contract dates so you have plenty of time to take strategic action at the appropriate time.

BUILD AND MAINTAIN RELATIONSHIP WITH VENDORS, CLIENTS

Business relationships are a two-way street. One party does not hold more power over the other. It requires commitment and maturity from both sides. Understanding each other's perspectives and respecting differences is key, along with an understanding of how each party benefits themselves as well as each other.

It requires open and honest communication, and the ability to have difficult conversations if required. It's worth it though, as a great supplier relationship can make a world of difference in serving your customers and lowering your own stress levels



CONTROL OVER ANY CHARGES FOR SERVICES OUT OF THE SCOPE OF THE CONTRACT

A change to an existing contract is a modification. A contract modification could change the scope of the contract, the price of the contract, or both. A contract modification exists when the parties to the contract approve the modification either in writing, orally, or based on the parties' customary business practices.

However, in cases where the parties to an arrangement have agreed to a change in scope, but not the corresponding change in price (for example, an unpriced change order), the reporting entity should estimate the change to the transaction price in accordance with the guidance on estimating variable consideration.

Management should assess all relevant facts and circumstances (for example, prior experience with similar modifications) to determine whether there is an expectation that the price will be approved. Below example illustrates a contract modification with an unpriced change order.

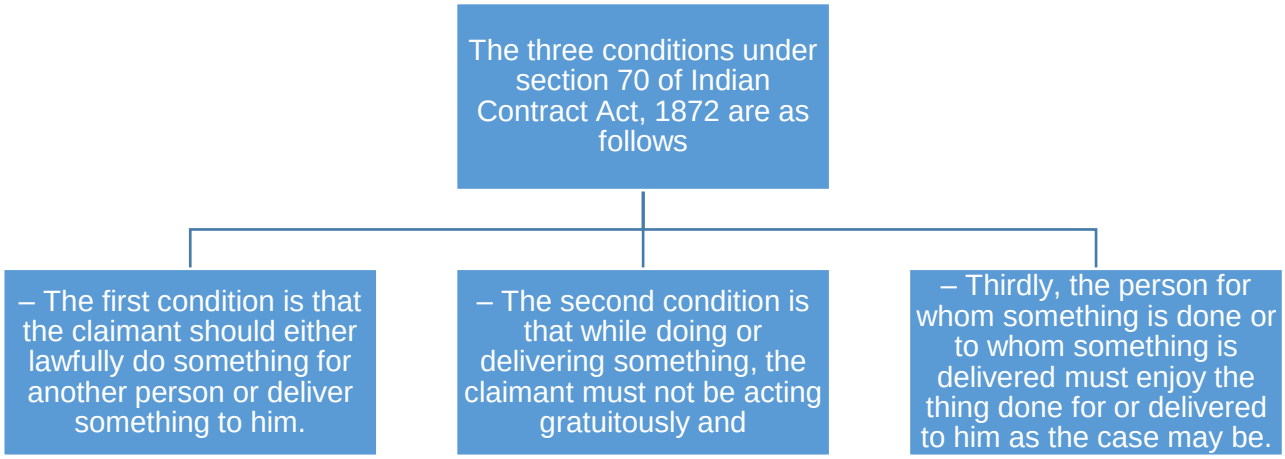
Contractor enters into a contract with a customer to construct a warehouse. Contractor discovers environmental issues during site preparation that must be remediated before construction can begin. Contractor obtains approval from the customer to perform the remediation efforts, but the price for the services will be agreed to in the future (that is, it is an unpriced change order). Contractor completes the remediation and invoices the customer $2 million, based on the costs incurred plus a profit margin consistent with the overall expected margin on the project.

Charges/Payment of Services – Outside the Scope of the Contract: Indian Legal Perspective

Quantum meruit compensation

Compensation under quantum meruit is awarded for the services rendered by the contractor when the payment thereof is not fixed by the contract. Quantum meruit is a right which arises outside a construction contract. A quantum meruit claim arises, where work is done or services rendered by the contractor for the employer or owner, in circumstances which entitle the constructor doing the work or rendering the services to receive a reasonable additional remuneration, the situation being one where either there is no construction contract or there is a contract but the particular situation is not covered under that construction contract.

The compensation under the principle of Quantum Meruit is allowed in the courts under Section 70 of the Indian Contract Act 1872. The three conditions need to be fulfilled before the benefit of this section can be invoked by a person



Compensation awarded by the tribunal or court in quantum meruit laid on the equitable considerations. For the construction work which has been rendered by Constructor for Employer and the benefit of which has been taken by the Employer, then Employer will be made to compensate to the Constructor, unless it is shown that Constructor intended to render the services gratuitously. This is the principle on which quantum meruit compensation is granted. This is often described as “restitution for quasi-contract”.

However, the facts necessary for exercising this jurisdiction must be proved by the claimant.

"Compensation under quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable on that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable."

ACTION IN CASE OF BREACH OF CONTRACT

Section 73 – deals with compensation for loss or damage caused by breach of contract

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him, which naturally arose in the natural course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

- No compensation shall be given to any remote and indirect loss or damage sustained by reason of breach.
- Compensation in regard to failure to discharge obligation which resembles those created by the contract.
- An obligation resembling those created by contract has been incurred and has not been discharged, any person affected by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.
- Compensation for loss or damage which naturally arose in the usual course of things from such breach.
- Compensations to be recovered for loss or damage which the parties knew or which would have naturally arisen in the usual course, to be likely to result from the breach of it

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may reasonably and fairly be considered as arising naturally, i.e., according to usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

Section 73 deals with remote and indirect loss or damage

It states that no compensation is payable for remote and indirect loss or damage arising out on account of breach of contract. The indirect loss cannot be said to arise on usual course of things. The aggrieved party can claim compensation for indirect loss or loss of profit, only where it is expressly made known to the other party or contemplated by contract that breach of non-performance of the contract would result in some indirect loss or loss of profit to the party term remoteness of damage refers to the legal test used for deciding which type of loss caused by the breach of contract may be compensated by the award of damage.

Section 73 deals with breach of resembling contract

It confers a statutory right upon a party to get compensation from a party who has incurred a statutory obligation to pay compensation in case default even though there may be no contract to pay compensation. The party in default is under obligation to pay compensation to the injured party as if there was a contract and has broken such contract.

Section 73 deals with: mitigation of losses

It explains that the means which existed of remedying the inconvenience caused by the non-performance of the contract must be considered while calculating the damage or loss for breach of the contract. [M. Lachia Setty & Sons Ltd v. Coffee Board Bangalore, AIR 1981 SC 162, 168]

Section 74 – Penalties with regard to Breach of Contract

The party to the contract may agree at the time of contracting that, in the occurrence of breach, the party in default has to pay a stipulated sum of money to the other, or may agree that in the event of breach by one party any amount paid by him shall be forfeited. If this sum is genuine pre-estimate of damage likely to flow from the breach is called 'liquidated damages'. If it is not genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be called 'penalty'. Section 74 provides for the measure of damages in two classes: (a) where the contract names a sum to be paid in case of breach; and (b) where the contract contains any other stipulation by way of penalty

Essence of Penalty and Liquidated Damages

Penalty is a payment of money to a non –defaulting party, which puts the other party in fear and enforces the other party to perform its promise under the contract. The penalty is deterrent in nature. A liquidated damage is a genuine and reasonable pre-estimate of damage. Liquidated damages mean it shall be taken as the sum which the parties have by the contract assessed as damages to be paid whatever may be the actual damage.

Section 75 – Compensation to the Party Rightfully Rescinding the Contract

Damage can be claimed by: Only those parties can claim damages for breach of contract who have performed or is willing to perform his part of the obligations arising under the contract. Section 73 and 74 are for the benefit of a party willing to perform the contract and not for defaulting party. Loss which is caused by the party's failure to fulfil his duty is not recoverable from the other party. A party to a Contract cannot be in a better position by reason of his own default, than if he had fulfilled his obligations. A person, who is not a party to the contract, cannot claim damages.

Can damage or loss suffered by a third party be claimed?

A party claiming the damage need not necessarily suffer any loss from breach of contract. When it is contemplated by the contract. When it is contemplated by the contract that breach by any of the parties to the contract is likely to cause loss to an identified or identifiable stranger to the contract, rather than to the contracting party, a party not in default can claim damages for the loss caused to an identified or identifiable stranger to the contract. Thus, the party may recover substantial damages even though it does not personally bear the cost of correcting the defects or personally suffers the diminution in the value; provided this was intended or was within the contemplation of the parties; and if such intention or contemplation is shown it is immaterial that the true prayer or suffered is stranger to the contract. [Alfred McAlpine Constn Ltd. v. Panatown Ltd., (2001) AII ER (D) 41 (Apr)].

Can interest be claimed as damage?

Interest would be refused if the party fails to show that interest is being claimed under a contract or on account of usage or customs. The Supreme Court in Mahavir Prasad Rungta v. Durga Dutta, 1961 AIR 990 has ruled that interest can be claimed only if it is payable by custom or there is express or implied provision in the agreement for payment of interest or under provisions of substantive law plaintiff is entitled to recover the interest.

Nature of remedy of damage

The principle behind awarding damage for breach of contract to the party, who has suffered the loss, is to place that party in the same position in which it would have been had that contract not been broken. The damages must commensurate with the loss suffered. Where the contract is broken by one party, contract is discharged, and the obligations under the contract come to end; a new obligation arises for the payment of damages.

A contract is the fountain head of a correlative set of rights and obligations of the parties and would be of no value if there is no statutory provision for compensation for damage or loss caused to the aggrieved party. Chapter VI of the Indian Contract Act, 1872 provides for the remedy to the non-defaulting party to contract by way of compensation for damage or loss caused due to breach of contract by the other party. Section 73 provides for compensation for actual damage or loss from the party in breach of the contract Reasonable

liquidated damages are payable without proof of loss. Section 74 provides that contracting parties in the event of breach, may agree that the defaulted party shall pay a stipulated amount to the other, or may agree that in the event of breach by one party any amount paid to him shall be forfeited. If it is not genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be called 'penalty'. However mere stipulation does not give right for compensation by way of penalty. Prove has to be established for loss or damages caused by breach of contract

A Decree for Specific Performance

The situation where specific performance of contract may be allowed are as under:

When there is no standard for ascertaining actual damage

When it is impossible to quantify the actual damage caused by the non-performance of the act agreed to be done, the Court may, in its discretion, grant a decree of Specific Performance of that act.

When monetary compensation would not afford adequate relief

When the act agreed to be done is such that compensation offered in money for its non-performance would not afford adequate relief. However, until the contrary is proved, it is to be presumed that:

The breach of a contract to transfer immovable property cannot be adequately compensated by payment of money.

The breach of a contract to transfer movable property can be so compensated, except in the following cases:

- Where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market.
- Where the property is held by the defendant as the agent or trustee of the plaintiff.
- Usually, the Courts are entitled to presume that in case of breach of contract to transfer of immovable property, mere compensation is not adequate relief, whereas specific performance is adequate relief, whereas in the case of movable property, compensation is the ordinary relief and specific performance is exceptional. However, it must be noted that these presumptions are rebuttable.

