Business Law note provided to us by Bikita Mam (Law professor of Patan Multiple Campus BBA Programme) - www.sandeshsilwal.com.np

Meaning of law

The word 'Law' has been derived from the Teutonic word 'Lag, which means 'definite'. On this basis Law can be defined as a definite rule of conduct and human relations. It also means a uniform rule of conduct which is applicable equally to all the people of the State. Law prescribes and regulates general conditions of human activity in the state.

- Law is a collection of rules imposed by authority. It is a relation of individual with one another.
- This relation affects the social and economic order.
- It is a body of rule of conduct. This is the way that a court uses to make a decision.
- it is a regulation established by a community, society or nation by some authority and applicable to all people living under it.
- It influences the political, economic and social system of every civilized society.
- It affects every person directly or indirectly and regulates practically for every known human activity.
- It is those rules and principles that govern and regulate social conduct which can be enforced in the court.
- It operates to regulate the action of a person. It is enforced for maintaining peace, security, and justice in the state. Law is correlated with justice.
- It is not static, it is dynamic in nature and will be changed as per the requirement of the state.

Law can be either public or private. Public law is concerned with the public or it looks public as a whole and this is divided into three class such as constitution law, administrative law, and

criminal law. Similarly, private law concerns to the individual. It is separated into such special fields as a contract of agencies, sales, negotiable instruments, etc. These areas generally pertain to the business sector.

According to Hooker, "Law refers to any kind of rule or cannon(gun) whereby actions are framed."

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

According to Austin, "Law is a rule of conduct imposed and enforced by the state."

Black's Law Dictionary: A rule or method according to which phenomena or actions co-exist or follow each other.

According to Justinian, "Law is the king of all mortal and immortal affairs..“

Ulpian defined law as “the art of science of what is equitable and good."

Black Stone says, "Law in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kind of actions whether animate or inanimate, rational or irrational"

Nature of law

Law is the result of continuous effort through a workable set of rules in the society. It is not pure science based upon unchanging and universal truth. It affects every activity of the individual. The nature of law are as follows:

- Justice is an aim of Law- Justice is always provided through law. The law means to provide justice to people.

- Create a peaceful and harmonious relation between people living under society-Law is made for keeping peace and harmonious relation by providing security.
- The law is pervasive (spreading or spread throughout)- Every person is presumed to know it.
- It regulates human activities- It regulates human behavior in three ways: Prohibitory, mandatory and permissive.
- Ignorance of law is not excused.
- It is a set of rules which is set by the state.
- It regulates the human conduct.
- It is created and maintained by the state.
- It has the certain amount of stability, fixity and uniformity.
- It is backed by coercive authority.
- Its violation leads to punishment.
- It is the expression of the will of the people and is generally written down to give it definiteness.
- It is related to the concept of 'sovereignty' which is the most important element of the state.

Characteristics of Law

1) It is a set of rules.

2) It regulates the human conduct

3) It is created and maintained by the state.

4) It has certain amount of stability, fixity and uniformity.

5) It is backed by coercive authority.

6) Its violation leads to punishment.

7) It is the expression of the will of the people and is generally written down to give it definiteness.

8) It is related to the concept of 'sovereignty' which is the most important element of state.

Purpose of Law

(i) To maintain Order

(ii) To protect rights.

(iii) To preserve freedom.

(iv) To bring about peaceful change (Change with stability)

(v) To secure Justice.

(vi) To resolve conflicts.

vii) To maximize the happiness of the greatest number with minimum of friction.

viii) To define relationship among the members of Society.

(ix) To satisfy the interests of the community and its members.

(x) To set and strengthen values.

Types of Law:

Broadly speaking there are two main kinds of Law:

(i) **National Law** i.e. the body of rules which regulates the actions of the people in society and it is backed by the coercive power of the State.

(ii) **International Law** i.e. the body of rules which guides and directs the behaviour of the states in international relations. It is backed by their willingness and consent that the states obey rules of International Law. It is a law among nations and is not backed by any coercive power.

National Law is the law by which the people are governed by the state. It stands classified into several kinds:

1. Constitutional Law

2. Ordinary Law:

It is stands classified into two sub types:

2 (a) Private Law

2(b) Public Law:

It stands again sub-divided into two parts:

2(b) (i) General Public Law

2(b) (ii) Administrative Law

1. Constitutional Law:

Constitutional Law is the supreme law of the country. It stands written in the Constitution of the State. The Constitutional Law lays down the organisation, powers, functions and inter-relationship of the three organs of government. It also lays down the relationship between the people and the government as well as the rights, freedoms (fundamental rights) and duties of the citizens. It can be called the Law of the laws in the sense all law-making in the State is done on the basis of powers granted by the Constitutional Law i.e. the Constitution.

2. Statute Law or Ordinary Law:

It is also called the national law or the municipal law. It is made by the government (legislature) and it determines and regulates the conduct and behaviour of the people. It lays down the relations among the people and their associations, organisations, groups and institutions. The

legislature makes laws, the executive implements these and judiciary interprets and applies these to specific cases.

Ordinary Law is classified into two parts:

2 (a) Private Law and

2 (b) Public Law

2 (a) Private Law:

Private Law regulates the relations among individuals. It lays down rules regarding the conduct of the individual in society and his relations with other persons. It guarantees the enjoyment of his rights. It is through this law that the State acts as the arbiter of disputes between any two individuals or their groups.

2 (b) Public Law:

The law which regulates the relations between the individual and the State is Public Law. It is made and enforced by the State on behalf of the community.

Public Law stands sub divided into two categories:

2**(b) (i) General Law:**

It lays down the relations between the private citizens (Non-officials or who are not members of the civil service) and the State. General Public Law applies to all the citizens in their relations with the State.

2(b) (ii) Administrative Law:

It lays down the rules governing the exercise of the constitutional authority which stands delegated by the Constitution of the State to all the organs of government. It also governs the

relations between the civil servants and the public and lays down the relations between the civil servants and the State.

Business law

British was the first nation to development market economy business rules and regulations in the world. All the countries started to follow British business transaction. There is direct of British impact of business rules in the world. It means our business rules are influenced by British rules. There is an important role of British business rule to develop our business law. So it is taken as an important source of Nepalese business law.

Business comprises all profit seeking activities that provide goods and services necessary to an economic system. Business refers to the economic activities in which goods and service are supplied in exchange for some payment. It includes buying and selling, manufacturing products, extracting natural resources.

Law refers to the principles and regulations established by a government applicable to people.

Thus Business law is that portion of legal system which guarantees an orderly conduct of business affairs and settlement of legitimate dispute. It establishes a set of rules and prescribes conduct to order to avoid misunderstandings in business relationship.

Business law**,** also called commercial law or mercantile law, the body of rules, whether by convention, agreement, or national or international legislation, governing the dealings between persons in commercial matters.

Business law falls into two distinctive areas: (1) the regulation of commercial entities by the laws of company, partnership, agency, and bankruptcy and (2) the regulation of commercial transactions by the laws of contract and related fields

Features of Business Law

- Regulates industry, trade and commerce
- Regulates every business activity
- Promotes rights and interest of business activity
- It is the law of commerce or commercial law as it deals with all the aspects of entering into selling and purchasing agreements.
- It includes the study of the law of contract which is important in agreements or contracts that involve two or more parties buying and selling things in exchange for a consideration or purchase price.

- Business law clearly explains the rights, duties, liabilities and legal obligations of the parties involved in a contract of sales, purchase or any other kind of contract or agreement entered into in relation to any kind of business or commercial activity.
- It includes intellectual property law (patents, trademarks, copyrights, etc.) and consumer protection law.
- Business law will also apply to anyone who plans on opening or starting a business of their own.
- Business law also deals with banking law, finance law and other important civil laws.

Importance of Business law

- Protection of economic right
- Regulation and systematization of business
- Commencement and development of business
- enforcement

Purpose of Business Law

Enforcement: Provide enforcement that allows contractual relationships to stay intact.
Predictability Allow people in business to enter into multiple transactions with certain protection.
Uniformity When business owners rely on the same laws to conduct business, they need to know that State Agencies and Courts apply the laws in a uniform fashion.

Sources of law/ Business Law

A source means an origin or resources or cause or place from where law emanates. The term source of law denotes two meaning. Firstly the place or point from where the law begins and secondly the place from where the rules get legal authority. The main sources of business law are discussed below:

a) Custom and Usage: The custom is known as particular way of life or behavior. If such behavior is followed continuously by the people in the society, it becomes a customs or usages which are important sources of law. When there were no business rules in the world the earlier business cultural and tradition to manage and regulate business transaction. A large part of our business rules our business rules are influenced by that culture and tradition. Before making business rules our law makers follow that business culture and tradition. It means it helps us to make good business rules. This types of custom should not oppose to statutory law, mortality and public welfare. If there is no legislation, no precedents the matter is to be decided by the custom or usage of that particular.

b) Statutes/ Legislation: The legislatory law come from parliament or law making body of the nation. This types of law is the outcome of demand of people and need of the time. It is made after fulfilling a series of discussion by lawmakers. Now a day's most of business activities are regulated by the law made by parliament.

c) Judicial Decision: Judicial decision are known as precedent. Precedent is a judicial decision which contains in itself a principle. In other words it is the earlier decision of supreme court which is taken as a rule while deciding the later cases. Where there is no law to deal the problems in such cases the court can make decision in the light of justice and equity such decision are treated as law for that matter. It is the one of the major sources of modern business law.

d) English Mercantile law: business law was developed in England. It is the pioneer of business law in the world. Nepal is conjoined influenced by the British rule since year.

e) Professional Opinion of experts: Lawyers and critics may play significant role creating good legal environment. The opinion and explanation made by such professional may give proper instruction and better contribution to the development of law.

f) Business Agreement, Conventions: Conventional law refers to any rule or system of rule agreed upon by the parties to regulate their business conduct. International business organization are more active in national, region and world business nowdays. Examples: (WTO, SAFTA) . And bilateral agreement between the nations and conventions of business communities are the main sources of national and international business law.

Contract

Agreement

In simple term agreement means an offer and acceptance of that offer. Section 2 (e) of Indian Contract Act, 1872, defines agreement as 'every promise and every set of promises forming the consideration for each other is an agreement.' E.g., X offers to sell his car for Rs. 1,00,000 to Y. Y accepts this offer. This offer after acceptance becomes promise and this promise is treated as an agreement between X and Y.

Contract

In simple term contract is an agreement between two or more parties to do or not to do something which is enforceable by law.

A legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearances(abstaining from doing something) on the part of other or others. (S.W. Anson)

Contract is an agreement which creates and defines obligation between the parties (Salmond)

Every agreement or promise enforceable at law is a contract. (F. Pollock)

Section 2(h) of ICA, 1872, an agreement enforceable by law is contract. According to this contract must have two elements, (i) agreement and (ii) enforceability of an agreement.

Section 2 (a) of Nepalese Contract Act, 2056, defines contract as 'an agreement concluded between two or more parties to do or abstain from doing some act which must be enforceable by law'. An agreement is said to be enforceable by law if it creates some legal obligation. Parties to an agreement must be bound to perform their promises otherwise they can sue for damages. But in case of social or domestic agreements, the usual presumption is that the parties do not intend to create legal obligation. (*Balfour* v. *Balfour* 1919)

The Supreme Court of Nepal has defined the term 'contact as agreement of two or more parties with conditions'- in the case of *Vijaya kumar Basnet* vs. *Kathmandu Metropolitan et al* (Nepal Kanoon Patrika 2059 p. 37.1

Similarly the Supreme Court of Nepal has Stated 'Contract means meeting of mind between two or more parties to do or not to do something through offer and acceptance' in the case of *Tirtha kumar* vs. *Ramashekhar Shrestha* (Nepal Kanoon Patrika 2040 p. 298)2

The law of contract is applicable not only to business but also to all day to day personal dealings. E.g., when you purchase milk, you enter into a contract with the milkman.

Every contract is an agreement, but every agreement is not a contract. An agreement becomes a contract when the following conditions are satisfied

- There is some consideration for it
- The parties are competent to contract
- Their consent is free
- Their object is lawful

Functions

• Securing that the expectations created by a promise of future performance are fulfilled, or that compensation will be paid for its breach.

• To facilitate , planning for the future transaction and to make provisions for future contingencies.

• Establish the value of exchange- how much is paid for the goods or services provided.

• Establish the respective responsibilities of the parties, and the standard of performance to be expected of them

• The economic risk involved in the transactions are allocated in advance between the parties.

• Finally provide remedies if parties are not fulfilling their part of obligations.

Nature of Contract

A contract is an agreement between two or more parties which is enforceable by law, such agreement is the outcome of consensus and meeting of mind of the parties. It has some specific nature which can be mentioned as follows:

a. Civil Nature: The contract has civil nature because it creates rights and obligation to the parties. It is relating to the property and position. In the case of breach of contract, aggrieved party has right to claim compensation. There is no question of punishment as criminal law.

b. Social and Business Nature: Contract is relating to social and business sector. It regulates the social behavior like, sale of goods, court marriage and several transactions of business.

c. Autonomous Nature: Every persons has right to choose his act. Under this freedom of people, they can make contract to do or not to do something according to made contract. So, it possesses an autonomous character.

d. Limited Nature: Contract is limited upon the parties. The parties have rights to determine terms and conditions only for their extent. They have no right to impose any obligation to the third party. Therefore the contract is limited in nature only to the contracting parties

e. Relating to promise and obligation: Contract emerges from the promise. Promise creates the agreement and legal enforceability of an agreement is recognized as contract. Therefore contract is relating to the promise and obligation.

LAW OF CONTRACT CREATES JUS IN PERSONAM AS DISTINGUISHED FROM JUS IN REM - : • Jus in rem means a right against or in respect of a thing. • Jus in personam means a right against or in respect of a specific person. • For ex- A owes a certain sum of money to B. B has a right to recover this amount from A. The right can be exercised only by B and by none else against A. The right of B is jus in personam.

Consensus ad idem (meeting of the mind of parties)

The essence of an agreement is the meetings of the minds of the parties in full and final agreement; there must, be consensus ad idem. This means that the parties to an agreement must have agreed about the subject matter of the agreement in the same sense and at the same time. E.g., A who has two cars, one Toyota and one Maruti. B wants to purchase the Toyota, but A wants to sell Maruti. B asks A to sell the car and A agrees. There is an agreement to buy and sell the car, but both parties agree on different cars. So there is no meeting of mind of the parties. Since there is no consensus ad idem, contract cannot be formed.

Difference between Agreement and Contract

SN	Basis of Difference	Agreement	Contract
1	Creation	The union of offer and acceptance creates agreement	The union of agreement and its enforceability creates contract
2	Legal Obligation	Agreement alone does not create legal obligation to perform	Contract alone creates legal obligation to perform
3	Binding nature	Agreement is not binding upon the parties to it	Contract is binding upon the parties

4	Scope	Agreement is a vague term	Contract is a limited term
5	Inclusion	An agreement does not include contract	Contract includes agreement

Essentials of Contract Law

The human life is full of promise and agreement but all these promise does not transform into contract. An agreement, which is enforceable by law, is contract. And to enforce by law there must be some condition or essentials that a valid contract requires. In another word to be enforceable by law, contract must carry the essential element, which distinguish contract from invitation to treat, social & familiar agreement are merely to supply information. These elements are as follows.

(a) Two Parties: The general rule of contract is that there must be two parties i.e. offerer and accepter. One who purposes to do some thing is offerer & who accept is accepter. There must be meeting of mind between them that the intention of the offerer is to obtain assent from acceptor & accepter accept his proposed in same sense which the offerer put forward.

(b) Offer and Acceptance: offer and acceptance are most important elements. Offer helps to create an agreement. If somebody offers in one way, other party accepts in another way, it is not acceptance. E.g., A asks B if he wants to buy his car for Rs. 50000. In this case A is making an offer to B, it is upon B to accept it or not. If B accepts it then it amounts to contract.

(c) Competent Parties: The parties of the contract must be equaled footing and competent in the eye of law. The person who is entering into contract is be a person who understands what he is doing & is able to form rational judgment as to whether what he is about to do is to his interest or not. A minor, insane or person of

unsound mind & person disqualified by law are regarded as incompetent to parties of contract.

(d) Legal Relationship: The parties must have intention of creating legal relationship. The element of legal relation binds both parties to fulfill their obligations & seek remedy if anyone violates the contractual obligation. Agreements of a social or domestic nature will not constitute contract.

In a case *Balfour vs. Balfour:* A husband was employed in a government post in Ceylon. He returned with his wife to England on leave but she was unable to go back to Ceylon with him for her medical reasons. Husband promised orally to make her an allowance of £30 a months until she rejoined him. He failed to make this payment and she sued him. The Court of Appeal held that, husband and wife never intended to make bargain which conduct be enforced in law. Hence wife could not claim the money.

(e) Legality of Object: The object of the agreement must be lawful. In other words an object must not be illegal immoral, opposed to public policy. Law does not recognize the contract which has an illegal objective & against the law. e.g. When a landlord knowingly lets a house to a gambler to carry illegal gambling he cannot recover the rent through a court of law.

(f) Free Consent: The party should not be influenced by the external force while doing the contract. The consent of the parties is said to be free when they are of the same mind on all the material form of contract and which is not caused by coercion, fraud, mistake etc.

(g) Consideration: It is another element for the agreement to enforce legally. The parties should gain something by loosing something. An agreement without consideration is void.

(h) Not Expressly Declare Void: A contract to be valid must not expressly declared void by law like contract prohibiting someone's occupational right, immoral and against public right etc.

(i) Certainty: The meaning and terms of contract should be clear and certain as law provides remedy for those with clear meaning. e.g., A agrees to sell B 'hundred tons of oil'. There is nothing whatever to show what kind of oil was intended. It may be kerosene oil, may be sunflower oil and may be coconut oil.

(j) Possibility of Performance: The contract should be certain not to be vague and possible to perform because law provides remedy only if it is possible to perform. This is based on the principle ***lex non cogitad impossibilia*** which means law does not compel to do what is impossible. E.g., a contract to draw a line in sky

(k) Written form and registration: According to the Indian Contract Act, a contract may be oral or in writing. But in certain special cases it lays down that the agreement to be valid must be in written form and registered. But there is no specific provision in Nepal which made that contract should be registered. If parties wish they can register it but not mandatory.

(l) Formalities: A contract may be made expressly but some contracts are recognized after fulfilling certain legal formalities. Section 88 of Nepal Contract Act, 2056 has the provision that- "in case any current laws prescribes that any specific procedure must be followed for executing any specific contract or that any specific contract must be registered at a government office, a contract signed without fulfilling such formalities shall not be valid. An agreement becomes enforceable by law when all the essential elements of a valid contract are present.

Classification of Contract

Contract is classified on the following grounds

(a) Creation (b) execution (c) Enforceability

a) on the basis of creation

i) Express: express contract is one which is made by words spoken or written whose terms and conditions are set by the parties. In order to determine its validity and enforceability court typically examine the nature of communications between the parties and the context in which it was formed. Eg,. A offers B to but his car for Rs 500000/- in telephone and B accepts therein. It is an express contract.

ii) Implied: implied contract is one which is made otherwise than by words spoken or written, generally made by the conduct or act of the parties. E.g., travel in bus; obtaining cash from ATM etc

iii) Quasi Contract: contract resulted by law is quasi contract. Quasi contract is based on the principle that "a person shall not be allowed to enrich himself unjustly at the expense of other." E.g., A leaves the goods of B in C's place by mistake. C treats them as his own. Here, C is obliged to pay for them.

b) on the basis of execution

i) executed: it is a contract where both the parties to the contract have fulfilled their respective obligation under the contract. E.g., car sold and delivered

ii) executory: it is a contract where both the parties to the contract have still to perform their respective obligation under the contract. E.g., car sold and price taken but car not yet delivered

iii) partly executed and partly executory: it is a contract where one of the parties to the contract has fulfilled their respective obligation and other party has still to perform his obligation under the contract. E.g., car's price on credit for a month but car delivered

c) on the basis of enforceability

i) Valid contract: a contract which satisfies all the conditions prescribed by law.

ii) Void contract: a void contract is a contract which was valid when entered into but which subsequently become void (inoperative) due to impossibility of performance, change of law etc. e.g., X offers to marry Y. Y accepts but later Y dies.

iii) Voidable contract: a voidable contract is a contract which can be repudiated or avoided at the option of the aggrieved party. E.g., coercion, fraud etc

iv) Illegal contract: contract made by incorporating illegal act or objects. E.g.; contract to kill someone, destroying someone's property etc

v) Unenforceable contract: it is a contract which is actually valid but cannot be enforced because of some technical defect. E.g. oral agreement for arbitration

Distinction between Void and Voidable Contract

S.N	Basis of distinction	Void contract	Voidable contract

1	Validity	It becomes void from the formation	It becomes void only when the court declares it to be void
2	Third party's right	Third party cannot have rights over the goods acquired	Third party can have rights if he has purchased the goods before the contract was avoided
3	Enforceability	It is not enforceable	It is enforceable if the party does not take action within specified time
4	Damages	No recovery of damages	Aggrieved party can have damages from the other party

Features of Nepalese Contract Act 2056

1. Existence: after restoration of democracy this Act came into existence repealing Contract Act 2056 on 2057/3/14. The Act has 13 chapters and 90 sections.
2. Cost to be borne by losing Party: sec 22(c), (d) and 84(2) have provision related to this. Losing party shall borne the cost of wining party as well.
3. Third party's claim can be entertained: third party can claim benefit from contract if done for his/her benefit. Sec 78
4. Provision related to special contract: Act included special contracts like bailment, pledge, guarantee etc.
5. Freedom of contracting party: freedom to choose subject matter, time and date of performance.

6. Time limitation: extended to 2 yrs from the date of reason. (previous 6 months)

Legality of Objects

Legality means conformity with law or legal validity and object means design or purpose. The object and consideration of an agreement must be lawful, otherwise the agreement is void. Generally, every agreement is made with an object and for a consideration. Object here means design or purpose and consideration means something in return. But only the existence of object and consideration is not enough. For enforceability, the lawful object and consideration are necessary in agreement. Section 13 of NCA mentions contract shall be void if it has illegal object, or against morality or public welfare. Likewise Section 10 of ICA mentions, all agreements are contract if they are made for lawful consideration and with a lawful object.

The consideration or the object of an agreement is unlawful in the following cases:

1) Agreements opposed to Statutes:

a) If it is forbidden by law:

If the object or the consideration of an agreement is the doing of an act which is forbidden by law, the agreement is void. An act is said to be forbidden by law when it is punishable by the law of the country or by special legislation. Example: A promises B to obtain an employment in public service, and B promises to pay Rs.10, 000 to A. the agreement is void as the consideration for it is unlawful.

b) If it defeats the provisions of any law:

If the object or the consideration of an agreement is of such nature that, if permitted, it would defeat the provisions of any law, the agreement is void. Example, X borrowed Rs. 1, 00,000 from Y and agreed not to raise any objection as to the limitation and that Y may recover the amount even after the expiry of limitation period. This agreement is void as it defeats the provisions of the Law of Limitation Act.

c) If it is fraudulent:

If the object or the consideration of an agreement is to defraud others, the agreement is void. Example, A, B and C enter into an agreement of the division among them of gains acquired, or be acquired by them by fraud. The agreement is void, as its object is unlawful.

d) if it involves or implies injury to a person or property of another:

If the object or the consideration of an agreement is to injure a person or the property of another, the agreement is void. Example; X promised to pay Rs 10,000 to Y when he agreed to publish a libel (defamatory article against someone). It was held that Y could not recover the amount because the agreement was void as it involved injury to someone.

e) if the court regards it as immoral or opposed to public policy:

If the object or the consideration of an agreement is immoral or is opposed to the public policy, the agreement is void. Example; X let a flat to Y on a monthly rent of Rs 10,000. Y was a prostitute and used the flat for prostitution and did not pay the rent. X cannot recover the rent if he knew the purpose otherwise he can.

2) Agreements opposed to public policy

Public policy is that principle of law under which freedom of contract or private dealing is prohibited by law for the good of community. What government says and do or not to do is public policy. Agreement having tendency to injure public interest or welfare is opposed to public policy. Agreement opposed to public policy is not valid and such agreement is unlawful and void.

a) Agreement of trading with alien enemy

Agreement between the persons of two enemy countries at the time of outbreak of war is void and inoperative.

b) Agreement interfering with parental right

Every parent has right to take care of their children. In absence of mother, father can exercise right of guardianship. Agreement made with the intention of depriving such right is void as being against to public policy.

