



CAIIB BRBL Module-D

**Commercial & Other Laws With Reference To
Banking Operations**



CAIIB Paper 4 (BRBL) Module D: Commercial & Other Laws With Reference To Banking Operations

Index

No. of Unit	Unit Name
Unit 1	Meaning and Essentials of a Contract
Unit 2	Contracts of Indemnity
Unit 3	Contracts of Guarantee
Unit 4	Contract of Bailment
Unit 5	Contract of Pledge
Unit 6	Contract of Agency
Unit 7	Meaning and Essentials of a Contract of Sale
Unit 8	Conditions and Warranties
Unit 9	Unpaid Seller
Unit 10	Definition, Meaning and Nature of a Partnership
Unit 11	Relations of Partners to One Another
Unit 12	Relations of Partners to Third Parties
Unit 13	Minor Admitted to the Benefit of a Partnership
Unit 14	Dissolution of a Firm
Unit 15	Effect of Non-Registration
Unit 16	Definition and Features of a Company
Unit 17	Types of Companies
Unit 18	Memorandum of Association and Articles of Association
Unit 19	Doctrines of Ultra Vires/ Constructive Notice/ Indoor Management
Unit 20	Membership of Company
Unit 21	Prospectus
Unit 22	Directors
Unit 23	Limited Liability Partnership Act, 2008
Unit 24	Transfer of Property Act, 1882
Unit 25	The Right to Information Act, 2005
Unit 26	Right to Information and Obligations of Public Authorities
Unit 27	Information Technology Act, 2000
Unit 28	Prevention of Corruption Act, 1988

CAIIB Paper 4 (BRBL) Module D Unit 1-Meaning And Essentials of A Contract

Meaning of Contract

In India the law relating to contracts is provided by the Indian Contract Act 1872.

Contract means an agreement enforceable by law meaning thereby that the rights and obligations arising out of the contract must be enforceable in a court of law.

All agreements between two or more persons are contracts if those satisfy the following

- It is made by free consent of all the parties
- It is made by parties who are competent to contract.
- It is made for a lawful consideration
- It is made with a lawful object and
- It is not declared as void expressly in the Indian Contract Act

Therefore, a Contract = Agreement + Enforceability. **Thus, all contracts are agreements but all agreements are not necessarily contracts.**

Key Components To Form A Contract

- When one person signifies to another person, his willingness to do or not to do something, with a view to obtaining the consent of that other person, he is said to make a **proposal**.
- When a person to whom the proposal is made, signifies his assent (consent), the proposal is said to be accepted. **A proposal becomes a promise when it is accepted.**
- The person making the proposal is **called the 'promisor'**. The person accepting the proposal is **called 'promisee'**.

Essentials Of A Valid Contract

Proposal and Acceptance

- A contract comes into being only when an offer of a proposal is made by one party known as the **promisor** and is accepted by another party known as the **offeree**.
- The offer should be without any qualification and be definite. It must be clear, definite, complete and final. It should be communicated to the offeree. The process of making a proposal is completed by the act of communicating it. The acceptance of the offer should be absolute and unconditional. Moreover, the **offer and acceptance must be 'consensus ad idem' which means that both the parties must agree on the same thing in the same sense.**

Example: A proposes by a letter to B to sell his car for Rs. 10,000. This is known as a proposal. A is the promisor. If B accepts the proposal then he becomes the promisee. This results into a contract.

Intention to Create Legal Relationship

- The intention of the two or more parties entering into an agreement must be to create a legal relationship between them. If there is no such intention between them there is no contract.
- Agreements of social nature, as they do not contemplate legal relationship, are not contracts.

An Agreement may be oral or written

- Under certain laws such as The Transfer of Property Act certain agreements are required to be in writing only and are also required to be registered and/or attested. If such formalities are not complied with, then the agreement cannot be enforced before a court of law.
- This applies in the case of sale or mortgage of immovable property, lease, etc. This is brought out in Section 10(2).
- As per this section wherever there is a statutory requirement that the contract must be in writing and also registered etc, the statutory requirements must be complied with. Otherwise an agreement may be oral also.

Lawful Consideration

There must be a lawful consideration for both the parties to enter into an agreement. Consideration here means '**something in return**'.

The Contract Act (Section 2d) defines consideration as under:

- When, at the desire of the promisor, the promisee or any other person,
- Has done or abstained from doing, or
- Does or abstains from doing, or
- Promises to do or to abstain from doing something. Such act or abstinence or promise is called a consideration for the promise.
- An agreement not enforceable by law is said to be **void**. An agreement enforceable by law is a contract. An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a **voidable contract**. A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable

However, in the following cases an agreement without consideration is valid:

- An agreement made out of natural love and affection.
- Between parties standing in near relation to each other.
- Which is in writing and registered.

The object of a contract should be lawful

- It must not be illegal or immoral or opposed to public policy. It is lawful unless it is forbidden by law. When the object of a contract is not lawful, the contract is void.

Free and Genuine Consent

- Free and genuine consent of the parties to a contract is required. A consent is said to be free when the parties agree to the same thing in the same sense. Consent is said to be free when it is not caused by coercion, as defined in section 15, or undue influence, as defined in section 16, or fraud, as defined in section 17, or misrepresentation, as defined in section 18, or mistake, subject to the provisions of **sections 20, 21, and 22.**

Certainty and Possibility of Performance

- The agreements, in which the meaning is uncertain is deemed void. The contract must be certain and not vague or indefinite (Section 29).

Agreement not declared void

- The agreement must not have been expressly declared void by the law in force in the country. For example dealing in 'rhinoceros horn' is banned. An agreement for export of the horn between A and B is void.

Capacity to Contract

- According to Section 11 dealing with 'who is competent to contract "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".

Contract Act and Banking

- The relationship between a banker and customer is the transactional relationship and depends on the type of transaction.
- When money is deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor. The relationship between bank and customer becomes that of creditor-debtor when customer has borrowed money from the
- When a bank accepts securities, valuables, bonds, or other documents with the bank for safe custody from a person, the bank, besides becoming trustee, becomes a bailee and the customer is the bailor. When ancillary services rendered by the bank such as remittance, collection of cheques, bills, etc. on behalf of the customers, it is acting as an agent of its customer. In respect of hiring of safe deposit lockers by the bank, the relationship is that of lessor and lessee, etc.

CAIIB Paper 4 (BRBL) Module D Unit 2-Contracts Of Indemnity

Contract Of Indemnity

- **A Contract of Indemnity is a contract by which one party promises to save the other from loss likely to be caused to him.** This loss can be, either by the conduct of the promisor himself or by the conduct of any other person.
- The promisor is called the indemnifier and the other person is called indemnified. The essence of any contract of indemnity is that the assured must prove a loss.
- **Example:** A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Rights Of Indemnity Holder

In terms of Section 125 of the Act which deals with extent of liability of the Indemnifier, the promisee is entitled to recover from the promisor/indemnifier, in respect of the matter to which the promise to indemnify applies:

- All damages which he may be compelled to pay in any suit, in respect of any matter to which the promise to indemnify applies.
- All costs which he may be compelled to pay in any suit if, in bringing or defending it, or if the indemnifier authorized him to bring or defend the suit.
- All sums paid in compromise, not contrary to indemnity.
- Right to sue for specific performance – the indemnity holder is entitled to sue for specific performance if he has incurred absolute liability and the contract covers such liability.

Implied Indemnity

- **A contract of indemnity may be express or implied depending upon the circumstances of the case,** though Section 124 of the Indian Contract Act does not seem to cover the case of implied indemnity.
- An act is done by one person at the instance of another and such an act is not in itself manifestly tortuous to the knowledge of the person doing it, and such act turns to be injurious to the rights of a third person, the person doing it is entitled to an indemnity from him who requested that it should be done.
- Example: A broker in possession of a government promissory note endorsed it to a bank with forged endorsement. The bank acting in good faith applied for and got a renewed promissory note from the Public Debt Office. Meanwhile the true owner sued the Secretary of State for conversion who in turn sued the bank on an implied indemnity.

Enforceability Of Contract Of Indemnity

Commencement of Liability

- **The Indian Contract Act 1872**, does not specify, the actual time of commencement of the liability of the indemnifier. Therefore the judgements have been varied with some High Courts opining that the indemnifier is not liable till the actual loss has been incurred by the indemnity holder and others insisting that the indemnity holder can compel the indemnifier to make good the loss even before he actually discharges his liability by payment etc.

Specified Time for Notice

- Where notice has to be given to the indemnifier as per the terms of the indemnity, the indemnity holder has to abide by it, to be entitled to the claim.

CAIIB Paper 4 (BRBL) Module D Unit 3-Contracts Of Guarantee

Contract Of Guarantee

- A 'Contract of Guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of latter's default.
- A guarantee may be either oral or written.
- The question whether a particular contract is a contract of indemnity or guarantee has to be decided by examining the language of the documents entered into between the parties and the nature of transaction.
- The person who gives the guarantee is called the '**surety**'. The person in respect of whose default the guarantee is given is called the '**principal debtor**'. The person to whom the guarantee is given is called the '**creditor/beneficiary**'.

Consideration

Anything done, or any promise made, for the benefit of the principal debtor, is a sufficient consideration to the surety for giving the guarantee (Sec. 127).

Example 1: B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will give guarantee for the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

Example 2: A sells and delivers goods to B. C afterwards, out of nothing and without any request or promise to him by any party, agrees to pay for the goods in default of B. This is a void (invalid) contract as there is no consideration for C's promise.

The Liability Of The Surety

- The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract (Sec. 128).
- A surety is regarded as a favoured debtor. This means that only if the principal debtor is unable to pay the debt, the surety takes the place of the principal

debtor. Again, once the surety has paid the debt, he then occupies the place of the original creditor. He can then claim from the principal debtor, the entire sum he has paid to the original creditor.

- The surety has no right to restrain an action against him by the creditor on the ground that the principal debtor is insolvent and that the creditor may have relief against the principal debtor in some other proceedings.
- Similarly, if the creditor has obtained any decree against the surety and the principal debtor, the surety has no right to restrain execution against him just because the creditor has not exhausted his remedies against the principal. discharged.
- Even the death of the principal debtor does not release the surety from his obligation during his lifetime and against his legal heirs to the extent of estate (immovable and movable properties) inherited by them from the deceased surety.

Continuing Guarantee

A guarantee which extends to a series of transactions, is called, a 'continuing guarantee'. This type of guarantee is not limited to only one transaction but to many transactions.

Illustration Mr. A contracts with Mr. B, a shopkeeper to allow Mrs. A to take whatever goods she may need from his shop, up to the amount of Rs. 20,000. Mr. A will be liable for the debts incurred by Mrs. A up to the given amount. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor (Sec. 130).

Death of Surety

- Normally, when the surety dies, the guarantee ends from that date. However, this is not true in all cases. It depends upon the terms of the contract and the intention of the parties as regards future transactions.
- The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as future transactions are concerned. Generally all guarantees obtained by banks are continuing guarantees and in the case of death of a surety, the guarantee would stand revoked for future transactions. This is the precise reason when the information of a guarantor's death is received, banks prefer to break the running accounts of a borrower.

Variance In Terms Of The Contract

Any variance (change/modification) made, without the surety's consent, in the 'terms of contract', between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance (Sec. 133).

Example: the surety that Mr. A had given strict instructions to the shopkeeper not to allow his wife to buy any cosmetics on credit. If the shopkeeper allows Mrs. A to buy

these items, the terms of the guarantee are changed and therefore, Mr. A would not be liable to pay to the shopkeeper for any future transactions from that point onwards

Discharge of Principal Debtor

- The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor (Sec. 134).
- **Example:** A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B and afterwards B contracts with his creditors (including C) to assign/sell them certain properties of his, in consideration of all the creditors, releasing B from all their demands. Here B is now, after the settlement, not a debtor to C. A is therefore discharged from his surety-ship to C.

Forbearance To Sue

Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not discharge the surety unless the parties had agreed for such discharge.

Illustration: B owes to C a debt guaranteed by A. The debt becomes payable. However, C does not sue B for a year after the debt has become payable. Despite this forbearance A is not discharged from his surety-ship.

Release Of One Co-surety Does Not Discharge Others

Where there are co-sureties, a release by the creditor of one of them does not discharge the others. Also, the surety released does not become free from his responsibility to the other sureties.

Surety Can Claim His Dues From The Principal Debtor

Once the surety makes the payment or performs the act which the principal debtor has failed to pay/ perform, the surety steps into the shoes of the creditor and he can claim his dues from the principal debtor.

Subrogation is the right of the surety to recover his money from the principal debtor (PD) on settlement of the liabilities of PD with the creditor. Subrogation is the legal doctrine whereby one person takes over the rights or remedies of a creditor against his/her debtor.

Security

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety-ship is made, whether the surety knows of the existence of such security or not.

If the creditor loses such security, then the surety is discharged to the extent of the value of the security.

Misrepresentation Made By The Creditor

Any guarantee obtained by means of misrepresentation made by the creditor is invalid. Any guarantee which the creditor has obtained by keeping silent as to the material circumstance, is also invalid.

Implied Promise By The Principal Debtor To Indemnify The Surety

In every Contract of Guarantee there is an implied promise by the principal debtor to indemnify the surety. The surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee (but no sums which he has paid wrongfully) (Sec. 145).

Co-sureties For The Same Debt

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor (Sec. 146).

Illustration: A, B and C are sureties to D for the sum of Rs. 30,000 lent to E. E makes a default in payment. All of A, B and C are liable between themselves to pay Rs. 10,000 each.

CAIIB Paper 4 (BRBL) Module D Unit 4-Contract Of Bailment

Contract Of Bailment

- **As per Section 148 of the Indian Contracts Act 1872 defines bailment, bailor and bailee.** "A bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.
- **The person delivering the goods is called the "bailor". The person to whom they are delivered is called, the "bailee".**
- The contract of bailment will specify the time for which the goods will remain with the person taking them. Also, the person who gives the goods can direct the other, either to return the goods after the requisite time has expired or, direct him to dispose of the goods in a particular manner.

Essential Features Of Bailment

- **Contract** – There must be a contract between the party who delivers the goods i.e. bailor and the party which receives the goods, i.e. bailee, which may be express or implied.
- **Delivery of Goods** – It is imperative that goods are delivered by one party to another. Delivery may be actual or constructive.

- **Delivery of Possession** – Bailment compulsorily involves the delivery of ‘possession’ of goods from bailor to bailee. Possession involves control and intention to exclude others.
- **Purpose** – There must be delivery of goods from the bailor to the bailee for some purpose and not by mistake.
- **Return of Specific Goods** – In a bailment contract, it is agreed between the bailor and bailee that as soon as the purpose of the contract is achieved, the goods shall be returned or disposed of as per the directions given by the bailor.
- **No Transfer of Ownership**- Goods as has been defined in Section 2(7) of the Sales of Goods Act 1930, includes every kind of movable property only excluding money and actionable claims. Bailment is the delivery of goods alone. In a contract of bailment the possession passes from the bailor to the bailee, the ownership does not. Thus in transactions where money is exchanged for something, there is sale and not bailment since ownership passes to the buyer.