Suits for Enforcement of a Contract To Execute A Mortgage

In a suit for the enforcement of a contract to execute a mortgage or furnish any other security for the repayment of any loan which the borrower is not willing to pay at once, specific performance may be allowed. However, where only part of the loan has been advanced by the lender, he must be willing to advance the full amount of the loan.

- Contracts for the purchase of any debentures of a company.

- Suits for the execution of a formal deed of partnership.
- Suits for the purchase of partner's share.

Suits for the enforcement of a building construction contract or any other work on land, provided the following three conditions are fulfilled:

1. The building or other work has been described in the contract in a reasonably precise manner, so as to enable to Court to decide the exact nature of building or work;

2. The plaintiff has substantial interest in the performance of the contract, and the interest is such that financial compensation for non-performance of the contract would not be adequate relief; and

3. After the contract, the defendant has obtained possession of the whole or any part of the land in question. It is important to remember that specific performance is an equitable remedy, and is therefore left to the discretion of the Court, rather than to the right of a person by law

An Injunction

Under Section 36 of Specific Relief Act 1963, an injunction is defined as an order of a competent court, which:

(i) Forbids the commission of a threatened wrong,
(ii) Forbids the continuation of a wrong already begun, or
(iii) Commands the restoration of the status quo (the former course of things).

Clauses (i) and (ii) deal with preventive relief, whereas clause iii deals with an injunction called mandatory injunction, which aims at rectifying, rather than preventing the defendant's misconduct.

Under Sections 36 & 37 of the Specific Relief Act 1963, there are two types of injunctions – temporary and perpetual, whereas Section 39 governs mandatory injunctions.

- Temporary or interim injunctions are governed by Order 39 of Civil Procedure Code 1908 and are those injunctions that remain in force until a specified period of time, e.g. 15 days, or till the date of the next hearing. Such injunctions can be granted at any stage of the suit.
- Permanent or perpetual injunctions, as under Sections 38 to 42 of the Specific Relief Act, 1963 are contained in the decree passed by the Court after fully hearing the merits of the case. Such an injunction permanently prohibits the defendant from committing an act which would be contrary to the plaintiff's rights.

When are perpetual injunctions granted?

Under Section 38 of the Specific Relief Act 1963, whenever the defendant invades, or even threatens to invade the plaintiff's right to enjoyment of property or right to property itself, the Court may grant to the plaintiff a perpetual or permanent injunction in the four cases as follows:

(i) Where there is no standard for quantifying the actual damages caused, or likely to be caused, to the plaintiff, by the invasion of his rights;
(ii) Where invasion of the plaintiff's rights is such that any compensation in money would be inadequate relief;
(iii) Where the defendant is a trustee of the property for the plaintiff;
(iv) Where the injunction is necessary to prevent multiplicity of judicial proceedings.

Mandatory injunctions are granted in cases where in order to prevent the non-performance of an obligation, it is necessary to compel the performance of certain acts which the Courts are capable of enforcing. Thus, the Court may at its discretion grant an injunction to prevent such non-performance and also to compel performance of the required acts. This injunction is applicable to the breach of any obligation. It may be permanent or temporary, although temporary-mandatory injunctions are rare.

Damages instead of, or in addition to injunction:

Section 40 of the Specific Relief Act 1963 states that a plaintiff may claim damages either in addition to or in substitution for suing for perpetual or mandatory injunction, and if the Court deems fit, it may even grant such damages.

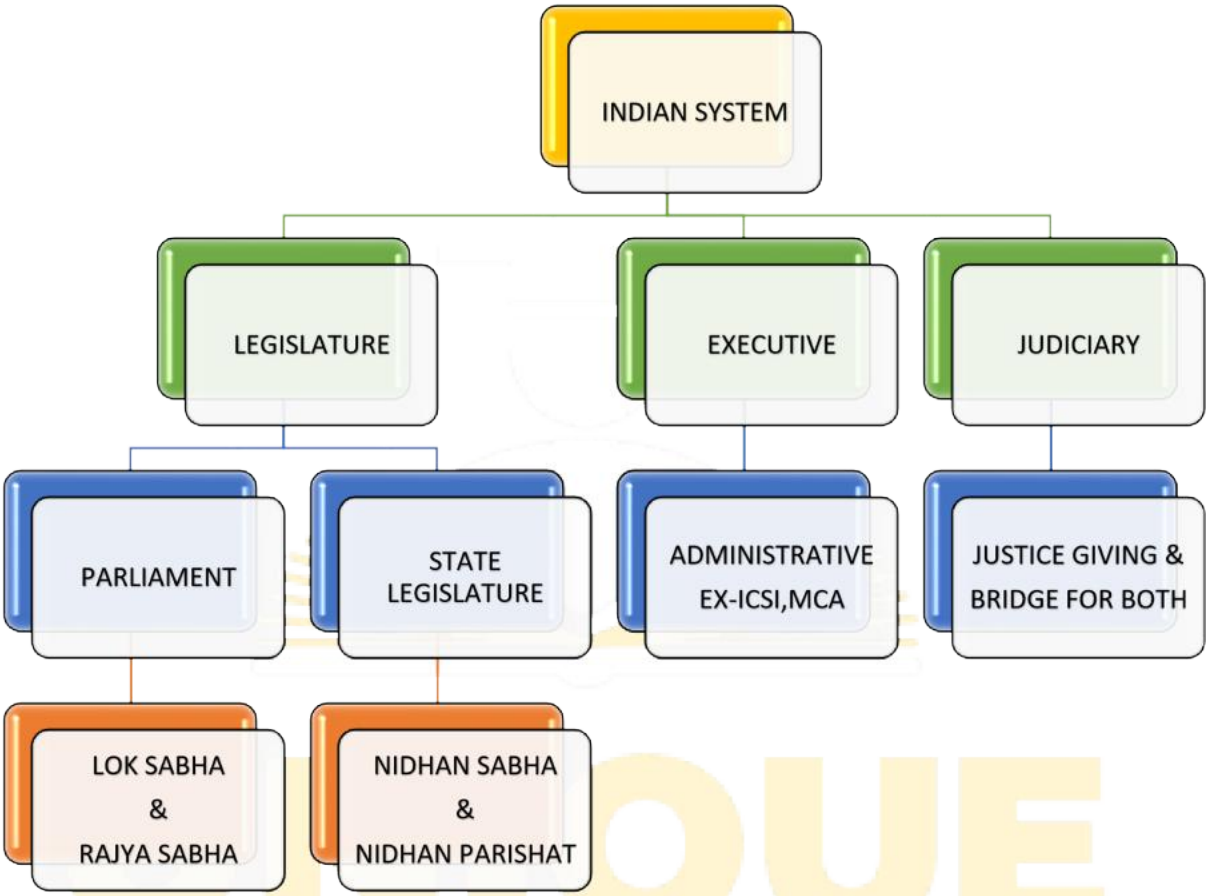
It is worth emphasizing that damages and injunction are not alternate remedies. Both may be allowed at the discretion of the Court.

However, damages cannot be granted unless the plaintiff has claimed damages in the plaint. In the event that the plaintiff has not claimed damages in the plaintiff itself, he should be allowed to amend the plaintiff, at any stage of the proceedings, on such terms as may be just in the circumstances of the case.

To conclude, it is thus evident that there are several remedies available in case of breach of a contract, none of which are very simple. One would have to overcome an abundance of challenges and rebuttals to prove a case of breach of contract.

LESSON 9

JUDICIAL & ADMINISTRATIVE FRAMEWORK



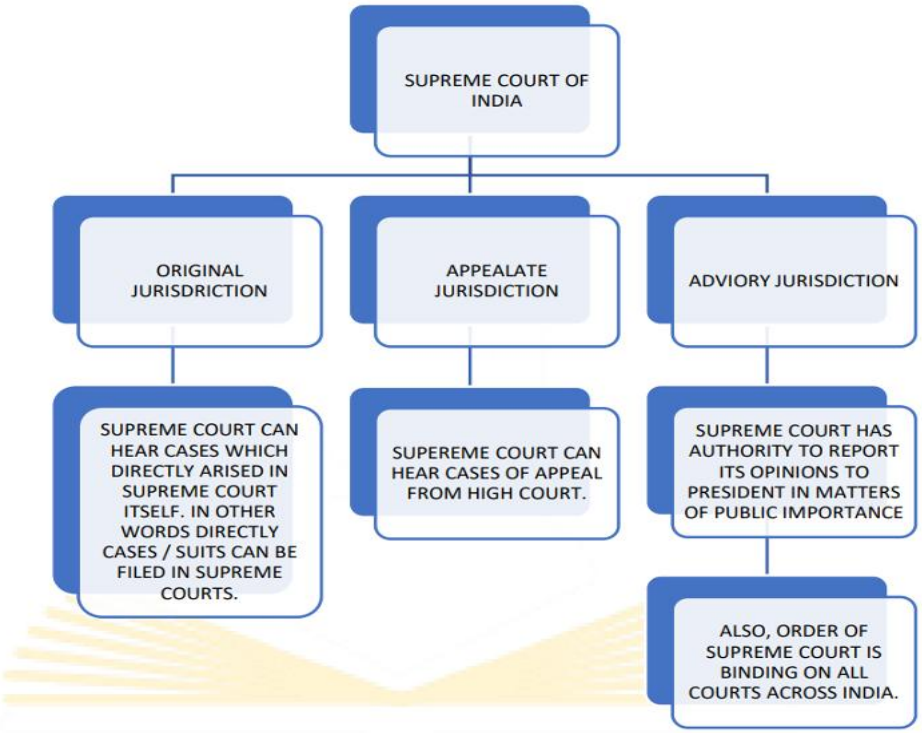
INTRODUCTION

- Legislature delegates the work to executive.
- Legislature is the law-making authority in our country but alone legislature cannot work out to fit varying aspects of complex situations. Hence delegation becomes necessary. This is known as delegation/subordinate legislation.

SUPREME COURT OF INDIA

Privy Council was the apex court before the commencement of the Constitution of India.

Supreme court is highest level of court in the Indian judicial system established as per PART 5, CHAPTER IV of Constitution of India.



HIGH COURT OF INDIA

Article 227 of constitution, gives authority to all high courts to practice superintendence over all courts & tribunals within the regional jurisdiction of high court.

High court has 2 jurisdiction –

1. ORIGINAL JURISDICTION- High Court can hear cases which directly arise in high court/ cases directly filed in high court. Example- As per ARTICLE 227 of constitution where fundamental rights are breached of any individual, he can file case directly in high court.

2. APPELATE JURISDICTION- High Court is empowered to hear appeals against order of lower court. Decision of high court is binding on all subordinate courts within its judication. There can be many benches but the principle bench is only one.

LOWER COURT IN INDIA

State governments has established district court for every district. Court at district level has dual structure.