G, a father of two minor sons, agreed to transfer the guardianship of those boys in favour of A, and also agreed not to revoke the transfer during his life. G sued back the boys. Here, G got back the custody of the boys as the agreement was interfering with parental right. [*Guddu Narayanish* v. *Annie Besant* (1915)]

c) Agreement restraining personal freedom

Agreement which restricts the personal liberty of an individual is void.

e.g.; restricting an individual to go out of country etc…

d) Agreement to obtain or transfer of public offices

The agreements which affect the normal working of government offices are void as they are opposed to public policy.

e.g., A paid certain sum of money to B, and B agreed to obtain a seat for A's son in medical college.; money paid for transfer; promotion etc

e) Agreement in restraint of trade

Article 12(3) of Constitution of Nepal provides that every individual has right to choose his profession. Therefore, an agreement to restraint individual from choosing his profession or trade is void.

f) Agreement in restraint of marriage

Individual reaching the age of majority can marry as per the choice. Hence agreement to restraint an individual from marriage according to the choice is void.

g) Marriage brokerage agreement

An agreement to procure marriage of a person in consideration of a sum of money is called marriage brokerage agreement. Such agreements are opposed to public policy and are void.

e.g., A, a father of a girl, promised to give certain sum of money to B, a father of a minor boy. A and B agreed to marry his minor son with A's daughter. Agreement is void.

h) Agreement interfering with course of justice

An agreement which obstructs the ordinary process of justice is void.

e.g.; A, a moneylender filed a recovery suit against B. A induced C his friend to give false evidence against B. And A agreed to give Rs 500 to C for his work. The agreement is void.

i) Agreement for shifting prosecution

An agreement not to prosecute an offender or to withdraw a pending prosecution is void.

e.g., A had instituted prosecution against B for recovery. A promised to drop the prosecution and B promised to restore the value of the robbed goods. Agreement is void as it is agreement to shift prosecution.

j) Agreement tending to create monopolies

An agreement with the intension to create business monopoly or exclusive right in the market is against to public policy and therefore void.

e.g., A local body grants a monopoly to b to sell fruits in a particular locality.

k) Agreement for champerty

The term champerty may be defined as a bargain in which a stranger promises to give assistance (monetary or otherwise) to another person in recovering the property. And also promises to share the profit obtained by legal action. Such agreement is void.

e.g., A agreed to supply funds to B to enable him to file a suit for the recovery of his property and B promised to give him $3/4^{th}$ share in his property, if recovered. The agreement was held to champaterious and void.

Void agreements

An agreement, the legal status of which is null without validity is called a void agreement. No contractual right and obligation arises out of such agreement. Void agreement is a mere agreement and not a contract at all and it cannot be enforced by law as it is void ab initio.

NCA 2056 does not define the term void agreement but it stipulates some legal provision in connection with void agreement.

Section 13 of NCA 2056 has expressly declared some agreements to be void.

Following are void agreements

a) Agreement in restraint of marriage
b) Agreement having unlawful object and consideration
c) Agreement by bilateral mistake of fact
d) Agreement without consideration
e) Agreement with/by incompetent parties
f) Agreement in restraint of public facility: any individual enjoys the facilities as provided to the public. If an agreement has been entered with the intention to restraint anyone from enjoying such facilities, the agreement is void. E.g, public toilet, water etc
g) Agreement in restraint of legal proceedings: nobody can prevent another from exercising his legal right.
h) Agreement to do impossible acts: if an agreement contains the act which cannot be performed by the human being is void. E.g., an agreement to bring stars etc
i) Agreement having uncertain meaning: meaning and terms should be certain
j) Agreement contingent on impossible event: e.g., A agrees to pay a sum of 2000 to B if B marries C, A's daughter. The agreement is void.

Contingent contract

The law of contract is that branch of law, which determines the circumstances in which promises made by the parties to the contract shall be legally binding on them i.e., to say A contact is such an agreement which allows a party to do or not to do something in reference to the contract which they have performed.

Generally, A contract may be of two types i)Absolute contract, and ii)contingent contract. An absolute contract is the one in which the promissory binds himself to perform in any event without any precondition' whereas, contingent contract is a sort of conditional contract, where a condition itself is of uncertain nature.

Thus, a contract which is, subject to certain or an absolute type of condition cannot be regarded as a contingent contract. For example, a contract to pay a sum of money on the expiry of a time or on the death of a person is not a contingent contract because of the obvious reason that, in these both of the contract the condition prescribed are of sure or certain in nature . If the condition is of uncertain nature, then only the contract can be regarded as truly contingent. For example, to pay a sum of money on the destruction of a building by earthquake is a contingent contract. Thus, from this particular point , what can be said is that, all the contracts like, contract of indemnity and guarantee , contract of insurance(except life insurance) and even a wagering contract are the contingent contract.

According to Black's law of dictionary the word 'contingent' means that which is dependent on something else. Thus contingent actually means something uncertain or accidental. This is to say, there is no certainty, about something that may happen or not. The contingent contract further emphasizes that; the contingency contemplated by the contract must be collateral to the contract. It means that a contract has already arisen or a subsisting contract is there but its performance cannot be demanded unless the contemplated events happens or does not happen. Thus a contract to sell a piece of agricultural land which was the subject matter of the

on going consolidation proceedings was held to be of contingent nature, because nobody could tell beforehand to whom the land might become allocated .It was not enforceable until and unless the consolidation would leave the land on hand of the seller.

Nepalese contract Act 2056, in its section 12 has dealt about contingent contract to some extent, but in this section also the definition regarding the contingent contract has not been mentioned and only the provision regarding it has been dealt with. However, the Indian contract Act has made an attempt to define it according to which "A contingent is a contract to do or not to do something, if some event collateral to such contract does or does not happen." Thus it is a type of contract the performance of which depends merely upon the happening or non-happening of something uncertain.

Where, collateral means "connected with something else" but in addition to the contract and therefore is of less important. As for Pollack and Mullah, a collateral event which is neither a performance directly promised as a part of the contract nor the whole of the consideration for a promise .Thus, a contingent contract is nearer to a unilateral promise or obligation, then to a mutual obligation .For example, A promises to pay nine lakes to B on the destruction of House by a fire. The house gets destroyed by the recent Tsunami. The liability of A does not arise even though the house has been destroyed because the event cause is not in the contingent contract.

Therefore, from all these clarification the basic characteristic of contingent contract can be listed as follow:

i) There must be a contract between the parties to do or not to do something
ii) The performance of a contract must be dependent upon the happening or non-happening of a uncertain event in future
iii) The event must be possible but of uncertain nature.
iv) The event must be collateral to the subject matter of the contract

RULES REGARDING CONTINGENT CONTRACT

As a basic characteristics of a conditional contract, the contingency depends on the uncertainty of an event. The rules regarding a contingent contract are provided in sec 12(1) (2) (3) (4) (5) of Nepalese Contract Act which are found to be quite similar to those of Indian Contract Act (ICA).

a) On the happening of a future uncertain event.

A contract to do or not to do something if uncertain event happens cannot be enforced by law unless and until the event has happened but if the 'ground event' becomes impossible then such a contract becomes void because there is no ground for the fulfillment of such contract.

Example: A contract to pay B a sum of money when B marries C but if C dies without being married to B, the contract becomes void.

A promises to pay B, Rs 10,000, if A's ship coming from London does not reach at Mumbai on or before 31st may 2011.

Case I: when ship reaches on or before time (void)

Case II: when ship reaches after specified time (valid)

Case III : when ship sinks (Valid)

b) Event which is contingent to be deemed impossible due to the act of human conduct:

If contract contingent on the act or conduct of a specialized person becomes impossible by his denial or inability can not create any liability for the performance of the contract. Example: A agrees to pay B a sum of money if B marries C, but C marries D. The marriage of B to C must now be considered impossible. Therefore, where the contract is enforceable if a certain person is to act in a certain way, the event shall be considered to have become impossible if that

person does something which makes it impossible that he should act in that way in any definite time or without further contingencies being fulfilled. In Frost v. Knight (1872), the defendant promised to marry the plaintiff on the death of his father. While was still alive he married another woman. It was held that it had become impossible that he shall marry the plaintiff and then she was entitled to sue him for the breach of contract.

c) When performance depends upon non-happening of an event.

If an uncertain future event does not happen can be enforced when the happening of that event becomes impossible and not before if any uncertain event does not happen in the future. Liability under that contract shall emerge only after the happening of the event becomes impossible. Example: A agrees to pay R a sum of money if certain ship does not return. The ship sunk. The contract can be enforced when the ship sinks. Similarly, R agrees to sell her car to P if S dies. The contract cannot be enforced so long as S is alive.

d) When contract become void which are contingent on happening of specified event within fixed time:

If a specified uncertain event happens within a fixed time, it becomes void if at the expiration of the time fixed ,such event has not happened, or if , before the time fixed such event becomes impossible . Example, A promises to pay B a sum of money if a certain ship returns with in a year. The contract may be enforced if the ship returns with in a year and becomes void if the ship is burnt or, sunk and or lost in the sea

e) On the non –happening of on event within a fixed time :-

If a specified uncertain event doesn't happen with in a fixed time, may be enforced by law when the time fixed has expired and such even has not happened or, before the time fixed has expired, if become certain that such event will not happen. Example: 'X' promises to pay 'Y' a sum of money if a certain ship does not return with in a year. The contract may be enforced if

the ship does not return within the year or is burnt, lost or such with in the year. These are the various provisions which our contract Act has dealt about but beside these Indian contract Act sec 36 further adds that in an agreement to do or not to do something, if an impossible event happens, is void whether the event is known or unknown to the parties at the time of creation of that contract. For example, S agrees to pay R a sum of money if two straight lines enclose a space. Then this agreement in fact is a void contract. Similarly if M agrees to give N his property if n will marry M's daughter to R but R was dead at the time of the agreement. The agreement is void.

f) Agreements contingent on Impossible Events

Agreements contingent on impossible events are void whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. Example; A agrees to pay B Rs 1,000 if B will marry A's daughter C. C was dead at the time of agreement. The agreement is void because B's marriage with C can never take place.

Free Consent

The English term 'consent' was derived from the Latin term 'consentire' which means 'permission' or 'agree to do on 'agreement'. A contract is the consensual outcome of all the contracting parties. It means that a meeting of the mind of the contracting parties is necessary to be a contract in the absence consensus ad idem (the identity of mind) no effective contract can came into existence.

Nepalese contract act 2056 section 2 (c) defines it as 'the consent given by the person to whom a proposal has been presented in the substance of that proposal'. In the same way Indian contract act 1872, section 13 has also defined contract by means of consent Thus, consent is the agreement of the concerned parties upon the same thing and in the same sense.

Free consent

Free means 'not under the control of anyone else or able to do what one wants', or not confined. Whereas consent is agreement. The agreement without any control or not costing any value is 'free consent'. In other words 'mutual understanding between the parties represents agreement on the same thing and in same sense

Free consent is a genuine acceptance of the agreed parties from their free minds. Consent is said to be free when it is not caused by coercion, fraud, Undue influence misrepresentation and mistake.

When Consent is not free

To prove that the consent is 'not free the complainant must prove that if he had known the truth or had not been forced to agree, he would not have entered into the contract. If he can prove it, then the contract will turn out to be voidable at the option of the party whose consent is so caused.

Example: A is forced to sign a promissory note at the point of pistol. A knows what he is signing but his consent is not free. The contract in this case is voidable at his option. In this example the consent is not altogether missing. It is there, but is not free.

There are certain circumstances or weaknesses on which the law presumes that, the consent of the parties is not free such a circumstances is neither binding nor satisfying the negative concerned parties. The circumstances are cleared by the following chart:

As mentioned in section 14 of Nepalese contract act 2056 may be made voidable at the option of party whose consent is not free. They are the contract concluded through the exercise of coercion, undue influence, and fraud. In this case 'consent is not free' and deceit, mistake is dealt by section 13 (g).

Importance of free consent

- Secures the freedom of parties to enter into a contract
- Brings an opinion or views in similar nature
- Assures that the parties are free from any compulsion or pressure
- Ignores all types of pressure to enter into a contract
- Furnishes legal remedy to the parties
- Signifies validity of a contract

Coercion

'To coerce' means to force or threaten somebody to do something. When a person is compelled to enter into the contract by the use of force by the other party or under a threat against the law 'coercion' is said to be employed. It is one of the circumstances when consent given by the party is not free. An agreement, in which consent is accused by coercion, is voidable at the option of the party whose consent was so obtained. Here, physical force is used but there is an absence of mental and psychological force.

Contract Act 2056, section 14 has provided the provision relating to the circumstances of coercion, under void able contract such contract can be made void by the aggrieved party. Explanation to section 14 (a) of Nepal contract Act states that when somebody has detained or

threatened to detain property or has threatened to commit any act forbidden by the law for causing any person to enter into a contract against his will, the person is said to have coercion.

Section 15 of the Indian contract Act also has defined coercion in a similar manner as Nepal law which states 'Coercion as threat with intention to enter into an agreement'. The threat amounting to coercion need not necessarily proceed from a party to the contract. It may proceed even from a stranger to the contract. Likewise it may be directed against anybody necessarily to other contracting party.

Examples:
A threatens to shoot B if he (B) does not release him (A) from a debt which A owes to B. B releases A under the threat the release has been brought about by coercion. But, the English law only used the near equivalent of the term 'coercion' that is 'duress' which denote the act or threat aimed at the life or liberty of other party to the contract or the members of his family. But, the scope of 'coercion' is much wider than 'Duress' as it also includes threats over the property also. But a threat to file a suit, a threat to suit, a threat to commit suicide , high price or rate of interest are not regarded as coercion. These above mentioned cases forbidden by the Indian penal code. It depends on the circumstances and that is determined by the natures of the cases. Similarly common code of Nepal has also prescribed the list of criminal cases in its section 9 of the provision of Judiciary agreement. Among them fraud and deception came under the hindrance of free consent.

Consequences of Coercion Contract:
The contract which is created on the ground of coercion is void able nature. Such a contract can be turned into void by the aggrieved party (Section 14(2), NCA 2056) as victim party of a voidable contract he may either exercises the option to affirm the transaction and hold the other party bound by it or repudiate the transactions by exercising a right of rescission. If the aggrieved party rescinds the contract, he must restore any benefit has received, to the other party from whom he has received. The burden of proof lies on the aggrieve party, but there must be completion of contract to claim 'coercion'. According to section 84 of Nepalese contract act he gains competition if the transaction has happened.

Undue Influence

- 'Undue influence' is 'the domination will of the other by moral coercion'.
- It is an abuse of position and one's moral to achieve unfair benefits.
- It is also a cause of voidable contract, which is up to the aggrieved party whether to affirm it or to make void.
- It is a kind of 'mental coercion' as opposed to physical coercion as defined by section is of Indian contract act 1872. Sometimes a party is compelled to enter into an agreement against his will as a result of unfair persuasion by the other party. This happens when a special kind of relationship exists between the parties such that one party is in the position to exercise undue influence over the other.

Explanation of section 14 (b) of the contract Act 2056, has defined 'undue influence'. The subsection b (2) further provides the types of persons are under influence to mobilize for own

interest. Section 16 of Indian contract Act defines it is the same sense as Nepalese contract act which states 'a contract is said to be induced by undue influence where.

i) One of the parties is in a position to dominate the other's will and
ii) He uses the position to obtain an unfair advantage over the other. (I.e. when parties not in equal footing). So, Undue influence is an influence which compels another person to do something which he would not have done if he had been a free mind.

For Example: F, having advanced money to his son B during his minority, upon B's coming of age obtains by misuse of parental influence, a bond from B for a greater amount than the sum advanced F employs undue influence in this case.

a) Real or apparent authority: where a person holds real or apparent authority over the other person he can dominate the will of other. Eg. Master and servant, principal and temporary teacher. Etc

b) Fiduciary relation: every relationship of trust and confidence is fiduciary relation. E.g., lawyer and client, doctor and patient, spiritual advisor and his devotee etc.

c) Mentally or physically weak person: a person taking care of a person who is mentally or physically sick is in the position of dominating the will of such person.

Undue influence may be presumed to exist in the following cases

- Consideration is inadequate
- There is a fiduciary relationship between the parties
- There is inequality between the parties in respect of social status, position age etc
- A greater sum demanded than the actual sum
- There is absence of independent advisors for weaker party

Effects of Undue Influence:

- An agreement induced by Undue Influence is void able at the option of the aggrieved party
- Aggrieved party must go to court within the time limit specified by law, i.e. within 1 year
- Undue influence by a person, who is not a party to a contract, may make the contract void (NCA- 2056, Section. 14 (2)).
- Generally, the burden of proof that lies onto dominant party to prove non use of undue influence
- If contract declared void the party shall refund or repay money or anything received to other party

In dealing with cases of undue influence the court in ***Mohamed Bakshi*** v. ***Hosseni Bibi***, mentioned that the court should consider the following four questions as followers:

a. Whether it is a thing which a right minded or reasonable person might to expected to do?
b. Whether the contract suggests the idea that the donor was not master of him and not in a state of mind to weight what he was doing?
c. Whether it was a matter requiring a legal advisor?
d. Whether the intention of making the gift originated with the donor?

Fraud:

- 'Fraud' means, 'to cheat'.
- 'Fraud' means a Criminal deception intended to gain money or person advantage.
- Fraud is the false statement made to trick someone.
- Fraud means a false representation of fact made intentionally or knowingly by a party to another party.
- Where there is negligence with the intention to deceit others there is Fraud.
- Fraud is also one of the Flaws or hindrances of free consent that turns contract into void able class.

For e.g., A sells a ring to B stating that it is made of pure gold though he knows that it is not true. B purchase the ring believing A's statement to be true. It is fraud by A.

Section 14 (c) of the Nepalese contract Act 2056, "when, with an intent to deceive the other party to the contract or his agent, a party or his agent, a party or his agent induces him to believe a thing as true, which is not true, conceals actively any subject matter of the contract and does some such act as Nepalese current laws specially declare fraudulent, that is said to be fraud."

This definition includes the following things under fraud if committed by a party to the contract or his agent with a view to deceiving another party or his agent

i) To induce a party to believe a false act as a true one
ii) To conceal actively any factual truth
iii) To do any act by which the party believes false as true and
iv) To do some such act which is declared to be fraudulent by other Nepalese law in force

It is to be noted that mere commendation or praising of one's own good is not fraud Traders and manufacturers are inclined to speak optimistically of their products

For Example:
'A' brought a gun from 'B". The gun was defective but unknowingly 'B' plugged it. 'A' did not examine the gun right there and while using later it burst. It does not amount Fraud.

Essentials of Fraud:

To constitute a fraud, it must satisfy the following essentials:

a) By a party to a contract: The party to the contract or his agent has to commit fraud. It must not be committed by third party. E.g., A prospectus containing false statement was issued by the directors of a company. A shareholder subscribed for the shares on the faith of such prospectus and wanted to avoid the contract. Held, the shareholder was entitled to do so because the false statement made by the directors was fraud. [*Reese River Silver Mining co*. v. *Smith* (1869)]

b) False representation: there must be a representation and it must be false, and must be made with the knowledge of its falsehood. E.g., A fraudulently informs B that his estate is free from encumbrance. B purchases the estate on the faith of A's statement. In fact, the estate is subjected to mortgage.

c) Relation of representation with fact: the representation must relate to the fact. A mere opinion, a statement of expression, or intention does not amount to fraud. e.g., A, while negotiating with B for the sale of certain goods, tells him it costs Rs 5000. This is a statement of fact. But if states it's around Rs5000, this is a statement of opinion.

d) Actually deceived: the fraud must have actually deceived the other party who has acted on the basis of false representation.

e) Suffered from damage: it is a common rule of law that "there is no fraud without damage. As such fraud without damage or damage without fraud fails to give rise to an action on deceit. Therefore, the party acting on the representation must have suffered damages. Damages may consists of actual or temporary injury, money's loss etc.

Effects of Fraud

- The party who is aggrieved by fraud can take action against the other party to avoid contract
- Instead of taking action, the aggrieved party can accept the contract and demand to put him in the same position in which he would have been if fraud was not made
- If the party whose consent was caused by fraud suffers some loss, he can claim damages

In following conditions contract induced by fraud is not voidable

i) If the subject matter of the contract has been consumed or destroyed
ii) If such party after becoming aware of the fraud takes a benefit under the contract
iii) If such party does not go to court within time limitation(i.e. 1 year from the time of having knowledge)

<u>Silence regarding fraud</u>

a) Mere Silence is not fraud:

Mere silence is not a fraud is the general rule based on the latin principal caveat emptor(let the buyer beware). The general rule is that a person entering into a contract is not bound to disclose to another party the material facts. There is no such duty under law to make him disclose the facts material to the contract to another party. Here the party entering into a contract has to have full knowledge about all the matters related to the contract.

NCA has not stipulated any provision in respect of silence as to facts but explanation to Section 17 of ICA provides that mere silence as to facts likely to enter into a contract is not a fraud.

e.g. A sold a horse to B for Rs 25,000. A knew that the horse was ill but A never made any representation to B to the effect that his horse was ill. Here knowledge of horse's sickness will not give B a ground to avoid the contract.

b) Silence is fraudulent:

Under certain circumstances no party to the contract has right to keep silence about the subject matter and terms and conditions of the contract or facts material to it. This is guided by the principle *uberrimae fidei*. In contract based on this principle, if one of the parties has any information concerning to the subject matter which would affect the willingness of other party, the party is bound to disclose all the facts.

Duty to disclose arises in following conditions:

i) Statutory obligation to disclose: the law may include certain provisions, which can bind the party knowing certain facts to disclose to the other party.
ii) Contract of utmost confidence: where contracting parties stand in such a relation that utmost confidence or good faith is required, either of them has to make full disclosure of relevant facts. Contract between parent and child, doctor and patient, etc. E.g, insurance
iii) Changes in circumstances: if any changes are made about the fact or subject matter of the contract, its holder has to communicate to other party.
iv) Silence equivalent to speech: if silence is in itself equivalent to speech it amounts to fraud. E.g, A says to B if you do not deny I shall think the bike is in good condition. B says nothing. Here B's silence is equivalent to speech. If the bikes turns out to be not in good condition, B's silence turns out to be fraud.

Misrepresentation:

A representation means a statement of fact made by one party to the other, either before or at the time of contract, relating to some matter essential to the formation of the contract, with an intention to induce the other party to enter into the contract.

A representation when wrongly made, either innocently or intentionally, is termed as misrepresentation.

Misrepresentation means a misstatement or a false representation of fact made by a party to another.

So, we can say, misrepresentation is a representation wrongly made by a party to the contract innocently or without any intention to deceive the other party.

Section 14 (d) of Nepalese contract act provides the provision relating to misrepresentation. Misrepresentation means submission of a false statement on any matter without any reasonable basis of fact, misleading a party so as to aggrieve him and inducing mistake about the subject matter of the contract.

According to its explanation the following activities are regarded as misrepresentation.

a. Submitting a false statement or particulars of any fact without any reasonable basis
b. Causing any party of the contract to his prejudice or misleading him so as to aggrieve him.
c. Causing a mistake deliberately about the subject matter of the contract (i.e. only speaking a baseless statement but it should lead to aggrieve somebody)

About misrepresentation, a prominent writer Prof. Anson has written 'a false statement which the person making it honestly believes to be true or which at any rate he does not know to be false. It can include non-disclosure of material fact of contract but there is no intention to deceive other party.

a) By a party to a contract: The party to the contract or his agent has to make misrepresentation. It must not be made by third party.

b) False representation: there must be a representation and it must be false but the person making it must honestly believe it to be true.

c) Relation of representation with fact: the representation must relate to the fact. A mere opinion, a statement of expression, or intention cannot be regarded as misrepresentation. e.g., A sold his hotel to B and stated that a part of the hotel is occupied by a tenant who is most desirable. However, A could recover the rent from him only under pressure and the rent was currently much in arrears. Held, B was entitled to avoid the contract because the statement made by A amounted to misrepresentation. [Smith v land and House Property Cor.(1884)

d) Actually acted: the party to whom representation is made must have acted on its faith.

e) A false representation to whom: A false representation need not be made directly to the plaintiff. A wrong or false representation made to a third person with an intention of communicating it to the plaintiff is also misrepresentation.

Effects of Misrepresentation

- The party who is aggrieved by misrepresentation can take action against the other party to avoid contract

- Instead of taking action, the aggrieved party can accept the contract and demand to put him in the same position in which he would have been if misrepresentation was not made
- If the party whose consent was caused by misrepresentation suffers some loss, he can claim damages

In following conditions contract induced by misrepresentation is not voidable

iv) If the subject matter of the contract has been consumed or destroyed
v) If such party after becoming aware of the misrepresentation takes a benefit under the contract
vi) If such party does not go to court within time limitation(i.e. 1 year from the time of having knowledge)

Mistake:

Mistake may be defined as an erroneous belief concerning something. Consent cannot be said to be 'free' when an agreement is entered into under a mistake. 'Mistake' is 'Misconception". It is a slip which is made not by design but by mischance. Mistake is a wrong opinion about something. When an offer is accepted in another sense than the offer was made, it is said to be assented by mistake. 'Mistake' and 'free consent' does not exist in the same side, they always exists in the opposite side. Such a contract cannot prove 'consensus ad idem' of the concerned parties.