Bailor Bound To Disclose To Bailee

The bailor is bound to disclose to the bailee faults in the goods bailed (Sec. 150):

- **Of which the bailor is aware and**
- **Which materially interfere with the use of them or**
- **Expose the bailee to extraordinary risk**

If bailee does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for any damage whether he was aware of the existence of such faults in the goods bailed or not.

Example: A hires a carriage of B. The carriage is unsafe, though B is not aware of it and A is injured. B is responsible to A for the injury.

Bailee To Take Care Of Goods

- The bailee is bound to take care of the goods bailed to him as he would do for his own goods. The bailee (in the absence of any special contract) is not responsible for the loss, destruction or deterioration of the thing bailed if he takes such care.
- On the other hand, if the bailee does anything different or inconsistent with what was supposed to be done with the goods, the bailor can demand that the bailee must pay the damage suffered as a result of these acts. **A contract of Bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.**

Example: A hires a horse in Mumbai from B to go to Lonavla. A rides with due care but goes to Khandala instead of Lonavla. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

Effects Of Mixing Of Goods And Expenses

- If the bailee (with the consent of the bailor), mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.
- If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods and the goods can be separated or divided, the property in the goods remain with the parties respectively. The bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Example: If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Duties Of The Bailee With Regard To Goods

- It is the duty of the bailee to return the goods bailed as soon as the time, for which those were bailed has expired or the purpose for which they were bailed has been accomplished.
- The bailee is responsible to the bailor for any loss, destruction or deterioration of the goods if the goods are not returned on time.
- In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor any increase or profit which may have arisen from the goods bailed.

Example: A leaves a cow in the custody of B. B agrees to take care of the cow. The cow delivers a calf. B is bound to deliver the calf as well as the cow to A.

Rights of Bailee with Regard to Goods

- The bailor is responsible to the bailee for any loss which the bailee may sustain because of the reason that the bailor was not entitled to make the bailment or to receive back the goods.
- If the bailor has no title to the goods and the bailee, in good faith delivers them to the bailor or according the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.
- If the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Bailee's Lien

If the bailee has rendered any service involving the exercise of labour or skill in respect of the goods bailed to him, he has a right to retain such goods until he receives due remuneration for the services he has rendered.

Example: A delivers a rough diamond to B, a jeweller, to be cut and polished which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

Bankers, factors (financiers who purchase receivables and also offer related services), Attorneys of a High Court and policy brokers can, in the absence of a contract to the contrary, retain any goods bailed to them as a security for a general balance of account. Others do not enjoy such right unless there is express contract to that effect.

CAIIB Paper 4 (BRBL) Module D Unit 5- Contract Of Pledge

Contract Of Pledge

As per Section 172 of the Indian Contract Act 1872 “the bailment of goods as security for payment of a debt or performance of a promise is called ‘pledge’.

The bailor is in this case called ‘pawnor’. The bailee is called ‘pawnee’.

To constitute a valid pledge, there must be:

- A contract in relation to an identified chattel to be delivered to the pledgee as security
- Actual delivery of possession of the identified chattel in pursuance of the contract.

The essential ingredients of a valid pledge are:

- The property pledged should be actually or constructively delivered to the pawnee; and
- Pawnee has only a special property in the pledge while the general property remains with the pawnor and wholly reverts to him on discharge of debt.

The major distinction between a pledge and lien is :-

- In lien there is no power of sale or disposition of the goods whereas in case of pledge there is power to sell on default.
- In the case of a lien, there is no transfer of any interest; the person exercising the lien has only a right to retain the subject matter of lien until he is paid. A lien disappears the moment the possession is lost and there is no right of sale. While in case of pledge, sale can be made in the event of default. Apledge is assignable.

Nature Of Pledge

- If the pawnor makes default in payment of the debt in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor and retain the goods pledged as a security (or) he may sell the goods pledged, after giving notice of the sale to the pawnor.
- If the proceeds of such sale are less than the amount due, in respect of the debt, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.
- Pledge is a type of bailment. The bailee, while he is in possession of the goods, steps into the shoes of the owner for the purpose of legal remedy. Thus, if any person were to deprive the bailee of the goods – by way of theft, etc. – the bailee,

himself, would have the right to file a suit against such other person. If, any damages are received from such a suit, it would be split between the bailor and the bailee, according to the proportion of their losses or damages.

- The pawnee can retain the goods pledged, not only for payment of the debt/interest on the debt but also for all necessary expenses incurred by him in preservation of the goods pledged. (Section 173)
- Where person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest. (Section 179)
- If a third person wrongfully deprives the bailee of the use of possession of goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Pledge Without Actual Possession

Sometimes despite a charge of pledge available to a creditor/bank, it allows the custody of the movable property pledged to remain with the debtor for a special purpose. But this does not vitiate the effectiveness of the pledge.

Example: a cinema projector and accessories were pledged with a bank. The bank allowed the property to remain with the pledgers, Since it was required by the pledger for running his business. However subsequently the pledger sold the equipment. It was held by the Andhra Pradesh High Court that the sale was subject to priority of charge with the pledgee.

Pledge By Pledgee

- Where, under certain circumstances, the pledgee further pledges the movable property pledged, the pledge will be valid only to the extent of the interest of the pledgee, which is equivalent to the amount for which the property has been given to him as security.
- It has been held in the case, that if the pledgee pledges the goods pledged to him for a larger amount, the original pledger will still be entitled to the goods on paying the amount for which he himself pledged the goods.

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CAIIB Paper 4 (BRBL) Module D Unit 6- Contract Of Agency

Contract Of Agency

- A 'Contract of Agency' stems from the need which arises sometimes for a person to employ another person to do an act for him/her or to represent him/her in dealing with third persons.
- **In terms of Section 182 of Indian Contract Act:** "An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "**principal**".
- Contract of agency is created when right is given to a person to represent the principal in dealing with third persons or to do something for the principal.

Essential Characteristics of Contract Of Agency

Principal should be Competent to Contract:

- In terms of Section 183 of the statute "Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent". Moreover whatever a person can do personally he can do through an agent.

Agent should also be Competent to Contract:

- In terms of Section 184 “As between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.”

Consideration for appointment not Necessary:

- No consideration is necessary to create an agency. This is provided in Section 185 of the Act. According to Section 185 “No consideration is necessary to create an agency.”
- Authority given to the Agent may be express or implied. An authority is express when it is given by words oral or written and the authority is said to be implied when it is inferred from the circumstances of the case.

Rules Of Agency

The two important rules of agency are –

- The first rule of agency is that whatever a person can do personally can also be achieved through an agent, subject of course to certain exceptions such as when the act to be performed is personal (e.g. marriage) or official.
- The second rule is that he who does an act through another does it himself. This means the acts of an agent, subject to certain conditions, are acts of the principal. This has also been emphasized by Section 226 of the Act which states “**Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person**”.

Types Of Agents

There are two ways of classifying an agent

- On the basis of extent of their authority.
- On the basis of nature of work performed by them

Classification on the basis of extent of authority

- **Special Agent:** An agent appointed to perform a particular act for the principal or represent the principal in a particular transaction This agent cannot bind the principal in any other matter than that for which he has been appointed.
- **General Agent:** A general agent is one who is authorized to do all acts in respect of a particular line of business, trade or employment. Such authority of the agent generally continues until it is terminated. If the principal wants to restrict the authority of a general agent he may do so but has to put persons dealing with the agent to notice regarding the curtailment. If he does not do so the principal becomes bound by the action of the agent.

- **Universal Agent:** Universal agent is one whose authority to act for the principal is unlimited. He/ she has authority to bind the principal by any act which he/she does, provided the act is legal.

Classification on the basis of nature of work performed

- **Mercantile or Commercial Agent:** A Mercantile agent as defined in Section 2(9) of the Sale of Goods Act 1930, However the definition does not cover all types of mercantile agents such as Factors, Auctioneer, Broker, Commission Agent and Del Credere Agent who are also mercantile agents.
- **Banker:** The relationship between a banker and a customer is basically that of a debtor and creditor for most of the transactions.
- **Non-Mercantile Agent:** These type of agents include solicitors, attorneys, insurance agents, forwarding agents etc.

Duties Of Agents

- To carry out the work undertaken as agent as per the directions given by the principal and in the absence of any special/specific directions, the agent must carry out the work in accordance to the prevailing practices in the line.
- To carry out the work rationally and with care, skill and diligence.
- To render proper accounts to the principal on demand and not cause loss due to misappropriation or fraud.
- To communicate with the principal if he/she faces any difficulty in the discharge of their function and seek instructions.
- To pay to the principal all sums received for him after deducting therefrom all moneys due to himself from the principal or expenses properly incurred by him as well as any remuneration payable to him for acting as agent. (Section 217)
- In **terms of Section 215 of the Indian Contract Act, 1872:** If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.
- To protect and preserve the interest of the principal in case of his/her death or insolvency.
- Not to use information which may come to his knowledge in the course of his function, as an agent, against the principal.
- Not to make undisclosed secret profit from the agency.
- An agent must not set up his own title or that of a third party, to the goods that he receives from the principal. If he does he may become liable for conversion.
- Not to put himself in a position where interest and duty suffer. For example P employed A, a stockbroker, to buy some shares for him. A sold shares belonging

to him to P without disclosing that the shares belonged to him. When the case was referred to a court of law it was held that P could rescind the contract.

- An agent cannot delegate his/her authority and depute another person to do what he has himself undertaken to do. However, sub agent can be appointed in accordance with the provisions contained in the Act.

Rights Of Agents

- **In terms of Section 217** of the statute “An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent”
- **As per Section 219** “In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.”
- In the absence of contract to the contrary, an agent may retain goods, papers etc. whether movable or immovable, belonging to the principal received by him or in his possession until the amount due to him in respect of such goods etc. has been paid or accounted for to him. **(Section 221)**
- An agent is indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him. **(Section 222)**
- The agent has to be compensated for injuries sustained by him due to neglect or want of skill on the part of the principal.

Duties Of Principal

- To indemnify the agent against the consequences of all lawful acts **(section 222)**.
- To indemnify the agent against the consequences of all acts done in good faith **(Section 223)**.
- To indemnify the agent for any injury caused by the principal's neglect **(Section 225)**.

Rights Of Principal

- All duties of the agent, are the rights of the principal such as right to recover damages in case the agent neglects to follow the directions of the principal which causes damage to the principal, to recover secret profits of the agent not disclosed to the principal after obtaining a full account for them, to resist the agent's claim for indemnity against liability incurred under certain circumstances.

CAIIB Paper 4 (BRBL) Unit 7- Meaning and Essentials of a Contract of Sale

Sale of Goods Act 1930

The Sale of Goods Act, 1930, extends to the whole of India.

The Sale of Goods Act is specially enacted to lay down the law relating to the sale and purchase of moveable goods in the country. A contract of sale of goods is a contract under which the seller transfers or agrees to transfer the property in goods to the buyer for a price. When the property in the goods is transferred from the seller to the buyer, the contract is called a sale.

'Goods' means every kind of moveable property (other than actionable claims and money) and includes

- Stock and shares
- Growing crops, grass
- Things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Features of Contract of Sale of Goods

- **Bilateral contract:** A sale involves two persons – The buyer and the seller.
- **Money consideration:** The consideration for a sale of goods must be money, called the price payable for the transfer of goods.
- **Moveable property:** The Sale of Goods Act covers only the sale of moveable goods and not immovable property like land and building. The contracts relating to transfer of immovable property are governed by the Transfer of Property Act
- **No particular form:** The Act does not make it mandatory to enter into written contracts for the sale of goods. However, if any particular law provides for sale of certain types of goods to be done by a contract in writing, then that law has to be complied and the contract has to be in writing

The contract may be oral or written or can be implied by the conduct of the parties. A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer.

The contract may provide for:

- ✓ Immediate delivery of the goods on immediate payment of the price.
- ✓ For the delivery or payment by instalments.
- ✓ Postponement of delivery or payment.

Distinction Between A Sale And An Agreement To Sell

Sale	Agreement to Sell
1. A sale is a contract in which the parties have already performed their part.	1. An agreement to sell is an act in which the parties are yet to perform their mutual promises.
2. In a sale the ownership of goods have already passed, irrespective of whether the goods are delivered or not.	2. In an agreement to sell the ownership of goods is yet to pass from the seller to the buyer at a later date after the fulfilment of certain conditions, as agreed upon by the seller and the buyer.
3. The risk in goods is with the buyer.	3. The risk in goods is still with the seller and passes to the buyer only after the agreement to sell becomes a sale.
4. In a sale, if the seller does not deliver the goods, the buyer can file a suit and demand specific performance and delivery of the goods.	4. In an agreement to sell, if the seller does not deliver the goods, the buyer can only claim damages in a suit and cannot demand the delivery as the sale is not yet concluded.
5. If the buyer does not pay for the goods, the seller can claim, file a suit and demand the price. He also has the right to stop the delivery of goods in transit and he can also resale the goods	5. In an agreement to sell the seller may not part with the goods until he is paid the price. In case he parts with the possession, he can sue for return of goods or payment of price.

CAIIB Paper 4 (BRBL) Module D Unit 8-Conditions And Warranties

Meaning Of Condition And Warranty

- **Under Section 12(1) of the Sale of Goods Act**, “A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty”.
- **Condition:** If the stipulation agreed to between the parties is essential to the main purpose of the contract and is of such a nature that if the stipulation is breached (i.e. violated/not complied) then a party to the agreement would have a right to treat the contract as repudiated (cancelled) then such a stipulation is known as a condition.
- **Warranty:** It is a stipulation collateral to the main purpose of the contract. The breach of such a stipulation gives rise to a claim for damages only. The parties cannot reject the goods and treat the contract as repudiated.

Implied Conditions And Warranties

Implied conditions and warranties are those, which the law interprets to imply to every contract of sale of goods.

Title of the seller:

There is an implied condition on the part of the seller that,

- He has a right to sell the goods (in the case of a sale), or
- He will have a right to sell the goods at the time when the ownership is to pass to the buyer (in the case of an agreement to sell).

Example: A buys a second-hand car from B and pays him. Police takes away the car, as it was a stolen one. A can recover the price paid, from B, as he has violated the implied condition above.

Sale of goods by description

- In the sale of goods by description, there is an implied condition that the goods shall correspond with the description.