Civil Side

It is known as district court & headed by district judge. There are

1. Additional district judge
2. Assistant district judge

Sharing the load of district judge of additional district judges have same power as of district judges.

District court has two jurisdictions.

1. Original jurisdiction – cases can be directly filed in district court.
2. Appellate judication- District court can hear matters of appeal over subordinate courts in its jurisdiction.

Subordinate courts in civil cases are: junior civil judge court, principle junior & senior civil judge court.

CRIMINAL COURT

At every district level is known as session court headed by session judge. There are additional judges to share work load of session judge

Subordinate courts in criminal cases are: magistrate of second-class, magistrate of first class & chief judicial magistrate.

Judges who take both matters - CIVIL + CRIMINAL are known as district & session judge.

Revenue court

These courts are actually not courts as a part of judiciary but they come under administration of state government. They deal with matters related to stamp duty, registration rent due to government, etc.

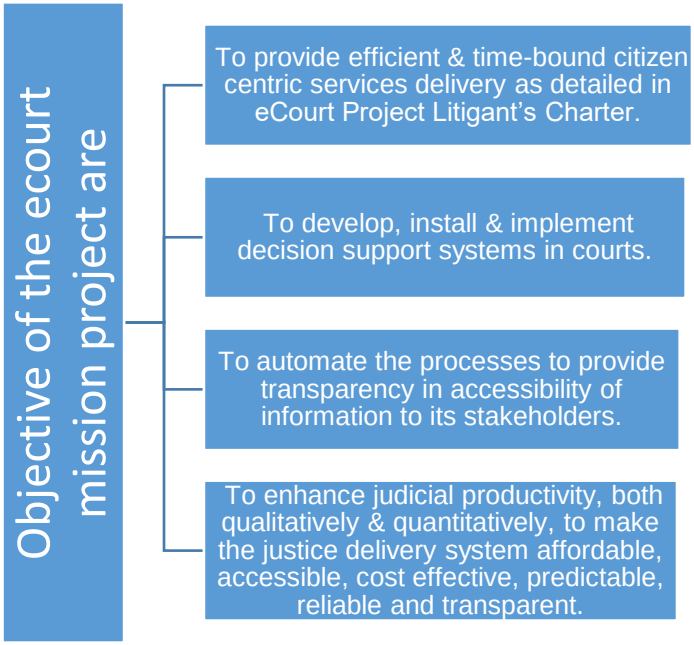
At lowest level there is tehsildar or assistant tehsildar. Above it there is office of sub directorial officer. Then comes the district collector. Above it is the board of revenue

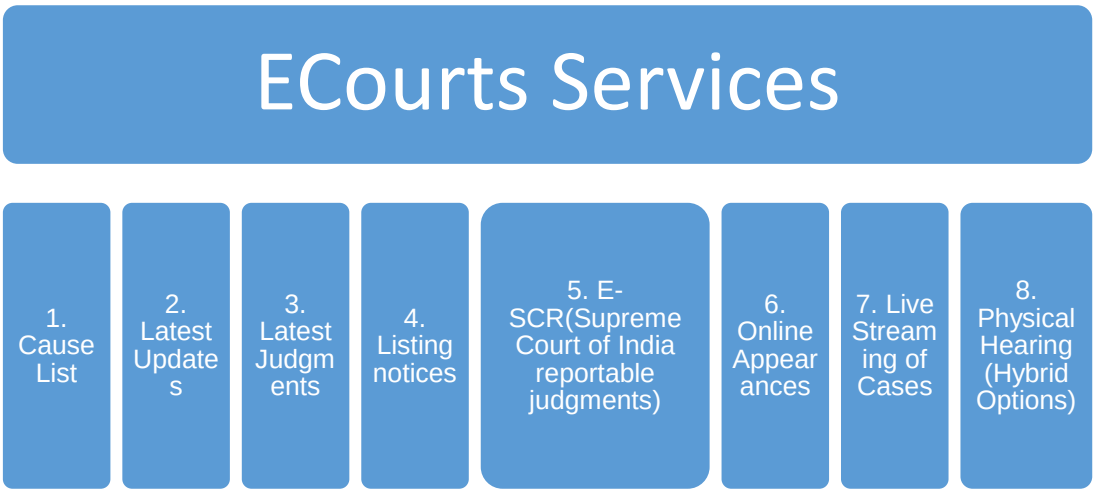
E-Courts

The eCourts Project was conceptualized on the basis of the “National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005” submitted by eCommittee, Supreme Court of India with a vision to transform the Indian Judiciary by ICT enablement of Courts.

Ecommittee is a body constituted by the Government of India in pursuance of a proposal received from the than Hon'ble the Chief Justice of India to constitute an eCommittee to assist him in formulating a National policy on computerization of Indian Judiciary and advise on technological communication and management related changes.

The eCourts Mission Mode Project, is a Pan-India Project, monitored and funded by Department of Justice, Ministry of Law and Justice, Government of India for the District Courts across the country.





Tribunals

They are a part of executive branch of government where they have many powers & duty & they act in judicial capacity for settlement of disputes. They are quasi-judicial bodies that are less formal, less expensive and enable speedy disposal of cases.

SOME IMPORTANT TRIBUNALS

DEBT RECOVERY TRIBUNAL

It has been constituted under section 3 of RECOVERY OF DEBTS DUE TO BANKS & FINANCIAL INSTITUTION ACT (RDDBFI). DRT was established for recovery of debts due to financial institution from individuals & partnership firm in order to reduce the non-performing assets. DRT receive applications from banks & financial institutions against their defaulting borrowers. DRT also receives application for bankruptcy of individuals & partnership firms.

NATIONAL COMPANY LAW TRIUNAL

It is a quasi-judicial body exercising the same functions which were earlier exercised by high court or the central government. It has been established by central government under section 408 of Companies Act 2013 with effect from 01/06/2016.
NCLT consolidated the following authorities & their jurisdictions:

- Company law board.
- Board of industrial & financial reconstruction.
- Appellate authority for industrial & financial reconstruction.
- Jurisdiction & powers relating to winding up vested in high courts.

COSUMER FORUM

To protect the rights of consumers in India & for settling disputes of consumers three tire redressal forum has been constituted.

THE THREE TIER REDERSSAL FORUM

1. **DISTRICT UPTO 20L**
2. **STATE > 20L UPTO 1CR**
3. **NATIONAL ABOVE 1 CR**

Consumer forum do not entertain any complaints for deficiency in any services which is rendered free of change or under contract of personal services.

Motor Accident Claims Tribunal (MACT)

MACT Deals with matter related to compensation of motor accident victims or his legal representation. Any person who has lost a property or life in the motor accident, then he or his legal representative can claim compensation at MACT.
MACT is prescribed over by judicial fireform state higher judicial service and are under direct suppression of high court of respective state.

Central administrate tribunal (CAT)

It is established by the amendment of constitution of India by article 323A. CAT is a multi-member alleging non-observation of their terms of service or any other related matters.

National green tribunal (NGT)

It was established for effective & expeditious disposal of cases relating to environmental protection & conservation of forest & other natural resources including enforcement of legal rights relating to environment & giving relief & compensating the damages to persons & property for related matters.

Headquarters of NGT are in Delhi & branches are at Pune, Bhopal and Chennai.

PROCEDUAL ASPECTS OF WORKING OF CIVIL COURTS:

Jurisdiction

It means the authority of court to try a particular matter. It is basically of three types-

1. Pecuniary Jurisdiction- Authority of court to try matters upto a particular sum of money.
2. Territorial Jurisdiction- Authority of court to try matters upto a particular territorial limit.
3. Subject Matter Jurisdiction- Authority of court to try only a particular subject matter. Example-Matters related to company law is tried by NCLT.

Stay of suit

If any particular case is pending in one court & subsequent suit is filed by another party in another court at different time i.e., parties, subject matter is same then subsequent suit should be stayed. This rule is not applicable if the first suit is pending in foreign court.

Res-judicata / Bar of Suit

If a particular case is conclusively decided & subsequent suit is filed by another party i.e., parties, subject matter is same, then subsequent suit is barred. This rule is applicable only if the first case is decided by competent court in India.

Plaint

It is starting point of all pleading in a case. Plaintiff when sues the defendant, he files a document in the court called as plaint. After submitting plaint, if court finds that it should be submitted before some other court then plaint is returned & intimated to the plaintiff.

Court has power to reject the plaint on following grounds:

1. If it doesn't disclose cause of action.
2. If relief claimed is undervalued and is not corrected by plaintiff
3. If relief is properly valued but court fess / stamp duty is not paid.
4. If suit is barred by any law.

Summons

It is issued by court to defendant to appear & answer the claim. Defendant can appear in person or by pleader to answer all questions. If defendant didn't appear then court may issue ex parties judgement. If defendant didn't keep out of the way for purpose of avoiding service of summon then court may order service by advertisement in newspaper.

Adjournment

Court has power to adjourn a case and take it up to a future date this is the sole discretion of court. Rules of adjournment are considerable strict if applied in their true spirit.

Appearance of parties

Defendant is required to appear on a particular day which is fixed by court. If defendant is absent, court may proceed ex-party. If defendant was not served with summon due to fault of plaintiff, then court may dismiss the case. If defendant appears and plaintiff doesn't then court may order dismissal of the suit.

Ex party decrees

It is passed in the following cases-

1. If defendant fails to submit written statement.
2. If defendant has not filed pleading
3. If defendant doesn't appear on a fixed date of hearing

Defendant has following remedies in case of ex party decree –

1. He can prefer appeal.
2. Apply for review.

3. Can apply for set aside

Interlocutory proceeding

The period involved in ignitions & disposal of case is very long and sometimes it is required to give interim relief, so court may on separate application grant interim relief such as injunction, status quo, any other interlocutory order

Written statement

The defendant is required to file a written statement of his defence at or before first hearing. In written statement there is denial of alleged facts and denial has to be very specific.

Examination of parties

It is every important stage after appearance, here parties admit or deny allegations of facts and such administration on and deny shall be recorded and after that judge gives the judgement.

Production of documents

Parties or their pleader before the settlement of issues shall produce all documents evidence in court. If documentary evidence has not been produced in court which should have been, then subsequently it will not be admissible. Court at it's discretion can call any document to be submitted in court and can require any document which is admitted to be proved.

Framing of issues

Court after the hearing and after reading the plaint and written statement frames the issue. Issues are framed from allegations, interrogation or any document. If there is any question of law or bar of suit, then court will try this issue at first. Court then determines such issues, give decision and pronounce judgement.

Summoning and attendance of witness

Within 15 days after issues are settled, parties shall present list of witnesses whom they propose to call. Court may at any stage of suit inspect any property or thing. Court can also recall any witness who was already called earlier to answer the questions raised in court. Person to whom summon has been issued if fails to attend without any lawful excuse, court can order for arrest with or without bail.