Section 13 of Nepalese contract act has prescribed 'mistake' under the void contract. It states in the section 13 (g) that 'a contract cannot be performed because the subject matter of the contract is not clearly known to the contracting parties'. In this regard section 20 of Indian contract act clearly defines it as' where both the parties to an agreement are under mistake as to the matter of fact essential to agreement is void'.

e.g., B makes an offer to A with intent to buy his Red horse. A accepts B's offer to sell black horse. Here, intention of A and B is different and both they are mistaken on the color of the horse. This is void agreement.

Classification of Mistake

A) Mistake of Law:
There is a popular maxim '*Ignorantia juris non excusat'* means 'ignorance of law is non excusable' has settled a rule of law. 'Ignorance of law is not caused by inability' Legal mistake of a contract turns it as void condition because a contract also stands on a legal ground. If the ground is erased no contract can stand on. Mistake of law not only makes the contract void but is also punishable to the parties depending upon the volume and its nature.

Types:

a. Mistake of general law of the country or mistake of law(municipal law)
b. Mistake of foreign law (In the contract act 2056, there is no such provision)

Mistake of foreign law may be allowed because it is not compulsory that everyone has to know foreign law. And also 'mistake of law of foreign country is regarded equivalent to the mistake of fact and is sometime excusable according to Indian contract Act.

B) Mistake of fact:
A mistake connected with the subject matter of the contract is mistake of fact. A contract entered into by making a mistake of fact may be either valid or void. Mistake of Facts are of two types.

Unilateral Mistake :
Where only one of the contracting parties is mistaken as to a matter of fact, the mistake is unilateral mistake. Thus, if one of the parties to the contract is mistaken about the subject matter or in expressing or understanding the terms or the legal effect of an agreement, the mistake is known as unilateral mistake.

NCA is silent regarding to mistake made by one of the contracting parties. But as stipulated in section 13(g) of the Act, it can be presumed that if one of the parties is mistaken in fact essential to the contract, the contract may be valid. Regarding the effect of unilateral mistake on the validity of contract, section 22 of Indian contract act provides that, "a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact'.

Example: A wants to sell his house to B for Rs. 50000. By mistake he makes an offer of Rs. 40000 in writing. He cannot plead mistake.

Bilateral Mistake:
Where the parties to an agreement misunderstood each other and are at cross purpose, there is a bilateral mistake. In case of bilateral mistake of essential fact, the agreement is void ab-intio.
NCA is silent regarding to mistake made by one of the contracting parties. However, Section 13(g) provides that where the fact essential to the contract is not known to the parties and the contract becomes impossible to perform due to such ignorance, the agreement is void.

From this it becomes clear that to become mistake of fact

i) Parties to the contract should not have known the subject matter
ii) Subject matter must be related to contract
iii) Performance of contract should be impossible

Section 20 of Indian contract act provides that 'where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void'. But,

- There must be a mistake of fact as to the formation of contract.
- The mistake must be of the both parties.
- It must be a fact essential to agreement.

Example:

A wants to buy a particular horse. B has two horses' one cart horse and another race horse. A wanted to buy a race horse but B thinks he is selling a cart horse. Agreement is void as there is bilateral mistake as to the identity of subject matter.

Effects of mistake

- Voidable at the option of the parties
- Party must go to the court within 1 year
- Any benefit obtained must be returned to the party from whom it was obtained
- Burden of proof lies on the party claiming the contract by mistake

Quasi-Contract

Quasi means almost or apparently but not really or as if it were. Quasi contract is not a contract at all because one or the other essentials for the formation of a contract are absent. It is an obligation imposed by law upon a person for the benefit of another even in the absence of a contract. The relationship of the parties by which one party is bound to pay money in consideration of an act done or suffered by the other party even in the absence of contract is quasi contract. It is based on latin maxim, 'nemo debet locuplatari ex liena justua', which means no man must grow rich out of another person's cost; which means no person shall be allowed to unjustly enrich himself at the expense of another.

Features of Quasi contract

- It is imposed by law and does not arise from any agreement
- The duty of a party and not the promise of any party is the basis of such contract
- The right under it is always a right to money
- The right under it is available against specific person

- A suit for its breach may be filed in the same way as in case of a complete contract

Kinds of Quasi Contract/ Rules regarding Quasi contract

a) Right to recover the price of necessaries supplied

The person who has supplied the necessaries to a person who is incapable of contracting or anyone whom such incapable person is legally bound to support, is entitled to claim their price from the property of such in capable person. Example; necessaries supplied to minors, lunatic etc

Following points should be satisfied:

i) The supplies are or real necessities
ii) The necessities are supplied at the time when actually needed
iii) The price is reasonable
iv) Supplies are not of gratuitous nature
v) Necessities supplied are payable only when the incapable person has property for them

b) Right to recover money paid for another person

A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. E.g., B holds land in Bengal on a lease granted by A. A's land is advertised for sale due to non payment of revenues. B to prevent the sale and cancellation of lease pays government sum due from A. A is liable to B for the sum paid.

Condition:

i) Person making the payment must necessarily be concerned with the payment of amount

ii) Payment must not be of voluntary nature

iii) Payment of money must be one which another was legally bound to pay

c) Right to recover for non gratuitous act

Non gratuitous means 'not done free'. The act which are done with the intention of being paid are called non gratuitous act.

Right to recover arises if the following three conditions are satisfied:

i) the thing must have been done or delivered lawfully;

ii) the person who has done or delivered the thing, must not have intended to do so gratuitously; and

iii) the person for whom the act is done must have enjoyed the benefit of the act

Example: A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

d) Responsibility of finder of goods

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee. Example: X guest found a diamond ring at a party of Y. X told Y and other guests about it. He has performed his duty to find the owner. If he is not able to find the owner he can retain the ring as bailee.

A found a diamond on the floor of B's shop and handed it over to B to keep it till the true owner is found. Best efforts were made to trace the true owner and advertisement was given in newspaper. True owner couldnot be traced. After sometime A tendered to B the expenses incurred by him for tracing true owner and requested him to return the diamond. B refused to return the diamond to A. it was held that b must return the diamond to A as he alone was entitled to retain it against everyone except true owner. (*Hollins* v *Fowler* 1957)

e) Right to recover from a person to whom money is paid or thing is delivered by mistake or under coercion:

A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it. Example: A and B jointly owe Rs 100 to C. A alone pays the amount C, and B, not knowing this fact, pays Rs 100 over again to C. C is bound to repay the amount to B.

Performance of contract

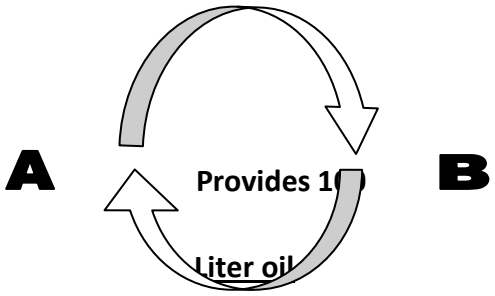
Contract is an agreement between the two or more parties to do not to do something, which is enforceable by law. It mean's when there is a contract there is something to perform. Performance of contract means fulfillment of contractual duties by both the promisor and the promisee. So performance is very essential for contract because:-

→ if there is no performance there is no contract.

→ To fulfill the contractual obligation.

→ Peaceful settlement of the contract.

At last we say that performance of contract is very essential to the very existence of the contract.



In this case if A provides B 100 liters oil and gives Rest 10 thousand instead of oil both perform their contractual duties. The both parties duly perform when contract, the contract to a ending and no thing more remains. Performance by all the parties o the respective obligation is the normal and natural mode of the discharging of terminating a contract. So it is also known as a

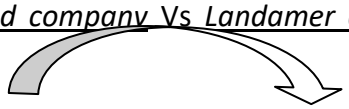
method of discharging a contract peacefully because when person perform the contractual obligation there is no dispute remain.

Section 71 of NCA focuses on methods of performance and section 74 means each party to a contract shall fulfill their obligations under contract.

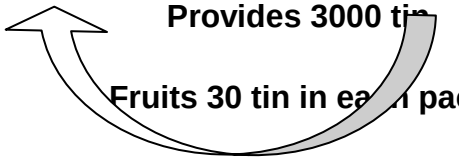
General Rules of Performance

The General Rules of performance of contract is that performance must exactly match that the party agreed too do. If x provides Y 100 Q rice 30 of March 2005 and Y gives Rs 20 thousand in same day. They fulfill their contractual obligation.

In the case of *Remore and company* Vs *Landamer and company* (1921) same principle was applied.



RE more and company **Landamer and company**



Provides same quality

But 24 tin in each

Packet

So refuse to take or receipt the delivery. Court said that contract must be performed on prescribed mode and conditions so defendant has right to take or not to take the fruits.

Essentials of a valid performance:

- Performance should be unconditional
- Performance should be precise and exact
- Performance must be made at proper time and place
- It must be made to proper person
- Party must be given reasonable opportunity to examine the performance of promise
- Performance must be of whole obligation
- Person must be able and willing to perform his obligation

Types of performance

a) Actual performance

Actual performance means to fulfill the contractual liabilities completely according to the terms and conditions of the contract. The contracts come to an end and the party is discharged of contract after actual performance. E.g., If A provides 100litres of oil to B in 15 Jan 2005 in Jhapa and B provides A Rs 20 thousand instead of oil there is actual performance of contract. The main assumptions of the contract law are honestly performing the contractual obligation by the entire contract. So contract is terminated after actual performance.

b) Partial Performance

Against the general rule of the performance of contract but partial performance is accepted in contract because of the doctrine of quantum merits it's also known as quasi contract. E.g. A and B signed the agreement that A will make a home to B in Rs 10 lakh within 6 months. After three months A completed half of the construction and he was unable to finish left part of the construction. In such situation A is entitled to get Rs 5 lakh because he did half of the work or he performs a part or the contract. If doses not get any thing another party takes unusual benefit.

c) Attempted performance / tender of performance

Tender is a offer by one party; who is ready, willing and able to perform, to the other party to perform his obligation under the contract. This offer is called tender of performance. It is then for other party to accept the performance. If he doesn't accept, the promiser is not responsible for non-performance. The tendering party doesn't lose his right of the contract. In other words, the tender of performance if rejected by the other party excuse the promiser from further performance and entitles his to use the promiser for breach of the contract.

Rules of performance contract

A) Responsible person to demand performance (Who to ask for performance)

a) By the promisee

Only the promise is entitled to demand the performance of a contract. E.g., A promised to paint a picture for B. Here only B has the right to demand the performance from A.

b) By the legal representative

In case of death of the promisee before performance the liability of performance falls on his legal representatives. But in the case of contracts involving personal skill the legal representatives are not bound to perform the contract. Such contract comes to end on the death of the promisee. E.g., A contracted to sing a song in B's theatre on 1st Jan 2015 for Rs 5000. A died before this date. This contract cannot be performed by A's representatives as it involves the use of personal skill.

c) Third party

General rule in a common law system is that, a person cannot acquire rights to demand performance under a contract to which s/he is not a party to such contract. This is known as privity of contract.

This rule does not apply

- In case of beneficiary
- In case of family settlements, trusts, etc

d) joint promisees

When two or more persons have made a joint promise all such person must jointly fulfill the promise and promisees can demand for such performance. Section 78(2) of NCA mentions except otherwise provided all promisees can demand performance. ICA is clearer on this context. It provides

Circumstances	**Provision**
In case all the promisees are alive	All promisees shall jointly demand for performance
In case any one of the joint promisees dies	Heir/ legal representative of dead promisee along with other promisees jointly
In case all joint promisees dies	Heirs/legal representatives of all dead promisees jointly

B) Responsible person to perform contract (Who perform the contract)

a) By the promisor himself Sec. 77 of NCA an sec 56 of ICA)

In the case of a contract involving personal skill, test or credit, promisor must himself perform the contract.

b) By the promisor or his agent: sec77 (1) NCA

In the case of a contract of impersonal nature for eg. a contract of sale of goods or a contract to lend a sum of money, the promiser himself of his agent may perform the contract.

Promises to pay sum of money

A ⟶ B

A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another. Sec 40 of the ICA states that when the promisor appoint agent he must be competent to do that. Sec 40 of ICA & sec 77(1) of NCA states that contractual only right can be.Sec 77 (2) of NCA further states that one the promise accepts the act done by the contract must be performed promisor. In the case of Lal kapurchand V Mir Nawab Azamjah (1963) court laid this principle. When a promise accepted lesser amount from the third party in full satisfaction of his claim, it was held that he can not enforce the promise against the promisor. So under this section performance of the promise, discharges the promisor, although the promisor has neither authorized nor ratified the act of the third party.

c) By the legal representative

In case of death of the promisor before performance the liability of performance falls on his legal representatives. But in the case o contracts involving personal skill the legal representatives are not bound to perform the contract. Such contract comes to end on the death of the promisor.

d) performance of joint promise [Sec 77 (3) (4) (5)]

i) All the person must jointly fulfill the promise:-

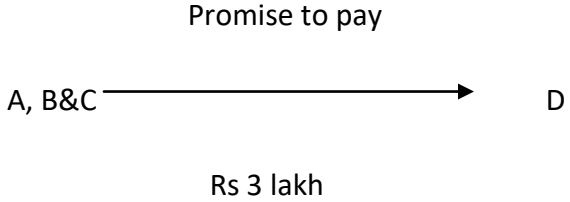
When two or more persons have made a joint promise all such person must jointly fulfill the promise. E.g., A, B, C, are jointly liable to pay Rs 3 lakh to D under a contract indicated them to pay it jointly.

ii) Any one or more of joint promisors may be compelled to perform:-

When two or more persons make a joint promise the promise is entitled to compel any one or more or such joint promises to perform the whole promise. E.g., X,Y,Z are complelled to pay Rs 3 lakhs to A under a contract and A may compel either X, Y, Z (all) or X or y or Z or any of them to pay 3 lakh.

In the case of Phani Bhusan V. Rajendra A.I.R. (1947) The court has held that a decree against some only of the joint promisors constitutes a bar to a second suit against other co-promisors, even if the promise fails to release the whole of the decrials amount for his claim merges in the decrials amount for his claim of the decision is that the liability of joint promises is joint and alternative.

iii) Right to contribute inter-se between joint promise : if one of several joint promises is made to perform the whole contract, he may require equal contribution from the other joint promises.

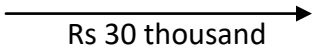


If ‘A’ is compeled to pay entire amount of Rs 3 lakh to D we can realize from B and C Rs 1 lakh each.

iv) Sharing of loss by default in contribution:-

If any one of the joint promises makes default in making contribution the remaining joint promises such default in equal shares.

A, B & C Promise to give D

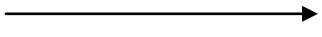


Rs 30 thousand

If A unable to pay the money B and C joint must pay whole Rs 30 thousand.

v) Effect of release of one joint promisor:-

In case of joint promise, if one of the joint promisors if released from his liability by the promise, his liability to the promise ceases but this doesn’t discharge the other joint promisors form their liability neither does it free the joint promisor so released from his liability to contribute to the other joint promisors.

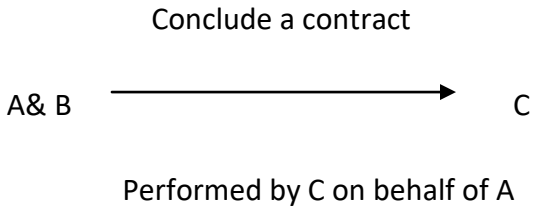
X, Y, Z  D

Promise to pay 30lakh

If X pays Rs10 lakh and release from the contract in this situation other parties are bound to pay rest amount of money.

e) Third Party

Unless otherwise mentioned in a contract third party can perform the contract on behalf of promisor.

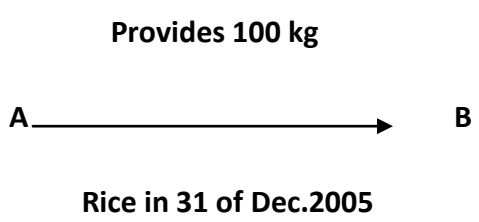


C) Time of performance

Sec 71 of NCA

a) The performance of contract must take place within the time. Sec 71 (1)

If the contract stipulates time for performance of the contract should be performed within that time.



A must provides 100 Kg rice in 31 of Dec2005. Otherwise contract laps or terminates and B has right to claim damages with A for breaching the contract.

b) If the contract is specific in nature it must be performed in that time**.** Sec 71 (2)

If Biratnagar Sugar Mill call the notice for the workers, workers join the mill in November, December not in March or April.

c) If there is no stipulation of time the contract can be performed within reasonable time sec 71(3)

There is no clear cut definition about reasonable time so it is depends on nature of the contract. The transactions between the parties about the land and goods may have long time there may be one two weeks or months but the transaction of gold or dollar has man few time may be hour. So it is always depends upon third person eyes. But time must be adequate to persons that work.

D) Place for performance (sec72)

a) If the Place of performance is fixed in the contract the contract must be performed on said place [sec 72 (1)]

provide 1000 copy of books in Biratnagar

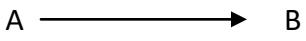
A ⟶ B

Here, A must provides 1000 copy of books in Biratnagar to B.

b) At the place of storage of goods: If the contract is delivery of goods and contract is silent about the place delivery where the goods are situated shall be the place of delivery (sec 72 (2)
c) At a particular place: If the contract dies not stipulate the place of performance and certainly type of Act can be done certain place only are there is custom of doing the act in certain place such place shall be the place for performance of contract (sec 72 (3)
d) At a reasonable place: where the situations explained in above (b) and (C) doesn't exist the performing party shall apply to other party to fix the place of performance for the performance of contract sec 72 (4)

E.g

Provides 500 Kg



Potato

If the situation of (b) and (c) is not exist A told B to fix the place of performance. In such situation B must show the place of performance.

Methods /procedure of performance

a) contract must be performed in given procedure [sec 71 (1)]
b) In the case of specific nature of contract it must be perform in the procedure [sec 71(2)]
c) If procedure methods are not fixed the reasonable method should apply.

Contracts which need not be performed [**sec 73]**

a) If one party absolves the other party from fulfilling the obligations according to the contract 73 (a)
b) which may have a void able contract, made void does so sec 73(6)
c) Violation by other party sec 73 (c)
d) It becomes unnecessary to perform the work mentioned in this Act, {for eg. Sec 13 contracts need not be performed}. If such situation arises contract is not enforceable. It is void.
e) It becomes unnecessary to comply with the contract under sec 79
f) Contract need not executed in the event of fundamental changes in the situations.

Discharge of Contract

(Termination of Contract)

Discharge of contract means termination of the contractual relationship between the parties to a contract. A contract is said to be discharged when it ceases to operate, i.e., when the rights and obligations created by it ends.

Modes of discharge of contract

1) Discharge by performance: a contract is said to be discharged by performance in any of the following ways

a) By actual performance: a contract is said to be discharged by actual performance when the parties to the contract perform their promises in accordance with the terms of the contract. E.g., A agrees to sell B his care for Rs 50,000/-. Here B pays and A delivers his car is actual performance.

b) By attempted performance: a contract is said to be discharged by attempted performance when the promisor has made an offer of performance to the promise but it has not been accepted by the promise. E.g. E.g., A agrees to sell B his care for Rs 50,000/-. Here A delivers the car but B refuses to pay.

2) Discharge by mutual agreement: since a contract is created by mutual agreement, it can also be discharged by mutual agreement. A contract can be discharged by mutual agreement in any of the following ways

a) Novation: novation means the substitution of a new contract for the original contract. Such a new contract may be either between the same parties or between different parties. E.g., A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A.

b) Rescission: rescission means cancellation of the contract by any party or all the parties to a contract. E.g., A promises D to sell and deliver 100 bales of cotton on 1st January at his godown and D promises to pay for goods on 1st feb. A does not supply the goods, D may rescind the contract.

c) Alteration: alteration means a change in the terms of a contract with mutual consent of the parties. Alteration discharges the original contract and creates a new contract. However, parties to a new contract must not change. E.g., A promises D to sell and deliver 100 bales of cotton on 1st January at his godown and D promises to pay for goods on 1st feb. Afterwards, A and D mutually decide that the goods shall be supplied in 5 installments. Here, the original contract has been discharged and a new contract came into effect.

d) Remission: remission means acceptance by the promisee of a lesser fulfillment of the promise made. E.g., A owes B Rs 5000. A pays to B, and B accepts, in satisfaction of the whole debt, Rs 2000 paid at the time and place at which Rs 5000 were payable. The whole debt is discharged.

e) Waiver: waiver means intentional relinquishment of a right under the contract. Thus, it amounts to releasing a person of certain legal obligation under a contract. E.g., B owes D Rs 2000. Subsequently D exempts B from debt.

3) Discharge by operation of law : a contract may be discharged by operation of law in the following cases:

a) by death of the promisor

b) by insolvency

c) by unauthorized material alteration: if any party makes any material alteration in the terms of the contract without the approval of the other party the contract comes to an end.

4) By impossibility of performance (Doctrine of frustration) : Sometimes the performance of a contract is possible when made between the parties but sometimes due to the disappearance of the subject matter, the contract becomes physically impossible. This type of impossibilities is called frustration.

a) Destruction of the subject matter: -

If the subject matter of a contract is destroyed without any fault of the parties than the contract terminates. In the *Howell* v. *Coupland* (1876) 1 QBD 258 (CA) The defendant

contracted to sell a specified quantity of potatoes to be grown on his farm, but failed to supply them as the crop was destroyed by a disease. Delivering the judgment of the court of Appeal, MELLISH LJ said: Suppose the potatoes had been fully grown at the time of the contract, and afterwards the disease had come and destroyed them; accordance to the authorities it is clear that the performance would have been excused; and I cannot think it makes any differences that the potatoes were not then in existence…Here there was an agreement to sell and buy two hundred tons out of a crop to be grown on a specific things; therefore neither party is liable if the performance becomes impossible.

Regarding the destruction of the subject matter there has been the provision in the NCA .It has been mentioned in the section 79(2)(c) which provides that, in case anything essential for executing the contract is destroyed or damaged, or no longer exists, or cannot be obtained.

b) Change of circumstances

Sometimes certain change in the circumstances may directly affect the contract. In that case the contract may be impossible to perform and can automatically terminate. We can discuss by taking the example, A and B did a contract of supplying particular cloths to A from the particular factory of the B. latter what happened is that the particular factory was destroyed by the fire. In this case the contracting parties did not foresee the happening of this incident. This sort of change in circumstances frustrates the parties and could easily be terminated. A contract will frustrate “where circumstances arise which make the performance of contract impossible in the manner and at the time contemplated”.

Section 79(2)(b) of the NCA has mention the frustration takes place during the change of the circumstances. It provides that, in case it becomes impossible to execute the contract due to emergence of such situations as war, floods, landslides, fire, earthquakes, and volcano eruptions, which are beyond the control of human beings.

c) Death or incapacity of party: -

It is impossible to perform the contract incase of death of the either party or becomes incapable of performing it. Such a cause of termination often happens in contract based on personal skill and qualification. It has been defined in the case of Robinson v. Davison (1871) LR Exch 269: 40 LJ Ex 172 in which; There was a contract between the plaintiff and the defendant's wife, who was an eminent pianist that she should play the piano at a concert to be given by the plaintiff on a specified on a specified day. On the morning of the day in the question she informed the plaintiff that she was too ill to attend the concert. The concert had to be postponed and the plaintiff lost a sum of money.The plaintiff's action for breach of contract failed. The court said that under the circumstances she was not merely excused from playing, but she was also not at liberty to play, if she was unfit to do so. The contract was clearly subject to the condition of her being well enough to perform: The whole contract is based on the assumption of the continuance of life, and on the conditions, which existed at the time. Both make that assumption; it is really the foundation of the contract. It does not require close reasoning to prove that if the foundation fails, the whole contract must fail. Here the foundation was wanting for there was on Mrs. Davison's part an entire and total incapacity to do the thing contracted for. Therefore it shows that, in case of the contract, which is based upon the personal skill and quality, if the party fails to perform its act due to bad health or death. The contract terminate to this extend.

Likewise, it has been mentioned in the provision of NCA. It has been provided in section 79(2)(d), where it has stated as, in case anything essential for executing the contract is destroyed or damaged, or no longer exists, or cannot be obtained;

d) Government or illegality of performance: -

In this case when the contract is taken place there was no legal intervention but latter on government made such a legal provision which may effect the contract than at that time the contract will be effected by the doctrine of frustration and that contract get terminated. I would like to illustrate with the help example that A and B made a contract to buy and sell wood of the certain forest, when there was no restriction of sell and purchase of wood but later

on the performance become impossible due to the restriction applied by the government that cutting of trees is crime than at this situation the contract get frustrated and the contract terminate than and over.

Regarding the legislative intervention NCA has mentioned the provision under the section 79(2)(a) where it has provided that, in case the contract becomes illegal and therefore, shall not be executed.

e) Change of law

Contract was valid when entered but it becomes unlawful due to subsequent changes in law is void.