Example: A sells certain curtains to B by describing them to be of seventeenth century. Later on B discovers that the curtains are not of the seventeenth century. A can reject the goods and claim back the price.

Sale by sample:

In case of a sale by sample there is an implied condition that the:

- Bulk shall correspond with the sample in quality
- Buyer shall have an opportunity to compare the bulk with the sample
- Goods shall be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination of the sample.

Sale is by sample as well as by description:

- If the sale is by sample as well as by description, the goods must correspond not only to the sample but also to the description given.

Example: A sells to B, 'foreign rape-seed refined oil'. He even shows a sample to B. Afterwards the oil according to the sample is delivered to B. When the oil is delivered to B, he discovers that there is some 'hemp oil' also mixed in it. B can reject the goods because he was delivered as per the sample but the sample and oil itself were not 'foreign rape-seed refined oil' as described by A.

Quiet possession:

- There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

Goods are free from any charge or encumbrance:

- There is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Quality or fitness of goods for any particular purpose:

- There is no implied warranty or condition as to the quality or fitness of goods for any particular purpose except in the following case: If the buyer discloses to the seller the purpose for which he wants the goods and he relies on the seller's skill/judgement and if the goods are in the course of the seller's business to supply, then in such case, there is an implied condition that the goods shall be reasonably fit for such purpose.

Example: A buys a hot water bottle from B. A asked B whether it would hold hot water. B says it is meant to hold hot water only. A's wife is injured as the hot water bottle bursts. B was held liable for breach of implied condition as to the quality or fitness of the hot water bottle.

Caveat Emptor (Buyer beware)

- Caveat means a warning, a caution. According to the doctrine of caveat emptor, the person who buys goods must keep his eyes open, his mind active and be cautious while buying the goods. In other words, the buyer must examine the goods thoroughly
- Later on, if the goods do not serve his purpose or he depends upon his own judgement and he makes a bad choice, he cannot blame the seller for selling him such goods. The Sale of Goods Act also enshrines doctrine by stating that 'There is no implied warranty or condition as to the quality or fitness of goods for any particular purpose' except in specific cases.

CAIIB Paper 4 (BRBL) Module D Unit 9-Unpaid Seller

Introduction

The seller of goods is deemed to be an 'unpaid seller' (Sec. 45 of Sale of Goods Act, 1930)

- When the whole of the price has not been paid or tendered;
- When the payment for the goods is received in the form of a cheque or other negotiable instrument and the same is dishonoured for financial or other reasons.

Here, the term 'seller' includes any person who is in the position of a seller, e.g., an agent of the seller, to whom the bill of lading has been endorsed, or a consignor or agent who has paid for goods to the seller.

Rights Of An Unpaid Seller (Sec. 46)

Unpaid seller's rights against the goods

- Lien on the goods for the price while he is in possession of them.
- In case of insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them.
- A right of resale. If the property in goods has not passed to the buyer, the unpaid seller also has a right of withholding delivery of the goods.

If the property in goods has not passed to the buyer, the unpaid seller also has a right of withholding delivery of the goods.

Unpaid seller's lien (Sec. 47)

The unpaid seller of goods (who is in possession of them), is entitled to retain possession of them until payment of the price is made in the following cases:

- if the goods have been sold without any stipulation as to credit;
- if the goods have been sold on credit, but the term of credit has expired
- if the buyer becomes insolvent.

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the balance goods, unless he makes part delivery under circumstances to show that he would waive the right to lien on all goods.

Termination of lien:

The unpaid seller of goods loses his lien thereon:

- When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods
- When the buyer or his agent lawfully obtains possession of the goods
- By waiver of lien.

Right of stoppage in transit:

- When the buyer becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit. He may retain them until payment of the price.

Duration of transit:

- Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer and the transit ends, when the buyer or his agent takes delivery of them from such carrier or other bailee.
- The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are.

Effect of sub-sale or pledge by buyer (Sec. 53)

- The unpaid seller's right of lien or stoppage in transit is not affected by a further sale or by other disposition of the goods, which the buyer may have made. Exception to this is when any person in good faith and for consideration takes documents of title to goods from a buyer; or transfer of goods is by way of pledge, where right of unpaid seller may get defeated.
- If the goods are of a perishable nature, or if the unpaid seller, who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay the price, resell the goods.
- He can also recover from the original buyer, damages for any loss occasioned by his breach of contract. The buyer is not entitled to any profit which may occur on the resale.

- If the unpaid seller does not give a prior notice of sale to the buyer, then the unpaid seller is not entitled to recover damages from the buyer. On the contrary, the buyer becomes entitled to the profit on a resale.
- If the unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the, 'new' buyer acquires a good title to the goods as against the original buyer, even if no notice of the resale was given to the original buyer.

Unpaid seller's rights against the buyer personally:

- These rights arise out of breach of contract and the seller can file a suit to claim damages, claim the price of goods with interest and he can also repudiate the contract.

CAIIB Paper 4 (BRBL) Module D Unit 10- Definition, Meaning And Nature Of A Partnership

Partnership Act, 1932

- The Partnership Act, 1932 lays down the important provisions relating to partnership contracts. However, the general principles of the Contract Act also continue to apply to the partnership contracts.
- A business can be carried on by a single individual by using his own funds (Sole Proprietorship) or by two or more persons together in which case some of them would bring in money and some of them would use their business skills (Partnership). In the latter type of organization persons agree to share the profits and losses of their venture and it amounts to a contract. The rights and liabilities arising out of such a mode of carrying on business are governed by the Partnership Act.

Meaning And Definition Of Partnership

Section 4 of the Partnership Act, 1932 defines a partnership, partner, firm and firm-name as follows – "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

Thus, Partnership is the result of an agreement between the persons joining together to do some lawful business and

- The contract between the partners may be oral or written.
- The partnership must be formed to carry on some lawful business.
- The business must be carried on to earn and share the profits and returns of the business.
- There must be a mutual relation of 'agency' between the partners. This means that any partner can by his acts bind all the partners of the firm.

Partnership Act, 1932

- **Section 464 of the Companies Act 2013** has prescribed that the number of persons in case of a partnership firm **should not be more than 100**.

- Two partnership firms cannot enter into a partnership though all the partners of two separate firms may join together and form a partnership which would be distinct **from the two firms**.
- A Company being a legal person is an entity distinct from its members and is a 'person' as per Section 4. Hence a Company may enter into a contract of partnership if authorized by its Memorandum of Association.

Essential Characteristics

Agreement between two or more persons:

- At least two persons competent to contract are necessary to form a partnership
- In **terms of Section 5 of the Act**, "The relation of partnership arises from contract and not from status". The contract may be express (oral or written) or implied.
- The agreement may have its own characteristic like being for a fixed period or for a completion of a particular task etc. The partnership being a contract never arises from the operation of law or inheritance. Thus it must have all the characteristics of a valid contract.

Business

- It is imperative that a partnership is formed for carrying on some business. Business has been defined in **Section 2(b) of the act** as "**Business**" includes every trade, occupation and profession. The term business also conveys some actions involving transactions. However, the business being carried out by the persons forming the partnership must be legal.

Profits

- It is also necessary that the object of carrying on the business is to make profits, which may be shared amongst the partners in a definite ratio, as agreed.
- If any person declared as a partner is deprived of a share in the profits, he/she will not be considered as a partner as the motive for carrying on the business, in such an eventuality, is not profit. However, the reverse is not necessarily true as one or more partners may contract out of sharing losses while sharing the profits and it is also possible that all persons sharing profits may not be partners.

Mutual Agency

- Since the business of a partnership firm may be carried out by all the partners or any or few of them acting for all, a partner is both an agent and the principal. Agent, because a partner can bind by his acts the firm /other partners, and principal because a partner is bound by the act of any of the other partners. Thus, a contract of partnership is regarded as an extension of the contract of agency.

Types Of Partnership

Partnership at will (Sec. 7):

- Where no provision is made by a contract between the partners for the duration of their partnership or for the termination of the partnership – the partnership is known as '**partnership at will**'.
- A partnership at will can be dissolved by any partner by giving notice in writing to all the other partners of his intention to dissolve the firm. The firm gets dissolved from the date mentioned in the notice as the date of dissolution and if no date is mentioned, the/firm gets dissolved from the date of the commencement of the notice.

Partnership for a fixed period:

- When two or more persons enter into a partnership agreement for a fixed period of time, it is known as a partnership for a fixed term.
- In such a case, when the fixed period of partnership is over, it comes to an end. However, the partners can continue to carry on the business after the fixed period. In that case, the mutual rights and duties remain absolutely unaffected and the partnership is automatically transformed into a partnership at will.

Particular partnership

- Such partnership is entered into, for completing a particular job or assignment taken up by two or more persons jointly and to share the profits arising there from. Hence, a person may become a partner with another person in particular adventures or undertakings.

Limited Liability Partnership (LLP)

- Limited Liability Partnership Act, 2008 came into effect by way of notification dated 31st March 2009. A LLP is a body corporate and a legal entity separate from its partners.
- The mutual rights and duties of the partners of the LLP and those of the LLP shall be is governed by an agreement between the partners, subject to the provisions of the Act.
- No partner is liable on account of the independent or unauthorized actions of other partners or their misconduct.
- Every partner in a LLP is an agent of the LLP but not of other partners of LLP.
- Every LLP has at least two partners and also has at least two individuals as Designated Partners having Designated Partner Identification Number (DPIN), of whom at least one should be resident in India.
- The Central Government has powers to investigate the affairs of a LLP, if required, by appointment of competent inspector, for the purpose.
- A firm, private company or an unlisted public company is allowed to be converted into a LLP in accordance with the provisions of the act.
- Indian Partnership Act, 1932 is not applicable to LLPs unless as expressly provided in the LLP Act.

- The winding up of LLP may be either voluntary or by the National Company Law Tribunal (NCLT) under certain circumstances, etc.
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CAIIB Paper 4 (BRBL) Module D Unit 11-Relations of Partners to One Another

General Duties of Partners

- Partners are bound to carry on the business of the firm to the greatest common advantage. The partners are responsible to each other for the conduct of the business of the firm.

- A partnership is primarily a contract of 'uberrimae fidei' and Section 9 of the **Indian Partnership Act, 1932** deals with the duty of a partner in this connection, as '**general duties**'.
- In terms of Section 9 "Partners are bound to carry on the business of the firm to greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner, his heir or legal representative."

Duty To Indemnify The Loss Caused By Fraud

- According to Section 10 of the Act "Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm." This duty to indemnify is an absolute one and no partner can contract himself out of it in the agreement.
- The innocent partners while being liable to third parties for the fraud of one of the partners can claim damages from that partner who committed the fraud.
- For example, if a partner commits a fraud upon a customer of the partnership firm for which the firm is held liable then the partnership firm, is entitled to recover from the partner the damages that the firm is required to pay.

Determination Of Rights And Duties Of Partners

- Subject to the provisions of this Act Sec. (11), the mutual rights, and duties of the partners of a firm may be determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing.
- Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, contracts between partners may provide that a partner shall not carry on any business other than that of the firm while he is a partner, the agreement becomes an agreement in '**restraint of trade**'.

The Conduct Of The Business

Section 12 of the Indian Partnership Act sets the rules for conduct of business by partners in a partnership firm.

- Every partner has a right to take part in the conduct of the business (unless he or she is a sleeping partner)
- Every partner is bound to attend diligently to his duties in the conduct of the business
- Any difference arising as to ordinary matters connected with the business can be decided by a majority of the partners and every partner has a right to express his opinion before the matter is decided. However, no change can be made in the nature of the business without the consent of all the partner.
- Every partner has a right to have access to and to inspect and copy any of the books of the firm.

Mutual Rights And Liabilities

As per Section 13 of the Indian Partnership Act 1932 dealing with mutual rights and liabilities of partners “Subject to a contract between the partners-

- A partner is not entitled to receive remuneration for taking part in the conduct of the business.
- The partners are entitled to share equally in the profits earned and liable to contribute equally to the losses made by the firm.
- Where a partner is entitled to interest on the capital subscribed by him such interest is to be paid only out of profits of the firm.
- Interest at 6 per cent on extra amount paid by the partner.
- The firm has to indemnify a partner in respect of payments made and liabilities incurred by him
- In the ordinary and proper conduct of the business, and
- In doing such act in an emergency, for the purpose of protecting the firm from loss
- A partner has to indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.

However, the partners are free to have an understanding/ agreement amongst themselves, e.g. all or some of the partners may be allowed remuneration by way of salary in addition to share profits.

The Property Of The Firm

- The property of the firm includes all rights in property originally brought into the firm or later on acquired by the firm for the purpose of business of the firm and includes also the goodwill of the business.
- Unless the contrary intention appears, the property acquired by the partners from the funds of the partnership business is deemed to be the property of the firm (e.g. the partners had decided to purchase a particular property from the partnership funds and give it to a partner towards his long due remuneration).
- The property of the firm has to be held and used by the partners exclusively for the purposes of the business. However, the partners can decide the use of the property by mutual consent. (Section 14/15)

Profits Earned By Partners

- If a partner derives any profit for himself from any transaction of the firm or from the use of the property/ business connection of the firm/ the firm name, he is bound to pay it to the firm.
- Also, if a partner carries on any business competing with the firm he is bound to pay to the firm all profits made by him in that business. The reason for this is that a partnership is a fiduciary relationship and no partner is entitled to make any personal profit.
- However on the matters stated hereinbefore, the partners are free to have an understanding other than in the manner stated above. However, if they have no specific understanding on these matters, the above applies to them. (Section 16)

Rights And Duties Of Partners (SEC. 17)

- After a change in the partners of a firm the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change.
- Similarly, after the expiry of the term of the firm, if a firm constituted for a fixed term, continues to carry on business, the mutual rights and duties of the partners remain the same as they were before the expiry. Where additional undertakings are carried out where a firm constituted to carry out one or more adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.
- On the matters stated above, the partners are free to have an understanding other than in the manner stated above. However, if they have no specific understanding on these matters, the above applies to them.

CAIIB Paper 4 (BRBL) Module D Unit 12-Relations Of Partners To Third Parties

Partner Is An Agent Of The Firm

- Section 18 of the Act implies that a partner is an agent of the firm for the purpose of the business of the firm. A partner can make the firm liable by his acts, if done in the name of the firm and in the ordinary course of business of the firm.
- However a partner, who contracts in his own name, incurs only a personal liability and the firm is not liable for the contracts entered in to in his personal name.

Implied Authority Of Partner As Agent Of The Firm

Authority

- 'Authority' available to a partner in a firm is actually the capacity in which a partner can bind the firm, through his acts. The authority may be express or implied.
- Where the authority of a partner is conferred on him through an express agreement, it is called express authority. However, on the contrary, where there is no agreement or there is one which is silent about the authority of the partner, then "the act of a partner which is done to carry on, in the usual way, business of the kind, carried on by the firm, binds the firm" and is known to be done under the 'implied authority' of a partner.