Affidavit

Court can at any time order that the facts need to be proved by affidavit or affidavit of any witness to be read at hearing. Affidavit contains oath of deponent of facts which were in his knowledge. Affidavit needs to be verified and the need is to test the genuineness of

allegations. Court can call affidavit to be given with evidence and after that may even direct cross examination of such party.

Final argument

After documents are submitted, court witness of both sides are examined and this is called final argument.

Judgement

When hearing is concluded, judge is required to give judgement in 1 month. If there is any delay, he shall give reasons. When judgement is pronounced decree is to be pronounced within a period of 15 days. Court has power to award "cost". It means if there is any delay, court may award "cost".

Decree an execution

When decree is passed, court orders it's execution which means actually execution of order of the court.

Reference to the High Court

Section 395 of CRPC empowers subordinate court to make a reference to high court in following conditions-

1. If there is question as to validity of law and it is essential to solve it for disposal of case
2. If subordinate court wants to refer its case setting out its opinion & reasons court can make reference only to high court to which it is subordinate.

While referring a matter, it is necessary to give it's own opinion too, so that there will be a clarification to high court.

Revision

Section 397 to 401 deals with revision. Revision can be done by high court & session court both. It can be for pending as well as on going cases. Whenever there is miscarriage of justice due to misconception of law or irregularity of procedure or due to some negligence of part of law & order, then party can file a revision plan in high court or session court.

Object is to correct the irregularity of inferior court. High court & session court can call any record from inferior court to examine the proceedings of inferior court as whether it is correct, legal & proper.

There are following conditions of revision under section 397:

1. Proceedings must be of inferior court.
2. Inferior court includes all magistrates (they are subordinate to session judge & high court)
3. Inferior court must be within the local limits of jurisdiction of revisional court.

NO REVSISONS WHERE RIGHTS TO APPEAL EXISTS

The party having rights to appeal cannot apply for revision. It means if there is a right to appeal, they do not have a right of revision. This is prohibition to individuals & not to high court or session court. High court & session court has power of revision suo-moto. They can call for records of proceedings of any inferior court & has power to enhance the sentence also.

REVSISON MAY BE TREDTED AS APPEAL

Revision may be treated as appeal if high court desires so. This situation arises when appeal lies against order of inferior Court but party believed erroneously that appeal does not lie & have filed a revision, the high court has discretionary power to consider it as revision.

ENHANCEMENT or REDUCTION OF SENTENCE

HIGH COURT UNDER REVSIONERY jurisdiction does not have power to enhance sentence in every case. It would interfere only if the sentence passed is grossly inadequate. There are no limitations on power of high court up to max prescribed by IPC, expect in cases tried by magistrate.

REDUCTION

If after hearing, government pleader, high court thinks that sentence imposed is too server & needs to be reduced. Then it may reduce it by exercising revisionary judication minimum up to prescribed limit by IPC.

REFERNCE, REVIEW, REVISION UNDER THE CIVIL CASES

Reference under section 113 of CPC – At any time before judgment, a court in which suit has been instituted may refer the same for opinion of high court & high court may order thereon as it thinks fit.

Review under section 114 of CPC- any party who consider himself aggrieved by decree or order may apply for review of judgement of court on following grounds:

1. Discovery by applicant of new evidence which was not within the knowledge when decree was passed.
2. On account of some mistake or error apparent on the face of receiver.
3. For any other sufficient reasons then court may order as it thinks fit.

Revision under section 115 of CPC- High court may call for record of any case which was decided by any subordinate court & in which no appeal lies and subordinate court –

1. Exercised jurisdiction not vested in it.
2. Failed to exercise jurisdiction.
3. Exercised judication illegally or written material irregularity.

In above cases high court may order as it thinks fit.

TYPES OF CRIMINAL TRIAL

According to the Code of Criminal Procedure, a criminal trial is of three types. Depending upon the type of criminal trial the different stages of a criminal trial are discussed below.

1. Warrant Cases

According to Section 2(x) of Code of Criminal Procedure, 1973 a warrant case is one which relates to offences punishable with death, imprisonment for life or imprisonment for a term exceeding two years. The trial in warrant cases starts either by the filing of FIR in a police station or by filing a complaint before a Magistrate. Later, if the Magistrate is satisfied that the offence is punishable for more than two years, he sends the case to the Sessions court for trial. The process of sending it to Sessions court is called “committing it to Sessions court”.

Important features of a warrant case are:

- Charges must be mentioned in a warrant case
- Personal appearance of accused is mandatory
- A warrant case cannot be converted into a summons case
- The accused can examine and cross-examine the witnesses more than once.
- The Magistrate should ensure that the provisions of Section 207 are complied with. Section 207 of Cr.
  P.C. 1973, include the supply of copies such as police report, FIR, statements recorded or any other relevant document to the accused.

The stages of trial in warrant cases are given from Section 238 to Section 250 of the Code of Criminal Procedure, 1973.

A. Different Stages of Criminal Trial in a Warrant Case when instituted by the police report

- **First Information Report:** Under Section 154 of the Code of Criminal Procedure, an FIR or First Information Report is registered by any person. FIR puts the case into motion. An FIR is information given by someone (aggrieved) to the police relating to the commitment of an offense.
- **Investigation:** The next step after the filing of FIR is the investigation by the investigating officer. A conclusion is made by the investigating officer by examining facts and circumstances, collecting evidence, examining various persons and taking their statements in writing and all the other steps necessary for completing the investigation and then that conclusion is filed to the Magistrate as a police report.
- **Charges:** If after considering the police report and other important documents the accused is not discharged then the court frames charges under which he is to be tried. In a warrant case, the charges should be framed in writing.
- **Plea of guilty:** Section 241 of the Code of Criminal Procedure, 1973 talks about the plea of guilty. After framing of the charges the accused is given an opportunity to plead guilty, and the responsibility lies with the judge to ensure that the plea of guilt was voluntarily made. The judge may upon its discretion convict the accused.
- **Prosecution evidence:** After the charges are framed, and the accused pleads not guilty, then the court requires the prosecution to produce evidence to prove the guilt of the accused. The prosecution is required to support their evidence with statements from its witnesses.

  This process is called “examination in chief”. The magistrate has the power to issue summons to any person as a witness or orders him to produce any document.
- **Statement of the accused:** Section 313 of the Criminal Procedure Code gives an opportunity to the accused to be heard and explain the facts and circumstances of the case. The statements of accused are not recorded under oath and can be used against him in the trial.
- **Defence evidence:** An opportunity is given to the accused to produce evidence so as to defend his case. The defense can produce both oral and documentary evidence.

- **Judgement:** The final decision of the court with reasons given in support of the acquittal or conviction of the accused is known as judgement. In case the accused is acquitted, the prosecution is given time to appeal against the order of the court. When the person is convicted, then both sides are invited to give arguments on the punishment which is to be awarded. This is usually done when the person is convicted of an offence whose punishment is life imprisonment or capital punishment.

B. Stages of Criminal Trial in a Warrant Case when Private Complaint institutes case

It may sometimes happen that the police refuses to register an FIR. In such cases one can directly approach the criminal court under Section 156 of CrPC. On the filing of the complaint, the court will examine the complainant and its witnesses to decide whether any offence is made against the accused person or not. After examination of the complainant, the Magistrate may order an inquiry into the matter by the police and to get him submit a report for the same.

- After examination of the complaint and the investigation report, the court may come to a conclusion whether the complaint is genuine or whether the prosecution has sufficient evidence against the accused or not. If the court does not find any sufficient material through which he can convict the accused, then the court will dismiss the complaint and record its reason for dismissal.
- After examination of the complaint and the inquiry report, if the court thinks that the prosecution has a genuine case and there are sufficient material and evidence with the prosecution to charge the accused then the Magistrate may issue a warrant or a summon depending on the facts and circumstances.

2. Summons Cases

According to Section 2(w) of Code of Criminal Procedure, 1973, those cases in which an offence is punishable with an imprisonment of fewer than two years is a summons case. A summons case doesn't require the method of preparing the evidence. Nevertheless, a summons case can be converted into a warrant case by the Magistrate if after looking into the case he thinks that the case is not a summon case.

Important points about summons case

- A summons case can be converted into a warrant case.
- The person accused need not be present personally.
- The person accused should be informed about the charges orally. No need for framing the charges in writing.
- The accused gets only one opportunity to cross-examine the witnesses.

The different stages of criminal trial in a summon case are given from Section 251 to Section 259 of the Code of Criminal procedure.

Stages of Criminal Trial in a Summons Case

- **Pre-trial:** In the pre-trial stage, the process such as filing of FIR and investigation is conducted.
    - **Charges:** In summons trials, charges are not framed in writing. The accused appears before the court or is brought before the court then the Magistrate would orally state the facts of the offense he is answerable.
- **Plea of guilty:** The Magistrate after stating the facts of the offence will ask the accused if he pleads guilty or has any defense to support his case. If the accused pleads guilty, the Magistrate records the statement in the words of the accused as far as possible and may convict him on his discretion.
- **Plea of guilty and absence of the accused:** In cases of petty offences, where the accused wants to plead guilty without appearing in the court, the accused should send a letter containing an acceptance of guilt and the amount of fine provided in the summons. The Magistrate can on his discretion convict the accused.
- **Prosecution and defense evidence:** In summons case, the procedure followed is very simple and elaborate procedures are eliminated. If the accused does not plead guilty, then the process of trial starts. The prosecution and the defense are asked to present evidence in support of their cases. The Magistrate is also empowered to take the statement of the accused.
- **Judgement:** When the sentence is pronounced in a summons case, the parties need not argue on the quantum of punishment given. The sentence is the sole discretion of the judge. If the accused is acquitted, the prosecution has the right to appeal. This right to appeal is also extended to the accused.

3. Summary Trial

Cases which generally take only one or two hearings to decide the matter comes under this category. The summary trials are reserved for small offences to reduce the burden on courts and to save time and money. Those cases in which an offence is punishable with an imprisonment of not more than six months can be tried in a summary way. The point worth noting is that, if the case is being tried in a summary way, a person cannot be awarded a punishment of imprisonment for more than three months

The trial procedure is provided from Section 260 to Section 265 of the Code of Criminal Procedure, 1973.

Stages of Criminal Trial in Summary Cases

- The procedure followed in the summary trial is similar to summons-case.
- Imprisonment up to three months can be passed.
- In the judgement of a summary trial, the judge should record the substance of the evidence and a brief statement of the finding of the court with reasons.

Appellate Forum

Any society that claims to uphold the supremacy of law will definitely have an elaborate provision for appeal under its various laws. This is because the majesty of judiciary notwithstanding, at the end of the day, judges are human beings and they can also be at fault just like any other individual. It is a fundamental tenet of a just society that the shortcomings of men should not operate to the disadvantage of fellow human beings in the courts of law. The system of Appeal provides an opportunity to correct judicial orders which otherwise would operate unjustly. Indian legal system has made sufficient provisions for appeal both under the Civil Procedure Code as well as the Criminal procedure Code. Various laws themselves have specific provisions for appeal.