Above mention are the conditions where the impossibility of performance applies. Therefore, there are other conditions where the impossibility does not apply. There are various instances that the situation or circumstances contemplated by the parties at the time of formation of contract changes before or at the time of performance such changes may be from slight or fundamental. In minor change of circumstances the parties are not discharged from performance. The change must be so severe that performance is made possible. If the slightest changes also are allowed each party will claim impossibility if performance becomes less beneficial.

Under section 79(3) of NCA the following situations are not allowed for discharge although the situations may put the parties in more difficult position than contemplated at the time of formation of contract.

a) Difficult in performance: -

Where the changes of circumstance make the performance difficult the party cannot claim of discharge on the ground of impossibility. Let me clear through the example. H and S agreed that S would supply 1000 eggs per day to H at the price of Rs 4 per egg for one year. But latter on

due to widespread poultry disease it was difficult to collect 1000 eggs. Here S cannot claim doctrine of impossibility to be discharged from supply eggs.

b) Commercial impossibility: -

Commercial impossibility means less profit or loss in the transaction. When performance of contract leads to less profit then excepted or loss it may be commercially profitable not to perform. But Doctrine of impossibility doesn't apply here. He has to perform the contract although there may be less profit or loss.

e.g., A, furniture manufacturer agreed with B to supply furniture on an agreed rate. But before the delivery the rate of timber and daily wages of worker increased rapidly, which would amount loss to A if he supplies. A didn't supply the furniture to B. here B can sue for damages as A is liable to supply as per the contract.

c) Impossibility due to default of third person: -

Section 79(3)c states wherein case any party to a contract is dependent upon any third party who is not a party to the contract for performing the contract, if the third party commits a mistake or becoming unfit than the contract is not discharged because of impossibility caused by default of or incapacity of the third person.

In *Samual fiza and company* v. *standard cotton company* (1945) AIR, Mad 291 where the defendants placed and an order with the plaintiff for supply of tapestries of certain kind, making it clear that they intended to sell them in Australia. But the Australian government prohibited the import of such goods. The defendants lost their market and cancelled the order. The court held that the foundation of contract was not that the goods were to be resold. That cannot be read on the contract that enforceability of the contract was dependent upon the ability of the purchaser to fine customers for goods.

d)Strikes and lockouts: -

The parties of contract are not discharged from performing the contract where the impossibility of contract is caused due to strikes and locks outs. It is because a strike is manageable (as labor is available otherwise) and latter is self-induced.

e) Additional tax: -

For example A agreed to supply a car to B for 3500000/-. Latter custom duty for import of car is increased. A cannot refused to supply the car on the ground that the custom duty is increased.

f) Failure to one of the objects: -

A contract made for more than one purpose is not discharged due to failure of one or more object. The other objects need to be fulfilled i.e. performed. For example ram agrees to sale his houses one for Rs 300000/- and other for 700000/-. One house is destroyed by fire. The object to sell the destroyed house is discharged. But the object to sell the next house remains to be performed.

5) By lapse of time: a contract is discharged if it is not performed or enforced within a specified time called the period of limitation.

6) By breach: a contract is said to be discharged by breach of contract if any party to the contract refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract.

Breach of contract takes place when

- Any party does not fulfill liability according to contract
- He renounces about the performance of promise
- His conduct shows his incapability of performance
-

Breach of contract occurs on following ways:

a) Actual breach of contract

Actual breach of contract occurs either on due date of performance or during the course of performance. E.g., A agrees to sell a car to B on 1st June 2016. He fails to deliver on the due date.

b) Anticipatory breach of contract

Anticipatory breach of contract occurs when the party declares his intention of not performing the contract before the performance is due.

e.g., A contracted to supply to B 100 pieces of plugs on 15th dec 2015. But before due date of performance A informed B that he is not going to deliver. A and B may put an end to contract.

AGENCY

Agent: A person, employed to do any act for another, or to represent in dealing with third person is called Agent.

Principal: A person for whom such act is done or who is so represented is called principal.

A contract of agency is such type of relation between the principal and agent

The Indian contract Act 1872 (Sec 182) defines agent as a person employed to do any act for another or to represent another in dealings with third person. The person for whom such an act is done or who is represented is called the principal.

Nepal Agency Act 2014 Sec.2 (a) defines agent as one who works for any domestic or foreign business firm all over Nepal or in any party of the kingdom of Nepal and the term 'agent' may mean a distributor, stockiest, nominee, or a representative.

Nepalese contract Act 2056 has made provision relating to agency. Sec 56 states that " any person may appoint any other person as his agent to do anything an his behalf, except something connected with his personal skills or capacity or to conduct business as his agent or to transact with a third person or establish any kind of legal relation with the personal appointing an agent and a third person, and in case an agent is appointed a contract relating to agency shall be deemed to have been concluded.

Similarly An agent is appointed to fulfill various objectives and to do various act on behalf of the principal (the person who authorized another to carry out some responsibility) such as buying and selling, to draft or send the money from one place to another or from one country to another country or to sell the share of the company etc. the important thing is that if the agent is appoint for achieve the objective but he is doing work for his principal. But if he committed the wrong at that time the principal is liable. For e.g. ram appoint the shyam as his agent to bring 100 tones of cement from gopal on credit. Shyam brings the cement that cost Rs. 60000 from gopal of his principal ram. Ram is liable for the payment of price because the cement is purchased for Ram.

Essentials for a valid agency

1. There must be an agreement between principal and the agent
2. The agent must act in representative capacity i.e. power to create legal relationship of his principal with third party

3. The principal must be competent to contract
4. Consideration is not necessary (agent can be remunerated by way of commission)

Principles of Agency

The agency relationship is based upon following two principles

a) Whatever a person can lawfully do himself, he may also do the same through an agent except in case of contracts involving personal expertise
b) He who acts through another is considered to have acted personally, i.e., the acts of the agent are considered the acts of the principal

Types of Agent:

1. **Mercantile or Commercial Agent:** Mercantile agent may be defined as an agent who has the authority either to sell the goods or to consign the goods for the purpose of sale, or to buy or to raise the money on the security of goods on the behalf of the Principal. Mercantile agent can be further classified as:

a. **Factor**: A factor is a mercantile agent to whom the possession of the goods is given for the purpose of selling the same. A factor usually sells the goods in his own name.

b. **Broker**: A broker is an mercantile agent who is appointed to negotiate and make contracts for the sale or purchase of goods on behalf of his principal. He is not given the possession of the

goods. his main function is to bring about a contractual relationship between his principal and the parties who wish to buy or sell goods.

c. **Auctioneer:** An auctioneer is a mercantile agent who is appointed to sell the goods at a public auction i.e. to sell the goods at the higher price in public competition.

d. Commission Agent: A commission agent is a mercantile agent who buys and sells the goods on behalf of principal and receives the commission for his charges.

e. **Del credere agent**: A del credere agent is a mercantile agent who, in addition to his work of bringing a contract between his principal and third parties, also undertakes to be liable to the principal for the default of the third party to perform the contract. In other words he also guarantees the principal about the performance of the contract by the third party. He gets extra commission for the extra risk, the commission of such is called del credere commission.

f. **Banker**: Generally, the relationship between a banker and customer is that of a creditor and debtor. However, when the banker buys or sells securities, collects cheques, dividends, etc on behalf of his customer, he also acts as an agent.

2. **Non-Mercantile Agent :** He is agent appointed by principal to do some acts which are not done by mercantile agents. Some of the non-mercantile agents are

a. **Insurance Agent:** An insurance agent is an agent who is appointed to effect insurance policies on behalf of principal. he receives commission for his service.

b. **Counsels or Advocates:** A Counsel or advocate is a person who is engaged to conduct the legal proceedings on behalf of his principal (i.e. client). he receives fee for his service.

3. **On the basis of Authority**

a. **General Agent:** A general agent is an agent who is appointed to perform all acts relating to a particular trade or business for which he is appointed. A general agent can do all the legal acts for the purpose of carrying on that trade or business on behalf of his principal. His authority is continuous until terminated.

b. **Special Agent:** A special agent is an agent who is appointed to perform a special act. In other words, he is the agent who represents his principal in some particular transaction, e.g., an agent employed to sell a piece of land or buy a house. He has a limited authority which comes to an end after the fulfillment of the act prescribed.

c. **Universal Agent**: A universal agent is an agent who is appointed to do all the various trades of business of his principal. In other words, he is an agent who is authorized to do all the acts which his principal can lawfully do under the provisions of law of the land. he has more power than that of special or general agent.

Modes of creating agency.

The relationship between the principal and an agent is called agency. An agency is created by various ways which are given below.

1. **Agency by express authority:**

An express agreement creates an agency, which may be either written or oral. By this mode the agent so appointed gets formal power in a written, stamped, signed document etc while doing agreement. In Nepal it is done only in written form. But in India it can be both written and oral form. Here, the usual form of a written agreement is power of attorney, which gives an authority to an agent to act on behalf of the person who gives the authority.

2. **Agency by Implied authority**

It arises from the conduct, situation or relationship of parties. Whenever a person places another in a situation in which that other is understood to represent or to act for him, he becomes an implied agent. For e.g., husband and wife, master and servant etc.

Agency by implied authority includes:

a) **Agency by Estoppels**

The term estoppel may be defined as prevention of a claim or assertion by law. In other words, when someone makes another person to believe that a particular thing or fact is true, then later on he cannot be allowed to deny the truth or thing or fact. If a person by his words or conduct, has willfully led another to believe that certain circumstances or facts exists the other person, who had acted on that belief, may create an agent once accepted acts or facts cannot be rejected again he agent is based on doctrine of estoppels[estoppel means prevention of a claim or assertion by law]. For e.g., X tells Y in presence and within the hearing of Z that he (x) is the agent of Z. Z does not contradict the statement. Later Y contracts with X believing him to be Z's agent. In such case Z is bound by the contract in a suit between X and Y, Z is not permitted to say that X was not his agent.

b) **Agencies by necessity**

Although the power of the agents are, ordinarily, limited to particular acts; yet sometimes extraordinary emergencies may arises in which a person may be compelled to act as an agent of some person without requiring the consent or authority. Such an agency is called agency by necessity.

However, to constitute a valid agency by necessity the following conditions must be satisfied:

- There must be real emergency and necessity to act on behalf of the principal
- The agent must not be in a position to communicate with the principal or to obtain instructions

- The agent must act honestly and in the interest of the principal
- The agent must adopt reasonable and practicable course under the circumstances of the case

e.g. A, the master of petrol tanker is agent of B. A brings petrol from Birjung for B. On the way, a problem arises, there is a leakage and it cannot be sealed and it is impossible to carry the petrol to Kathmandu. A sells the petrol to a pump in hetauda. So A becomes a sales agent by necessity.

A stored some furniture in B's house, free of charge. Thereafter, they lost the contacts with each other. After three years B needed the space occupied by the furniture. He obtained A's address from his bank and wrote two letters to him. But he received no reply. B then sold the furniture. Subsequently, A turned out and claimed for furniture from B. it was held that there was no agency by necessity as there was nothing in the nature of an emergency compelling B to sell the furniture. [*Sachs* v. *Milkos* (1948)]

c**) Agency by holding out**

Such agency arises when a person by his past or positive conducts leads third party to believe that the person is doing some act on his behalf with authority.

For e.g. A is the servant of B and A can bought the goods from the shop of C on credit day to day for his master and master paid that money time to time. But on one occasion A bought goods for himself not master on credit from C's shop on the name of B. B was liable to pay. He cannot say that I won't pay. B is liable on acts of A by his prior conduct and A is his agent.

3. **Agency by operation of law**

Such agency is said to arise where the law treats one person as an agent of another. For e.g., on formation of a partnership firm, every partner becomes the agent of another.

A, B and C were the partners of a firm which was carrying on the business of shoe making. A bought some raw materials from D on credit, for the purpose of firm. And the raw material was bought in the name of the firm. In this case, the firm is bound by the purchases made by A and is liable to pay the price to D.

4. Agency by ratification

Ratification may be defined as the confirmation of acts already done. Even if the agent enters into a contract without the authority of the principal, he may subsequently ratify, that is to say adopt the benefit and liability of a contract made on the principal behalf.

Where an agent does an act for his principal without consent, and the act is accepted by the principal afterwards, it is called agency by ratification, thus the act performing the act of ratifying by the principal may create an agency and it depends on the wish of he principal whether to ratify the act or not.

e.g

A is the insurance agent and B is the businessman. A insures the goods of B without his consent. If B ratifies the act of A, the policy of insurance is valid with retrospective effect as if A was authorized to the insure goods.

Rules regarding ratification

1. The agent must expressly contract as an agent and the contract can only be ratified by a principal who's name is mentioned or disclosed.
2. The principal must be in existence at the time of contract.

3. The whole contract can only be ratified. The principal cannot say he is ratifying only a part of the contract
4. The principal must have contractual capacity at the date of contract.
5. Ratifier must communicate his ratification to the agent.
6. Ratification should not put a third party to damage.
7. Lawful acts can only be ratified.

Is wife an agent to her husband?

A wife living with her husband has the implied authority of the husband to buy articles of household necessity. As long as people continue to live in houses the wife will normally do the household shopping, and the husband will pay the bills the law of principal and agent will always out deeply into the law of house hold and wife. However, the husband is bound to pay for the credit purchases made by his wife only if following conditions are satisfied

a) The husband and wife must be living together
b) The husband and wife must be living together in a domestic establishment of their own that means wife should be incharge of domestic establishment
c) The wife must purchase the articles suited to the style in which the husband chooses to live

When all the above conditions are satisfied, the wife is presumed to be the agent of her husband. And the husband is bound by the acts of his wife. However, husband can escape the liability on following circumstances

a) where the goods purchased on credit are not necessaries

b) where the wife is given sufficient money for purchasing necessaries

c) where the wife is forbidden from purchasing anything on credit or contracting debts

d) where the trader has been expressly warned not to give credit to his wife

A was the manager of a hotel where his wife B was working as manageress. They were living in a same hotel but they did not have any domestic establishment of their own. The wife purchased some cloths from C on credit. C demanded the payment from A, husband of B. the court laid down the principle that, 'They must be living together in a domestic establishment of their own. The mere fact of the marriage does not make the wife an agent in law of her husband" nor is the fact of living together sufficient. There must be a domestic establishment of which the wife is the in charge, if there is a domestic establishment of which a person is acting as the manager, the presumption of agency will arise even if that person is not the wife this well known principle was establish.' ***Debenham*** v. ***Mellon*** (1880) AC 24

Husband not implied agent of wife.

A husband has no original, inherent or implied power to act as an agent for his wife. His authority can arise from an appointment as agent, expressly or impliedly or by ratification by his wife of his acts done by him on her behalf.

Rights of an agent (Duties of Principal)

a) Right to remuneration

The agent has the right to receive the agreed remuneration from his principal. If no remuneration is fixed, agent is liable to receive reasonable remuneration. Remuneration becomes due when the following conditions are fulfilled

i) When the act undertaken by the agent is completed
ii) When the transaction that has resulted, is the result of agent's services and efforts

e.g., A was appointed as an agent by a newspaper agency for securing orders for advertisements. It was agreed, that A would be paid the commission on the publication of the

advertisements. Advertisements were published on newspaper. Hence the agent is liable to receive remuneration.

b) Right to lien

Right of lien is the right of a person to retain the possession of the property of another until the charges due to the person in possession of the goods, is paid. The agent has the right to retain the possession of the goods belonging to his principal for the payment of his commission or other charges. Thus, agent has the right to retain goods or properties of principal until dues are paid. The following conditions must be satisfied for the exercise of his right:

i) The agent must have the possession of the goods belonging to his principal
ii) The agent must have received such possession of the goods in his capacity as an agent
iii) The agent must be lawfully entitled to receive his dues from the principal
iv) There must not be any contrary agreement

e.g., A appointed B, as his agent for the purpose of buying some goods on his behalf. B purchased those goods on behalf of principal, and the principal paid the purchase price. The goods were however in the possession of B. Afterwards, A failed to pay the agreed amount of B's commission. In this case, B may retain the possession of goods until his dues for commission are paid by A

c) Right to indemnity

Indemnity means to compensate other party who has suffered loss. The agent has the right to be indemnified against all losses and expenses incurred by him in the course of agency business. It must be noted that, agent can be indemnified agent against lawful acts only.

e.g., A appointed B, as his agent, for the purchase of 10 drums of oil for him. B entered into a contract with C, oil dealer for the purchase of oil. Accordingly, C delivered the oil to A, but he refused to take delivery of oil. In consequence C filed a suit against B for breach of contract. B informed A about the suit. But A cancelled the contract. B defended the suit and was compelled to pay damages and cost. In such case B is liable to claim damages and cost from A.

d) Right to compensation

The agent has also the right to receive compensation for the losses suffered due to principal's negligence or want or skill. But if injury is caused due to the negligence of agent principal is not liable to pay compensation for the injury.

e.g., A, a contractor, employed, B, a brick-layer, for the construction of a house. A put up the scaffolding (temporary structure for making or repairing a building). But the scaffolding was unskillfully put up which broke down and B was injured. In this case, A must make compensation to B for the injuries sustained by him.

Duties of an Agent (Rights of Principal)

i) duty to act according to the directions of principal

The agent must act according to the directions and instructions of the principal. If no directions are given, then the agent shall act according to custom of trade.

e.g, A instructed his agent B to store his (A's) goods at a particular place. B stored part of the goods at a different warehouse which was equally safe. These goods were destroyed by fire without the negligence of B. in this case B was liable to A for the loss of the goods destroyed as he did not act according to the instructions given by A. [***Lilley*** v. ***Doubleday*** (1881)]

ii) duty to act with reasonable care and skill

Agent should carry on the business of agency with reasonable care and skill. The standard of reasonable care required from the agent depends upon the nature of his business and circumstances. If the principal suffers any loss due to agent's neglect, want of skill or misconduct, the agent must compensate his principal for such loss.

e.g., A was an agent of B. A had the authority to sell the goods of his principal on credit. A sold the goods to C on credit without proper information related to C. At the time of sale C was

insolvent. In this case the agent is liable to compensate for the loss caused due to C's insolvency.

iii) duty to maintain accounts

It is the duty of agent to keep true and correct account of all his transactions and to explain the same to the principal whenever he asks for the same.

iv) duty to communicate with principal and to obtain principal's instructions

Sometimes an agent is involved in certain difficulties, in such situation agent should make reasonable efforts to communicate with principal and obtain his instructions. However, in cases of emergency where there is no time to communicate with the principal, the agent may act in good faith without consulting the principal.

e.g., A, consigned certain goods to B, his agent at Calcutta, and directed him to send the goods immediately to C at Cuttack. On receiving the goods, B found that the goods could not bear the journey to Cuttack without spoiling. And, thus B sold the goods in Calcutta as he acted in good faith and for the benefit of principal.

v) duty not to make secret profit from agency

The relationship between principal and agent is of mutual trust and understanding. Hence, agent shall not make secret profit out of agency business. If agent makes any secret profit, without the knowledge of principal, then the principal can claim from agent any such benefit which has resulted to him from transaction.

e.g., A directed B to sell certain goods belonging to him. B sold the goods to C and received secret commission from him as well in addition to commission given by A. Here, B is liable to handover secret commission to A received from C.

vi) duty to pay sum received for principal

It is the duty of an agent to pay his principal all money's received on his behalf. However, the agent is entitled to deduct his lawful charges from the money received on account of his principal.

e.g., A appointed B, as his agent for the purpose of collecting rents from the tenants of his estate. B collected Rs 10,000/- as rents of the estate and incurred Rs 200/- as his travelling expenses. In this case, it is B's duty to pay the amounts of rent collected to A after deducting the travelling expenses incurred by him and his remuneration.

vii) duty not to delegate authority

A principal always appoints an agent in whom he has full trust and confidence about his integrity and competence. Thus, the agent must do personally, the work delegated to him by his principal. And it is his duty not to further delegate the work which has been delegated to him personally by the principal.

Personal liabilities of Agent

An agent being the representative of principal establishes a legal relationship of the principal with third party. Hence, generally, the agent is not personally liable for any acts performed by him for or on behalf of principal in the course of agency business. But under following conditions agents can be made liable

- when he contracts with a third person in relation to any transactions accepting personal liability
- when he has done any act for or on behalf of undisclosed principal and the principal cannot be identified
- when the principal cannot be sued for any reason
- when he makes a contract on his own name
- when any cheat or fraud has been committed in the course of transaction

- when the nature of work requires the agent must be personally liable
- when the interest of agent is also involved in the transaction

Sub agent and substituted agent

Sub agent is a person who is employed by the original agent and who acts under the control of the original agent in the business of agency.

a) in case of proper agent

- principal is bound
- original agent is responsible for the acts of sub agent
- the subagent is responsible for his acts to original agent but not to principal, except in cases of fraud

b) not properly appointed

- principal is not bound
- original agent is responsible for the acts of sub agent both to principal and third party
- subagent is responsible for his acts to the original agent but not to principal

Substituted agent

Substituted agent is a person who is named by agent holding an express or implied authority to name another person, to act for the principal. Such person is the agent of the principal. For e.g., A directs B, his lawyer, to sell his estate by auction, and to employ an auctioneer for this purpose, B names C to conduct sale. C is not sub agent but A's substituted agent for the conduct of sale.

(No provision in NCA)

S.N.	Sub-Agent	Substituted Agent
1	A sub agent is appointed by the agent, and also works under his control, i.e. a sub agent is the agent of the original	A substituted agent is also appointed by the agent, but he works under the control of the principal i.e. the

	agent	substituted agent is the agent of the principal
2	Sub agent is responsible to the original agent alone, and not to the principal except for fraud	A substituted agent is responsible to the principal alone and not to the original agent
3	The original agent is responsible to the principal for the acts of sub agent	The original agent is not responsible for the acts of substituted agent if he has taken reasonable care in appointing him
4	There is no direct contract between the sub agent and the principal. Sub agent cannot directly sue principal nor principal can directly claim damages from sub agent	There is a direct contract between the sub agent and the principal. Substituted agent can directly sue principal and principal can directly claim damages from sub agent

Termination of Agency

End of relationship between principal and agent

A) By act of parties

i) by mutual agreement

Agency can be terminated by mutual agreement between the principal and agent.

ii) by revocation of authority by principal

Principal can revoke the authority any time before agent exercises his power. Revocation of agent's authority by his principal is subject to following condition

a) where the agent has partly exercised his authority, the principal may revoke the agency for further acts only.
b) Where the agency is created for a fixed period, the principal may revoke the agency before the expiry of fixed period.
c) If the agency is of continuous nature, then the principal must give to a agent, a reasonable notice of revocation of the agency.

iii) **by renunciation of agency by agent**

The agent may renounce the business of agency in the same manner as principal because a person cannot be compelled to work against his will.

B) by operation of law

a) on completion of business of agency

The agency relationship is terminated on the completion of agency business. Thus, where an agency is for single transaction, the agency comes to an end on the completion of the transaction.

b) on death or unsound mind

The agency relationship is automatically terminated, when either the principal or his agent dies or becomes insane (unsound mind).

c) on insolvency of principal

The agency is terminated when the principal is declared insolvent.

d) on expiry of fixed period

Sometimes the agency is created for a fixed time. In such cases, the agency terminates on expiry of time irrespective of whether the purpose has been fulfilled or not.

e) on destruction of subject matter

The agency is also terminated when the subject matter of the contract of agency is terminated.

f) On dissolution of company

If agent is appointed by a company, the agent gets terminated on dissolution of a company.

g) On principal or agent becoming an alien enemy

In this situation also agency comes to an end.

h) Termination of sub agent's authority

In case of termination of agent, sub agent appointed by him also gets terminated.

Nepalese context,

The history of business law in Nepal is not so long. But to manage the business agency it is necessary to develop the law relating to agency. The law relating to Agency Act 2014 has mentioned about the definition, registration, recognition, renewal and transfer, punishment, consequence of breach of law etc. After that the Nepalese contract Act 2056 tried to fulfill the lacks of the Agency Act, in NCA there is some provision, regarding agency i.e. agency contract, right and duties, principal, personal liabilities appointment and termination of agency etc.

Registration

The law relating to agency provide that no one can acts as agent without registering his name with the department of commerce, Nepal Govt.(NG) otherwise s\he will penalized with fine up to NRS 1000 (sec-3).

Procedure for registration:

Those who wants to acts as an agent should apply the authority with the particularized matter sec4 (1) the authority should registered his name as an agent after fulfilling some procedure like s\he has to pay Rs 25 for application and RS 100 for the registration charge, security and with some bonds sec 4 (2).

If the NG department of commerce rejects the application at that time the charge of registration should be refunded by NG and application charge should not refunded. (Agency Regulation 2019. (4)}

Renewal:

Registration is valid for only 1 year. The registration of agency is valid until last of the chaitra. If they want to continue the business has to renew by attaching NR 20 (renew charge). (Agency reg. 5)

To submit the statement of account:

Each registered agency has to submit statement of account to the authority (NG, dept. of commerce) every three month. The statement has to mention the particular relating to the goods sold, stocks received and their prices (sec-5, reg, -6)

Transfer of agency:

An agent can transfer his business to other people but he has to take consent of his principal. Both can give their written statement those who want to buy agency. The agency regulations made provision regarding transfer of agency in (rules-7) before transfer of agency he has to submit application with attached RS 25, in HMG, department of commerce.