This authority has its origin in the principle of agency and is subject to the following:

- **The act carried out by the partner must relate to the firm's normal business and should not be different from it**

- **The act must be done on behalf of the firm or in a manner expressing or implying an intention to bind the firm.**

“In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm, shall be done or executed in the firm name or in any other manner expressing or implying an intention to bind the firm.”

Acts Included In Implied Authority

- Purchasing goods on behalf of the firm
- Selling goods to the clients of the firm
- Receiving repayments in respect of the debt of the firm and giving receipts for them
- Settling accounts with the stakeholders of the firm
- Engaging servants to help in the business
- Borrowing money on behalf of the firm.
- Receiving goods from suppliers to the firm on credit.
- Drawing, Accepting and endorsing negotiable instruments on behalf of the firm.
- Pledging goods of the firm as security for borrowed money
- Employing a solicitor or lawyer to defend an action against the firm in a court of law
- Submitting a dispute pertaining to the business of the firm for arbitration.
- Open a banking account on behalf of the firm
- Compromise or relinquish any claim filed on behalf of the firm
- Withdraw a suit or proceedings filed on behalf of the firm
- Admit a liability in a suit or proceedings in a court of law
- Acquire or dispose or transfer immovable property on behalf of the firm
- Enter into partnership on behalf of the firm.

The aforesaid acts can however be carried out by a partner if a partner has express authority to do so from the other partners.

Extension And Restriction Of Partner's Implied Authority

- The partners in a firm may by mutual agreement amongst themselves, extend or restrict the implied authority of any partner.
- Any act done by a partner on behalf of the firm within his implied authority binds the firm unless the person with whom he is dealing knows the restriction or does not know or believe that partner to be a partner. This has been provided in Section 20.
- Thus a third party is not affected by a secret restriction of the implied authority of a partner of which he does not know about or has no notice about.

Partner's Authority In An Emergency

Whatever may be the powers given to a particular partner, in case of an emergency, a partner has authority to do all acts to protect the firm from loss, as would be done by a person of ordinary prudence in his own case. The firm is bound by such acts. This has been provided in Section 21.

For example: a partner in a firm receives a consignment of fruit in Kolkata on behalf of his firm situated in Chennai and being perishable sells it in Kolkata for a price which was less than that obtaining in Chennai as he was sure that the fruit will not bear the journey. He is not liable as Section 21 protects him.

Mode Of Action To Bind Firm

- In order to bind a firm, the partner must do the activities in the name of the firm and execute the documents on behalf of the firm or in any other manner expressing or implying an intention to bind the firm.
- A person cannot simply sign an agreement in his own name to purchase goods for the firm and say that since he is the partner in a firm XYZ it is implied that the partners are bound to pay for the goods. **For example, he should sign as 'For and on behalf of XYZ'.**
- Every partner is liable jointly with all the other partners and also severally for all acts of the firm done while he is a partner. This is a core principle of partnership business.

Liability Of The Firm For Wrongful Acts Of A Partner

Sec. 26 of the Act stipulate that if a partner commits some wrongful act or omits doing of something in the ordinary course of the business of the firm with or without the authority of other partners and consequently a loss or injury is caused to any third party, the firm is liable thereof to the same extent as the partner.

For example where due to the negligence of the managing partner of a firm the shaft of the mine they operated is not properly guarded and a workman falls and is injured, the firm itself becomes liable.

Liability Of Firm For Misapplication By Partners

Misapplication by a partner is dealt with in Section 27 of the Indian Partnership Act 1932. This section of the statute states "Where -

- A partner acting within his apparent authority receives money or property from a third party and misapplies it or,
- A firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

Holding Out

- Sec. 28 of the Act states that anyone who, by words spoken or written or by conduct, represents himself for knowingly permits himself to be represented to be a partner in a firm is as liable as a partner in that firm to anyone who has on

the faith of any such representation given credit to the firm whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit. This is known as doctrine of holding out.

- Such a stranger is liable individually and personally for the debts of the firm as if he was a partner in the firm on the principle of holding out. However, legal heirs or estate of the deceased partner is not liable to the firm, who uses his name or when the business of the firm is carried on in the old name of the firm, after his death.

Rights Of Transferee Of A Partner's Interest

- A transfer by a partner of his interest in the firm does not entitle the person to whom the interest is transferred (transferee) to interfere in the conduct of the business but entitles the transferee only to receive the share of profits of the transferring partner and the transferee has to accept the account of profits agreed to by the partners.
- On dissolution of firm or cessation of the partnership business, the transferee is entitled to a share in assets of the firm and verification of accounts to ascertain his share.

CAIIB Paper 4 (BRBL) Module D Unit 13- Minor Admitted To The Benefit Of A Partnership

Minor Cannot Be A Partner

- A person who is a minor cannot be a partner in a firm but with the consent of all the partners, he may be admitted to the benefits of partnership (Section 30(1) of the Indian Partnership Act 1932)
- In no circumstances, the minor can be made a party for the liabilities of the firm, i.e. cannot be personally liable for the acts of the firm except to the extent of such minor's share in the partnership (Section 30(3)).
- The minor has a right to share the property and profits of the firm as may be agreed upon by the partners and the minor can have access to the accounts of the firm. only the minor's share is liable for the acts of the firm but the minor is not personally liable for the acts of the firm and the liabilities arising from there.
- The minor may or may not take legal action (by filing suit) against the partners for payment of his share of the property or profits of the firm except when severing (ending) his connection with the firm.
- This is provided in Section 30(4). As per this section "Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48"

- However, all the partners acting together or any partner who is entitled to dissolve the firm by notice to other partners can elect (choose) in such a suit filed by the minor to dissolve the firm. Thereafter, the court proceeds with the suit as a suit for dissolution and for settling accounts between the partners. The share of the minor is then determined along with the shares of the other partners.

Legal Position After The Minor Attains Majority

- Section 30(5) of the Act stipulates that at any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership (whichever date is later) the minor partner who has attained majority may give public notice informing whether he has elected to become a partner or not.
- This notice determines his position as regards the firm. However, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

Where such a person becomes a partner:

- ✓ His rights and liabilities as a minor continue up to the date on which he becomes a partner but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership
- ✓ His share in the property and profits of the firm shall be the share to which he was entitled as a minor.

If such person elects not to become a partner:

- ✓ His rights and liabilities shall continue to be those of a minor up to the date on which he has given public notice that he does not want to become a partner
- ✓ His share shall not be liable for any acts of the firm done after the date of the notice; and
- ✓ He shall be entitled to sue the partners for his share of the property and profits. (Section 30(7))

Retirement Of A Partner

A partner may retire:

- With the consent of all other partners
- In accordance with an express agreement by the partners, or
- Where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

The retiring partner and other partners shall be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before retirement until the public notice is given of the retirement.

A retiring partner is discharged of his liability to a third party for acts of the firm before his retirement if there is an agreement between the third party, the retiring partner and the remaining partners of the reconstituted firm. (Section 32)

Insolvency Of A Partner

- If partner of a firm is adjudicated as an insolvent, he ceases to be partner from the date on which the order of adjudication is made.
- An order of adjudication of a partner may or may not dissolve the firm. If the firm is not dissolved pursuant to a contract upon adjudication of a partner, the estate of a partner so adjudicated is not liable for any act of the firm and firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made. (Section 34)

CAIB Paper 4 (BRBL) Module D Unit 14- Dissolution Of Firm

Dissolution

- When there is a “**Dissolution of a Firm**” there would be termination of the firm and end of business relationship among all the partners.
- When there is a “**Dissolution of a Partnership**” there is only a change in the business relationship among all the partners and the firm continues to run.
- ‘**Dissolution of a firm**’ means that there is a breakdown in the relationship between all the partners in the firm. However where there is a breakdown of relationship or understanding/ faith between a few and not all partners usually allowing the remaining partners to reconstitute the firm, **it is called reconstitution (dissolution) of a partnership.**

Modes of Dissolution

Dissolution by Agreement:

In terms of Section 40 of the Indian Partnership Act 1932, a firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Compulsory Dissolution:

A firm is dissolved:

- if all the partners (except one) are adjudicated insolvent; or
- by the happening of any event which makes it unlawful for the business itself to be carried on or the event makes the business unlawful if it carried on in partnership.
- However, if the partnership firm is carrying on more than one separate businesses, the illegality of one or more does not cause the dissolution of the firm. The firm can continue to carry on its lawful adventures and undertakings. (Section 41)

Dissolution on the Happening of Certain Contingencies

A firm is also dissolved under the statute (Sec. 42) under certain circumstances. To avoid dissolution in these cases, the partners should have expressly agreed/or should expressly agree that the firm shall not be dissolved in these circumstances

- if the partnership is constituted for a fixed term, then by the expiry of that term
- if the partnership is constituted to carry out one or more adventures or undertaking, then by the completion thereof;
- by the death of a partner; and
- by the adjudication of a partner as an insolvent.

Dissolution By The Court

Section 44 of the Act states that on the filing of a suit by a partner, the court may dissolve a firm on any of the following grounds:

- That a partner has become of unsound mind
- That a partner has become permanently incapable of performing his duties as partner.
- That a partner is guilty of conduct which is likely to affect prejudicially the carrying on of the business
- That a partner wilfully or persistently commits breach of agreements in relation to the management of the affairs of the firm or the conduct of its business or it is not reasonably practicable for the other partners to carry on the business in partnership with him because of his conduct with respect to the business
- That a partner has transferred the whole of his interest in the firm to a third party,
- That the business of the firm cannot be carried on except at a loss
- On any other ground which renders it just and equitable that the firm should be dissolved. (Section 44)

Liability For Acts Of Partners Done After Dissolution

- Any or all partner of the firm must give a public notice to the effect that the firm is dissolved.
- This is because even after the dissolution of a firm, the partners continue to be liable to third parties for any act done by any of them, until such public notice is given. This has been provided in **Section 45 of the statute**.

CAIIB Paper 4 (BRBL) Module D Unit 15-Effect of Non-Registration

Registration

- The partners may or may not enter into a partnership deed and may decide to have an oral partnership if they have a strong understanding amongst

themselves. Further, even if a partnership deed is entered into by the partners they may not opt for registration of the partnership firm.

- **However, the Partnership Act casts certain disabilities on a partnership firm that is not registered with the Registrar of Partnership Firms.** Due to this provision which is stated in the Section 69, a majority of the partnership firms decide to register the firm to avoid future hassles and complexities on solving issues amongst the partners as well as with third parties. However, the enforcement of any right to sue, for matters relating to the dissolution of a firm is not affected and can be brought before the Court of Law.

Effect Of Non-registration

The provisions of Sec. 69 states as follows-

- No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
- No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm

The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

- ✓ The enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or
- ✓ The powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (2 of 1909), or the Provincial Insolvency Act, 1920 (5 of 1920), to realize the property of an insolvent partner.

This section shall not apply—

- ✓ To firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56, this Chapter does not apply, or
- ✓ To any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (15 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

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CAIIB Paper 4 (BRBL) Module D Unit 16-Definition And Features of A Company

Definition of A Company

- **Section 3 of the Companies Act, 1956** defined a company as ‘a company formed and registered under this Act, or an existing company’.
- An existing company means a company formed and registered under any of the former Companies Acts. Section 2(20) of the new Companies Act, 2013 similarly defines company as “a company incorporated under the Companies act, 2013 or under any previous company law” which also means that those companies that were incorporated **under Section 3 of the Companies Act, 1956** or any previous Companies Act.

Features Of A Company

Registration:

- A company has to be compulsorily registered under the Companies Act, 2013. Companies registered under Companies Act, 1956 need not re-register.

Artificial Legal Person:

- A company is an artificial legal person which is created by law and can be dissolved by the law alone. It is invisible, intangible and exists only in the eyes of the law. It enjoys many rights of a natural person. A company may enter into contracts in its own name, and it can acquire and dispose of property and can be fined under the provisions of the law for violation of law.
- A company is not a natural citizen like an individual and courts have held that neither the provisions of the Constitution of India nor the provisions of the Citizenship Act apply to a company.

Independent corporate personality

- By incorporation under the Companies Act, 1956/The Companies Act 2013, the company is vested with a corporate personality which is independent of and different from the members who compose it.

Limited liability:

- Limitation of liability is an advantage of incorporation of a company. Since under company law, the existence of a company is different from its own members and directors and a company has its own existence and is itself the owner of its assets and has its own liabilities, the members of the company are not bound to contribute anything more than the nominal value of the shares held by them and their liability ends there even though there may be creditors who may be claiming much larger sums from the company.

Perpetual succession:

- An incorporated company never dies unless wound up as per the applicable law. It is a legal entity with perpetual succession.

Separate property:

- On incorporation the company becomes the owner of its capital and assets. The company is capable of holding property in its own name.

Transfer of shares:

- The Companies Act, 1956 (now ICA 2013) states that shares or other interest of any member in a company shall be moveable property, transferable in the manner provided by the articles of association. A shareholder may sell his shares in the open market and get back his money without changing the capital of the company.

Common Seal:

- As a company is an artificial legal person, it is not capable of signing documents for itself. It acts through natural persons who are the directors appointed by the shareholders of the company. Any document bearing the common seal of the company is legally binding on the company.
- As per the **amendment to Sec. 46 of the Companies Act, 2013**, dealing with issue of share certificates of a Company, the use of common seal has been made optional. All such documents which required affixing the common seal may now instead be signed by two directors or one director and a company secretary of the company.

Corporate veil:

- Although a company is a separate legal entity distinct from shareholders, in reality it is an association of persons who are the beneficial owners of all the corporate property. Hence, it may sometime become necessary to look at the persons who are behind the corporate veil.
- The corporate veil is said to be lifted or pierced when the Court ignores the separate entity of the company and directly concerns itself with the members or directors of the company. Corporate veil is normally ignored and lifted by the Court when the persons managing the company have indulged in to fraudulent, illegal acts or have siphoned off the funds of the company for their own benefit.

Distinction Between A Company And Partnership

Registration:

- Registration of a company is compulsory under the Companies Act, 2013. Registration of a partnership is not compulsory under the Indian Partnership Act, 1932.

Number of members/partners:

As provided under Section 3(1)- A company may be formed for any lawful purpose by—

- ✓ Seven or more persons, where the company to be formed is to be a public company;
- ✓ Two or more persons, where the company to be formed is to be a private company;

Minimum number of two persons is required to form a partnership. The maximum number shall not exceed one hundred

- **Legal status:** A company has a legal existence separate from its own members and is viewed as a separate legal person from its members. A firm does not have a separate legal existence different from its own partners.
- **Ownership of property:** The property of the company is owned by the company itself and not its members as the company has a separate legal existence. The

property of the firm is owned by the by the firm through its partners as a firm does not have a separate legal existence different from its own partners.