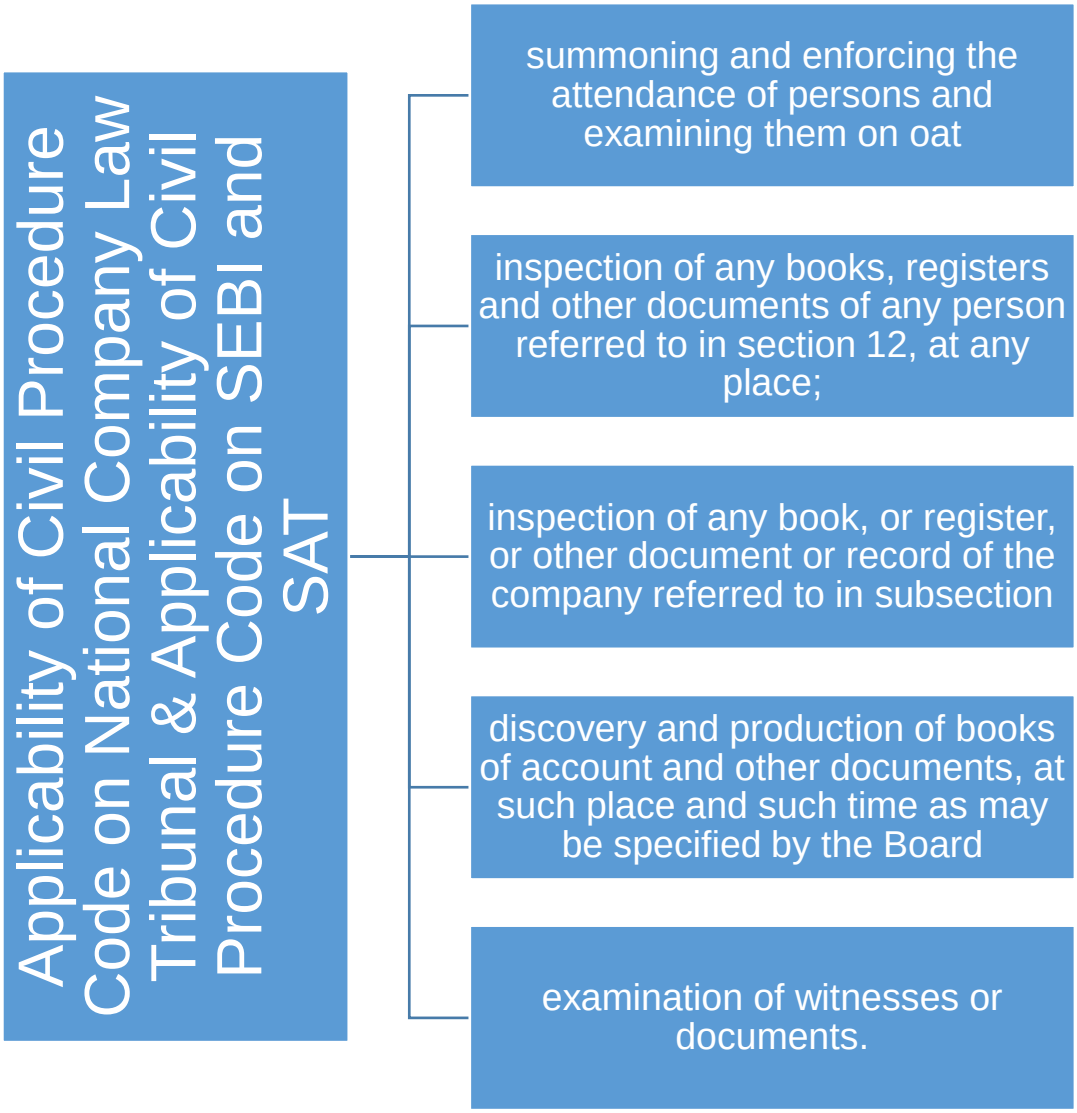
Under the Civil Procedure Code, an appeal may be an appeal from order or an appeal from decree.
All orders are not appealable and complete description of the appellable orders has been given in Order 43 of the Code of Civil Procedure . The appeal has to be preferred within prescribed limitation period before the appellate court. The limitation period for appeal to High Court is 90 days and appeal to District Court is 30 days. If the period of limitation is expired, then application for condonation of delay also is required to be moved.

The Code of Criminal Procedure, 1973 also contains elaborate provisions on appeals against a judgment or order of the criminal courts. Appeals to the Sessions Court and to the High Court are largely governed by the same set of rules and procedure. But the High Court being the highest appellate court within a state, has been given primacy in many cases where appeal is permissible.

Thus, District and Sessions Court and High Courts are the most common appellate forums.

The Supreme Court is the appellate court of last resort and enjoys very wide plenary and discretionary powers in the matters of appeal. Under Article 136 of the Constitution, the Supreme Court also enjoys a plenary jurisdiction in matters of appeal. However, Article 136 is not a regular forum of appeal at all. It is a residual provision which enables the Supreme Court to interfere with the judgment or order of any court or tribunal in India in its discretion.

Indian laws that have constituted Tribunals for dispute settlement or grievance redressal have constituted appellate forum. For example, under the Companies Act, 2013 the appellate forum is National Companies Law Appellate Tribunal (NCLAT) if one wants to challenge the order of National Company law Tribunal. Similarly, the appellate tribunal for SEBI is Securities Appellate Tribunal (SAT) and for Debt Recovery Tribunal is Debt Recovery Appellate Tribunal (DRAT). Some of the laws like the Companies Act provide that matters from appellate tribunal (NCLAT) will go directly to the Supreme Court and not to the High Courts.



LESSON 10

PLEADINGS

INTRODUCTION

"Pleading" shall mean 'plaint' or 'written statement'.

The document stating the cause of action and other necessary details and particulars in support of the claim of the plaintiff is called the "plaint".

The defence statement containing all material facts and other details filed by the defendant is called the "written statement".

The objective of pleadings is to find out and narrow down the controversy between the parties.

The object of the pleadings is three-fold. They are

a) to define the issues involved between the parties;
b) to provide an opportunity to the opposite party or other side to meet up the particular allegation raised against him or her, and
c) to enable the Court to adjudicate the real issue involved between the parties

Function of pleadings

The function of a pleading is not simply for the benefit of the parties but also and perhaps primarily for the assistance of the court by defining with precision for the assistance of the court the area beyond which without the leave of the court and consequential amendment of the pleadings, the conflict must not be allowed to extend.

Importance of pleadings

The importance of the art of pleading is insufficiently realised in this country. It is at least as important as any other part of the duties of an advocate. Moreover, it demands a high degree of skill, and the final form of any pleading should be stated only by advocates who have the necessary skill and experience. The case of a party is one which is set out in his pleading. No relief based on any ground not set out as pleading can be granted. A party urging a ground which is entirely a legal ground may be allowed to set it up at a later stage but plea based on a question of fact or a mixed question of law and fact cannot be allowed to be taken at a later stage. A finding based on no pleading and no evidence, cannot be sustained

Rule of Pleading and a Rule of Proof

It is necessary to keep in mind the distinction between a rule of pleading and a rule of proof. That inconsistent pleading can be pleaded it in the alternative is a well-established rule of pleading, but the proof of a plea depends upon the provisions of substantive law.

Fundamental Rules of Pleadings

The four fundamental rules of pleadings are:

1. That a pleading shall contain, only a statement of facts, and not Law;
2. That a pleading shall contain all material facts and material facts only.
3. That a pleading shall state only the facts on which the party pleading relies and not the evidence by which they are to be proved,
4. That a pleading shall state such material facts concisely, but with precision and certainty

Rule I: Facts and not Law:

The duty of the pleader is to set out the facts upon which he relies and not the legal inferences to be drawn from them. And it is for the judge to draw such inferences from those facts as are permissible under the law of which he is bound to take judicial notice.

The rule that every pleading must state facts and not law is subject to the following exceptions:

1. Foreign Law
2. Customs
3. Mixed question of law and fact
4. Legal Pleas
5. Inferences of law

Rule II: Material Facts:

When a litigant comes to a legal practitioner, he brings all facts and circumstances pertaining to a case. In fact, he tries to narrate each and every event which may possibly have a remote bearing upon the case. Not all such facts are important.

What is necessary therefore are the facts which are material; facts which have a direct and immediate bearing on the case, facts which are secondary or incidental may easily be omitted.

The second fundamental rule of pleading is therefore, that every pleading shall contain and contain only, a statement of the material fact as on which the party pleading relies for his claim or defence. This rule is embodied in Order VI Rule 2 and it requires that –

1. The party pleading must plead all material facts on which he intends to rely for his claim or defence as the case may be; and

2. He must plead material facts only, and that no fact which is not material should be pleaded, nor should the party plead evidence, nor the law of which a Court may take a judicial notice.

"Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence.

Exception to the General Rules: The second fundamental rule of pleading, namely, that every pleading must state all the material facts and the material facts only is subject to the following well known exceptions:

1. **Condition Precedent**: The performance of occurrence of any condition precedent need not be pleaded as its averments shall be implied in the pleading. But where a party chooses to contest the performance or occurrence of such condition, he is bound to set-up the plea distinctly in his pleading.
   "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading"
2. **Presumption of Law**: Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied.
   Regarding legal presumptions, the exception applies to only such facts as the court "shall presume" and not to those facts which the court may presume", and therefore the facts falling under the latter class must be pleaded.
3. **Matters of Inducement**: Another exception to the general rule is regarding facts which are merely introductory. Such facts only state the names of the parties, their relationships, their professions and such circumstances as are necessary to inform the Court as to how the dispute has arisen. Such facts are hardly necessary or material to the pleading, but they are generally tolerated and are set in the pleadings by both the parties in order to facilitate the court to take a stock of the situation of the parties. It is better if such prefatory remarks are cut down to the minimum.

Rule III: Facts not Evidence:

The third fundamental rule of pleadings is that only facts must be stated and not the evidence there of as there is a tendency among the litigants to mix up the bare facts with the facts which are in realty the evidence. At the stage of pleading, the Court and the opposite party should be supplied with the facts and such contentions on which the claim is founded; the plaintiff must keep the facts in evidence for a later stage of evidence. The reason behind the rule stating evidence is that if the evidence were also allowed to be

stated in the pleading, then there shall remain no limit of details and the chief object of the pleading would disappear. Evidence also consists of facts.

Evidence also consists of facts and in order to distinguish between the two kinds of facts, the material facts on which the party pleading relies for his claim or defence are called facta probanda and the facts by means of which they (i.e., material facts) are be proved are called facta probantia.

a. **Facta probanda**: The facts which are to be proved. These are the facts on which a party relies and are ought to be stated in the pleading.
b. **Facta probantia**: These are the facts which are not to be stated because by their means facta probanda are proved. Thus, these facts are the evidence as to the existence of certain facts on which the party relies for his cause of action or defiance as the case may be. Facta probanda are not facts in issue, but they are relevant in that at the trial their proof will establish the existence of facts in issue. No doubt in certain cases both the facts in issue and their facts in evidence are mixed up and are almost indistinguishable. They should not be stated in the pleading.