Penalties:

There are some penalties for those who breach the provision of Act.

1. If any agency breaches the provision of registration of an agency. in a government office he has to pay RS 1000 for penalty. And government prohibits that business agency to run for 2 yrs. This is very nominal penalty we have to change this punishment.
2. If an agency breaches the provision of bond in accordance with sec-4 (2), the party will have to pay NR 500/ for penalty and the government can prohibit from business for 5 yrs.
3. If an agency breaches any other provision they will pay NR 200/ for penalty or prohibits running business agency for 2 yrs.

Contract of Sale of Goods

Meaning

Goods denote movable property except actionable claims and money. Actionable claims is that type of claim, which can be enforced through court for eg. debt. Likewise money indicates the coins and notes of practice not the rear one. Such actionable claims and money cannot be sold and bought, so they are not considered as goods. "Goods" shall denote any of moveable property other than current money, securities or actionable claim which may be bought and sold. Sale means selling of thing of any kinds. Thus, Sale of goods denotes the sell of any goods.

Contract of sale of goods denotes the contract to transfer the goods in return of money. Contract of sale of goods is a contract under which one party transfers or agrees to transfer his goods for a price and the other pays or agrees to pay price for goods. Thus, a contract as to sale and purchase of goods for price made between two persons is called a contract of sale of goods.

NCA 2056 Section 40(1) mentions, “A contract of sale of goods is deemed to have been concluded if any seller agrees to handover the goods to the buyer either immediately or in the future for a price.”

Thus, contract of sale of goods results from an offer made by one party and its acceptance by other party. The person who sells the goods is called seller and who buys the goods is called buyer.

Essential Elements of a contract of sale

1) **Seller and buyer**

The two parties are the primary requirement of the contract of sale of goods known as seller and buyer. Seller is the person who sale or agrees to sale. Buyer is the person who buys or agrees to buy. So who buy or agrees to buy goods in a fixed price is buyer and who sell or agrees to sale in a fixed price is seller. In a contract both the seller and buyer cannot be a same person. Generally it is assumed that they are different because no one will buy their own goods.

2) Goods

Goods are the major subject matter of the contract of sale of goods. As the contract on sale of goods is done with a view to buy and sell so there is a need of movable goods. "Goods" shall denote any of moveable property which is purchable.

3) Transfer of ownership

The sale of goods indicates the transfer of ownership from seller to buyer. Only transfer of possession is not sufficient but there must be transfer of ownership. Section 48 of NCA, has prescribed the modes of transferring the ownership of the goods.

4) Price

Price denotes money consideration. In the absence of price the goods cannot be sold or bought. Price is always paid in terms of money. If it is in terms of goods, it is barter. But partial money and partial goods is taken as consideration, and then it is assumed as contract of sale of goods. In the context of Nepal, section 42 of NCA has prescribed the way of determination of price of goods.

5) Expressed or implied

There is no specific format of contract of sale of goods. According to Indian law it can be written or oral or behavior. In England the contract should be written if it is related with £10 or above it. But in Nepal no clear procedure is mentioned. The acceptance can be written even if the offer is oral and vice versa.

6) Terms of contract of sale

The terms of contract can be absolute or conditional. But both parties must accept the condition of contract. Both parties must give consent on the transfer of goods, place, time method of the payment of invoice etc. these terms can be divided into essential and non-essential. Essential terms are known as condition and less essential terms as warranty. (Deal in different chapter)

7) Other essentials

Beside above essentialities, the general element of contract such as offer, acceptance, capacity of parties, free consent, legal consideration, legal object etc are also required.

B. Contract of sale of goods

Sale: Sale literally means the act of buying and selling. Under it, the ownership instantly transferred from seller to buyer. There is no need of delivery and payment.

Agreement to sale: Contract for future selling and purchasing is called agreement to sale. In another words, if the seller agrees to hand over the goods later or in future, it also is called agreement to sale. Agreement to sale is changed to sale when conditions are fulfilled or lapse of time.

Comparison between sale and agreement to sell

Point of comparison	Sale	Agreement to Sell
1. Nature of contract	It is executed in present. It is absolute and unconditional	It is executed in future. It is not absolute and is conditional. It is executed only after the fulfillment of condition

		or only after the expiry of time limit.
2. Transfer of ownership	Ownership is transferred immediately.	Ownership is transferred in future or after the condition is fulfilled.
3. Risk transfer	Risk is transferred to buyer so s/he is responsible for any future damage to goods	Though, the possession is transferred to buyer, the risk falls on seller
4. Right of buyer against seller	Buyer can file case against seller or even the third party if there is any fault in goods	Buyer can claim only for damage for default of delivery or other breaches
5. Right of seller against buyer	Seller can claim for payment even if the goods in the possession of seller	Seller can file case against buyer for the damage not for price if buyer does not or cannot pay
6. Right of resale	Seller cannot resale even if buyer has not cleared the due	Seller can resale because the seller owns the goods till it is actually sold
7. In case of insolvency of seller	Buyer can claim from official receiver	Buyer cannot claim from official receiver. If the payment is already done,

		s/he becomes a creditor
8. In case of insolvency of buyer	If goods are not transferred to buyer and buyer is declared insolvent, goods are transferred to official receiver and becomes a creditor	If goods are already transferred to buyer, s/he can claim for return. If payment is due and the ownership is not transferred, seller is entitled to keep it with her/himself.

Goods

Good indicates all types of movable property. Section 40(1) of NCA mentions Goods shall denote any of moveable property other than current money, securities or actionable claim which may be bought and sold. Goods mean any kind of movable property such as gold coins, debentures, shares, goodwill, etc which can be sold and bought.

Following points are notable to that effect

- Money generally refers to current coins or notes but not old and rare coins.
- Securities means nay shares, bonds, debentures or stocks issued by a company, and the term includes the receipt relating to deposits of securities and the rights and entitlement relating thereto
- Actionable claim implies such a claim which can be enforced in the court of law.

Types of goods

A) Existing goods: these are the goods which are in actual existence at the time of contract of sale. And the seller is either the owner of the goods or he has the possession of such goods. Existing goods are further divided as

i) Specific goods: these are the goods which have been actually identified and agreed by the parties at the time of contract of sale. For e.g., A had five cars of different model. He agreed to sell his Fiat car to B and B agreed to purchase the same car. In this case, the sale is of specific goods

ii) Ascertained goods: goods identified and recognized after the formation of the contract of sale is ascertained goods. For e.g, bike of different model displayed in a showroom, once you identify which to buy it is ascertained goods

iii) Unascertained goods: the goods which cannot be specifically identified but indicated by description at the time of contract of sale. The goods existing by being mixed up with other goods of the similar nature is unascertained goods unless it is set aside from the group. E.g., bike of different model displayed in a showroom is unascertained goods

B) Future Goods: these are the goods which are not in existence at the time of contract of sale. The seller acquires such goods after the making of contract of sale. Thus, the future goods are those which are to be acquired or produced by the seller after the contract of sale is executed. For e.g, A a manufacturer of furniture contracted to sell B 100 table and chairs at the rate of 2500 each. B agreed to purchase the same. However the table and chair were yet to be manufactured by A.

Note: future goods should not be confused with unascertained goods. Future goods are neither in existence nor in possession of the seller at the time of contract of sale, whereas unascertained goods are in existence or in possession of the seller at the time of contract of sale.

C) Contingent goods: these are the goods which are also not in existence at the time of contract of sale. The contingent goods are type of future goods which depends on the contingent event i.e. happening or non happening of future uncertain event.

For e.g, A agreed to sell B certain goods which are to be arrived by a ship. In this case, the contract is for the sale of contingent goods as the availability of the goods depends upon the arrival of the ship.

Note: the distinction between future and contingent goods is that future goods are the goods to be received in future whereas contingent goods are the goods to be received in future upon specific contingency i.e. happening or non happening of some events.

Conditions and warranty

I. Condition:

The term condition may be defined as a representation made by the seller which is so important that its non fulfillment defeats the very purpose of the buyer. As a matter of fact, condition is a stipulation which forms the basis of a contract of sale i.e., which is essential to the main purpose of the contract. Condition includes the quality of goods, price, date of delivery etc. The conditions should be fulfilled before the performance of contract otherwise it may terminate. The major and essential terms of the contract of sale are called condition. The Nepalese contract act has not defined the conditions. Section 12(2) of Indian Sale of Goods Act

1872 defines condition as a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

Thus, a condition is an important representation by the seller which is essential to the main purpose of the contract. And, if it proves to be false, the buyer has the right to terminate the contract, and to have refund of the price.

For e.g., A consulted B, a car dealer, and told him that he wanted to purchase a car 'suitable for touring purpose'. B, suggested that a 'Bugatti' car would be fit for the purpose. Relying upon this statement, A bought a 'Bugatti car'. Later on, the car turned out to be fit for the purpose. A wanted to reject the car and demanded refund of price. It was held that A was entitled to reject the car and to have the refund of price. In this case, the suitability of the car, for touring purpose, was a condition of the contract. It was so important that its non-fulfillment defeated the very purpose for which A bought the car. [***Baldry v. Marshall*** (1925)]

Types of Condition

1. Express Condition: it is a condition, which has been expressly agreed upon by both the parties at the time of contract of sale. For e.g., a buyer desires to buy a Panasonic radio model no 2004. Here model number is an express condition
2. Implied condition: it is a condition, which the law implies into the contract of sale. In other words, it is the stipulation which has not been included in the contract of sale in express words but law presumes that the parties have incorporated it into their contract. The implied conditions are stated below:

a. Conditions as to title: it is presumed that the seller has a valid title to the goods, i.e. he has the rights to sell the goods. If later on, the buyer comes to know that the seller had no valid right to

sell the goods, then he may reject the goods and claim the refund of the price. As a matter of fact, in every contract of sale there is an implied condition that the seller has a valid title to the goods.

A bought a second hand car from B, a car dealer. After a few months, the car was taken by the police as it was stolen one. And A was forced to return the car to the true owner. It was held that A could recover the full price from B. in this case, there was a breach of condition as to title as B had no right to sell.

b. Conditions as to description: sometimes the goods are sold by description. In such cases, the implied condition is that the goods shall correspond with the description. The term correspondence with description means the goods purchased by the buyer must be same as described by the seller.

A purchased a car from B which he had never seen. B described the car as a brand new car. However on delivery A found that the car was used and repaired. A returned he car to b and claimed for refund of money. Here B is entitled to refund A as the car did not match the description.

c. Conditions as to sample as well as description: Where there is a contract of sale of goods by description, there is an implied condition that the goods must be as per the sample showed at the time of creation of the contract. For e.g., A contracted to sell to B the timbers of 15 mm thickness but when B received the timber, it was discovered that the thickness varied from 15 mm to 20 mm. here the buyer B has right to reject the goods as they did not correspond with the description given in the contract.

d. Conditions as to merchantability quality: merchantability quality means commercially saleable, i.e., the quality and conditions of the goods bought must be such that a reasonable man after a full inspection would accept them as the goods of that description. Goods sold or to be sold shall be deemed to be of merchantable quality. If any goods are found to be some defect then that is not a merchantable quality. The goods are of merchantable quality in following cases

i) if the goods are purchased for resale, then they should be immediately resalable in the market under their description. For e.g., cement turned to stone by water is not merchantable

ii) if the goods are purchased for self use, then should be reasonably fit for the purpose for which they are generally used. For e.g., a watch that will not keep proper time, pen that does not write etc

A, a shopkeeper sold a radio to B, who purchased it in good faith. The radio had some manufacturing defects and it did not properly work after some days even after repairing. In this case the radio was not merchantable and not fit for the ordinary purpose. Thus, the buyer has the right to reject the goods and get refund of the price.

e. Conditions as to fitness or quality: Generally, the buyer must be aware of the fitness or quality of the selling goods. However, when the seller tells the buyer about the fitness and quality of the goods for the particular purpose, there is the implied condition that the goods shall be reasonably fit and qualitative for the purpose. However, this implied condition will be there only if the following requirements are satisfied

i) the buyer requires the goods for a particular purpose

ii) the buyer should make known to the seller about that particular purpose

iii) the buyer should rely on seller's skill and judgment

iv) the seller's business is to supply such goods whether he is the manufacturer or producer or not

A, a customer had no knowledge about hot water bottles. He went to B, a chemist and demanded a hot water bottle from him. B gave a bottle to him and stated that it was meant for hot water. After a few days, while using the bottle it burst and injured A's wife. It was found that the bottle was not fit for use as hot water bottle and seller was held liable for the damages.

f. Conditions as to wholesomeness: condition as to wholesomeness means the article sold should be fit for human consumption. In case of eatables or food stuffs in addition to the condition of merchantability, there is another implied condition that the goods shall be wholesomeness. For e.g., A purchases a milk from B, a diary owner. The milk contains germ of typhoid fever. A's wife on consuming the milk gets infection an dies. Here, A is entitled to get damages because the milk is not fit for consumption. [*Frost v.Aylasbary Diary Co. ltd*(1905)]

Warranty:

The term warranty may be defined as a representation made by the seller which is not of that importance as a condition. It supports major conditions and its non fulfillment does not defeat the very purpose of the buyer. In fact, warranty is a stipulation collateral to the main purpose of the contract the breach of which gives rise to a right to claim for damages but not a right to reject the goods and treat the contract as repudiated. Thus, a warranty is a representation, by the seller, which is not very important factor in sale of goods. It is only collateral to the main purpose of the contract. And if it proves to be untrue, the buyer cannot put an end to the contract. He can only claim damages from the seller. NCA has not defined warranty.

For e.g., A, a customer, went to B, a horse dealer, and told him that he wanted to buy a healthy horse. B pointed at a particular horse and said it to be healthy. Moreover, B informed A that the particular horse can also run at a speed of 40 k.m. per hour. A bought that particular horse and subsequently found that the horse to be healthy but it could run only at the speed of 20 k.m. per hour. A wanted to reject the horse and to have the refund of price. In this case, the representation made by the seller is a warranty because it is only collateral to main purpose. Thus A cannot reject the horse.

Kinds of warranties

The warranties of a contract may be either expressed or implied:

1. Express warranty: The warranty, which is expressed by the use of any word as the time of making the contract, is an expressed warranty.

2. Implied warranty: Implied warranties are those that have not been expressly agreed upon by the parties but are implied in a contract by the operation of law. They are as follow:

a. Warranty of quiet possession of buyer: according to this warranty, it is presumed that the buyer shall have and enjoy the quite possession over the goods which mean buyer has the right to enjoy it as per his wish. There should not be any disturbances in the contract of sale by the seller.

A purchased a second hand typewriter from B. A used it for some time and also spent some money on its repair. The typewriter turned out to be stolen one and such A had to return it to true owner. It is held that A could recover damages from B amounting to the price and money spent on repair.

b. Warranty of freedom from any encumbrances or charges: The goods should be free from any charge or encumbrances in favor of any third party. If it is found, the buyer is entitled to the damage as a breach of warranty.

For e.g., A, obtained a loan of Rs 200 from B and hypothecated his cycle with B as security for the repayment of loan. Subsequently A sold the cycle to C, an innocent buyer, who had no knowledge about B's charge on the cycle. In this case, if C's possession is disturbed by B who is having charge on the cycle, then he (C) can claim damages from A for any loss which he may suffer due to such charge.

c. Warranty by usage of trade: if the sold goods are of defective nature, the duty of the seller is to make the buyer aware of it e.g. the food must be hygienic, if some defect is found the sold goods must be returned.

d. Disclosure of dangerous nature of goods: if the goods are of dangerous nature and the seller knows that buyer is ignorant about them, the seller must warn the buyer about the probable danger. In case of breach of this warranty, the buyer is entitled to claim damages from the seller.

A buys a tin of disinfectant powder from B. B knows that the tin was to be opened with special care; otherwise it might be proved dangerous. He also knows that C is ignorant about it, but does not warn A. A opens the tin and his eyes are injured by the powder. B is liable to damage as he should have warned A of the probable danger. [*Clarke v. Army & Navy Cooperative Society ltd (1903)]*

Comparison between condition and warranty

Points of difference	Condition	Warranty
1. Essential v. Collateral	This is the main element and done to fulfill the objectives. Without its fulfillment, the contract cannot be followed.	It is minor element. It is not binding.
2. Right of aggrieved party	If violated, the aggrieved party can claim for return of goods or damages or terminate the contract	If violated, the aggrieved party can claim for damages but cannot terminate the contract
3. Performance	If violated, the aggrieved party is not obliged to perform	If violated, the aggrieved party has to perform
4. Transfer of ownership	If the condition is not fulfilled, the ownership is not transferred	Even if the warranty is not fulfilled, ownership is transferred
5. Status	Violation of condition is considered the violation of warranty. The buyer can freeze goods and claim for damages	Violation of warranty cannot be considered as violation of condition.
6. Liability	Party has more liability	Party has less liability

Meaning and exception to the Doctrine of Caveat Emptor

The expression Caveat Emptor is a Latin term which means let the buyer beware, i.e., a buyer purchases the goods at his own risk. In other words, it is not the seller's duty to give to the buyer the goods which are suitable for a particular purpose of the buyer. The buyer must take care of his own purpose while purchasing the goods, i.e., it is his duty to purchase the goods of his requirement. As such, the buyer must take care while purchasing the goods. And if the buyer makes a wrong choice of the goods, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose. The seller is not supposed to know the particular purpose for which the buyer is purchasing the goods. If the buyer discloses the seller that the goods to be bought are for a particular purpose, the seller must sell the goods suitable for that purpose. Therefore, the buyer must disclose the seller the purpose for which the goods are to be bought; otherwise he cannot reject the goods by charging the seller. Thus, when goods are displayed for sale, it is not seller's duty to point out the defects in goods but it is the buyer's duty to inspect the goods by himself before purchasing them. If the buyer makes a bad choice, he can neither oppose the seller nor claim any compensation from him.

For For e.g., A sold certain pigs to B by auction. The pigs were sold 'with all faults and errors of description' (i.e. no warranty was given by seller in respect of any fault or error of description). B paid the price for the pigs. The pigs were ill, and all, except one died of typhoid fever. They also infected some of buyer's own ships. It was held that there was no implied condition or warranty that the pigs were of good health. Thus, B could not recover damages from A. In this case, it was buyer's duty to see whether the pigs were healthy or not. [***Ward v. Hobbs (1878)***]

Exceptions to doctrine of caveat emptor

As a matter of fact, the doctrine of caveat emptor was originated during the time when almost all the sales took place in open market. And the buyer as well as seller used to come face to face, and the buyer had the opportunity to examine the goods or their fitness for a particular purpose. But as the trade expanded it became impossible for buyer to examine the goods due to the complex structure of modern goods. Moreover some of the transactions are conducted through correspondence. Thus, it is only the seller who can assure the quality of goods and

their fitness for buyer's purpose. Because of these reasons, it became necessary to restrict the application of doctrine of caveat emptor by providing certain exceptions to it. The exceptions are as follows:

a) Condition as to quality or fitness for buyer's purpose: if the buyer makes his purpose clear to the seller and buys the goods relying upon his skill and judgment, then there is an implied condition that the goods shall be fit for the buyer's purpose. And in such case the doctrine of caveat emptor does not apply.

b) In case of misrepresentation by seller: if the seller makes any misrepresentation and buyer relies on it, then the doctrine does not apply.

c) In case of concealment of defect: if the seller knowingly conceals any defect which cannot be discovered on a reasonable inspection, the doctrine does not apply.

d) In case of sale by sample as well as description: if the seller sells the goods by sample and description but the goods supplied by him does not match the description and sample the doctrine does not apply. For e.g., 250 ml of nestle milk in a tin but later supplied 200 ml of other brand milk in tin.

e) Condition as to merchantability: sometimes, the goods are sold by description. In such cases, there is an implied condition that the goods shall be of merchantable quality. Thus, in case of sale by description the seller is bound to deliver the goods of merchantable quality. Here also doctrine does not apply.

f) Condition as to trade usage: the implied condition as to quality of fitness for a particular purpose may be attached by custom or usage of trade. This is so because the parties enter into an agreement with reference to those known usages.

A sold certain drugs by auction to B. in case of sale by auction, it was a trade usage to declare any 'sea damage' in the goods. In this case, the goods were sold without such declaration. Subsequently the goods were found to be sea damaged. It was held that the goods sold without such declaration meant that the goods were free from any sea damage. And thus, B could reject the drugs and claim the refund of price. [***Jones v. Bowden*** (1813)]

Transfer of ownership (sec 48 of NCA)

The main purpose of sale is the transfer of ownership from seller to buyer. It is also known as passing of property in goods. The ownership gets transferred or passed from the seller to buyer as soon as the seller sells his goods to the buyer. According to section 48(5) of the NCA, unless otherwise provided for in the contract, the title of ownership of goods is deemed to be transferred from the seller to the buyer at the very moment when they are delivered to him. In this way, determination of exact or precise moment of time at which the property in goods passes from seller to buyer personally becomes important, because

a) The general rule is that risk follows the owner, whether delivery has been made or not. Thus a risk to loss as a rule lies on owner.
b) When there is a danger of the goods being damaged by the action of third parties, it is the owner who can take action,
c) The seller becomes entitled to recover the price of the goods from the owner only after the ownership of the goods has been transferred to buyer, and
d) In case of insolvency of either seller or buyer, it is necessary to know whether the goods can be taken over by the official receiver. The answer will depend upon the property in the goods was with the party who has become insolvent.

Passing of property

Passing of property implies transfer of ownership and not the physical possession of goods. In order to know the time at which the ownership is transferred from seller to buyer, the goods have been classified into 3 categories

a) specified or ascertained goods: -goods identified and agreed upon at the time when contract of sale is made
b) unascertained goods:- goods which has not been identified and agreed upon at the time when contract of sale is made

c) goods sent on approval or on sale or return basis:- those goods on respect of which the buyer has option either to return or retain

Rules for transfer of ownership

1. **Rules regarding transfer of ownership of specified or ascertained goods**

While entering into the contract for sale, the goods identified and agreed upon are called specific or ascertained goods. In connection with specific goods, the following rules are applicable to passing of property:

a) The ownership is transferred at the time of making the contract:

The general rule, in case of specific goods, is that the ownership of the goods is transferred from seller to buyer at the time of making contract. The ownership of the goods is transferred at the time of contract only when the following conditions are fulfilled:

i) The sale must be of specific goods

ii) The goods must be in deliverable state: the goods are in deliverable state when they are acceptable to the buyer and he can take delivery immediately, e.g., if the seller has to paint the car to make it acceptable to the buyer, it is not in a deliverable state until it is painted

iii) The contract of sale must be unconditional: the contract should not have any conditions in regard to transfer of ownership.

Note: in case of sale on installments, the intention of the parties is that the ownership should not be transferred until the last installment is paid. In such cases, the ownership is not transferred at the time of contract because the contract is conditional

b) The ownership may also be transferred at some other time:

If any of the above conditions is not satisfied then the ownership will not be transferred at the time of contract of sale, e.g., when the goods are not in deliverable state or the seller has to do something in relation to the goods etc. in such cases following rules shall apply:

i) Where the goods are to be put in a deliverable state by the seller

Sometimes, the goods are not in deliverable state at the time of contract, and the seller has to do some act to put them in a deliverable state. In such cases, the ownership is transferred as soon as the seller has put the goods in a deliverable state and the buyer comes to know about it. The ownership is transferred to buyer on the fulfillment of following conditions

- When the seller has done his act of putting the goods into deliverable state, and
- When the buyer came to know that the goods have been put into a deliverable state

ii) Where the goods are to be weighed or measured by the seller to ascertain the price

Sometimes, the seller has to do some act e.g., to weigh or to measure the goods for the purpose of ascertaining price. In such case, the ownership is transferred to the buyer as soon as the seller has done such act and the buyer comes to know about the act. Thus, the ownership is transferred to buyer on the fulfillment of following conditions:

- When the seller has done his act of ascertaining the price of the gods, and
- When the buyer came to know that the price has been ascertained by the seller's act

A sold some quantity of wheat to B at the rate of Rs 10 per k.g. however, A had to weigh the wheat in order to know the price of entire quantity of wheat sold to B. in such case ownership is transferred to B as soon as A weighs the wheat and B comes to know about it.