- **Management:** The company is managed by a board of directors elected by the shareholders. A partnership is managed by the partners except the dormant and sleeping partners.
- **Perpetual existence:** A company has a perpetual existence. A partnership does not have a perpetual existence and may be dissolved on the happening of certain events or otherwise even with the consent of all partners.
- **Contracts:** A member/shareholder of the company can contract with the company. A partner cannot contract with his/her own partnership firm.
- **Liability:** Except in case of a company with unlimited liability, the liability of the members of the company is limited to their shareholding. The liability of partners in a partnership is unlimited.
- **Transfer:** When shares of a company are transferred to someone, he/she i.e. the transferee becomes a member of the company and the consent of all members is not required to become a member. A person can become a partner in a partnership firm with the consent of all the partners.
- **Death:** The death of any or all members of the company does not determine (end) the existence of the company. Death of a partner dissolves the partnership unless the partnership deed provides otherwise.
- **Agency:** The members of a company are not the agents of each other or of the company. Every partner of a firm is an agent of the firm as well as other partners.

CAIIB Paper 4 (BRBL) Module D Unit 17-Types Of Companies

On the basis of incorporation, companies could be of two types namely -

- Statutory Corporation
- Companies registered under the Companies Act, 1956/2013

Statutory Company: A statutory company is created or incorporated by a special Act passed by either the Central or the State Legislature. It enjoys powers, rights and privileges as laid down in the Act. Hence, the statutory companies are not required to have Memorandum of Association. Although each statutory company is governed by the provisions of the special Act, the Companies Act, 1956/2013 is also applicable to them in so far as the provisions of the Companies Act, are not inconsistent with the provisions of the special Act

Example: Reserve Bank of India incorporated under the Reserve Bank of India Act, 1934.

Registered under the Companies Act, 1956 and also Companies Act, 2013: Such companies are incorporated and registered under the prevailing Companies Act, e.g. Tata Iron and Steel Company Limited is incorporated and registered under the Companies Act prevailing before the enactment of the Companies Act, 1956, i.e. the Companies Act, 1913 etc. and continue as such.

Classifications Of Companies On The Basis Of Liability

Where Companies are classified on the basis of liability, they could be –

- Company limited by shares
- Company limited by guarantee
- Company with unlimited liability

Company limited by shares:

- In such companies there is a provision for 'share capital' divided into a certain number of shares, which forms the source of funds to the Company, and each share has a fixed nominal value also known as the face value which the shareholder is bound to pay either at a the time of allotment or sometimes in instalments.
- The member is not bound to pay anything more than the fixed amount on the share, whatever may be the liabilities in the books of the Company. In other words, the liability of the members of such a company is limited to the extent of amount unpaid on the shares.

Company Limited by Guarantee

- Where the liability of the members of the company is limited by the memorandum of association to such an amount as the members undertake to contribute to the assets of the company in the event of the liquidation of the company, the company is known as a company limited by guarantee.
- In such a company each member promises to pay a fixed sum of money in case of its winding up. The amount is called the guarantee.
- A company limited by guarantee may or may not have a share capital. However, such a company must have articles of association.
- If such a company has a equity share capital then each member is required to pay the amount of the fixed share capital, as in the case of a company limited by shares in addition to the guarantee. Thus the liability is restricted to the amount of the share capital plus the amount of guarantee.

Company with Unlimited Liability

- Where the liability of the members of a company is unlimited it is known as an unlimited company. Every member of such a company is liable without any limit for its debts as in the case of a partnership firm in proportion to his/her interest in the company.
- If such a company has equity share capital, it may be a public company or private company. An unlimited company must have articles of association and it must state the number of members and the share capital (if any) with which it is proposed to be registered.

Classifications Of Companies On The Basis Of Public Interest

On the basis of public interest, companies can be classified as under

- Private company
- Public company
- Government company
- Foreign company
- One Person Company
- Small Company

Private Company: Sec.2 (68) of ICA 2013

A private company is defined under the Section 3 of the Companies Act, 1956 as a company which under its articles of association contains the following restrictions:

- **Transfer of Shares:** If a private company has a share capital it imposes restriction on the right to transfer shares in a manner which restricts the number of members to two hundred.
- **Restricts the number of members to two hundred:** Except in the case of One person Company the maximum number of members of a private company is limited to two hundred excluding the members who were past employees or are the present employees of the company.
- **Issue of Prospectus:** A private company cannot issue a prospectus and cannot invite the public to subscribe for any shares or debentures of the company.
- **Deposits:** A private company prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives. No minimum paid up capital is prescribed for a private company as per the Companies Act, 2013.

Public Company (Sec. 2 (72) of ICA 2013)

- A public company is one which is not a private company. In a public company the number of its members is unlimited. Any seven or more persons can form a public company.
- Generally, the shares of a public company are listed on the stock exchange and thereby the marketability/liquidity of the shares increases. No minimum paid up capital is prescribed for a public company as per Companies Act, 2013.

Government Company (Sec. 2 (72) of ICA 2013)

The Companies Act, 2013 Sec. 2(45) defines a government company as any company in which not less than fifty-one per cent of the paid-up share capital is held by:

- ✓ The Central Government or
- ✓ By any State Government or Governments or
- ✓ Partly by the Central Government and partly by one or more of State Governments and

Includes a company which is a subsidiary of such a government company. In India there are a large number of such companies, two examples being Bharat Heavy Electricals Limited and Hindustan Aeronautics Ltd.

Foreign Company

Foreign Company as per Sec. 2(42) of Indian Companies Act, 2013, means any company or body corporate incorporated outside India which:

- Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- Conducts any business activity in India in any other manner.

One Person Company (OPC) (Sec. 2(62))

- As per provision of section 2(62) of the Companies Act, 2013, “one person company” (OPC) means a company which has only one person as member.
- One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber’s death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles.
- The Companies Act further provides that when the paid up share capital of an One Person Company exceeds Rs. 50 lakh or its average annual turnover exceeds Rs. 2 crore immediately in preceding three consecutive financial years, the OPC shall be required to convert itself, into either private company or public company in accordance with the provision of section 18 of the Act within 6 months of the date as mentioned

Small Company

It means a company, other than a public company,

- **Paid-up share capital** of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- **Turnover** of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.

Holding And Subsidiary Companies

A company is deemed to be a subsidiary of another if:

- That other company controls the majority composition of its board of directors with the sole object of controlling its management.
- That other company holds the majority of its shares.

If the holding company’s subsidiary has its own subsidiary; it becomes the subsidiary of the first mentioned company (i.e. the first holding company).

Thus, for example, company B is a subsidiary of company A and company C is a subsidiary of company B then company C is a subsidiary of company A also.

Difference Between A Private Company And A Public Company

- A private company can have only two members and two directors. A public company has to have a minimum of seven members and three directors.
- A private company need not obtain a certificate of commencement of business from the Registrar of Companies which a public company has to obtain. A Private Company has to only get the certificate of incorporation.
- A private company need not hold a statutory meeting and submit a statutory report to the Registrar of Companies while a public company has to do so.
- Certain provisions of the Companies Act, with respect to requirements of appointment and remuneration payable to the directors applicable to a public company are not applicable to a private company.
- Certain provisions of the Companies Act, with respect to annual general meetings of a company are not applicable to a private company.
- Restrictions on the powers of the Board of Directors under Section 293 of the Companies Act, 1956 (Sec. 180 of ICA 2013) which stipulate that certain powers cannot be exercised by the Board of Directors except without with the consent of the shareholders of a company in a general meeting, are not applicable to a private company.

CAIIB Paper 4 (BRBL) Module D Unit 18-Memorandum of Association And Articles of Association

Memorandum Of Association

As per Section 4(1) “The memorandum of a company shall state—

- **The name of the company** with the last word—Limited in the case of a public limited company, or the last words—Private Limited in the case of a private limited company
- **The State in which the registered office of the company is to be situated**
- **The objects for which the company is proposed to be incorporated and any matter considered necessary**
- **The liability of members of the company, whether limited or unlimited etc.**

It is thus a document of great significance as it embodies the fundamental rules regarding the constitution and scope of activities of a company. The purpose is to enable the creditors and those who deal with the company to know the permitted scope of its activities.

Name Clause

- A company is a legal person and hence it must have a name to be identified. A company cannot have a name which in the opinion of Central Government is undesirable. A name is undesirable when it is identical with or too nearly resembles the name of another company.

- If the company is with limited liability the last word of the name should be “limited” and in case of a private company the last words should be “private limited”.
- However, the Central Government has powers to permit by licence a company not to use the words private limited or limited as the case may be, if the company is formed for promotion of arts, commerce, science, religion, charity or any other useful objective and the company intends to apply its income, if any, in promoting its objects and to prohibit the payment of any dividend to its members.

Registered office clause

- This clause must mention the name of the State in which the registered office of the company is situated. It is to be noted that the address of the registered office is not to be mentioned. Only the name of the State is required to be mentioned.
- A company shall from the date on which it commences business or within thirty days after the date of incorporation, whichever is earlier, have a registered office to which all the communications and notices may be addressed.
- Notice of the situation of the registered office and of every change therein is to be given within thirty days after the date of incorporation of the company or after the date of the change as the case may be to the registrar of companies who shall record the same.

Objective clause

- It should clearly state the objectives for which the company is established (incorporated) and the nature of business it can undertake/carry on.
- Choice of the objectives is left with the subscribers to the memorandum of association who incorporate the company. Although the ownership of the corporate capital is vested in the company itself, in reality the capital is contributed by the shareholders. It is therefore very essential that the objectives of the proposed company must be intimated to the shareholders so that they can decide in which business areas they want to invest their money.
- A company can have any lawful objectives. This means that a company cannot have objectives to carry on activities prohibited under the law.
- The objectives clause, of the memorandum of association of a company are to be classified and stated under two sub-clauses as '**main clause**' and '**other objectives**'.
- The **Main Objectives clause** must contain the main objectives which are to be pursued by the company immediately on incorporation and objectives which are incidental or ancillary to the attainment of the main objectives of the company. The **Other Objectives clause** must contain other objectives which are not included in the above clause.

Liability Clause

- If the company is to be incorporated with limited liability the liability clause must state that the liability of the members shall be limited by the unpaid amount on shares.

Capital clause

- In case of companies having a share capital this clause must state that the amount of share capital which the company will be authorized to raise and the number and the value of shares into which it is divided.

Association or subscription clause

- The memorandum of association concludes with a declaration of the subscription that the persons who have subscribed their signatures intend to form themselves into an association in accordance with the Memorandum of Association.

Articles Of Association

- The Articles of Association, is the second important document of a company and is described in Section 5 of the Companies Act 2013.
- It consists of a set of rules/regulations and bye laws made by the company for internal management of the company and for carrying out the objects of the company embodied in its Memorandum of Association.
- As per Section 5(5) "Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed"

EFFECT OF MEMORANDUM AND ARTICLES

- As per Section 10 of the Companies Act 2013, Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.
- All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

Distinction Between MOA And AOA

- The memorandum of association contains the fundamental activities (objects) for which the company is incorporated. The conditions are introduced for the benefit of the creditors, the shareholders, and the outside public. The articles of association are the internal regulations of the company and they provide the manner in which the company will be managed.
- The memorandum of association is a dominant instrument as it states the purposes of the company and the reasons for which it has come into existence. The articles of association are always held to be subordinate to the memorandum of association because the articles of association are merely the internal

regulations of the company while the memorandum of association states the objects of the company beyond which the company cannot go. Clauses in the memorandum of association (e.g. change of registered office in another State or the objects clause) can be altered only by a special resolution passed by the company and with the approval of the Central Government. Any terms of the articles of association can be altered by a special resolution and no approvals are required from the Central Government or any other authority.

- If a company commits an act in contravention of the memorandum of association (e.g. a company having objects only to manufacture biscuits starts activities of bottling of milk without proper amendments in the objects clause) then the acts done and liabilities arising there from are not binding on the company and the same cannot be ratified by the company. If a company does something in contravention of the provisions of its articles of association, it is only a procedural irregularity and the same can be ratified by the shareholders at a general meeting and thus rectified.

CAIIB Paper 4 (BRBL) Module D Unit 19-Doctrines Of Ultra Vires/ Constructive Notice/ Indoor Management

Doctrine Of Ultra Vires

- The Doctrine of Ultra Vires is a fundamental rule of Company Law. It states that the objects of a company, as specified in its Memorandum of Association, can be departed from only to the extent permitted by the Act.
- When a company exercises its powers to promote and/or realize any of its objectives stated in the memorandum of association, it is intra vires (i.e. within the powers of) the company. However, any other act of the company which is outside the scope of the objects clause of the memorandum of association is known as ultra vires (i.e. beyond the powers of) the company. The company cannot sue on an ultra vires transaction. Further, it cannot be sued too.

Effects Of Ultra Vires Transactions

- An ultra vires transaction is void ab initio and therefore cannot become intra vires by reason of ratification. No company can be held liable for obligations arising out of such a contract.
- If lending done by the company is ultra vires then the company is entitled to recover the money from the debtors because the debtors cannot say that the company had no power to lend.
- If the rendering of a particular service by the company is ultra vires the company is entitled to recover the charges for such services. If the property of the company is delivered to an outsider through an ultra vires act, the company can get back the property if such property can be traced.

- If the company borrows money from a lender beyond the limits which it is permitted to borrow, such borrowing would be ultra vires and the company may not be held to be liable for the same unless the money has been used for the purposes of the company.
- However, the lender can trace the assets created out of such borrowing and can proceed against those assets for recovery of the money due to him. This is popularly known as 'Doctrine of Tracing' which is well recognized by Foreign Courts as well as Indian Courts.
- If a company's money has been spent ultra vires in purchasing any property the company is entitled to the ownership of such a property because that asset though wrongly acquired represents the capital of the company.
- If a director of a company makes an ultra vires payment, he is personally liable to the company and he can be compelled to refund the money. In the case of deliberate misapplication, criminal action can also be taken for fraud.
- Directors are the agents of the company. Hence, they must act within the limits of the powers of the company. If they induce (however innocently) an outsider to contract with the company in a matter in which the company does not have power to act, they will be personally liable to such an outsider for his loss provided that the outsider had no knowledge of the fact that the act was ultra vires the company.

Constructive Notice of Memorandum of Association And Articles of Association

- The memorandum of association and articles of association of a company are registered with the Registrar of Companies at the time of incorporation. As the office of the registrar of companies is a public office, they become public documents. Hence, the act expressly guarantees the right of inspection of these documents to all. It is therefore the duty of every person who deals with a company to inspect its public documents. However, whether a person has actually read them or not he shall be in the same position as if he had read them.
- In other words, he will be presumed to have knowledge of the contents of these documents and to have understood them according to their proper meaning. This kind of presumed notice is known as constructive notice. This is known as the doctrine of constructive notice.