Exception: The only exception to the third fundamental rule of pleadings is to be found in the case of writ petitions and election-petitions. In such petitions, it is necessary to state matters of evidence in support of the allegations made therein.

Rule IV: Facts to be stated concisely and precisely:

Every pleading must state the material facts concisely, but with precision and certainty. What this rule means is that the pleading should be brief and to the point. There should be no obscurity or vagueness or ambiguity of any sort otherwise the very purpose of pleading will be defeated. Another point to remember is that no doubt brevity and conciseness are the rule, but brevity should not be at the cost of precision or clarity.

Other Rules

Pleading must be Signed

Order VI Rule 14 makes it obligatory that the pleading shall be signed by the party and his pleader (if any). However, where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

The main purpose of this rule is to prevent any possible denial by any party that he did not authorize the proceedings. Thus, even if pleader produces the vakalat-nama duty authorizing him to fight or defend the suit, the signature of the pleader alone would not do. The pleading must bear the signature or thumb impression or any other identification mark of the party concerned. The only exception is that the party is unable to sign by reason of absence or any other good cause. Mere absence would sufficient; “absence” in this context

means such as would not enable the party to be present. Where the party is unable to sign the pleading as aforesaid, then a person duly authorized by him will sign the pleading. Such authority to sue or defend must be produced before the court.

Verification of Pleading

Order VI Rule 15, states every pleading shall be verified at the foot by the by any of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The person verifying shall specify, by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verified upon on received and believed to be true. The verification shall be signed by the person making it and the date on which and the place at which it was signed. The aim of verification is only to fix responsibility of the statements made in the pleading upon same one before the court proceeds to adjudicate upon them.

A person making a false verification is liable to be punished under the Indian Penal Code, 1860 as making a false statement is by itself an offence. Therefore, the responsibility of verifications is very great and its significance and the consequences thereof must be realized. After the signature to the pleading some space may be left out and then verification should begin.

Striking out pleadings

It is no difference to an application to strike out impertinent matter, it will make the pleading inconsistent and un meaning or insufficient, for the pleading should be amended if necessary. It meant which is pertinent in a pleading not to be ordered to be expunged on the ground of its being scandalous.

Amendment of pleadings

Court and tribunals are constituted to do justice between the parties within the confines of statutory limitations, and undue emphasis on technicalities or enlarging their scope would cramp their powers, diminish their effectiveness and defeat the very purpose for which they are constituted. Within the limits prescribed by the decisions of the Supreme Court, the discretionary jurisdiction of the tribunals to amend the pleadings is an extensive as that of civil court. The same well settled principle lay down in the matter of amendment to the pleadings in a suit should also regulate the exercise of the power of amendment by a Tribunal. Accordingly, the pleadings should not be too strictly constructed and that regarded should be substance of the matter and not the form.

The general rule governing amendment of pleadings is that a party is not allowed by amendment to set up a new case or a particularly when a suit on the new cause of action is barred by time. But where the amendment does not constitute or amount to the addition of a new cause of action or raise a new and different case already set up, amount mainly to a different or additional approach to the same facts, amendment is to be allowed even after the expiry of the statutory period of limitation. In this context the expression cause of action

does not mean every fact which is material to be proved two enable the plaintiff to succeed. Again, the word new cause means new set of ideas. It therefore at the court will not allow an amendment which introduces a new set of ideas acquired by any party by lapse of time.

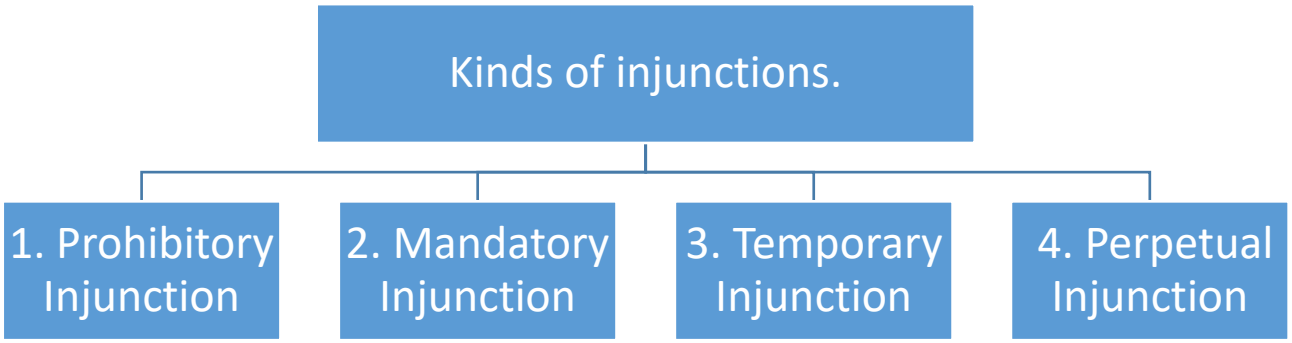
The court always give leave to amend the pleading of a party. However, negligence or carelessness may have been the first omission and however late the proposed amendment and amendment may be allowed if it can be made without injustice to the other side. The amendment introduces new case, new cause of action, new or alternative relief, correct description, change in the character of suit, to be considered on the basis of the fact and circumstances of each case. The amendment can be allowed at any stage. There is no invariable rule that an amendment which deprives the opposite party of the plea of limitation should always be refused. The court is, however entitled to allow amendment of the plaint even after the period of limitation has expired, holds that the omission was due to a Bonafide mistake on the part of the plaintiff. Rule of amendment of pleadings is essentially a rule of justice, equity and good conscience.

Inconsistent defences

A defence cannot be ruled out merely because it is inconsistent with another defence. It is certainly open to a party to raise inconsistent defences in the alternative, but at the time when evidence is led, he has got to elect as to which of the alternative inconsistent defences he is going to prove.

SUITS FOR TEMPORARY AND PERMANENT INJUNCTIONS

Preventive Relief is granted at the discretion of the court by injunction, Temporary or Perpetual. The Relief of Injunction is an equitable relief and he who seeks equity must do equity. Hence, a party who asks for an injunction must be able to satisfy the court that his dealing of the matter had been fair, honest and free of any fraud or illegality. The Discretion in granting or refusing injunction must be exercised judicially and not arbitrarily.



Pleading Civil

Classes of Civil Courts: Besides the Supreme Court and High Courts, there are Civil Courts at District level. Highest among them is Court of District Judge, followed by Additional District

Judges. The lower Civil Courts are divided in two forms e.g., one by territorial limits and secondarily pecuniary limit. The territorial limit is by jurisdiction of the court and by pecuniary limit it is divided into Civil Judge (Senior Division), Civil Judge (Junior Division) and Small Cause Court. When a suit is filed, if it is of civil in nature, it is filed by a complaint which is submitted to computerized filing centre of a District.

PLAINT:

Particulars to be contained in plaint provided under order VII, Rule 1

a) The name of the Court in which the suit is brought;
b) The name, description and place of residence of the plaintiff;
c) The name, description and place of residence of the defendant, so far as they can be ascertained;
d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
e) The facts constituting the cause of action and when it arose;
f) The facts showing that the Court has jurisdiction;
g) The relief which the plaintiff claims;
h) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

In money suits: Amount claimed should be stated in the plaint.

Where interest is sought in the suit – Pleadings shall also state—

a) the rate at which interest is claimed;
b) the date from which it is claimed;
c) the date to which it is calculated;
d) the total amount of interest claimed to the date of calculation; and
e) the daily rate at which interest accrues after that date

Where the subject-matter of the suit is immovable property: The plaint shall contain a description of the property sufficient to identify it.

When plaintiff sues as representative: The plaint shall show not only that he has an actual existing interest in the subject- matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

Dilatory Pleas

Pleas which merely delay the trial of a suit on merits have been characterized as 'dilatory pleas'. They simply raise formal objections to the proceedings and do not give any substantial reply to the merits of the case, e.g., the plea that the court-fee paid by the plaintiff is not sufficient. Such pleas should be raised at the earliest opportunity.

Interlocutory Application

"Interlocutory" means not that decides the cause but which only settles some intervening matter relating to the cause. After the suit is instituted by the plaintiff and before it is finally disposed off, the court may make interlocutory orders as may appear to the court to be just and convenient. The power to grant Interlocutory orders can be traced to Section 94 of C.P.C. Section 94 summarizes general powers of a civil court in regard to different types of Interlocutory orders. It provides for supplemental proceedings. The detailed procedure has been set out in the Schedule I of the C.P.C which deals with Orders and Rules.

Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit e.g., Applications for appointment of Commissioner, Temporary Injunctions, appointment of Receivers, payment into court, security for cause etc. The Supreme Court in Rashtriya Ispat Nigam Ltd. V. Verma Transport Company, AIR 2006 SC 2800, placing reliance upon its earlier judgment in Vareed Jacob v. Sosamma Geevarghese, AIR 2004 SC 3992 explained the distinction between incidental and supplemental proceedings explaining that incidental proceedings are those which arise out of the main proceedings.

Plaint Structure

PLAINT:

Particulars to be contained in plaint provided under order VII, Rule 1.

According to this rule the plaint shall contain the following particulars:

(a) The name of the Court in which the suit is brought;

(b) The name, description and place of residence of the plaintiff;

(c) The name, description and place of residence of the defendant, so far as they can be ascertained;

(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) The facts constituting the cause of action and when it arose;

(f) The facts showing that the Court has jurisdiction;

(g) The relief which the plaintiff claims;

(h) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

Written Statement

- A written statement is required to be filed by the defendant in answer to the claim made by the plaintiff.
- Written statement is the statement or defence of the defendant by which he either admits the claim of the plaintiff or denies the allegations or averments made by the plaintiff in his plaint.
- The written statement must specifically deal with each allegation of fact in the plaint and when a defendant denies any fact, he must not do so evasively but answer the same in substance.

Formal Portion of Written Statement: A written statement should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants.

No relief should be claimed in the written statement but a prayer for set off or counter claim can be made.

Body of the Written Statement: The rest of the written statement should be confined to the defence. Forms of defence-

1. Traverse/ Denial- Where the defendant totally and categorically denies the plaint allegation.
2. Confession and avoidance/ Special Defence- Where defendant admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts
3. An objection in point of law (formerly called in England “a demurrer”)- Defendant tries to dismiss the case by some legal inferences. Example- Plaint allegation does not disclose cause of action.
4. Dilatory Pleas- It is a plea which merely delays trial of suit.
5. Set Off and Counter Claims

Notice (DIRECTLY IN DRAFT BOOK)

PETITIONS

Original Petition

Suits are filed to lodge money claims in civil courts working under District Courts while petitions are filed in High Courts which are above District Courts seeking some directions against the opposite party; mostly the Government

After judgment in suit or petition, if any aggrieved party challenges it, then it is by filing appeal in the higher court which is ordinarily called as Appeal but often in some court it is termed as Letters Patent Appeal (LPA) & as Special Leave Petition (SLP) in Supreme Court.