2. Transfer of ownership in case of sale of unascertained goods

In case of, sale of unascertained goods, the ownership of goods is transferred as soon as the goods are identified and are set apart for the purpose of delivering to the buyer. In case of unascertained goods, the ownership is transferred on the fulfillment of following conditions:

i) Ascertainment of goods: the term ascertainment may be defined as the process by which the goods to be delivered under the contract are identified and set apart. It is the unilateral act of the seller alone to identify and set apart the goods. It may be noted that the ownership is not transferred merely by the ascertainment of the goods. After ascertaining the goods, these must be appropriated to the contract.

ii) Appropriation of the goods to the contract: the term appropriation may be defined as the process by which the goods to be delivered under the contract are identified and set apart with the mutual consent of the seller as well as the buyer. The seller may appropriate the goods in one of the following ways

- By separating the contracted goods from the other with the consent of the buyer
- By putting the contracted quantity in suitable receptacles (boxes, bags etc) with the consent of the buyer
- By delivering the contracted goods to the carrier or other bailee for the purpose of transmission to the buyer

A sold to B 20 bags of sugar out of large quantity. Four bags of sugar were filled and taken away by B. later on, A filled 16 more bags and informed B. B promised to take the delivery of those 16 filled bags also. B promised to take delivery of those 16 filled bags also. Before B could take the delivery, the goods were lost. It was held, that at the time of loss, the ownership had passed to the buyer. Therefore, he should suffer loss. In this case the appropriation is unconditional and mutual. The seller appropriated by putting the sugar into bags, and the buyer gave his consent by promise to take the delivery. ***[Rhode v. Thwaites (1827)]***

3. Transfer of ownership in case of sale on approval

The term sale on approval may be defined as the sale in which the buyer may return the goods within a reasonable time, if the goods do not serve his purpose. This is also known as sale on return basis. In case of sale on approval, the ownership is transferred to the buyer when he accepts the goods. It may be noted that the seller cannot ask for the return of the goods. He can only recover the price of the goods if the goods are not returned within a reasonable time. In case of sale on approval, the ownership is transferred to the buyer in any of the following condition:

i) Acceptance of goods: the buyer may accept the goods and inform the seller accordingly. When the buyer gives his acceptance (i.e. approval) to the seller, the ownership is transferred to the buyer. For e.g., A, a shopkeeper delivered his watch to B on 'sale on approval' basis. Later on B, informed A that he has accepted the watch. In this case, here is an express acceptance of the watch, and the ownership is transferred to B on approval.

ii) Adoption of transaction: the buyer may adopt the transaction by doing some act in respect of the goods. When the buyer does some act, which shows that he has adopted the goods, the ownership is transferred to him on the act of adoption. For e.g., A delivered some jewellery to B on sale on return basis. B pledged the jewellery to C. it is held that ownership of the jewellery has transferred to B as he had adopted the transactions pledging the jewellery with C. in this case, A has no right against C. He can only recover the price of the jewellery from B.

iii) Failure to return the goods: the ownership is also transferred to the buyer when he fails to return the goods to the seller. It may be further dealt as

a) When the time is fixed for the return of the goods: if the buyer fails to return the goods within specified time, the ownership gets transferred after the expiry of such time period
b) When no time is fixed for the return of goods: in such cases, if the buyer fails to return the goods within a reasonable time, the ownership gets transferred.

Sale by non-owner

The general rule is expressed by latin maxim 'Namo dat quod non habet' which means that no one can give what he doesnot himself possess. If the seller's own title is defective, the buyer's title will also be defective. For e.g., X stole a TV and delivered it to Y, an auctioneer; Y sold the TV to Z at auction. It was held that Z obtained no title over the goods.

Where the goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than that the seller had. Thus, where goods are sold by a non owner, the buyer does not get a better title to the goods than that of the seller, i.e., the sale by the non owner doesnot make the buyer an absolute owner of the goods.

For e.g., A stole a horse and delivered it to B, an auctioneer, for the purpose of selling it, B sold the horse to C at a public auction. In such case C obtains no right on the horse as the seller had no title to it.

However there are certain exceptions to this general rule. In these exceptional circumstances, the buyer gets the valid title even if the seller is not the absolute owner of the goods. The exceptions to this rule as follows

a) sale by mercantile agent: a mercantile agent is an agent who deals on buying and selling of goods on behalf of principal. Where a mercantile agent sells good in the ordinary course of business, the buyer gets the title over it even if he is not the true owner of the goods. However the buyer will get the valid title over the goods only if the following conditions are fulfilled: on behalf

- the mercantile agent must be in possession of the goods or of the documents of title to good
- the mercantile agent must obtain the possession of the goods with the consent of the owner
- the mercantile agent must sell goods in his capacity as agent
- the buyer must act in good faith

A delivered his car to B, a mercantile agent for sale. A instructed B that the car should be sold at a particular price and not below that. But B sold the car to C below the stated price. However C had bought the car in good faith. In this case C will get a valid title over the car and A cannot recover it from C but he can claim money from B.

b**) sale by one of the joint owner**

the term joint owner may be defined as a person who ows goods jointly with some other persons. When the joint owner is in sole possession of the goods, and he sells them to a person who buys in good faith, the buyer gets a valid title over the goods.

c) **sale by a person in possession under a voidable contract**

the person in possession of goods under a voidable contract(goods obtained without free consent) can make a valid sale even if the possession so obtained is not by free consent. And the buyer from such a person gets a valid title if following conditions are satisfied

- the seller must have obtained the goods under the voidable contract and not under a void contract
- the contract must not have been put to an end at the time of sale
- the buyer must be unknown about the wrongful possession i.e., must act in good faith

A purchased a refrigerator from C by fraud. Here A is holding the possession under a voidable contract. Before, the contract is put to an end, A sold the refrigerator to C who bought it in good faith without knowing A's defective title. In this case C gets a valid title over the goods even if A was holding it under voidable contract.

d) **sale by a seller in possession after sale**

sometimes with the consent of the seller, the buyer gets the possession of the goods which he has bought or promised to buy from the seller. But the seller still has some lien or other rights over the goods, and the buyer resale the same goods to a third person. In such cases, the second buyer gets a valid title over the goods free from seller's right if he has bought it with good faith.

A agreed to buy some furniture from B. the payment of the price was to be made in two installments. The furniture was delivered to A but the ownership was to be transferred after the last installment only. A sold the furniture to C who bought it in good faith. In this case C has a valid title over the goods.

e**) sale by finder of goods**

the finder may sell the goods only if the true owner could not be identified and the goods are of dangerous or perishable nature.

f) sale by a pawnee or pledge

if pawnor makes default in repayment of the amount of loan borrowed from the pawnee, the pawnee may sell the goods by giving reasonable notice to the pawnor. And the buyer from such a pawnor gets a valid title over the goods.

g) sale by owner by estoppels

Estoppel is a prevention of claim or assertion of law. In other words, when someone makes another person to believe that a particular thing or act is true, then afterwards he cannot be allowed to deny the truth of that thing of fact. If the buyer buys the goods in such belief, later on the owner cannot say seller had no authority to sell. And the buyer who buys in good faith gets the valid title.

A said to B, a buyer in the presence of C that he (A) is the owner of the horse, but C remained silent though the horse belonged to him. B bought the horse from A. here, the buyer B will get a valid title over the horse though A had no title to the horse. In this case C by his own conduct is stopped from denying A's authority to sell the horse.

Performance of Contract of Sale of Goods The term 'performance' is the fulfillment of the promise. The performance of the contract of sale of goods means the performance of the respective duties of the seller and the buyer as per the terms and conditions of contract. Thus, the performance of the contract of sale implies delivery of goods by the seller and acceptance of the delivery of goods and payment for them by the buyer in accordance with the contract. The parties are free to provide any terms in their contract about the time, place and manner of delivery of goods, or acceptance of goods and as well as time and mode of payment of the

price. Delivery of goods from by the seller and payment of price for them by the buyer is the performance of contract of the sale of goods. There are reciprocal promises in the contract of sale of goods.

There are three main processes of the performance of a contract of sale of goods.

a. Transfer or delivery of goods.

b. Acceptance of the goods by the buyer.

c. To pay a price for the goods.

Unpaid seller

The term unpaid seller may be defined as the seller to whom the full price of the goods sold has not been paid.The seller of goods is deemed to be an unpaid seller

- when the whole of the price has not been paid or
- when a conditional payment was made by a bill of exchange or other negotiable instruments and the same has been dishonored, i.e., the buyer failed to pay the amount on maturity of the instrument

Note: if goods are sold on credit the seller cannot be said unpaid seller during the credit period. Where the full price has been paid by buyer and seller has refused to accept it he cannot be said unpaid seller.

Rights of an unpaid seller

A) Against goods
   a) Right of lien: lien is the right to retain possession of goods until the payment of price. Seller can use right of lien on the following conditions
   - goods have been sold without mentioning any credit

- goods have been sold on credit and the credit period has expired
- when the buyer becomes insolvent

A sold some specific goods to B for Rs 500. The price was to be paid within fifteen days of sale. B, the buyer, became insolvent before the expiry of this credit period of 15 days. In this case, A may retain the possession of the goods until the price is paid by A.

b) Right of stoppage of goods in transit: means the right of stopping the goods while they are in transit to regain them and to retain them till the full price is paid. Unpaid seller can exercise right if following conditions are fulfilled

- the goods must not be in possession of seller
- the goods must be in course of transit
- the buyer must have become insolvent

Goods are deemed to be in course of transit from time when they are delivered to a carrier for the purpose of transmission to buyer until buyer or his agent takes delivery of goods.

c) Right of resale: unpaid seller can resale the goods under following conditions

- where the goods are of perishable nature
- where the seller expressly reserves a right of resale if the buyer commits a default in payment
- where the unpaid seller gives a notice to the buyer about his intention to sell and buyer does not pay within a reasonable time

B) Against buyer personally

a) Suit for damages: where the buyer wrongfully neglects or refuses to accept the goods and pay for the goods the seller may sue him for damages.

b) Suit for price: when the property in goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods, the seller may sue him for the price of goods and can even claim interest from the date on which the price was payable.

Breach of Contract

Breach means to break. Simply, the term breach is refusal of doing something or violation thereof. A breach of contract means non-fulfillment of obligation, which a contract imposes. A breach of contract occurs if any party refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. In case of breach, the aggrieved party is relieved from performing his obligation and gets a right to proceed against the party at fault.

Section 82(1) of NCA 2056, mentions, 'if a party to a contract fails to fulfill his contractual obligation under the contract, or gives information to the other party that he will not perform the work as mentioned in the contract, or if his actions and conduct show that he is incapable of performing the work as mentioned in the contract, he is deemed to have broken the contract.'

Accordingly, a breach of contract includes the following elements:

- If the party fails to fulfill obligations under the contract
- If the party gives information to the other party that he will not perform the work as mentioned in the contract
- If by action and conduct the party seems to be incapable of performing the work as mentioned in the contract

Types of Breach of Contract

a) Actual Breach of Contract: when one of the party to a contract does not perform his obligation under the contract when due, it is called an actual breach.

It takes place in any of the following ways:

i) On due date of performance: if any party to contract refuses or fails to perform his part of the contract at the fixed period of time. E.g., X agreed to sell 100 tons of wheat @ Rs 8000 per ton on 20th Oct to Y. On 20th Oct X refused to sell. This is an actual breach on due date of performance.

ii) During the course of performance: if any party has performed a part of the contract and then refuses or fails to perform the remaining part of the contract. E.g., X agreed to sell 100 tons of wheat @ Rs 8000 per ton on 20th and 21st Oct to Y. On 20th Oct X delivered 50 tons and refused to deliver the remaining 50 tons. This is an actual breach during the course of performance.

b) Anticipatory breach of contract: it occurs when the party declares his intention of not performing the contract before the performance is due. E.g., X agreed to sell and deliver 100 tons of wheat @ Rs 8000 per ton on 20th Oct to Y. On 1st Oct X refused to sell and deliver. This is an anticipatory breach of contract.

Remedies for Breach of Contract

The term remedy can be understood as a legal treatment provided by the court of law or other formal agency formed under law to the injured party as per his demand. Basically, a question of remedy arises if one of the parties to the contract breaks it by rejecting the fulfillment of contractual obligations. Thus, a remedy is the course of action available to an aggrieved party for the enforcement of a right under a contract.

The various remedies available to the aggrieved party are as follows

a) Rescission:

Rescission may be defined as the cancellation of the contract. Rescission means a right not to perform obligation. In such a case, the aggrieved party is discharged from all the obligations under the contract. E.g., X agrees to supply 10 tons of wheat to Y on 2nd January. Y promises to pay on the receipt of the goods. X does not supply the goods on due date. Here, Y is discharged from the liability of paying the price. Y can also claim compensation for the damage which he sustained due to non-supply of goods on the due date.

However, the court may refuse to rescind the contract in any of the following conditions:

- Where the party entitled to rescission has expressly or impliedly ratified the contract
- Where there has been a change of circumstances after making of the contract and due to change, the parties cannot be substantially restored to the position in which they would when the contract was made
- Where during the subsistence of the contract, the third party has acquired the right with the good faith without notice and for some value
- Where only a part of the contract is sought to be rescinded and such part is not separable from the rest of the contract

Eg.

A sold certain goods to B for Rs 2000. On receiving the goods, B used some part of goods and also sold some of them to C. subsequently B filed a suit against A for the rescission on the ground that the goods were not of contract quality, and sought to recover the price. It was held that by using and reselling the goods, B had adopted the contract, and was not entitled to rescind the contract and recover the price. [Harnor v Grovers, 24 LJCP]

A fraudulent man, went to the shop of B, a jeweler. A purchased a diamond ring and gave a fake cheque for the price. Before the discovery of this fraud, A further sold the ring to C, who purchased it with the value and without any notice of the fraud. In this case the contract cannot be rescinded as C has acquired right in good faith.

b) Suit for specific performance

Specific performance means actual carrying out of work by the parties of their contract, and in proper case, the court will insist the parties carrying out their obligation. E.g., P agreed to sell an old painting to S for Rs 10000. Subsequently, P refused to sell, here, S may file a suit for the specific performance of the contract.

It may be noted that the party who brings an action for specific performance of the contract must prove the following:

- That a valid and enforceable contract was concluded between himself and the other party
- That he was ready and willing, at all material dates, to perform his part

Cases where suit for specific performance is not maintainable

- Where the damages are considered as an adequate remedy
- Where the contract is of personal nature
- Where the court cannot supervise the performance of the contract
- Where one of the party is minor

e.g., A contracted to sell 10 pieces of ceiling fans to B. but on the due date of performance A refused to sell the fans. In this case B cannot obtain specific performance of the contract as he can easily buy the ceiling fans from other dealer as well.

c) Suit for injunction

Suit for injunction means demanding court's stay order. Injunction means an order of the court which prohibits a person to do a particular act. Where a party to a contract does something which he promised not to do, the court may issue an order prohibiting him from doing so.

e.g., W agreed to sing at L's theatre only during the contract period. During the contract period, W made contract with Z to sing at another theatre and refused to perform the contract with L. it was held that W could be restrained by injunction from singing for Z. [*Lumley* v. *Wagner* (1852)]

d) Suit for damages

Damages are monetary compensation allowed for loss suffered by the aggrieved party due to breach of contract. The object of awarding damages is not to punish the party at fault but to make good the financial loss suffered by the aggrieved party due to breach of contract. This is called doctrine of restitution or compensation. E.g., A delivers to B, a common carrier, a machine to be delivered without delay to A's mill informing that his mill has stopped for want of the machine. B unreasonably delays the delivery of machine, and A, in consequence, loses a profitable contract with government. A is entitled to receive from B, by way of compensation, the average amount of profit, which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the government contract.

e) Suit upon Quantum Meruit

Quantum meruit means as much as earned. Right to quantum meruit means a right to claim the compensation for the work already done. Where there is a breach of contract, the injured party, instead of suing for damages, may claim payment for what he has done under the contract. Cases of quantum meruit fall under the category of quasi contracts.

The claim of quantum meruit arises:

i) when one party abandons or refuses to perform the contract

P was engaged by C to write a book to be published in installments in a weekly magazine. After few numbers had appeared the magazine was abandoned. Here, P could recover on a quantum meruit for the work he had done under the contract. [*Planche* v. *Colburn* (1831)]

ii) when work has been done and accepted under a void contract

A company under a written contract employed C as managing director. The contract was not binding, because the directors who made it were not authorized to enter into it. C rendered services and sued for remuneration. Held, he could recover on a quantum meruit. [*Carven* v. *Cannons ltd* (1936)]

Negotiable instruments

The term negotiable instrument may be defined as a written promise or order to pay money which may be transferred from one hand to another as a substitute for money. In simple terms, it is a piece of paper which entitles a person to a sum of money mentioned in it and which is freely transferable from person to person.

NCA 2056 is silent regarding to negotiable instruments. However, Section 2(e) of Negotiable Instruments Act 2034 mentions, promissory note and bill of exchange are said to be negotiable instruments. Cheque comes under bill of exchange.

Section 2(r) of Nepal Rastra Bank Act, 2058 defines negotiable as, the act of transferring an instrument to any person having the right to hold negotiable instrument enabling him or her to become a bearer.

Thus, a negotiable instrument is a certain type of document which can be taken as money in business transactions. A document can be a negotiable instrument if it satisfies following two conditions

i) It should be freely transferable
ii) The person who obtains it in good faith and for value, becomes entitled to recover the money mentioned in it.

Characteristics of a negotiable instrument

a) A negotiable instrument must be in writing
b) A negotiable instrument must be signed by its maker
c) A negotiable instrument must contain an unconditional promise or order to pay some money
d) A negotiable instrument must contain a certain amount of money
e) A negotiable instrument must be freely transferable from one person to another person

Presumptions about negotiable instruments

It may be noted that in case of any dispute about these presumptions, these need not be proved by the person who holds the negotiable instrument until contrary is proved.

1. **Consideration**: it is presumed that every negotiable instrument has been made or drawn for consideration. But if the party liable for [payment shows that the negotiable instrument was taken from him without any consideration, then the holder has to prove that he took the negotiable instrument for consideration.
2. **Date**: in case of a dated negotiable instrument it is presumed that it has been made or drawn on the date that appears on it.
3. **Time of acceptance**: the instrument was accepted within a reasonable time, after date and before its maturity.
4. **Time of transfer**: it is also presumed that every transfer has been made before its maturity.
5. **Order of endorsements**: the endorsements appearing on the negotiable instrument have been made in the same order in which they appear on the instrument.
6. **Holder in due course**: it is presumed that holder of the instrument is the holder in due course

Kinds of Negotiable Instruments

1. **Promissory Note**: it is a negotiable instrument in writing which contains an unconditional promise by one person to pay a certain sum of money to another person.

2. **Bill of Exchange**: it is a negotiable instrument in writing which contains an unconditional order directing a certain person to pay a certain sum of money to another specified person
3. **Cheque**: it is a negotiable instrument in writing which contains an unconditional order directing a specified banker to pay a certain sum of money to the bearer of the instrument or to another specified person

Promissory Note

The term promissory note may be defined as a negotiable instrument in writing by a person to pay a certain sum of money to another person. Section 2(f) of Negotiable Instruments Act 2034 defines, 'a promissory note is an instrument in writing except government note or bank currency, containing an undertaking to pay, without any condition, certain sum of money to any particular person referred to in such instrument or to the person ordered by such person or to the bearer of such instrument on a fixed date or on demand.'

For e.g., I promise to pay Hari Rs 5000 is a valid promissory note.

Parties to a promissory note

a) Maker: it is a person who makes the promissory note and promises to pay the amount written therein.
b) Payee: it is a person to whom the amount of promissory note is payable.

Essentials of a Valid Promissory Note:

i) It must be in writing.
ii) It must contain an express promise to pay
iii) The promise to pay must be unconditional: must not depend on uncertain event. For e.g., I promise to pay B Rs 500 on C's death
iv) It must contain a promise to pay in terms of money only: if the promissory note contains promise to pay any other thing except money, it is not a valid promissory note.
v) It must contain promise to pay definite(i.e. certain) amount of money
vi) It must contain certain parties: if from the face of note the payer and maker cannot be identified with certainty the note is invalid
vii) It must be signed by the maker
viii) Intention to make promissory note and its delivery: if promissory note is kept on drawer, the maker cannot be made liable to pay the person whose name is mentioned until and unless it was delivered to the payee
ix) It may be made on demand: the expression on demand means payable immediately on presentation. The note on which no time of payment is specified is payable on demand.
x) Other formalities: there are certain other formalities, such as number, date, place, consideration etc which are generally found on a promissory note. But they are not that

essential in law. The omission to mention date and place where it was made does not invalidate the instrument.

Bill of Exchange

The term bill of exchange may be defined as an order, in writing, requiring a certain person to pay a certain sum of money to a specified person. Section 2(g) of Negotiable Instruments Act, 2034 defines bill of exchange as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determined future time, a certain sum of money to or to the order of a specified person or to the bearer of the instrument.

Parties to a Bill of Exchange

1. Drawer: the person who makes and signs the bill of exchange is called drawer.
2. Drawee: it is a person who is ordered to pay the amount of bill of exchange.
3. Payee: it is the person to whom the amount of bill of exchange is payable. e.g., A ordered b to pay C rs 5000 after 3 months.

Essential features of Bill of Exchange

a) It must be in writing
b) It must contain an express order to pay
c) The order to pay must be unconditional
d) It must contain an order to pay in terms of money only
e) It must contain an order to pay a definite amount of money
f) It must contain certain parties
g) It must be signed by the drawer
h) Intention to make a bill of exchange and delivery
i) Other formalities

Cheque

The term cheque may be defined as a bill of exchange which is drawn upon a banker and is always payable on demand. Section 2(h) of Negotiable Intrument Act, 2034 defines a cheque as, ‘a bill of exchange which is drawn upon a banker to pay on demand.’

Cheque is a bill of exchange with two distinctive features

- A cheque is always drawn on a specified bank
- A cheque is always payable on demand

Parties to a Cheque

a) Drawer: the person who makes the cheque

b) Drawee: it is a banker who is directed to pay the amount
c) Payee: it is a person to whom the amount of cheque is payable

Essentials of a Valid Cheque

a) it must have all the essentials of a valid bill of exchange
b) it must be drawn on a specified banker
c) it must be payable on demand

Types of cheque

1. Open cheque: Open cheque are paid over the counter of a bank. Anybody can change the cheque into cash. These are further classified into
   (i) Bearer cheque: the person who bears the cheque may encash it over the counter of bank.
   (ii) Ordered Cheque: where the cheque is transferred with the endorsement on the back of the cheque to order a payment by the person whose name is prescribed by him and that becomes holder in due course that is the ordered cheque.

2. Crossed Cheque: crossing the cheque is the direction to the banker not to pay the cheque in the bank counter. The crossed cheque must be put through a bank account, which can provide a protection and safe guard to the owner and the receiver of the cheque. Crossed cheque are further categorized into:

a) General crossed offer: where two parallel lines are drawn across the face of the cheque that is the symbol of crossed cheque. Such a cheque is not encashed by the paying banker and proceed to put through an account of the bank.
b) Special crossed cheque: where a bank's name is put in the crossed line of the cheque, it is known as a special crossed cheque. Such types of cheques are possible to collect only in the bank named in the crossed cheque.
c) Account payee cheque: where account payee is termed between the parallel line of the cheque, it is known as account payee cheque.

Bank draft

Bank draft is a negotiable instrument issued by one bank to another bank or by one bank's branch to another branch. It cannot be payable to bearer of the cheque.

Hundis

Hundi may be used for transmitting from one place to another.

Holder

Holder is a person, who is entitled to the possession of the negotiable instrument in his own name and is also entitled to receive the money due on the same. Nepal Negotiable Instrument Act 2034 Section 2(k) defines that a holder is a person entitled to the possession of the instrument in his own name and to receive or recover the amount due thereon from the parties. To be a holder following two conditions must be satisfied:

a) Entitle to possession: he should be a de jure holder or legitimate holder of the instrument which provides him a legal right to possession under a legal title.
b) Entitle to recover or receive amount: the person must have right to receive or recover the amount prescribed in the instrument.

Holder in Due Course

A holder in due course is a person who takes the possession of negotiable instrument in good faith for value(consideration). The person becomes holder in due course of negotiable instruments if all of the following conditions are satisfied

1. He must be the holder of the negotiable instrument
2. He must have obtained the negotiable instrument before its maturity
3. He must have received the negotiable instrument for valuable consideration
4. He must have obtained the negotiable instrument in good faith
5. He must take the negotiable instrument which is complete and regular

Rights and Privileges of a Holder in Due Course

1. Right in case of inchoate stamped instrument: An inchoate instrument means an incomplete instrument. Sometimes, a person puts his signature on a stamped paper and delivers it to another to fill it as a negotiable instrument for a certain amount. In such cases, the person signing the blank stamped paper becomes liable to pay amount filled in the instrument. For e.g., A signed his name on a blank stamped paper and delivered the same to B with an authority to fill it up as a promissory note for Rs 2000. But B fraudulently filled it as a promissory note for Rs 5,000. The stamp put on the paper was sufficient to cover the amount of Rs 5000. Subsequently, B indorsed the promissory note in favor of C, a holder in due course, who took it without any knowledge of the fraud. In this case, C is entitled to recover Rs 5000 from A, and he (A) cannot escape his liability on the ground that in filling the amount, his authority has been exceeded by B.