Effect Of The Doctrine Of Constructive Notice

- He who deals with the company is deemed to have notice of the public documents whether he has actually seen them or not.
- A person dealing with the company is not only deemed to have notice but is also presumed to have read those documents and to have understood not only the company's powers but also of its officers.

- The doctrine of constructive notice is of a negative nature in the sense that it stops a person from contending (arguing) that he had no notice of the contents of the public documents.
- In companies law the doctrine of constructive notice is a doctrine where all persons dealing with a Company are deemed (or “construed”) to have knowledge of the company’s articles of association and memorandum of association.

Doctrine Of Indoor Management

- A person who deals with the company is deemed to have read and understood the registered public documents such as the memorandum of association and articles of association, etc., to see that his contract with the company is not inconsistent with them. But he is not bound to inquire into the regularity of the company’s internal functioning or the internal management of the company. Hence, if his contract is consistent with the public documents, the company is bound by such contract. He will not be affected by any irregularity in the internal management of the company. This is known as the doctrine of indoor management.
- Doctrine of indoor management protects outsiders dealing with the company.

Exceptions to Doctrine Of Indoor Management

- **Knowledge of internal irregularity:** Where a person dealing with the company has actual knowledge of the internal irregularity of the company he is not entitled to claim protection of this doctrine because he could have taken measures For self-protection.
- **Acts outside apparent authority of an officer of company:** Finally, if an officer of the company makes a contract with an outsider and if the act of the officer falls outside the apparent authority of an officer, then the company is not bound by such a contract.

CAIB Paper 4 (BRBL) Module D Unit 20-Membership of Company

Member Of A Company

According to Section 2 (55) of the Companies Act, 2013, the term member of a company means:

- The subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company and on its registration shall be entered as member in its register of members
- Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members
- Every person holding shares of the company and whose name is entered as beneficial owner in the records of the depository.

Various Modes Of Becoming A Member Of A Company

- **By Subscribing to Memorandum of Association:** The Companies Act, 1956 and The Companies Act, 2013 provides that a subscriber of the memorandum of association shall be deemed to have agreed to become a member of the company.
- **Membership by Allotment of Shares:** A person may become a shareholder if he agrees to take shares in the company by allotment.
- **Transfer of Shares:** If a person buys shares of a company in the open market and then applies to the company to register him as a member, he becomes a member on registration of his name
- **Transmission of Shares:** On a death of a member, if the member has not made a nomination for the shares then the surviving joint holder (if any) or his legal representatives have the right to register themselves as members.
- **Membership by Acquiescence:** A person is deemed to become a member of a company if he allows his name to be put on the register of the members or otherwise holds himself out as a member even if there is no agreement to become a member.
- **Joint Membership:** When two or more persons hold shares in a company in their joint names, it is called a joint membership. In such a case the name of the member appearing first is considered to be the main member for the purpose of sending notices, dividend, etc.
- **Beneficial Owner in the Records of Depository:** Every person holding shares of the company and whose name is entered as a beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

Who Can Be Members Of A Company?

- **Any Person competent to contract:** The Companies Act, 1956 (now ICA 2013) has not prescribed any qualifications for acquiring membership of a company. Hence, every person who is competent to contract can become a member of a company. It, therefore, follows that a person who is incapable of entering into a contract cannot be a member.
- **Minor and persons of unsound mind:** Under the Indian Contract Act, 1872 minors and persons of unsound mind are incompetent at law to contract. Hence such persons cannot become members of a company. However, if a minor has by mistake been recorded as a member of the company, the company and the minor have a right to rescind the transaction and remove the name from the register of members. However, if a minor has been allotted shares and his name is entered into the register of members he incurs no liability during minority.
- **Company as a member:** As a company is a legal person it can become a member of another company provided it is so authorized by its memorandum of association. A company cannot buy its own shares and become a member of it
- **Partnership firm:** Since a partnership firm is not a legal person it cannot buy any shares in its own name and thus become a member of a company. The shares have to be bought only in the name of the individual partners of the partnership

firm even though such shares constitute a part of the assets of the partnership firm.

- **Registered society:** A society registered under the Societies Registration Act, 1860 can hold shares in a company
- **Non-residents:** A non-resident cannot become a member of a company without complying with the requirements of the Foreign Exchange Management Act, 1999.
- **Fictitious Persons:** The Companies Act provides that any person who: (i) makes in a fictitious name an application to a company for acquiring or subscribing shares therein, or (ii) otherwise induces a company to allot, or register any transfer of shares to him or any other person in a fictitious name, shall be punishable with imprisonment for a term which may extend to five years.
- **Limited Liability Partnership:** A LLP, being an incorporated body under the statute, can become a member of a company.
- **Insolvent Person:** An insolvent person may remain a member of a company as long as he is on the register of members. He is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver.

Cessation Of Membership In A Company

- If a member transfers his shares to another person.
- If a member's shares are forfeited.
- If the shares are sold pursuant to a decree of a Court.
- If the member surrenders his shares to the company where such surrender is permitted.
- If he rescinds the contract to take the shares, e.g. on the ground of misrepresentation in the prospectus.
- If a member is adjudicated insolvent
- On the death of a member
- If redeemable preference shares are redeemed.
- If the company is being wound up.

Register Of Members

In terms of Section 88 of the Companies Act 2013

Every company shall keep and maintain the following registers

- ✓ Register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India
 - ✓ Register of debenture-holders
 - ✓ Register of any other security holders.
- Every register maintained under sub-section (1) shall include an index of the names included therein.

- The register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.
- A company may, if so authorized by its articles, keep in any country outside India, in such manner as may be prescribed, a part of the register referred to in sub-section (1), called "foreign register" containing the names and particulars of the members, debenture-holders, other security holders or beneficial owners residing outside India.
- If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2), the **company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.**

The Companies Act provides that every company shall keep a register of its members and enter following particulars:

- ✓ The name and address, and the occupation, if any, of each member
- ✓ In the case of a company having a share capital, the shares held by each member
- ✓ The date at which each person was entered in the register as a member
- ✓ The date at which any person ceased to be a member.

A company may, after giving not less than seven days previous notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members or the register of debenture holders for any period not exceeding in the aggregate forty-five days in each year.

Place Of Keeping And Inspection Of Register Of Members

The register of members is to be kept at the registered office of the company. It may be kept at any other place within the city, town or village in which the registered office is situated, if:

- Such other place has been approved for this purpose by a special resolution passed by the company in general meeting and
- The Registrar of Companies has been given in advance a copy of the proposed special resolution.

The registers are to be open during business hours to the inspection of any member or debenture holder without fee. Any other person has to pay a fee.

The liability of a member of a company depends upon the nature of the company.

- **Unlimited Liability Company:** The member is liable in full for all the debts of the company contracted during the period of his membership.
- **Company Limited by Guarantee:** The member is liable to contribute a sum of money agreed and specified in the liability clause of memorandum of association in the event of being wound up.

- **Company Limited by Shares:** The member is liable to pay the full nominal value of the shares and the liability of the member ends there. However, if the member has paid only a part of the amount of the shares then his liability is limited to the unpaid amount on the shares in respect of which he is a member.

Rights Of Members

Statutory Rights:

These are the rights conferred by the Companies Act. These rights cannot be taken away or modified by the memorandum of association or the articles of association.

- Priority to have new shares offered, in case the company proposes to increase capital.
- To receive notice of meetings, attend and vote at meetings.
- Transfer shares
- Receive copies of annual accounts of the company.
- To inspect the register of members, register of debenture holders and copies of annual returns.
- To apply to National Company Law Tribunal (NCLT), for calling an annual general meeting if the board of directors fails to call such a meeting.
- To convene an extraordinary general meeting of the company.
- Appoint the directors and auditors at the general meetings of the company.
- To approach the NCLT to order an investigation into the affairs of the company.

Documentary Rights

- These rights are conferred upon the members by the memorandum of association and the articles of association of the company.

Proprietary Rights:

- To be registered as a member in the company's register of members.
- No personal liability of a company's debts.
- To receive dividends (if declared by the board of directors and approved by the members at AGM).
- To participate in the distribution of assets in case of liquidation of the company.

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CAIIB Paper 4 (BRBL) Module D Unit 21-Prospectus

Prospectus

The Companies Act, 2013 {Sec. 2(70)} defines a prospectus as any document described or issued as a prospectus and includes a red herring prospectus (Sec. 32) or shelf prospectus (Sec. 31) or any notice, circular, advertisement or other document inviting offers from the public for subscription or purchase of any securities of a body corporate.

As per Section 32

- A company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus.
- A company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.
- A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.
- Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

Red herring prospectus

- Means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. **Shelf prospectus** means a prospectus in which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

In the following cases, even though shares are offered to the public, issue of prospectus is not required:

- When a person is invited to enter into an underwriting agreement/arrangement to purchase/subscribe the shares.
- When the shares are offered only to the existing shareholders or debenture-holders of the company.
- When the shares or debentures offered are, in all respects, uniform with the shares or debentures previously issued and listed on a recognized stock exchange.

Compliance With Respect To Prospectus

- **Time of issue of Prospectus:** A prospectus can be issued only after the incorporation of the company.
- **Contents of the Prospectus:** Section 26 of the Companies Act, 2013 stipulates the mandatory provisions that are to be stated in the prospectus.
- **Date of publication:** It is stated that a prospectus must be dated and this ensures a prima facie evidence of the date of its publication.
- **Signature of every director on the Prospectus:** A prospectus must be signed by every person mentioned therein as a director or proposed to be a director.
- **Application form with a Prospectus:** Every application form for shares must be accompanied by a copy of the prospectus except for the application forms issued to underwriters and existing shareholders and debenture holders.
- **Statements by Expert in Prospectus:** A prospectus, including a statement purporting to be made by an expert, cannot be issued unless he has given his written consent to the issue thereof and he has not withdrawn such consent before the delivery of a copy of the prospectus for registration to the Registrar of Companies
- **Registration of the Prospectus:** Before the issue of a prospectus the same must be delivered to the Registrar of Companies for registration with the documents. No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar.

Misstatements In A Prospectus And Remedies

A person who has been induced to subscribe for shares or debentures on the faith of a statement in a prospectus which is untrue has a twofold remedy:

- **Remedy against the company**
- **Remedy against the promoters and experts** who were responsible for the issue of the prospectus. The liability can be civil or criminal.

Civil Liability

Remedies against the Company: If there are untrue statements or misstatements or omissions in a prospectus which have induced any shareholder or debenture holder to buy shares or debentures respectively, the person has two fold remedies:

- ✓ Rescind the contract
- ✓ Claim damages from the company whether the statement is a fraudulent one or innocent one.

Claim remedies against the promoters and experts: who were responsible for or associated with the issue of the prospectus. A suit for damages can be filed for misstatements in the prospectus

Criminal Liability

- It is required that certain matters and reports must be stated in the prospectus. Failure to do so will render the director or any other person responsible for the issue of such prospectus to be punished with fine.
- Section 34 provides that if prospectus contains an untrue statement, every person who is responsible for the untrue statement in the prospectus shall be punishable with a fine or imprisonment or with both.

CAIIB Paper 4 (BRBL) Module D Unit 22-Directors

Introduction

- The board of directors control the day-to-day working and management of the company as well as the long-term strategic planning of the company.
- No body corporate, association or firm can be appointed as director of a company, and only an individual can be appointed

Minimum Number Of Directors

As per Sec. 149 of ICA, 2013 every company must have:

- A minimum number of **three directors in the case of a public company, two directors in the case of a private company**, and one director in the case of a One Person Company; and
- A **maximum of fifteen directors**
- Provided that a company may appoint more than fifteen directors after passing a special resolution: Provided further that such class or classes of companies as may be prescribed, shall have at least one-woman director.

Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

Independent Director

Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

'Independent director' has been elaborately defined in Section 149 as "An independent director in relation to a company, means a director other than managing director or a whole-time director or a nominee director,—

- Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience
- Who is or was not a promoter of the company or its holding, subsidiary or associate company; and who is not related to promoters or directors in the company, its holding, subsidiary or associate company
- Who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed, with the company, during the two immediately preceding financial years or during the current financial year.

None of whose relatives—

- Is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year: Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed.
- Is indebted to the company, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;
- Has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or
- Has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii)

Who, neither himself nor any of his relatives-

- Holds or has held the position of a key managerial personnel or is or has been employee of the company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed.
- Is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed,

- Holds together with his relatives two per cent. or more of the total voting power of the company
- Is a Chief Executive or director, of any non-profit organization that receives twenty-five per cent. or more of its receipts from the company, or that holds two per cent. or more of the total voting power of the company; or
- Who possesses such other qualifications as may be prescribed

Appointment Of Directors And Proportion Of Those Who Are To Retire By Rotation

The provisions for appointment of Directors is found in Section 152 of the Companies Act 2013.

- Where no provision is made in the articles of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed
- No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number
- A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within thirty days of his appointment in such manner as may be prescribed
- Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall—
 - ✓ Be persons whose period of office is liable to determination by retirement of directors by rotation; and
 - ✓ Save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation.

The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

Right Of Persons Other Than Retiring Directors To Stand For Directorship

- Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with such fees.

- The Central Government shall, within one month from the receipt of the application, allot a Director Identification Number to an applicant.
- Any person is eligible for appointment to the office of director at any general meeting, if not less than fourteen days before the meeting, he himself or some other member intends to propose that person be appointed as a director, gives a signed notice in writing to the company signifying that person's candidature for the office of director along with a deposit of one lakh rupees, which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty- five per cent. of total valid votes cast either on show of hands or on poll on such resolution.

Additional Director

- The board of directors can appoint directors by passing a resolution if such a power exists in the articles. Such directors are known as additional directors and they hold office only up to the date of the next annual general meeting of the company.

Whole-time Director

- A "whole-time director" includes a director in the whole-time employment of the company. No company can appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time: Provided that no re-appointment shall be made earlier than one year before the expiry of his term.

Qualification Shares

- A director is required to hold certain shares as qualification shares if such requirement is there in the articles of association of the company. This requirement is not applicable to a private company, unless it is a subsidiary of a public company.