Execution Petition

Application for Execution

Execution of decree

Application for execution of a decree shall be made by a holder of a decree who desires to execute it to the appropriate court which passed it or to the officer appointed in this behalf. In case the decree has been sent to another court than the application shall be made to such court or the proper officer thereof. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible.

Application for execution of a decree may be either

(a) Oral Application: Where a decree is for payment of money the court may on the oral application of the decree holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgement debtor, prior to the preparation of a warrant if he is within precincts of the court.

(b) Written Application: Every application for the execution of a decree shall be in writing save as otherwise provided sub-rule (1) signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :

(a) the No. of the suit;

(b) the name of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of costs (if any) awarded;

(i) the name of the person against whom execution of the decree sought; and

(j) the mode in which the assistance of the court is required, whether–

(i) by the delivery of any property specifically decreed;
(ii) by the attachment or by the attainment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;
(iv) by the appointment of a receiver;
(v) otherwise, as the nature of the relief granted may require.

The court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. Some High Courts in different States have framed additional rules in this regard may also be taken care by the draftsman or the executing lawyer

SPECIAL LEAVE PETITION

In suitable cases, where some arguable questions, mostly on legal points are involved, the Constitution confers under Article 136 wide discretionary powers on the Supreme Court to entertain appeals even in cases where an appeal is not otherwise provided for. But so far as questions of fact, as distinct from questions of law, is concerned, it is only in rare or exceptional cases that the Supreme Court interferes and that too when finding of the High Court or the lower Court is such that it shocks the conscience of the court.

LESSON 11

Art of Advocacy and Appearances

DRAFTING OF AFFIDAVIT IN EVIDENCE – IMPORTANT CONSIDERATIONS

No extraneous evidence can be looked into in absence of specific pleadings (Habib Khan v. Valasula Devi, AIR 1997 A.P 52). The following must be kept in mind while preparing the affidavit-in-evidence by the parties –

(i) The best evidence is that of a person who was personally involved in the whole transaction. In case, that person is not available for any reason, then any other person who has joined in his place to make deposition by way of his affidavit.

(ii) In case, the petitioner himself was involved in the execution of a contract, he should file affidavit-in-evidence.

(iii) The allegations or charges or grounds relating to facts should be re-produced duly supported by documentary evidence.

(iv) In case, the point or issue pertains to engineering, medical, technology, science or other complex or difficult issues, then the evidence of expert is to be filed in the form of his Affidavit. If necessary, the said witness has to appear before the Forum for the purpose of cross-examination by the counsel for the other party. For example, hand-writing or finger print experts etc.

(v) Besides the leading evidence on the points raised by the petitioner or by the opposite party in his written statement/reply, if possible, the party who is filing the affidavit-in-evidence should also file documents, papers or books or registers to demolish the defence or case set up by the opposite party.

(vi) It is also permissible for any party to bring any outside witness (other than the expert witness) in support of his case if the facts and circumstances of the case so warrant and permitted by the Court/ Tribunal.

(vii) At the time of tendering affidavit-in-evidence, the party must bring along with it either the original of papers, documents, books, registers relied upon by it or bring with it the carbon copy of the same.

It may be noted that only photocopy of any paper or document (in the absence of its reply, original or carbon copy) cannot be relied upon and tendered as an evidence.

Evidence, as defined in Section 3 of the Evidence Act, 1872 means and includes–

(1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the

Court; such documents are called documentary evidence.

Rule of Adverse Inference

No evidence is required of matters which are, either formally admitted for the purposes of the trial, in civil cases, by the pleadings, by answer to interrogatories, by agreement or otherwise and in criminal cases, as regards proof of those documents admitted under Section 294, Code of Criminal Procedure, 1973.

It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party. The Court will be justified in drawing an adverse inference against that party. [Ms. Shefali Bhargava v. Indraprastha Appollo Hospital & Anr., 2003 NCJ 787 (NC)].

It is equally incumbent upon a party to produce evidence of some expert where the issue involved is a complex or difficult one as for instance, issues pertaining to engineering, medical, technology or science etc. Since the court cannot constitute itself into an expert body and contradict the claim/proposition on record unless there is something contrary on the record by way of expert opinion or there is any significantly acclaimed publication or treatise on which reliance could be based. [Dr. Harkanwaljit Singh Saini v. Gurbax Singh & Anr., 2003 NCJ 800 (NC)].

ARGUMENTS ON PRELIMINARY SUBMISSIONS

Preliminary submissions should primarily confine to the true and correct facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings. Additionally, the provisions of law or legal objections relevant and applicable to the issues involved in the matter should also be mentioned so as to demonstrate that the relief being claimed by the opponent is not eligible to be granted and/or that the relief being claimed by the party being represented by a lawyer/authorized representative should ordinarily be allowed as per those provisions of law.

ARGUMENTS ON MERITS

Such arguments as relate to the facts pleaded by the parties are termed as arguments on merits. While addressing arguments on merits, a lawyer/authorized representative should carefully point out the pleadings of the parties and the relevant evidence in support thereof, lead by the parties, both oral as well as documentary. A lawyer/ authorized representative should ensure that all or any contradiction in the pleadings of the opponent and the evidence in support of such pleadings are duly pointed out while submitting his/her arguments. Thus, where an agreement/contract of service is pleaded and there is no evidence either oral or documentary on record in support of such an agreement/contract, it should be

specifically pointed out that the opponent has failed to prove/establish that such an agreement/contract actually exists or that the same had actually been executed at all.

LEGAL PLEADINGS/WRITTEN SUBMISSIONS

As already pointed out above, legal pleadings/submissions should be taken under the heading "preliminary submissions/objections". While taking such plea one should ensure that the legal provisions and/or interpretation, thereof, is very clear and directly applicable to the issues involved in the matter. Similarly, all other legal submissions which go to the root of the controversy and which are sufficient as well as material for adjudication of the issues involved, should be taken in opposition to the claims put forth by the opponent. Some illustrations are as under:

(i) Suit is not maintainable for want of statutory notice etc.

(ii) Plaint does not disclose cause of action.

(iii) Plaintiff has no right to sue.

(iv) Suit barred by principles of res-judicata.

(v) Suit barred by principles of waiver, estoppel, acquiescence.

(vi) Suit is barred by special enactment.

(vii) Court has no

jurisdiction.

(viii)Suit is barred

by limitation.

(ix) Suit is premature, and so on.

Some of these are known technically as 'special defences'. In a suit based on contract, defendant may admit that he made the contract, but may avoid the effect of admission by pleading performance, fraud, release, limitation etc.

DRESS CODE

In professional life it is important to look presentable because personal appearance counts. How you look can be a major factor in how you are perceived by others. How you look, talk, act and work determines whether you are a professional or an amateur. The way you dress, speaks volumes about who you are as a person and as a professional. Whenever you enter a room for the first time, it takes only a few seconds for people you have never met to form perceptions about you and your abilities. Your clothes and body language always speak first. So, it is important that your image gives people the right impression.

A dress code is a set of rules governing a certain combination of clothing. Apart from the legal profession, professional dress code standards are established in

major business organizations and these have become more relaxed in recent decades. Dress codes vary greatly from company to company, as different working environments demand different styles of attire. Even within companies, dress codes can vary among positions.

Getting dressed for work is to project a professional and competent image. It has been observed that the professionals who do not take the time to maintain a professional appearance or those who have never learned how to dress properly for their chosen field of work, are not being taken seriously by co workers and present the image of not being able to perform satisfactorily on the job.

GUIDELINES FOR PROFESSIONAL DRESS OF COMPANY SECRETARIES

(a) The professional dress for male members will be navy blue suit and white shirt with a tie (preferably of the ICSI) or navy blue buttoned-up coat over a pant or a navy blue safari suit.

(b) The professional dress for female members will be saree or any other dress of a sober colour with a navy blue jacket.

(c) Members in employment may wear the dress/uniform as specified by the employer for all employees or if
allowed the aforesaid professional dress.

(d) Practising Company Secretaries appearing before any tribunal or quasi-judicial body should adhere to dress code if any prescribed for appearing before such tribunal or quasi-judicial body or if allowed the aforesaid professional dress.

It may be pointed out that any person whether a lawyer, pleader or authorized representative representing a litigant before any Court of law or a Tribunal or any other authority discharging the functions of a Court/a quasi judicial authority, should comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community and a gentleman.

PROFESSIONAL ETIQUETTES

Etiquette is the fine art of behaving in front of others. It is a set of practices and forms which are followed in a wide variety of situations. Many people consider it to be a branch of decorum, or general social behavior. Each society has its own distinct etiquette, and various cultures within a society also have their own rules and social norms.

Dealing a client with confidence, acting appropriately at business interactions and knowing the proper table manners at a business dinner are just some of the necessary skills today's professionals must have in an increasingly competitive environment, and that will leave a lasting impression – good or bad. Some manners

and behaviour remain constant. Nonetheless, other etiquette moments require you to conduct yourself differently than you do when you are with professional colleagues or clients at any business meeting/get-together. It is in these moments that you need to understand the particulars of etiquette. Being corporate professionals, you must practice some basic etiquette tips that would help you to go up the ladder of success in the workplace. These include Dressing Etiquette; Introduction and Greeting Etiquettes; Conversation Etiquette; Communication Etiquettes; Invitation Etiquette and Dining Etiquettes etc.

Dressing Etiquette

With every organization program comes the inevitable question: What do I wear? Knowing what to wear, or how to wear something, is key to looking great in any event.

- Always wear neat and nicely pressed formal clothes. Choose corporate shades while you are picking up clothes for your office wear.
- Ties for men should compliment.
- Women should avoid wearing exposing dresses and opt for little but natural make-ups. Heels should be of appropriate or modest height.
- Men need to keep their hair (including facial hair) neatly trimmed and set.
- Always polish your shoes.
- Keep your nails clean.
- Wear clothes which you are comfortable in and can carry well. This is very important while you are in a business meeting or client presentation.

Handshake Etiquette

Etiquette begins with meeting and greeting. A handshake is a big part of making a positive first impression. A firm shake is an indication of being confident and assertive. The following basic rules will help you get ahead in the workplace:

- Always rise when introducing or being introduced to someone.
- Shake hands with your right hand.
- Shake hands firmly (but not with a bone crushing or fish-limp grip), and with only one squeeze.
- Hold it for a few seconds (only as long as it takes to greet the person), and pump up and down only once or twice.
- Make eye contact while shaking hands.

Communication Etiquettes

- Always speak politely. Listen to others attentively. A good listener is always dear to every client.
- While speaking over telephones, always greet the other person while starting and ending the call.
- Speak only when the other person has finished talking instead of interrupting in between.
- Show interest in what other people are doing and make others feel good.
- Stand about an arm's length away while talking to others.
- Question another person in a friendly, not prying, manner.
- Make eye contact when talking to others.
- Be polite. Avoid foul language, unkind statements, and gossip.
- Keep your conversations short and to the point.
- Maintain your sobriety and politeness even if the client speaks something offensive or rude and avoid replying back in harsh tone/words.