2. Right in case of prior defects in the instrument: a holder in due course can recover the amount of the instrument irrespective of any defect in the title prior parties i.e. his rights to receive the amount due on instrument are not affected even if there were some prior defects in the instrument. Thus, when any negotiable instrument is lost or obtained by means of an offence or fraud or for unlawful consideration, no other person except a holder in due course is entitled to receive the amount due on it. For e.g., A obtained by

fraud, a promissory note for Rs 5000 from B and endorsed the same to C who received it in good faith and for value. In this case C is the holder in due course and he can recover the amount from B. And B cannot avoid the liability on the ground that from him A obtained the note by fraud.

3. Right against prior parties: a holder in due course has a right to recover the amount due on the instrument from any one of the parties prior to himself. As a matter of fact, every prior party is liable to make payment to the holder in due course, until the instrument is duly satisfied i.e. the payment due on the instrument is duly made.

4. Right in case of conditional delivery of instrument: sometimes, a negotiable instrument is delivered to a person, upon some condition i.e.it will be happening of a certain event. In such cases, the negotiable instrument cannot be further negotiated unless such event happens. However, if it is transferred to a holder in due course, his rights will not be affected by such condition. He can recover the amount due on the instrument from the parties liable to make payment, and the liable party cannot avoid liability on the ground that delivery of instrument was conditional. For e.g., A made a promissory note for Rs 4500 payable to B and delivered the same to B on the condition that he (B) will demand payment only on the death of C. before the death of C, B indorsed and delivered the promissory note to D, a holder in due course. In this case, D can recover the amount due on promissory note from A. and A cannot avoid his liability on the ground that the payment was to be made on death of C.

5. Title free from all defects: any holder who receives the instrument from a holder in due course gets the same free from all defects even if he had knowledge of some prior defects. But he must not be a party to such defects.

6. Presumption as to title: every holder of a negotiable instrument is presumed to be a holder in due holder. Thus, he is not required to prove that he is the holder in due course of the instrument i.e. he has received the instrument in good faith and for value.

7. Estoppels against denying the original validity of the instrument: sometimes the holder in the due course files a suit for the recovery of the amount due on the instrument, against the maker of the promissory note or the drawer of bill of exchange or cheque. In such cases, the maker or drawer cannot escape their liability on the ground that the instrument was invalid when it was made or drawn i.e. the maker or the drawer is stopped from denying the validity of the instrument.

8. Estoppels against denying the capacity of the payee to endorse the instrument: sometimes the holder in the due course files a suit for the recovery of the amount due on

the instrument, against the maker of the promissory note or the drawer of bill of exchange or cheque. In such cases, the maker or drawer cannot escape their liability on the ground that the payee had no capacity to indorse the promissory note or bill of exchange at the time of making i.e. the maker or the drawer is stopped from denying the payee's capacity to endorse the instrument.

9. Estoppel against denying the signatures or capacity of prior parties: sometimes the holder in the due course files a suit for the recovery of the amount due on the instrument, against the indorser. In such cases, the indorser cannot escape their liability on the ground that the signature of any prior party was forged or he was not competent to contract i.e. he is stopped from denying the signatures or capacity to contract of any prior party to the instrument.

Capacity of parties to a negotiable instrument

The person concerned with the negotiable instrument must be competent. The capacity of a person to draw, make, accept or endorse are as follows

a) Minor: though, minor are incompetent to contract, they can draw, endorse, deliver and negotiate such instrument so as to bind all parties. But he is not liable personally.
b) Insane person: the person of unsound mind due to lunacy, idiocy, drunkenness are not liable in the above situations like the minor party.
c) Legally disqualified person: disqualified person are not capable to exceed their capacity.

Acceptance:

Acceptance of bill may be defined as the indication of the drawee of his assent to the drawer that he will pay the amount of bill of exchange on due date. The liability of the drawee arises only when the bill of exchange has been validly accepted by him. The following are the essentials of the valid acceptance of bill of exchange

- The acceptance must occur on the bill of exchange itself
- The acceptance must be in writing
- It must be signed by the drawee or his agent
- It must be completed either by delivering the accepted bill of exchange to the holder

Modes of Acceptance

1. General acceptance: is the acceptance which is given without any condition regarding the payment of the amount due on the bill of exchange. The drawee accepts the bill as originally drawn.

2. Conditional/Qualified Acceptance: a conditional acceptance is one which is given without any condition regarding the payment of the amount due on bill of exchange. It is also known as qualified acceptance. In case of a conditional acceptance, the drawee makes himself liable to pay the amount due on the bill of exchange only if conditions of acceptance are fulfilled.

Discharge of Negotiable Instrument

The negotiable instrument is said to be discharged when all the rights of the persons involved in it are over i.e. no person related with the instrument has any further claim over others. In other words when the liability of primary party comes to an end, the instrument is said to be discharged. The negotiable instrument may be discharged in any off the following ways:

1. **Discharge of instrument itself**: an instrument is discharged when duly payments are duly made, presented after lapse of time or any other modes. The modes of discharge of negotiable instrument are as follows:

a) **By payment in due course**: payment in due course is the payment which is made in good faith and in accordance with the apparent tenor of the instrument i.e. according to what appears on the face of the instrument to be the intention of the parties. Thus, this is the payment made on the maturity of the instrument and of the entire amount due on it. The payment in due course discharges a negotiable instrument and all the parties who are primarily liable to pay the amount due on the instrument. For e.g., A, the maker of a demand promissory note, paid the amount due on it to the payee. But A failed to obtain back and cancel the promissory note. Subsequently, the payee transferred the same to B, a holder in due course. And B claimed from A the amount due on the promissory note. A cannot be discharged from liability as the promissory note was not cancelled, hence A is liable to pay B the amount mentioned on it.

It may be noted that the following conditions must also be satisfied in order to discharge a negotiable instrument by payment in due course:

- The payment should be made by the party who is primarily liable
- The payment must be made to a rightful holder
- The payment should be made in good faith and without negligence

b) **By the party primarily liable becoming the holder of the instrument**: sometimes, the acceptor of a bill of exchange becomes its holder in his own right at or after its maturity. In such cases, the bill of exchange is discharged. This happens by negotiation back. A bill of exchange when comes back to the accepter after a number of negotiations and he becomes its holder, then the process is called negotiation back. If this happens at or after maturity, the bill of exchange is discharged, and no party is liable on such a bill of exchange. However the following two conditions must be satisfied:

- The acceptor must have taken the bill of exchange at or maturity. If he takes it before maturity, then the bill is not discharged because he may again endorse the same
- The acceptor must take the bill of exchange in his own rights and not in any other capacity such as agent, administrator etc

c) **By the act as of general contract**: the instrument is discharged by operation of law e.g., when a debtor is declared insolvent, or by expiry of time limitation. Thus, if the amount due on a negotiable instrument is not recovered within the time prescribed by law, then, the party liable for payment is discharged from his liability to make payment.

d) **By material alteration**: the term material alteration may be defined as the alteration in the material parts of the instrument. It is the alteration which destroys the identity of the original instrument and affects the rights and liabilities of the parties to the instrument. Material alteration of a negotiable instrument discharges those parties, who were liable prior to the alteration. But if such parties give their consent to the alteration, then their liability on the instrument is not affected by such alteration. E.g., alteration of the date; amount payable etc

e) **By cancellation of the instrument**: where, the holder cancels or waives the right with the intention to release the liable party thereon from the liability, the instrument automatically discharges.

2. **Discharge of the parties to the instrument**: any party or parties to the instrument are discharged from their liabilities under certain circumstances:

a) **By Cancellation**: when the holder of the negotiable instrument intentionally cancels one or more names of the parties to a negotiable instrument, in such cases, the party whose name has been cancelled is discharged from his liability to such holder i.e. the holder cannot recover the amount due on the instrument from that party whose name has been cancelled.

b) **By Payment**: all the rights of action on an instrument are extinguished where payment due thereon is made in due course to the person legally entitle to it.

c) **By Release of a party**: sometimes, a holder of a negotiable instrument himself releases a party from his liability, in such cases, the party is not liable to pay the amount due on instrument. The holder may discharge the parties by any method such as an agreement, by waiving his right, etc.

d) **By giving additional time**: where the holder allows the acceptor of an instrument a period of more than two days i.e. 48 hours, exclusive of public holidays to consider wherever he will accept the same, all prior parties who have not given consent to such allowances, are thereby discharged from the liability to such holder.

e) **By conditional acceptance**: generally, a bill of exchange should be accepted without any condition. Thus, when the holder of a bill of exchange presents the bill to the drawee for his acceptance, then he should insist that it should be accepted without any condition. If the acceptance is conditional then the holder has the right to treat the bill as dishonoured.

f) **By fraudulent acts**: fraudulent act such as alteration without consent, scratching or erasing any words or alphabets made in instrument may cause discharge.

Law of Carriage

Essential terms

a) Transporter/Consignee: means a person operating a transport service, except air and marine transport, as persons involved in such business and the term also includes a person operating the transport business through internal waterways or ropeways or through animals or any other means.
b) Carriage: means transporting goods or passengers from one place to another that may be within or outside the country.
c) Carrier/Consignor: the person or firm who receives the goods for the purpose of carriage or transportation as a profession. In other words, any natural person or legal person or firm who does the profession of carrying goods as a business is a carrier.

The law which regulates the relationship between the carrier and the owner of goods is called law of carriage. Sec 65 of NCA mentions- A contract relating to transportation shall be deemed

to have been concluded if it provides the transportation of goods from one place to another. Sec 65 of NCA only includes carriage of goods and excludes carriage by air and marine.

A contract concluded between the carrier and the passenger or and the consignor or shipper or owner of the goods, where the carrier agrees to transport or convey or carry passenger and or goods of the owner from one place to another for money and sometimes for free of charge is called contract of carriage, which can be incorporated in the form of bill or receipt at the time of accepting goods for transportation. Law which regulates the relationship between the carrier and the owner of goods is called law of carriage.

Importance of law of carriage

- To regulate and control transportation business
- To settle disputes legally, that arise in carrier business
- To manage the rights and duties of carriers
- To give stability to market price

Classification of carrier:

1. **Carrier on the basis of fee**: while carrying goods and passengers from one place to another fare, fees may or may not be charged. Thus, on the basis of this, following are the types

(i) Non-gratuitous carrier: is a carrier who carries goods or passengers from one place to another place with fixed fare.

(ii) Gratuitous carrier: is a carrier who carries goods or passengers from one place to another place without any kind of fees or fare.

2. **Carrier on the basis of nature**

(i) Carrier of passenger: a carrier who carries only passengers from one place to another place. E.g., bus, jeep etc

(ii) Carrier of goods: a carrier who carries only goods. E.g., ship, cargo etc

3. Carrier on the basis of service:

a) Common/Public carrier: the common carrier is one who is engaged in the regular business of transportation of goods and undertakes for hire, to transport the goods of any person who chooses to employ him. Common carrier is a kind of carrier who is open for all persons, who are ready and willing to pay fee for service.

b) Private Carrier: the person who uses a means of carriage i.e. vehicle in carrying his own goods is called private carrier. A private carrier does not carry goods with a purpose of earning profit or for mercantile purpose. So, private carrier is one who does not make general offer but carries goods as casual occupation and not as a business. No one can compel him to carry goods against his will.

Carriage by different routes

A) **Carriage by land**: refers to an act of carrying or transporting goods or goods through land and inland waterways.

Common/Public carrier: the common carrier is one who is engaged in the regular business of transportation of goods and undertakes for hire, to transport the goods of any person who chooses to employ him. Common carrier is a kind of carrier who is open for all persons, who are ready and willing to pay fee for service.

Section 2(6) of Nepal Carrier and Transportation Act, 2049 defines a public carrier as the carrier which is used for transportation services. A common carrier can be classified into two classes; (i) Carrier for passenger and (ii) carrier for goods. Goods mean non living things except human being.

Private Carrier: the person who uses a means of carriage i.e. vehicle in carrying his own goods is called private carrier. A private carrier does not carry goods with a purpose of earning profit or for mercantile purpose. So, private carrier is one who does not make general offer but carries goods as casual occupation and not as a business. No one can compel him to carry goods against his will.

Characteristics of a Common Carrier

- The common carrier must be engaged in a regular business of transportation of goods.
- The common carrier must carry on his transportation business for money.
- The common carrier must transport the goods only. A carrier who transports passenger is not a common carrier.
- The common carrier may be an individual, firm, or a company. But the government is not considered as a person for this purpose. Thus, the post office is not a common carrier.
- The term common carrier applies to transportation by land only, not be sea or air.
- The common carrier must transfer all the goods of all persons without any discrimination.

Though a common carrier is bound to transport the goods of any person but in certain exceptional circumstances, he can lawfully refuse to transport the goods. These exceptions are:

- If there is no space in his vehicle
- If the goods are not of the type which he usually transports as a common carrier.
- If the reasonable charges are not paid for the carriage
- If the goods are unlawful, of dangerous nature or improperly packed
- If the destination is not on his normal route, and also if the destination can be reached only through area of disturbances

Characteristics of a Private carrier:

- The private carrier is not engaged in the regular business of transportation of goods.

- The private carrier is not bound to carry goods of all persons.
- The private carrier transports the goods for selected persons of his own choice and not for everybody.
- The private carrier may also transport the goods gratuitously i.e. without any charges.

Rights of a common carrier:

i) Right to charge fees

A common carrier is entitled to receive the agreed charges for his work i.e. transportation of goods. If the charges for transportation of goods are not agreed, then he is entitled to receive reasonable charges.

ii) Right to refuse to carry goods

A common carrier is bound to carry all the goods of all persons. However, it does not mean that he is bound to transport the goods of all types under all circumstances. He also has right to refuse to carry goods in certain circumstances as stated below:

- When there is no space in his vehicle
- when the goods are not of the type which he usually transports as a common carrier
- when the reasonable charges are not paid for the carriage
- when the goods are unlawful, of dangerous nature or improperly packed
- when the destination is not on his normal route, and also if the destination can be reached only through area of disturbances
- when the consignor is not willing to disclose the nature of goods offered to him for transportation

iii) Right to lien

The right of lien means person's right to retain the goods until the lawful charges due in respect of the goods are paid to him. A common carrier can exercise his right of lien, over the goods transported by him, for his charges, i.e. he has the right to retain the goods until his charges are paid.

iv) Right to sell goods

If the goods are of perishable nature, and gets spoil in the way and the carrier believes that the goods cannot be transported safely to the destination, he can sell such goods. But he can sell goods after obtaining the instructions of the owner only.

v) Right to take reasonable step

Sometimes, the consignee refuses to take the delivery of the goods on reaching their destination. In such cases the common carrier's position is that of a bailee, and he is expected to take reasonable steps for the safe custody of the goods. However, he becomes entitled to recover from the owner all reasonable expenses incurred by him for the safe custody of the goods.

vi) Right to limit the liability

A common carrier also has the right to limit his liability by entering into a special contract with the consignor. Such a special contract limiting the liability must be signed by the consignor. For e.g., a statement in consignment note that the goods are carried on owner's risk does not constitute special contract.

vii) Right to recover damages

Sometimes, the goods delivered to the common carrier, for transportation, are of a dangerous character or not properly packed, and he suffers loss or injury from such goods. In such cases,

the common carrier is entitled to recover damages from the consignor for the loss or injury suffered by him.

Duties of a common carrier:

i) To accept and carry goods indiscriminately

It is the main duty of the common carrier to accept and carry goods of all persons without any discrimination. If he wrongfully refuses to transport goods of any person he can be made liable to damages.

ii) To follow usual and customary route

The common carrier shall follow his usual and customary route. He cannot unreasonably deviate from his route.

iii) To deliver goods within time

The common carrier shall deliver the goods safely and within the time (if agreed) to the destination. The carrier should deliver the goods to the consignee. If no time is agreed it should be delivered within a reasonable time.

iv) To obey instructions of the consignor

The common carrier should follow the instructions of the consignor which he may issue at any time till the goods are delivered to the consignee.

v) To deliver goods against documents only

The common carrier should deliver goods only on the production of the original documents. If he delivers goods on the production of original document he cannot be made liable even though the documents were produced by unauthorized person.

Liabilities of a common carrier:

The general rule under which the carrier is not responsible for loss are:

- Any loss caused by an act of god, such as a storm or an earthquake

- Any loss caused due to act of war of a foreign enemy
- Any loss caused due to some hidden or inherent defects in goods
- Any loss caused due to negligence of consigner
- Any loss caused after the goods are delivered within agreed time and at prescribed place
- Any loss is due to perishable nature of goods
- If there is special agreement exempting him from liability

In Nepalese context, liability of a carrier is mainly regulated by NCA 2056 and Nepal Vehicle and Transport Management Act 2049. Some provisions stipulated by NCA under which the carrier is liable are:

a. First carrier Liable (sec 67)

If the consignor has handed over to more than one carrier or means of transport and they are lost or damaged in transit, unless otherwise mentioned in the contract the first carrier is liable to any loss or damage to the goods. The main reason is that the first carrier knows all the conditions of the goods.

b. Loss due to negligence or carelessness (sec 69)

If the goods are lost or damaged in transit due to carelessness or negligence of the carrier, he is bound to bear the amount as mentioned in the contract, if not then

- Reimbursement of the transported goods, if consignor agrees
- The current market price of the goods, if consignor disagrees
- Reasonable price of the goods when such price cannot be determined

c. Loss caused to the passengers or goods

If the carrier drops the goods or passengers on the way without taking them to the agreed place of destination, he is liable for any loss caused to the passengers or the goods.

d. Exemption from liability to compensate (sec 68(2))

Except the compensation has been clearly mentioned in the contract, a carrier is not liable to compensate the consignor for any loss or damage to the following loss due to any reason:

i) Gold, silver, diamond, jewels, goods made of such precious stone or material

ii) Negotiable instruments, securities, documents negotiated to offices, certificate issued by educational and other institutions

iii) Coins, bank notes and postal stamps

iv) Fish, meat, vegetables and fresh fruits

v) Insecticides, inflammable materials and petroleum products

vi) Precious art pieces, idols, curio goods and handicrafts

vii) Glass or goods made of glass or fragile goods

viii) Wildlife and pets

ix) Arms, ammunition and explosives

x) Radio, TV, Computer, Machinery and Equipments and their spare parts

xi) The goods which had to be declared by the consignor before transportation, but has not been clearly declared

B) **Carriage by Train**: refers to the act of carrying goods through train route. In connection with carriage by land, the importance of train is notable. In Nepal there is only one train route i.e. Janakpur to Jaynagar which is regulated by Nepalese Railway Act 2020.

Trains can be categorized in two folds (i) passenger trains and (ii) goods train. Fare of passenger train is higher in comparison to that of goods train.

Rights of Railway Administration

The rights of Railway Administration as guaranteed by Raliway Act 2020 are as follows:

- Not to allow people to travel without tickets or to dispatch the goods without railway receipts
- Right to check passengers or goods in the midway
- Right to submit the culprit to the nearby police
- Right to sell the goods of the consignee who does not receive the goods in time to recover demurrage for loading and unloading
- Right to take action against the person who cultivate or construct any buildings on the land area of train administration
- Right to take action against the person who throws stone at the train

Duties of Train Administration

(i) To carry goods indiscriminately
(ii) To carry goods with safety
(iii) To deliver goods within time
(iv) To deliver goods at the place and to the concerned party
(v) To obey instructions

Liabilities of Railway Administration

(i) Liability in course of transit: it the goods are lost or damaged on transit due to negligence of the train administration, it is responsible for any loss or damages.
(ii) Liability in case of delay: if the railway administration does not give delivery of goods to the consignee or his authorized agent in time, it is held liable for the loss or damage to the goods.
(iii) Liability for wrong delivery: if the railway administration does not deliver the goods to the authorized consignee or his authorized agent

C) **Carriage by Sea**: refers to an act of carrying or transporting good or goods through sea route by hiring ship or vessel.

Contract of Affreightment:

Term affreightment signifies hiring of a vessel or a ship, and generally the term contract of affreightment is a contract of carriage of goods by sea route. A contract concluded between two parties in respect to carriage of goods by sea from one part to another is called contract of affreightment. The price paid as consideration for this purpose is called freight. So, a contract of affrreightment is a contract between the ship owner or shipping company or agent and the shipper or consignor or agent agreeing upon carrying goods through sea route and paying freight in regard to placing and booking a ship on hire. The document given as a receipt is itself recognized as a contract of affreightment.

<u>Types of contract of affreightment</u>

Charter party: The term charter party may be defined as contract for the hiring of the whole ship or its substantial part. By a contract of charter party, the ship owner agrees to place the whole ship or its substantial part at the disposal of the consignor(charterer) for the purpose of carrying the goods to a particular place. And the charterer agrees to pay certain sum of money

called as freight for hiring of the ship. A charter party is a formal document containing the terms of contract between the Parties. Thus, a contract concluded between the parties in relation to hiring the whole or main portion of the ship for the purpose of carrying goods or travelling from one part to another through sea route is called charter party.

Types of charter party:

a) Time charter: where the ship is hired for the convenience of goods for a particular span of time, the charter party is called time charter. In such a charter, freight is determined on the basis of time.
b) Voyage charter: where the ship is hired for the convenience of goods for a specified voyage, the charter party is called time charter. The time taken for completion of voyage is not material for this type of contract.

Bill of lading: the term bill of lading may be defined as a document acknowledging the shipment of the goods, and containing the terms and conditions upon which the goods are to be transported by the ship. It is an informal document issued as evidence which acknowledges receiving goods. Bill of lading is a writing to be given to the shipper as an evidence of the goods undertaken by the shipping company for carriage through sea routes. It is issued after the goods have been placed on the board of the ship for carriage to the destination.

It may be noted that originally, a bill of lading was merely considered as receipt for the goods placed on board a ship. But with the development of trade, its concept widened, and it became to be recognized as a document of title and also a contract of affreightment. Thus now-a-days, a bill of lading serves the following purposes, which may also be regarded as the characteristics of bill of lading;

- It is an evidence of the receipt by the carrier of the goods as described in bill of lading
- It is a document of title to the goods mentioned therein, i.e., the person in whose name the bill is made, is entitled to receive the goods

- It is an evidence of the contract of affreightment: this means, it operates as a contract of affreightment as it contains the term and conditions on which the goods are delivered to the shipowner for transportation from one port to another

Types of Bill of lading

a) Clean and dirty bill of lading: when goods are in the order and condition, the bill of lading is the clean bill of lading. When goods are in bad condition, the issued bill of lading is termed as dirty bill of lading.
b) Through bill of lading: when the goods are to be carried partially by land and other means of transportation in addition to sea, is called through bill of lading.
c) Received bill of lading and on board bill of lading: an acknowledgment of receipt of the goods by the shipping company for carriage in a particular ship is known as received bill of lading. The on the board bill of lading refers to the fact that the goods have already been placed on the board.

Clauses of bill of lading

a) Name of the parties
b) Name of the ship
c) Port of loading
d) Port of destination
e) Name of the consignee
f) Marks as to identification of goods
g) Statement regarding to condition of goods

Difference between Charter party and Bill of lading

Basis of difference	**Charter party**	**Bill of lading**
Hiring of Space	The entire or main portion of a	The portion of a ship to be

	ship is hired to dispatch a lot of goods of the charterer.	covered by the goods is hired to dispatch a small quantity of goods of shipper.
Purpose	This is made for the particular time or voyage.	This is made for the particular destination.
Issuance of document	This need not to be issued by the shipping company to the charterer or consignor.	This needs to be issued by the shipping company to the shipper or consignor.
Owner	The charterer can be the owner of the hired ship for sometime	No question arises as to owner
Carriage of goods	Only a single charterer's goods are carried at a time	Many shippers or corporations goods are carried at a time

Master of ship:

A person appointed by the owner of the ship to carry the goods on the sea routes as instructed and ordered by him is called a master or captain of the ship.

Rights of Master

(i) Right to sign the bill of lading

(ii) Right to transfer the goods: if any risk arises during voyage can transfer all or some of the goods

(iii) Right to throw out goods: in order to save the ship from sinking

(iv) Right to sell goods: if damaged or perished

(v) Right to enter into a salvage agreement-: salvage-reward given to a person who saves the ship or goods from being wrecked(broken)

(vi) Right to change customary route

Duties of Master

(i) To take proper care

(ii) To follow customary route

(iii) To give proper time

(iv) To follow instructions

(v) To deliver goods

D) **Carriage by Air:** refers to an act of carrying or transporting goods through air route or airways by aircraft. Law relating to carriage by air is based on the international rules. In Nepal, the Civil Aviation Act 2015 has been placed as Nepalese law to some extent. But no separate Act has been yet enacted in Nepal. Carriage by air may be either national or international. Any carriage which is related with contract in which the place of destination and departure is of different counter is regarded as the international carriage.