Maximum Number Of Directorships

- No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten. The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

Vacation Of Office By Directors

In terms of Sec. 167 of Indian Companies Act, 2013, the office of a director shall become vacant in case:

- He incurs any of the disqualifications as specified in Sec. 164
- He absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board

- He acts in contravention of the provisions of Sec. 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested
- He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of Sec. 184
- He becomes disqualified by an order of a court or the Tribunal
- He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months.
- He is removed in pursuance of the provisions of this Act
- He, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

Restrictions On Powers Of Board

The board of directors of a public company, or of a private company which is a subsidiary of a public company can exercise the following powers only after a resolution is passed to that effect by the shareholders of the company in general meeting:

- Dispose of any undertaking of the company
- Remit or give time for repayment of, any debt due by a director
- Invest, otherwise than in trust securities, the amount of compensation received by the company in respect of the compulsory acquisition
- Borrow moneys in excess of aggregate of the paid-up capital of the company and its free reserves
- Contribute to charitable and other funds not directly relating to the business of the company or the welfare of its employees an amount more than Rs. 50 thousand or five per cent of its average net profits during the three immediately preceding, financial years whichever is greater.

Loan To Director

- No company shall, directly or indirectly, advance any loan to its Directors or any other person in whom the Director is interested, or give any guarantee or provide any security in connection with a loan taken by the Director or any other person in whom the director is interested.
- However, any loan or guarantee given by a company to its wholly owned subsidiary, or a guarantee extended to its subsidiary are exempted provided certain conditions stipulated in Section 186 of the Act are complied.

Alternate Director

- The Board of Directors, can appoint an alternate director to act for a director ('the original director') during the original director's absence for a period of not less than three months from India in which meetings of the board are ordinarily held if the articles or a shareholder's resolution have authorized the directors to make such appointments.

- The alternate director vacates the office when the original director returns or when the term of office of the original director expires.

CAIIB Paper 4 (BRBL) Module D Unit 23-Limited Liability Partnership Act, 2008

LLP

A limited liability partnership firm is a body corporate which has its existence separate from the partners of the firm and has certain characteristics which are similar to that which a company constituted under the Companies Act 2013 has.

These characteristics are available in Section 3 of the LLP Act 2008. As per Section 3

- A limited liability partnership is a body corporate formed and incorporated under this Act and is a Legal entity separate from that of its partners.
- A limited liability partnership shall have perpetual succession.
- Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.

Partner / Designated Partner

According to Section 6

- Every limited liability partnership shall have at least two partners.
- If at any time the number of partners of a limited liability partnership is reduced below two and the limited liability partnership carries on business for more than six months while the number is so reduced, the person, who is the only partner of the limited liability partnership during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the limited liability partnership incurred during that period.

Designated partners' required to be identified in each Limited Liability Partnership Firm as per Section 7.

- Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India.
- If the incorporation document specifies who are to be designated partners, such persons shall be designated partners on incorporation

An individual shall not become a designated partner in any limited liability partnership unless he has given his prior consent to act as such to the limited liability partnership in such form and manner as may be prescribed.

- Every limited liability partnership shall file with the registrar the particulars of every individual who has given his consent to act as designated partner in such form and manner as may be prescribed **within thirty days** of his appointment.

- An individual eligible to be a designated partner shall satisfy such conditions and requirements as may be prescribed.
- Every designated partner of a limited liability partnership shall obtain a Designated Partner Identification Number (DPIN) from the Central Government and the provisions of sections 153 to 159 (both inclusive) of the Companies Act, 2013 (18 of 2013)] shall apply.

Liabilities Of And Changes In Designated Partners

The responsibilities/ liabilities of the designated Partner have been detailed in Section 8. A designated partner shall be—

- Responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership in respect of compliance of the provisions of this Act including filing of any document, return, statement.
- Liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

As per Section 9 a **limited liability partnership may appoint a designated partner within thirty days of a vacancy** arising for any reason.

Incorporation Document

Section 11 states: for a limited liability partnership to be incorporated,—

- Two or more persons associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document
- The incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the registered office of the limited liability partnership is to be situated.
- There shall be filed along with the incorporation document, a statement in the prescribed form, made by either an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the limited liability partnership

The incorporation document shall—

- ✓ Be in a form as may be prescribed
- ✓ State the name of the limited liability partnership
- ✓ State the proposed business of the limited liability partnership;
- ✓ State the address of the registered office of the limited liability partnership
- ✓ State the name and address of each of the persons who are to be partners of the limited liability partnership on incorporation
- ✓ State the name and address of the persons who are to be designated partners of the limited liability partnership on incorporation

If a person makes a statement which he— (a) Knows to be false; or (b) Does not believe to be true, shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees.

Registration

When the requirements have been complied with, the Registrar shall retain the incorporation document and, unless the requirement has not been complied with, he shall, within a period of fourteen days—

- Register the incorporation document
- Give a certificate that the limited liability partnership is incorporated by the name specified therein.
- The Registrar may accept the statement delivered under section 11 as sufficient evidence that the requirement imposed by clause (a) of that sub-section has been complied with
- The certificate issued shall be signed by the Registrar and authenticated by his official seal.
- The certificate shall be conclusive evidence that the limited liability partnership is incorporated by the name specified therein

Effect Of Registration

As per Section 14 of the statute On registration, a limited liability partnership shall, by its name, be capable of—

- Suing and being sued
- Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible
- Having a common seal, if it decides to have one; and
- Doing and suffering such other acts and things as bodies corporate may lawfully do and suffer

Cessation of partnership

As per Section 24

- A person may cease to be a partner of a limited liability partnership in accordance with an agreement with the other partners or, by giving a notice in writing of not less than thirty days to the other partners of his intention to resign as partner.
- A person shall cease to be a partner of a limited liability partnership—
 - ✓ On his death or dissolution of the limited liability partnership;
 - ✓ If he is declared to be of unsound mind by a competent court;
 - ✓ If he has applied to be adjudged as an insolvent or declared as an insolvent.
- The cessation of a partner from the limited liability partnership does not by itself discharge the partner from any obligation to the limited liability partnership or to the other partners or to any other person which he incurred while being a partner.

- Where a partner of a limited liability partnership ceases to be a partner, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from LLP:-
 - ✓ An amount equal to the capital contribution of the former partner actually made to the limited liability partnership
 - ✓ His right to share in the accumulated profits of the limited liability partnership, after the deduction of accumulated losses of the limited liability partnership, determined as at the date the former partner ceased to be a partner.

CAIIB Paper 4 (BRBL) Module D Unit 24-Transfer of Property Act, 1882

Sale of Immoveable Property

- Section 54 of the Transfer of Property Act defines sale as “Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised”.
- The sale of tangible immoveable property for a consideration exceeding Rs. 100/- can be made only by a registered instrument.
- Delivery of tangible immoveable property takes place when the seller places the buyer (or such person as directed by the buyer) in possession of the property.

Mortgage of Immoveable Property

- A mortgage is the transfer of an interest in specific immoveable property to secure the payment of money given by way of loan or to secure the performance of an engagement which may give rise to a pecuniary (monetary) liability.
- The transferor is called a mortgagor. The transferee is called a mortgagee. The principal money and interest secured is called the mortgage-money. The instrument (if any) by which the transfer is effected is called a mortgage-deed. (Section 58a)

Simple Mortgage

According to Section 58(b) of the Transfer of Property Act, a simple mortgage is a transaction whereby, ‘without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold by a decree of the Court in a suit and the proceeds of the sale to be applied so far as may be necessary in payment of the mortgage money.’

Features of simple mortgage

- The mortgagor does not deliver possession of the mortgaged property to the mortgagee.
- The mortgagor binds himself personally to pay the mortgage money.

The mortgagor agrees that in the event of his failing to pay according to his contract, the mortgagee shall have a right to get the mortgaged property sold and recover his dues.

Mortgage by way of conditional sale

As per Section 58(c) of the Transfer of Property Act, a mortgage by way of a conditional sale of the property is a transaction whereby the mortgagor ostensibly sells the mortgaged property on the condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute, or on such payment being made the sale shall become void

Essential features

- The sale is ostensible and not real.
- If the money is not repaid on the agreed date, the ostensible sale will become absolute upon the mortgagee applying to the Court and getting a decree in his favour.
- On such payment being made the sale shall become void, or the buyer (mortgagee) shall transfer the property to the seller (mortgagor).

Usufructuary mortgage

According to Section 58(d) of the Transfer of Property Act, 'a **Usufructuary mortgage**' is a transaction in which

- The mortgagor delivers possession or expressly, or by implication binds himself to deliver possession of the mortgaged property to the mortgagee; and
- Authorises the mortgagee to retain such possession until payment of the mortgage money and
- To receive the rents and profits accruing from the property and
- Appropriate the same towards the payment of interest or mortgage-money or both.

English mortgage

Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage. (Section 58e)

Essential features

- The mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee.
- Subject to a condition that he will re-transfer it to the mortgagor upon payment of the mortgage money.

Equitable mortgage

As per Section 58 (f) of the statute, where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any other town which the State Government concerned may by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds.

Essentials

- The mortgagor delivers to a creditor or his agent documents of title to immoveable property.
- With intent to create a security thereon.
- The delivery of documents of title is done in the aforesaid towns or a town specified by the State Government.
- The property given as a mortgage may or may not be situated in the notified town

Anomalous Mortgage

According to Section 58(g) of the Transfer of Property Act, 'a mortgage which is not a simple mortgage, a mortgage by conditional sale and usufructuary mortgage and English mortgage or a mortgage by deposit of title deeds within the meaning of this Section, is called an 'Anomalous Mortgage.

Essential features

- It must be a mortgage as defined by Section 58 of the Transfer of Property Act.
- It is negatively defined and should not be anyone of the mortgages listed above.

Anomalous mortgages are usually a combination of two mortgages. Examples of such mortgages are:

- ✓ Simple and usufructuary mortgage, and
- ✓ An usufructuary mortgage accompanied by conditional sale.

Sale Without Court Intervention

- Where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the official gazette
- Where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government
- Where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situated within the towns of Kolkata, Chennai, Mumbai, or in any other town or

area which the State Government may, by notification in the official gazette, specify in this behalf.

Enforcement Of Mortgages Through Court

After the enactment of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, recovery of debts of Rs. 20 Lakh and above due to banks and financial institutions can be commenced in the Debts Recovery Tribunals. If the banks and financial institutions advance loans/facility below Rs. 20 Lakh, and if they were secured by a mortgage on the borrower's immovable properties, the lender has to file a civil suit for the recovery of his dues by enforcement of the mortgage.

While filing the civil suit the following aspects may have to be kept in view:

- The suit shall be instituted in the court of the lowest jurisdiction where it can lie.
- The suit shall be instituted in the jurisdiction of the court where the mortgaged properties are situated.
- All puisne mortgagees (subsequent mortgagees) shall be impleaded as defendants.
- If there is more than one mortgage in favour of the lender filing the suit, he shall sue on all debts unless a leave of the court is obtained for filing separate suits
- If personal covenant of the mortgage is to be enforced, it must be ensured that the claim is within limitation
- While executing the mortgage decree, the decree holder can bring the properties mortgaged to sale without first seeking an order of attachment from the Court.

The lender can also prefer recourse against the mortgaged property under SARFAESI Act for recovery of dues above Rs. 1 lakh irrespective of the type of mortgage.

Leases Of Immoveable Property

- A lease is a transfer of a right to enjoy the property for a certain time (express or implied) or in perpetuity (that is forever), in consideration of a price paid or promised or any other thing of value, to be given periodically to the transferee by the transferee.
- The transferor is called 'the lessor', the transferee is called the 'lessee', the price is called the premium, and the money or any other thing to be given is called the rent.
- A sale is an absolute transfer of property. A lease is a partial or limited transfer of property. In a lease, there is a transfer of the right to enjoy such property. Thus, in case of a lease, there is a separation between ownership and possession.

Duration of Certain Leases in Absence of Written Contract

In terms of Section 106 of the Transfer of Property Act 1882, In the absence of a contract or local law or usage to the contrary,

- A lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and
- A lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

Actionable Claim

- Actionable claim' means a claim to any debt (other than a debt secured by mortgage, hypothecation or pledge). Or to any beneficial interest in movable property, not in possession, either actual or constructive, which the Civil Courts recognize as giving reliefs, whether such debt or beneficial interest be existing, accruing, conditional or contingent.
- The transfer of an actionable claim whether with or without consideration, can be done only by the execution of an instrument in writing signed by the transferor. There is no mandatory requirement of giving notice to the debtor before the transfer of the actionable claim.

Example: A owes money to B. B transfers the debt to C. A is not aware of the same. B then demands the debt from A. A pays B. The payment is valid, and C cannot sue A for the debt.

CAIIB Paper 4 (BRBL) Module D Unit 25- The Right To Information Act, 2005

Introduction

- The Right to Information Act, 2005 was enacted with intent to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.
- The Act aims at containing corruption and holding the Governments and their instrumentalities accountable to the governed by providing access to information. The Act also creates a machinery for ensuring effective implementation of the Act.

Applicability

- In terms of amendment made to the Act with effect from 31-10-2019, It extends to the whole of India.
- All public sector banks and other institutions owned and controlled by the Government are public authorities and are also required to comply with the provisions of the Act.
- As per the Act, the public authority has to publish certain particulars about its organization which are
 - Particulars of its organization, functions and duties, powers of its officers and employees

- Procedure followed in the decision making process, including channels of supervision and accountability
 - Norms set by it for the discharge of its functions
 - Rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions etc.
- RTI provides for exemption from disclosure of information including commercial confidence trade secrets, the disclosure of which would harm the competitive position of a third party unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.
 - The Act exempts disclosure of personal information which has no relation to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual.

Definitions

- **‘Central Information Commission’** (Section 2b) means the Central Information Commission constituted by the Central Government.
- **‘Central Public Information Officer’** (Section 2c) means the Central Public Information Officer designated by the public authority and includes a Central Assistant Public Information Officer.
- **‘Information’** (Section 2 f) means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any law for the time being in force.

‘Public authority’ (Section 2h) means any authority or body or institution of self-Government established:

- by or under the Constitution
- by any other law made by Parliament
- by any other law made by the State Legislature
- by notification issued or order made by the appropriate Government

‘Right to information’ (Section 2 j) has been defined in an inclusive manner. It means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to:

- Inspection of work, documents, records
- Taking notes, extracts or certified copies of documents or records
- Taking certified samples of material
- Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in computers or in other device.

‘State Information Commission’ (Section 2k) means the State Information Commission constituted by the State Government under this Act.