Invitation Etiquette

How you respond to an invitation says volumes about your social skills. It reflects negatively on your manners
if your response (or lack of response) to an invitation costs time or money for your host.

- Reply by the date given in the invitation, so that the host or hostess knows what kind of arrangements to make for the event, food is not wasted, and unnecessary expense is eliminated.
- If an RSVP card is not included, respond by calling or sending a brief note.
- If you cancel after initially accepting an invitation, phone your regrets as soon as possible. Send a note of regret following the phone conversation.
- Don't ask for permission to bring a guest unless the invitation states.
- Arrive at the event promptly, but not too early.
- Mingle and converse with the other guests.
- Don't overstay your welcome.
- Extend your thanks as you leave.

Dining Etiquettes

- Always be courteous while official dinners. Offer the seat to your guest first. If you are the guest, be

punctual and thank the host for the dinner.

- Wait until you receive your host's signal.
- Initiate conversations while waiting for the food.
- Never begin eating any course until everyone has been served or the host/hostess has encouraged you to do so.
- Chew quietly; don't speak with your mouth full.
- Avoid pointing the knife or fork towards the other person while eating and speaking.
- Allow your guest to select the menu and wine.
- If something unwanted has gone to your mouth, place the napkin in front of your mouth tactfully and bring it out instead of putting your hand inside the mouth to get rid of it.
- Learn the basic table manners before you go out to dine with a potential client or an important business meet.

COURT CRAFT

Practicing these etiquettes in your professional life, will make a great impact on everyone you are associated with. You must always be conscious that your mannerisms reflect on your professionalism and your company. Company Secretaries act as an authorized representative before various Tribunals/quasi-judicial bodies. It is necessary for them to learn art of advocacy or court craft for effective delivery of results to their clients when they act as an authorized representative before any tribunal or quasi-judicial body.

Preparatory Points

There are certain basic preparatory points which a Company Secretary should bear in mind when contacted by a client.

- Take minute facts from the client;
- Lend your complete ears to all that client has to say;
- Put questions to the client while taking facts so that correct/relevant facts can be known;
- Convey to the client about exact legal position in context of relief sought by the client;
- Give correct picture of judicial view to the problem posed by the client.

Drafting of Pleadings

Pleadings could be both written and oral. Mastering both the kinds of pleadings is must for effective delivery of results to the clients. Some of the important factors

which may be borne in mind while making written pleadings are as under:

- Quote relevant provisions in the petition and excerpts of observations made by the Courts relevant to the point;
- Draft prayers for interim relief in such a manner which though appears to be innocuous but satisfy your requirements;
- Do not suppress facts;
- Highlight material facts, legal provisions and Court decisions, if any;
- State important points at the outset together with reference to relevant provisions/judgements.

If you are opponent

- File your reply to the petition at the earliest opportunity;
- Take all possible preliminary contentions together with reference to relevant law point and judgements;
- Submit your reply to each paragraph of the petition.

If you are for the petitioner

- File your rejoinder upon receiving the reply at the earliest opportunity and this is to be done on the permission of the concerned Court / Tribunal;
- Meet clearly with the specific points raised by the opponent in the reply affidavit.

Oral Pleadings

Effective oral pleadings are relevant both at the stage of preparation of the case before actual presentation and also at the stage of actual presenting a case before CLB/NCLT or other tribunals. Following aspects could be relevant at both these stages:

- Preparation before presentation of the case;
- Carefully read your petition, provisions of law and judgements;
- Note down relevant points on a separate sheet of paper together with relevant pages of the compilation;
- Keep copies of judgements to be relied ready for the Court and for your opponent(s).

While Presenting Your Case

- Submit a list of citations to the Court Master before opening of case; Start your address to the Court /Tribunal with humble note;
- Refer to the order sought to be challenged or reliefs sought to be prayed;
- State brief facts;
- Formulate issues/points, categorise them and address them one by one;
- Take each point, state relevant facts, provisions of law and relevant binding decisions;
- Hand over xerox copies of binding decisions to the Court Master while placing reliance;
- Refer to relevant pages of the compilation, provisions of law and judgements;
- Complete all points slowly but firmly;
- Conclude your arguments by reiterating your points in brief;
- Permit the opponent counsel uninterruptedly. However, if facts are being completely twisted, interrupt
  depending upon the relevant circumstances and that too only with the permission of the Court / Tribunal;
- Take instructions from client in advance with respect to alternative reliefs.

As Regards Advocacy

Advocacy is the presentation of logical facts of any dispute in a right perspective. It employs the noblest faculties of the human mind by differentiating between right and wrong, just and unjust, equitable and inequitable. They should be able to:

- Identify the client's goals and should continue to enjoy the confidence of his client;
- Identify and analyse factual material;
- Identify the legal context in which the factual issue arises;
- Relate the central legal and factual issues to each other;
- State in summary from the strengths and weaknesses of the case from each party's perspective;
- Develop a presentation strategy;
- Outline the facts in simple narrative form;
- Structure and present in simple form the legal framework of the case;
- Structure the submission as a series of propositions based on the evidence;
- Identify, analyse and assess the specific communication skills and techniques;
- Demonstrate an understanding of the purpose, techniques and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify evidence;

- Demonstrate an understanding of the professional ethics, etiquette and conventions of advocacy.

CONDUCT AND ETIQUETTE

Duty to the Court

(i) A Company Secretary shall, during the presentation of his case and while otherwise acting before a Court/Tribunal, conduct himself with dignity and self-respect.

(ii) A Company Secretary shall maintain towards the Courts a respectful attitude, bearing in mind that the
dignity of the judicial office is essential for the survival of a free community and legal system.

(iii) A Company Secretary shall not influence the decision of a Court by any illegal or improper means. Private
communications with the judge relating to a pending case are forbidden.

(iv) A Company Secretary shall use his best efforts to restrain and prevent his client from resorting to sharp and unfair practices or from doing anything in relation to the Court, opposing counsel or parties which the Company Secretary himself ought not to do. A Company Secretary shall refuse to represent the client who persists in such improper conduct.

(v) A Company Secretary shall not enter appearance, act, plead or practice in any way before a Court/ Tribunal or any other Authority, if the sole or any member thereof is related to the Company Secretary.

(vi) A Company Secretary shall not appear in or before any Court or Tribunal or any other Authority for or against an organization or an institution, society or corporation, if he is a member of the Executive Committee of such organization or institution or society or corporation.

(vii) A Company Secretary should not act or plead in any matter in which he is himself pecuniarily interested.

Duty to Client

(i) A Company Secretary shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.

(ii) A Company Secretary shall not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear if he can retire without jeopardizing his client's interest.

(iii) A Company Secretary shall at the commencement of his engagement and

during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either him or continuing the engagement.

(iv) It shall be the duty of a Company Secretary to fearlessly uphold the interest of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. A Company Secretary shall not at any time, be a party to fomenting of litigation. A Company Secretary shall not act on the instructions of any person other than his client or his authorized agent.

(v) A Company Secretary shall not do anything whereby be abuses or takes advantage of the confidence reposed in him by his client.

Duty to Opponent

(i) A Company Secretary shall not in any way communicate or negotiate upon the subject-matter of controversy with any party represented by an Advocate except through that Advocate.

(ii) A Company Secretary shall do his best to carry out the legitimate promise/ promises, made to the opposite-party

Important Principles

Some of the important principles of advocacy a Company Secretary should observe include:

1. Act in the best interest of the client;
2. Act in accordance with the client's wishes and instructions;
3. Keep the client properly informed;
4. Carry out instructions with diligence and competence;
5. Act impartially and offer frank, independent advice;
6. Maintain client confidentiality.

Advocacy Tips

Some of the tips given by legal experts which professionals like Company Secretaries should bear in mind while appearing before Tribunals or other quasi-judicial bodies are given herein below. They say while pleading, a judge in your pleadings looks for:

(i) ***Clarity:*** The judge's time is limited, so make the most of it.

(ii) ***Credibility:*** The judge needs to believe that what you are saying is true and that you are on the right side.

(iii) ***Demeanour:*** We do not have a phrase “hearing is believing”. Humans which includes the human judge, is
far more video than audio. The way we collect most of our information is through our eyesight.

(iv) ***Eye contact:*** While pleading, maintain eye contact with your judge.

(v) ***Voice modulation:*** Voice modulation is equally important. Modulating your voice allows you to emphasize the points you want to emphasize. Be very careful about raising your voice. Use your anger strategically. But use is rarely. Always be in control of it.

(vi) ***Psychology:*** Understand judge’s psychology as your job is to make the judge prefer your version of the truth.

(vii) ***Be likeable.*** At least be more likeable than your opponent. If you can convert an unfamiliar Bench into a group of people who are sympathetic to you personally, you perform a wonderful service to your client.

(viii) ***Learn to listen.***

(ix) ***Entertain your judge.*** Humour will often bail you out of a tough spot.

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83 CHINMAYEE KINJWADEKAR


80 DISHA SHAH


70 S SWATHI


63 VIDULA DAMLE

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89 CHIRAAG AGARWAL


88 S SWATHI


80 S SWATHI


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79 ARPIT BANTA


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84 SARIKA


84 GAURAV GUPTA


70 TANISHDEEP SINGH


78 SAUMYA SAKHUJA


78 S SWATHI


73 SOHAM PURANIK


70 AKSHITA GOYAL


70 MANAV


70 TIKSHA LOHIT


69 ANKITA JAIN


70 MANSI RAGHUVANSHI

69 VISHAL AHUJA

68 POOJA CHAUDHARY

JIGL

83 CHINTRANSHA

80 SHEEETAL CHANCHLANI

79 NEHA PRAJAPATI

74 KASHISH MITTAL

70 MANAV

68 GEETIKA TRIPATHI

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C.LAW

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70 S SWATHI

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64 ANCHAL GUPTA

60 JAYA TYAGI

60 AISHWARYA VERMA

S.LAW

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MARKS 217 — NEHA PRAJAPATI

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MARKS 215 — TAMANNA PATEL

MARKS 214 — ARBAZ ALAM

MARKS 213 — RISHIKA SONI

Module-2

MARKS 271 — SANJANA BINDAL

MARKS 295 — SARIKA

MARKS 264 — TANISHDEEP SINGH

MARKS 264 — SAMRIDDHI AGRAWAL

MARKS 277 — AKSHITA GOYAL

MARKS 266 — VISHAL AHUJA

MARKS 263 — GAURAV GUPTA

MARKS 256 — RIYA SONAR

MARKS 256 — KRUMIL PATEL

MARKS 255 — SHREYA AGARWAL

MARKS 251 — PALAK GOYAL

MARKS 250 — SANJANA D

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