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CAIIB Paper 4 (BRBL) Module D Unit 26-Right To Information Act And Obligation Of Public Authorities

Obligations of Public Authorities

As per Section 4 of The Right to Information Act 2005,

Every public authority shall—

- Maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all

records that are appropriate to be computerized are, within a reasonable time computerized and connected through a network all over the country on different systems so that access to such records is facilitated

Publish within one hundred and twenty days from the enactment of this Act,—

- The particulars of its organization, functions and duties
- The powers and duties of its officers and employees
- the procedure followed in the decision making process, including channels of supervision and accountability
- the norms set by it for the discharge of its functions
- the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions
- A statement of the categories of documents that are held by it or under its control
- The particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation
- A statement of the boards, councils, committees and other bodies consisting of two or more persons
- A directory of its officers and employees
- The monthly remuneration received by each of its officers and employees, including the system of compensation
- The budget allocated to each of its agency,
- the manner of execution of subsidy programs, including the amounts allocated and the details of beneficiaries
- Particulars of recipients of concessions, permits or authorizations granted by it
- Details in respect of the information, available to or held by it, reduced in an electronic form;

Procedure For Obtaining Information

- PIO shall deal with requests from persons seeking information and If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within five days, the request to that other public authority and inform the applicant immediately.
- PIO may seek the assistance of any other officer for the proper discharge of his/her duties.
- **PIO, within thirty days of the receipt of the request, either provide the information** on payment of such fee as may be prescribed or reject the request for any of the reasons specified under the Act.
- Where the information requested for, concerns the **life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.**

Disposal Of Request

If the PIO fails to give a decision on the request within the period specified, he shall be deemed to have refused the request. Where a request has been rejected, the PIO shall communicate to the requester –

- **The reasons for such rejection**
- **The period within which an appeal against such rejection may be preferred**
- **The particulars of the appellate authority.**

The application shall be accompanied by a fee of rupees ten. It may be paid in cash against proper receipt or by demand draft or a banker's cheque or by Indian Postal Order. The instrument is payable to the accounts officer of the public authority.

Appeal

- The Central Government has the powers to constitute a body known as the Central information commission. The State Governments have the power to constitute for the State a body known as the State Information Commission to administer the provisions of the Act where the State Government is the appropriate authority.
- Any person who does not receive a decision within the time specified (normally thirty days) or is aggrieved by a decision of the Central Public Information Officer may, within thirty days from the expiry of such period or from the receipt of such decision, prefer an appeal to the officer who is senior in rank to the Central Public Information Officer in each public authority.
- A second appeal will lie against the decision of the appellate authority before the Central Information Commission (or the State Information Commission) and the same shall have to be preferred within ninety days from the date on which the decision should have been made or was actually received.
- The appeal shall be disposed of within thirty days of the receipt of the appeal or within such extended time not exceeding a total of forty-five days from the date of filing thereof. The decision of the Central Information Commission is binding on the parties.

Orders in Appeal

In deciding the appeal, the Central Information Commission may pass the following orders:

- Require the public authority to take any steps necessary to secure compliance with the provisions of this Act including
 - By providing access to information in a particular form
 - By appointing a Central Public Information Officer; etc.
- Require the public authority to compensate the complainant for any loss or other detriment suffered
- Impose any of the penalties provided under this Act
- Reject the appeal.

Penalties

The Central Information Commission has the power to impose a **penalty of two hundred and fifty rupees for each day** till the information is furnished subject to a **maximum of twenty-five thousand rupees**.

The Commission shall give an opportunity to the parties of being heard before imposing any penalty.

The Commission has the power to recommend taking disciplinary action against the Central Public Information Officer under the service rules applicable to him when he is satisfied that the Central Public Information Officer:

- Without reasonable cause persistently failed to receive an application for information; or
- Has not furnished the information within the time specified; or
- With mala fide intent denied the request for information; or
- Knowingly given incorrect, incomplete or misleading information; or
- Destroyed information which was the subject of request; or
- Obstructed in furnishing the information.

CAIB Paper 4 (BRBL) Module D Unit 27-Information Technology Act, 2000

Introduction

- Information Technology Act 2000, was enacted consequent to the adoption of the **Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law in 1997**.
- This Act aims to provide the legal infrastructure for e-commerce in India which involves the use of alternatives to paper based methods of communication and storage of information and also to facilitate electronic filing of documents of Government agencies.
- The Information Technology Act, 2000 also aims to provide the legal framework so that legal sanctity is accorded to all electronic records and other activities carried out by electronic means.

Electronic Governance

- Chapter III of the Act deals with electronic governance and gives legal recognition to electronic records (section 4) and electronic signatures (Section 5) including in Government and its agencies (Section 6).
- It also provides that information or any other matter shall be in writing or in the typewritten or printed form, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or

matter is rendered or made available in an electronic form; and accessible so as to be usable for a subsequent reference.

- The Chapter also deals with Delivery of Services by Service Providers used for efficient delivery of services in electronic form by the Government (Section 6A) and retention of electronic records (Section 7).

Certifying Authorities

The Act envisages a Controller of Certifying Authorities who shall perform the function of exercising supervision over the activities of certifying authorities as also laying down standards and conditions governing the certifying authorities as also specifying the various forms and content of Digital Signature Certificates.

Section 18 enumerates the functions to be carried out by the Controller-

- Exercising supervision over the activities of the Certifying Authorities
- Certifying public keys of the Certifying Authorities
- Laying down the standards to be maintained by the Certifying Authorities
- Specifying the qualifications and experience which employees of the Certifying Authority should possess
- Specifying the conditions subject to which the Certifying Authorities shall conduct their business
- Specifying the contents of written, printed or visual materials and advertisements that may be distributed or used in respect of a electronic signature Certificate and the public key
- Specifying the form and content of a electronic signature Certificate and the key
- Specifying the form and manner in which accounts shall be maintained by the Certifying Authorities
- Specifying the terms and conditions subject to which auditors may be appointed and the remuneration to be paid to them
- Facilitating the establishment of any electronic system by a Certifying Authority either solely or jointly with other Certifying Authorities and regulation of such systems
- Specifying the manner in which the Certifying Authorities shall conduct their dealings with the subscribers
- Resolving any conflict of interests between the Certifying Authorities and the subscribers
- Laying down the duties of the Certifying Authorities
- Maintaining a data base containing the disclosure record of every Certifying Authority containing such particulars as may be specified by regulations, which shall be accessible to public.

Penalties

In terms of Chapter IX – Section 43 of the said Act, “if any person without the permission of the owner or any other person who is in charge of a computer, computer system or computer network:-

- Accesses or secures access to such computer, computer system or computer network or computer resource
- Downloads, copies or extracts any data, computer data base or information from such computer including information or data held or stored in any removable storage medium
- Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network
- Damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programs residing in such computer
- Disrupts or causes disruption of any computer, computer system or computer network
- Denies or causes the denial of access to any person authorized to access any computer by any means
- Provides any assistance to any person to facilitate access to a computer in contravention of the provisions of this Act
- Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network.
- Destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means
- Steal, conceal, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage,

he shall be liable to pay damages by way of compensation to the person so affected. **The Act provides for appointment of any officers not below the rank of a director to the Government of India or an equivalent officer who shall adjudicate whether any person has made a contravention of any of the provisions of the Act or rules framed there under. The said adjudicating officer has been given the powers of a Civil Court.**

Appeal

- **The Telecom Disputes Settlement and Appellate Tribunal** established under section 14 of the Telecom Regulatory Authority of India Act, 1997 shall, be the Appellate Tribunal for the purposes of this Act
- Any person aggrieved by an order made by controller or an adjudicating officer under this Act may prefer an appeal to a Appellate Tribunal having jurisdiction in the matter.
- No appeal shall lie to the Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.
- **Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed.**

- On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit
- The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Controller or adjudicating officer.
- The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to **dispose of the appeal finally within six months from the date of receipt of the appeal.**

Critical Information Infrastructure – Protected System

- In accordance with Section 70 of the statute, The appropriate Government may, by notification in the Official Gazette, declare any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure, to be a protected system.
- The appropriate Government may, by order in writing, authorize the persons who are authorized to access protected systems notified under sub-section (1).
- Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
- The Central Government may, by notification published in the Official Gazette, designate any organization of the Government as the national nodal agency in respect of Critical Information Infrastructure Protection.

Application Of The Act To Electronic Cheque And Truncated Cheque

- As per Section 81A of the Act, The provisions of this Act, shall apply to, electronic cheques and the truncated cheques subject to such modifications and amendments as may be necessary for carrying out the purposes of the Negotiable Instruments Act, 1881 by the Central Government, in consultation with the Reserve Bank of India, by notification in the Official Gazette.
- Every notification made by the Central Government under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be.
- The Act (Section 88) also provides for the constitution of the **Cyber Regulation Advisory Committee** which shall advise the Government as regards any rules or for any other purpose connected with the said Act.

Documents Or Transactions To Which The Act Shall Not Apply

The First Schedule to the statute enumerates the documents or transactions to which the Act does not apply.

- A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881.
- A power-of-attorney as defined in section 1A of the Powers-of-Attorney Act, 1882
- A trust as defined in section 3 of the Indian Trust Act, 1882
- A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925
- Any contract for the sale or conveyance of immovable property or any interest in such property.

However the Central Government has vide a notification dated September 26, 2022, amended the aforesaid schedule. The First Schedule has been amended to:

- Exclude demand promissory notes and bills of exchange issued in favour of or endorsed by an entity regulated by the Reserve Bank of India, National Housing Bank, Securities and Exchange Board of India, Insurance Regulatory and Development Authority of India and Pension Fund Regulatory and Development Authority from the entry relating to negotiable instruments, in addition to cheques which was already excluded from the first schedule.
- Exclude those powers-of-attorney which empower an entity regulated by the Regulatory Authorities to act for, or on behalf of, and in the name of the person executing them, from the entry relating to a power of attorney.
- Omit contracts for sale or conveyance of immovable property or any interest in such property.

CAIIB Paper 4 (BRBL) Module D Unit 28-The Prevention of Corruption Act, 1988

Introduction

- The Prevention of Corruption (P C Act) Act was promulgated on the 9th September 1988 mainly to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith.
- Thus, it is the main statute aiming to curb corruption among public servants and others in the country.
- The statute was amended in 2013/2018, and more recently on 3rd September 2021. The Government of India, Ministry of Personnel, Public Grievances and Pensions has introduced 'Standard Operating Procedures (SOP)' under Section 17A, for investigating agencies.

Special Judges

Appointment

- Section 3 of the P.C. Act gives powers to the Central and State Governments to appoint 'Special Judges' to try cases under the statute. It also specifies the offences which may be dealt with by these special judges and the minimum qualifications which are necessary for their appointment.

- A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974).

Cases that may be heard

- Section 4 stipulates that offences under the Act be tried by the Special Judges only and lays down the rules to be followed in such cases. The offences specified in sub-section (1) of section 3 shall be tried by special Judges only.

Transfer of Suits

- A situation sometimes arises where one of the parties in the trial requires it to be transferred to another court in the same or another city or to the High Court.
- The transfer of a case from a Special Judge to the High court itself was prohibited and not the transfer of a case from one Special Judge to another Special Judge, whether appointed under the Prevention of Corruption Act or any other statute.

Offences And Penalties

Section 7 to 15 of the P.C. Act defines the offences falling under the provisions of the Prevention of Corruption Act and the punishment/fine prescribed thereto.

Section of PC Act	Description of Offence	Punishment Prescribed
7	Where the public servant is bribed	Punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.
7A	Taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence.	Punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine
8	Where any person gives or promises to give an undue advantage to another person to induce a public servant to act illegally etc.	Punishable with imprisonment for a term which may extend to seven years or with fine or with both.
9	Offence relating to bribing a public servant by a commercial organization	Punishable with fine.
10	Where person in charge of commercial organization such as any director, manager, secretary or other officer is found to be guilty of offence.	Punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Section of PC Act	Description of Offence	Punishment Prescribed
11	Public servant obtaining undue advantage, without consideration from person concerned in proceeding or business transacted by such public servant.	Punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.
12	Punishment for abetment of offences	Punishable with imprisonment for a term which shall not be less than three years, but which may extend to seven years and shall also be liable to fine

- **Section 13 of the Act defines 'criminal misconduct'**. As per sub-section 2, a public servant who is found guilty of criminal misconduct is **punishable with**

imprisonment for a term which shall be not less than four years but which may extend to ten years and shall also be liable to fine

- **Section 14 of the Act deals with the punishment for a habitual offender,** who, is a person convicted initially of an offence under this Act and who subsequently commits another similar offence. Such a person is **punishable with imprisonment for a term which shall not be less than five years but which may extend to ten years and shall also be liable to fine.**
- **In terms of Section 15 which deals with punishment for 'attempting' to commit an offence under the Act** Whoever attempts to commit an offence referred to in clause (a) of sub-section (1) of section 13 shall be **punishable with imprisonment for a term which shall not be less than two years but which may extend to five years and with fine.**

Fixing of Fine

- In Section 16 of the statute, the criteria to be taken in consideration by the court while determining the amount of fine is brought out.
- According to the section while fixing the fine the court shall take into consideration the amount or the value of the property, if any, which the accused person has obtained by committing or "where the conviction is for an offence referred to in clause (b)] of sub-section (1) of section 13, the pecuniary resources or property referred to in that clause for which the accused person is unable to account satisfactorily."

Persons Authorized To Investigate

As per Section 17 of the Act the persons authorized to investigate have been specified.

The persons so authorized are no police officer below the rank,-

- In the case of the Delhi Special Police Establishment, of an Inspector of Police
- In the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973, of an Assistant Commissioner of Police
- Elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank.

Such persons are permitted to authorize without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant.

Enquiry or Investigation of Offences

- In terms of Section 17A, which was inserted in the amendment of 2018, specifies the levels at which approval is required to be obtained where enquiry or investigation is to be carried out in respect of offences purported to have been committed by a public servant in discharge of official functions or duties.

- Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person.
- Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.
- On 3rd September 2021, the Ministry of Personnel, Public Grievances and Pensions, Government of India, vide their circular given a set of 'Standard Operating Procedures (SOPs) with a view to achieving uniform and effective implementation for prior approval processes under section 17A of the statute.

The SOPs provide for

- Stage wise processing of information received by a Police Officer.
- Specifying the rank of Police Officer to seek prior approval under Section 17A, in respect of different categories of public servants.
- Consideration of the proposals under section 17A of the Act by the appropriate Government or Authority.
- Laying down of Single - Window procedure to specify receipt stage of the proposal and
- Check list for submitting proposals under Section 17A.

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Powers to Inspect 'Bankers Books'

- Section 18 of the P.C. Act gives powers to a police officer who has reason to suspect that for the purpose of investigation or inquiry in an offence under Section 17 of the statute, it is necessary to inspect any bankers' books.
- The Bank so approached, has to provide certified copies of the relevant entries to assist the police officer in the exercise of his powers under this section.

- However such powers cannot be exercised by a police officer below the rank of Superintendent of Police, unless he is specially authorized in this behalf by a police officer of or above the rank of a Superintendent of Police.
- Appeal and Revision in judgements of a special judge under the Act normally lies with the High Court as brought out by Section 27

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