Document relating to carriage by Air

a) Airway bill: if a person wants to dispatch goods by airway, he has to submit a document to the airway service provider or carrier mentioning therefore, such document is called airway bill. The airway bill must be made in three original copies. The first copy must be marked 'for the carrier', and signed by the consignor. The second copy must be marked 'for the consignee' and signed by the consignor and the carrier. The third copy must be signed by the carrier and handed over to the consignor or his agent after the goods or cargo has been accepted for carriage.

b) Passenger Ticket: a document to be issued by the airway service or company to the passenger travelling by plane is called passenger ticket. The issued ticket contains various descriptions, which are the citation of destination and departure, indication of stopping one or more places which may be the same country of departure.
c) Luggage Ticket: an airway company issues a document to the passenger after undertaking the goods handed over than small personal goods in charge of him for carriage by aircraft is called luggage ticket. It is also termed as baggage check.

Liabilities of the carrier by air

In the following circumstances, the carrier by air is responsible to pay for damages;

a) Death or bodily injury
b) Damage to luggage
c) Unnecessary delay

Exceptions: the air carrier is not bound to pay compensation to the passengers or consignors for any loss or damage under following situations

- That he or his agent has taken all possible measures to avoid the loss or damage
- That the damage was caused due to negligence on the part of injured person

Incoterms

The Incoterms rules or International Commercial Terms are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC). They are widely used in International commercial transactions or procurement processes. A series of three-letter trade terms related to common contractual sales practices, the Incoterms rules are intended primarily to clearly communicate the tasks, costs, and risks associated with the transportation and delivery of goods.

The Incoterms rules are accepted by governments, legal authorities, and practitioners worldwide for the interpretation of most commonly used terms in international trade. They are intended to reduce or remove altogether uncertainties arising from different interpretation of the rules in different countries. As such they are regularly incorporated into sales contracts worldwide.

First published in 1936, the Incoterms rules have been periodically updated, with the eighth version Incoterms 2010 having been published on January 1, 2011. "Incoterms" is a registered trademark of the ICC.

The following Incoterms are useful for any mode or modes of transports:

EXW – Ex Works: The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination. The seller's obligation is to make the goods available at his premises (works, factory, warehouse). This term represents minimum obligation for the seller. This term can be used across all modes of transport.

FCA – Free Carrier: The seller's obligation is to hand over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may choose within the place or range stipulated where the carrier shall take the goods into his charge. When the seller's assistance is required in making the contract with the carrier the seller may act at the buyers risk and expense. This term can be used across all modes of transport.

CPT – Carriage Paid To: CPT replaces the C&F (cost and freight) and CFR terms for all shipping modes outside of non-containerized sea freight. The seller pays the freight for the carriage of goods to the named destination. The risk of loss or damage to the goods occurring after the delivery has been made to the carrier is transferred from the seller to the buyer. This term requires the seller to clear the goods for export and can be used across all modes of transport.

CIP – Carriage and Insurance Paid to

The seller has the same obligations as under CPT but has the responsibility of obtaining insurance against the buyer's risk of loss or damage of goods during the carriage. The seller is required to clear the goods for export however is only required to obtain insurance on minimum coverage. This term requires the seller to clear the goods for export and can be used across all modes of transport.

DAT – Delivered At Terminal

Seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. "Terminal" includes quay, warehouse, container yard or road, rail or air terminal. Both parties should agree the terminal and if possible a point within the terminal at which point the risks will transfer from the seller to the buyer of the goods. If it is intended that the seller is to bear all the costs and responsibilities from the terminal to another point, DAP or DDP may apply.

Responsibilities

- Seller is responsible for the costs and risks to bring the goods to the point specified in the contract
- Seller should ensure that their forwarding contract mirrors the contract of sale
- Seller is responsible for the export clearance procedures

- Importer is responsible to clear the goods for import, arrange import customs formalities, and pay import duty
- If the parties intend the seller to bear the risks and costs of taking the goods from the terminal to another place then the DAP term may apply

DAP – Delivered At Place

Seller delivers the goods when they are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. Parties are advised to specify as clearly as possible the point within the agreed place of destination, because risks transfer at this point from seller to buyer. If the seller is responsible for clearing the goods, paying duties etc., consideration should be given to using the DDP term.

Responsibilities

- Seller bears the responsibility and risks to deliver the goods to the named place
- Seller is advised to obtain contracts of carriage that match the contract of sale
- Seller is required to clear the goods for export
- If the seller incurs unloading costs at place of destination, unless previously agreed they are not entitled to recover any such costs
- Importer is responsible for effecting customs clearance, and paying any customs duties

DDP – Delivered Duty Paid

The most important consideration for DDP terms is that the seller is responsible for clearing the goods through customs in the buyer's country, including both paying the duties and taxes, and obtaining the necessary authorizations and registrations from the authorities in that country. Unless the rules and regulations in the buyer's country are very well understood, DDP terms can be a very big risk both in terms of delays and in unforeseen extra costs, and should be used with caution.

FAS – Free Alongside Ship

The seller delivers when the goods are placed alongside the buyer's vessel at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment. The FAS term requires the seller to clear the goods for export, which is a reversal from previous Incoterms versions that required the buyer to arrange for export clearance. However, if the parties wish the buyer to clear the goods for export, this should be made clear by adding explicit wording to this effect in the contract of sale. This term should be used only for non-containerized seafreight and inland waterway transport.

FOB – Free on Board

Under FOB terms the seller bears all costs and risks up to the point the goods are loaded on board the vessel. The seller must also arrange for export clearance. The buyer pays cost of marine freight transportation, bill of lading fees, insurance, unloading and transportation cost from the arrival port to destination. Since Incoterms 1980 introduced the FCA incoterm, FOB should only be used for non-containerized seafreight and inland waterway transport. However, FOB is still used for all modes of transport despite the contractual risks that this can introduce.

CFR – Cost and Freight

The seller must pay the costs and freight required in bringing the goods to the named port of destination. The risk of loss or damage is transferred from seller to buyer when the goods pass over the ship's rail in the port of shipment. The seller is required to clear the goods for export. This term should only be used for sea or inland waterway transport.

CIF – Cost, Insurance & Freight

The seller has the same obligations as under CFR however he is also required to provide insurance against the buyer's risk of loss or damage to the goods during transit. The seller is required to clear the goods for export. This term should only be used for sea or inland waterway transport.

Company law

The word 'Company' is an amalgamation of the Latin word 'Com' meaning "with or together" and ‘Pains’ meaning "bread". Originally, it referred to a group of persons who took their meals together. A company is nothing but a group of persons who have come together or who have contributed money for some common person and who have incorporated themselves into a distinct legal entity in the form of a company for that purpose. Company is a business enterprise in which people work together for the manufacturing, buying or selling goods or for providing a service

According to Company Act 2063 “Company shall denote a company established under this Act.” [Sec.2 (a)]

According to Indian Company Act 1956
“Company means a company formed and registered under the Companies Act.” [Sec.3 (I)]
According to Black’s Law dictionary: “Company is a union or association of persons for carrying on a commercial or industrial enterprise; a partnership; corporation; association, Joint Stock Company.”
Halsbury’s Laws of England, The term "company" has been defined as a collection of many individuals united into one body under special domination, having perpetual succession under an artificial form and vested by the policies of law with the capacity of acting in several respect as

an individual, particularly for taking and granting of property, for contracting obligation and for suing and being sued, for enjoying privileges and immunities in common and exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers upon it, either at the time of its creation or at any subsequent period of its existence.

In the case of *Salomon* v. *Salomon* and company[(1895-99) All ER Rep 33:66 LJ Ch35 :75LT 426:13 TLR 46:1897 AC22]:A company is a legal person or legal entity separate from, and capable of surviving beyond the lives of, its members.

Company is a voluntary association of a number of persons called shareholders. It is established to carry on business for profit with capital divisible into transferable shares. The shareholders are real owner of the company and they are liable for the shares they have invested or guarantee provide for the company i.e. limited liability. Management of the company is carried out through the representatives of the shareholders. The law relating to the company is known as Company Law.

Company law provides the infrastructure, which enables people to collaborate in productive business relationship. Generally the wealth on which the whole community depends. It is the basis on which the companies are formed, given legal powers, operated and managed. It lays down the rules and procedures through which companies are controlled and financed. Company law stimulates entrepreneurship, promotes growth, enhances international competitiveness and creates the condition for the investment and commitment of resources whether of saving or employment.

Features of Company law

Section (8) of the Nepalese Companies Act 2053 has mentioned *" company to be a corporate body"*. Incorporation of a company offers the following advantages to the business community as compared with all other kinds of business organizations:

a. Independent Corporate Existence

By incorporation a company, the business organization obtains a corporate personality. The law recognizes it as a person. It is a distinct legal person existing independent of its members. Other business organizations like partnership have no existence apart from its members. In the case of Salomon v. Salomon and company (1997) this principle has been formally established. Salomon was carrying on business as leather merchant and boot manufacture. in 1892 he formed a limited company to take overtime business the Memorandum Of Association signed by Mr.Saloman, his wife, his daughter and four of his one, each subscribed. For one share worth 1 to full the statutory requirement of at least seven members. Saloman for the business, with him two sons constituted the board of payment was to give saloman €39,000 to saloman for the business and the node of payment was to give saloman €10,000 in debenture, secured by a floating change on the company's assets and 20,000 shares of €1 each and the company fell on hard times and a liquidator was appointed. The debts of the unsecured creditors' assets were approximately €6,000. The unsecured creditors claimed all the remaining assets on the ground that the company was a mere alias or agent for Salomon. The court decide that the company was separate and distinct person. The debenture was perfectly valid, and saloman was entitled to the remaining assets in part payment of the secured debentures held by him.

Similarly in Lee v. Lee's Air farming Ltd. (1961) Lees husband held 2,999 of the 3,000 shares in lee's Air forming Ltd. The was chief pilot of the company. He was killed while piloting aircraft during the course of topsoil dressing, and Mrs. Lee claimed compensations from the company, as a employer of her husband, under the New Zealand Workers Compensation Act 1922. Since he was its governing director, the question arose as to whether the relationship of employer and employee could exit between the company and him. One of his first acts as governing director by him-self. It was hold that Lee and Lee's Air farming Ltd were different and as such a claim for compensation was valid. Nepalese courts do have also recognize the same principal of separate legal entity of company.

b. <u>Limited Liability</u>

Privileges of limited liability for business debts, credits are one of the principal advantages of doing business under the corporate form of organization. The members, shareholders are neither the owner of the company's asset nor liable for its debts. Their liability is limited by the

maximum amount of the face value of the shares held by them. They shall not personally be liable to the debts to be borne by the company. **Section 9** of the Company Act has mentioned about this concept of limited liability.

c. Perpetual Succession

An incorporated company has perpetual succession and it never dies. It is an entity with perpetual succession. *A*, *B* and *C* are the only members of a company, holding all its shares. Their shares may be transferred to, or inherited by *X*, *Y* and *Z*, who may, therefore becomes the new members and managers of the company. But the company will remain the same entity. Perpetual succession, therefore, means that the membership of a company may keep changing from time to time, but that does not affect the company's continuity. The death or insolvency of individual members does not, in any way, affect the corporate existence of the company. Members may come and go but the company can go on forever**. Section 8 (1)** of the Act says that the company incorporated under it shall be an autonomous and corporate body having perpetual succession.

d. Separate Property

The company as a legal person is capable of owing, enjoying and disposing of property in its own name. The company is an owner of its capital and assets and liable to its debts or other liabilities. Although the capital of the company is formed from the share capital of the shareholders. But it distinguishes form the property of individual shareholder. Such a feature is not found in other business organizations like partnership firm. The property of the company is not the property of the shareholders; it is the property of the company. **Section 8 (3)** of the Act has stipulated the provision relating to the separate property.

e. Transferability of shares

When a company is incorporated the great achievement is attained that the shares of members of company should be capable of being transferred. It is not possible in the case of partnership.

According to **Section 31** of the *Company Act*, *2053*, the share of a company shall be transferred as a movable property. Thus, incorporation of a company enables a shareholder to sell their shares in the open market or in such a manner as the Memorandum of Association or Article of Association provides to get back his/her investment without having to withdraw the money from the company. But in the case of partnership, it is not possible and if such transfer is made against the will of the partners, the transferee does not become a partner.

f. Capacity to sue and be sued

A company, being a corporate body, can sue and be sued in its own name. **Section 8 (4)** of the Act connotes that a company may sue or be sued in its own name.

g. Common seal of company

Company has seal of it's own for its functions. Every documents of company for its authentication must be duly sealed. Without sealed that documents would be invalid.

h. Management by Representative:

The share holders of a company elect the BOD which manager the business affairs of the company.

Difference Between Private and Public Company:

Although Private and public company has various same feature and they are covered by the same Acts but they have various differences which are as following.

1) **Meaning**: Private Company –Pvt.ltd
   Public Company – public.Ltd

2) **Minimum share Holder :** Private company : 1 is sufficient
   Public company: at least 7 required

3) **Maximum shareholder:** Private company : not exceed 50
   Public company: unlimited

4) **Free Transfer of shares:** Private company : restriction in transfer in share market

Public company: success to transfer.

5) **Invitation to Public:** Private Company : restriction
Public Company: No restriction

6) **Prospectus :** Private company : Prohibition on issue of Prospectus,
Public Company: Able on issue of, Prospectus,

7) **Unanimous Agreements :** Private company : may have unanimous agreements
Public company: No Provision of unanimous agreements

8) **Signature on memorandum and Articles:** Private company : 1promoters
Public company: At least 7Prometers,

9) **Meeting:** Private company : As mention in MOA or AOA
Public company: hold G.M every year within six months from the date of expiring of its financial year.

10) **number of Directors :** Private company : As mention in AoA
Public company: not less then 3and not more than 11(sec 70(2))

11) **tenure of Directors:** Private company :provides in the Articles
Public company: not exceed four years.

12) **Publication of notice of G.M.:** private company : Provided in the Articles
Public company: share holder shall be notified of the agenda as well as the date and venue of the meeting in advance of at least 15 days for S.G.M of published in the national newspapers for at least two times

13) **Allotment of shares :** private company : Unable to allot to the shares to public
Public company: issues the shares to public.

14) **Quorum for general Meetings :** private company :prescribed in the Articles
Public company: sec 60(2)

67% of to total number of shares

33%of total number of shares for prospered G.M

But it least 7shareholder required.

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15) **Remuneration of Directors** : private company :no restriction
Public company: AS Prescribed in the Articles. Rewards not exceeding 5%of the net profit,(sec75)

Establishment of Company

Promotion refers to the entire process by which a company is brought into existence. It starts with the conceptualization of the birth a company and determination of the purpose for which it is to be formed. The persons who conceive the company and invest the initial funds are known as the promoters of the company. The promoters enter into preliminary contracts with vendors and make arrangements for the preparation, advertisement and the circulation of prospectus and placement of capital. The promoters must make a decision regarding the type of company i.e. a public company or a private company and accordingly prepare the documents for incorporation of the company. In this connection the Memorandum and Articles of Association (MA & AA) are crucial documents to be prepared.

Procedure for Registration

Any person who wants to undertake any enterprise with the motive of earning profits may establish a company with one or more objectives as incorporated in the Memorandum, personally or along with others. Any foreigner who has obtained permission pursuant to current law to undertake any enterprise with the motive of earning profits by making investment within the Kingdom of Nepal may also establish a company. There shall be at least seven promoters for the

establishment of a public company. But, the number of promoters need not be seven in case any public company establishes another public company.

Once the documents have been prepared, vetted, stamped and signed, they must be filed with the Registrar of Companies for incorporating the Company. The following documents must be filed in this connection: -

- The Memorandum of Association
- The Articles of Association
- In the case of public company, a copy of agreement, if any, which has been concluded among the promoters before the establishment of the company?
- In the case of a private company a copy of the unanimous agreement, if any

The procedure is mentioned in section 3 and 4 of Nepalese Company Act 2053.

In case an application is received for the establishment of a company complying all the necessary documents the Registrar with necessary investigations shall register the company within 15 days from the date of application so received, and issue a certificate of registration of the company in the prescribed form to the applicant.

But in case of registration of a company according to Sec 33(2) Indian Companies Act 1956, the declaration must be signed by an Advocate of the Supreme Court or of a High Court or an attorney or a pleader entitled to appear before a high court or a secretary or a chartered accountant, in whole time practice in India who is engaged in the formation of a company or a person named in the articles as a director, manager or secretary of the company.

When the requisite documents are presented for registration, the Registrar has to see whether they answer the requirements of the Act. He may, however, accept the declaration as sufficient evidence of compliance. He then registers the company and other documents and places the name of the company in the Register of the Companies.

Certificate of Incorporation

Once all the above documents have been filed and they are found to be in order, the Registrar of Companies will issue Certificate of Incorporation of the Company. This document is the birth certificate of the company and is proof of the existence of the company. For the Act provides that ”from the date of incorporation such of the subscribers of the memorandum and other persons, as may from time to time be the members of the company, shall be a body corporate, capable

forthwith of exercising all the functions of an incorporated company."[sec.34 (2)of I.C.A.]. Once, this certificate is issued, the company cannot cease its existence unless it is dissolved by order of the Court.

Commencement of Business

A private company or a company having no share capital can commence its business immediately after it has been incorporated. But, in the case of a public company, a further certificate for the commencement of business has to be obtained. This becomes necessary where a company has issued prospectus inviting the public to subscribe for its shares.

According to section 49 of Nepalese Company Act 2053, following formalities is to be completed:

after the amount due on shares to be subscribed by the promoters are fully paid up an application for permission to commence the business shall be submitted to the office

on receipt of the application the office can give the certificate of commencement

without getting the certificate to commence the business the company should not publish the prospectus

But the purpose of getting certificate to commence business is different according to the Indian Companies Act 1956.For this purpose, the following additional formalities have to be complied with: -

1. If a company has share capital and has issued a prospectus, then: -

Shares up to the amount of minimum subscription must be allotted.

Every director has paid to the company on each of the shares, which he has taken the same amount as the public has paid on such shares.

No money is or may become payable to the applicants of shares or debentures for failure to apply for or to obtain permission to deal in those shares or debentures in any recognized stock exchange.

A statutory declaration in Form 19 signed by one director or the employee - company secretary or a Company secretary in whole time practice that the above provisions have been complied with must be filed.

2. If a company has share capital but has not issued a prospectus, then: -

It must file a statement in lieu of prospectus with the Registrar of Companies

Every director has paid to the company on each of the shares, which he has taken the same amount as the other members have paid on such shares

A statutory declaration in Form 20 signed by one director or the employee - company secretary or a Company secretary in whole time practice that the above provisions have been complied with must be filed.

Once the above provisions have been complied with, the Registrar of Companies grants "Certificate of Commencement of Business" after which the company can commence its activities.

Power to refuse to Register Company

The Registrar may refuse to register a company in any of the following circumstances:

a) In case the name of the company is identical with the name of any company, which has already been registered and is still in existence.

In the case of *Kothari product limited V. Register of Companies*(2002)

Kothari Product Limited was marketing certain edible items under the registered trademark “Parag”. The trademark Parag was registered under the Trade and Merchandise Act since 1986. One Parag International Private Limited was registered without the consent of Kothari Product Limited, the owner of the registered trademark “Parag”. The court held that the name to be undesirable and accordingly ordered the change thereof.

b) In case the name of the proposed company seems to be inappropriate or undesirable from the view point of public interest, morality, etiquette etc.

c) In case the objectives of the proposed company are contrary to current law.

d) In case necessary conditions required for the establishment of a company under this Act are not fulfilled.

Insolvency

Insolvent is a person who is in financial difficulties, and is unable to pay his debts. But in legal sense, such a person becomes insolvent only when he is declared so by a competent court.

The term insolvency is generally defined as bankruptcy. Bankruptcy is derived from the latin term Bancus meaning Bench and Ruptus meaning Broken, this means the broken bench of a merchant whose creditors become angry due to non-payment of dues.

The word bankruptcy is derived from Italian banca rotta, meaning "broken bank", which may stem from a custom of breaking a moneychanger's bench or counter to signify his insolvency, or which may be only a figure of speech

Insolvency is the state of being unable to pay the money owed, by a person or company, on time; those in a state of insolvency are said to be insolvent. There are two forms: cash-flow insolvency and balance-sheet insolvency.

Cash-flow insolvency is when a person or company has enough assets to pay what is owed, but does not have the appropriate form of payment. For example, a person may own a large house and a valuable car, but not have enough liquid assets to pay a debt when it falls due. Cash-flow insolvency can usually be resolved by negotiation. For example, the bill collector may wait until the car is sold and the debtor agrees to pay a penalty.

Balance-sheet insolvency is when a person or company does not have enough assets to pay all of their debts. The person or company might enter bankruptcy, but not necessarily. Once a loss is accepted by all parties, negotiation is often able to resolve the situation without bankruptcy.

Section 2(b) of Insolvency Act 2063 defines “being insolvent” means a state of being unable, or appearing to be unable, to pay any or all of the debts due and payable to or payable in the future to creditors or a situation where the amount of liabilities of a company exceeds the value of the assets;

Importance of Insolvency Law

1. To ease the act of determining the exact amounts of assets and liabilities: the law of Insolvency helps by its investigation procedures to find out exact financial situation of the business.
2. To protect the debtor against harassment by the creditors:
3. To promote fresh start of the business (by Re-organisation)
4. Management of Insolvent’s estate
5. To provide machinery to satisfy claims of creditors
6. To grant fresh lease of life to debtor

Who can be adjudged Insolvent

Any person can be adjudged i.e. declared insolvent, if he is a debtor and has committed any act of insolvency. Thus, a person can be adjudged insolvent if following conditions are satisfied

i) He must be a debtor
ii) He must be competent to contract
iii) He must have committed an act of insolvency

Procedure of Insolvency of company

Application to be made for insolvency proceedings: (1) Where it is required to institute insolvency proceedings against any company, any of the following persons may make an application to the Court in the prescribed form for the institution of such proceedings:

(a) A company itself which has become insolvent;

(b) Out of the total creditors of a company which has become insolvent, at least ten percent creditor or creditors who has or have lent money;

(c) Shareholder or shareholders that has or have subscribed at least five percent of shares, out of the total shareholders of a company;

(d) Debenture-holder or debenture-holders that has or have subscribed at least five percent of debentures, out of the total debenture-holders of a company;

(e) A liquidator who has been appointed to liquidate a company; or

(f) In the case of a company that carries on any specific type of business set forth in Section 8, a body authorized to administer and regulate such business.

(2) In order for an application to be made pursuant to Sub-section (1), a period of thirty five days shall have been expired after a notice issued to pay the debt referred to in Section 5 has been duly served on the concerned company.

(3) Every application to be made pursuant to Sub-section (1) shall be accompanied by the reason for making the application, short description of the financial condition of the company and the evidence supporting the fact that the company has become insolvent and the following details, as well:

(a) Where the company itself which has become insolvent makes such application:

(1) A document certified by the board of directors of the company, mentioning that the company has become insolvent;

(2) A special resolution adopted by the board of directors of the company to institute the insolvency proceedings pursuant to this Act;

(3) Certified copies of the balance sheet and audit report of the company available at the time of making application for the institution of insolvency proceedings.

(b) Where the creditor of a company which has become insolvent makes such application:

(1) A statement of the principal and interest of the debt which the creditor claims to be due and payable by the company;

(2) The date on which the company borrowed the debt claimed by the creditor and the reason why the debt was borrowed;

(3) Description that the amount referred to in Clause (1) is due and such amount is payable immediately;

(4) That the debtor believes or the reason and ground the debtor has to believe that the company in respect of which demand is made for insolvency proceedings has become insolvent.

(c) Where the liquidator makes such application:

(1) Evidence that the company in respect of which application is made for insolvency proceedings has appointed the liquidator for the purposes of liquidation of the company; and

(2) The opinion expressed by the liquidator on the matter that the company in respect of which application is made for insolvency proceedings has become insolvent, and the ground for such opinion.

(4) Notwithstanding anything contained elsewhere in this Section, any shareholder or debenture-holder of a company shall obtain permission of the Court to make an application for insolvency proceedings pursuant to Clause (c) or (d) of Sub-section (1), and the shareholder or debenture-holder may, if so permitted, make an application on such terms and conditions as may be specified by the Court.

(5) The Court shall not give permission referred to in Sub-section (4) unless and until sufficient evidence proving that the company has become insolvent is produced.

5. Notice to be given for payment of debt: (1) Prior to making an application to the Court pursuant to Section 4 for insolvency proceedings, a notice shall be sent to the registered office of the company in the prescribed form for the payment of debt.

(2) The notice referred to in Sub-section (1) shall be signed by the creditor himself or herself or by a person authorized by the creditor, on his or her behalf.

6. Application to void notice issued for payment of debt: (1) Where the notice received pursuant to Section 5 is not reasonable or where there are any other reason for not repaying the debt immediately, the concerned company may make an application to the Court in order to void the notice, **not later than thirty five days** after the date of receipt of that notice.

(2) Where the application referred to in Sub-section (1) is made, the Court shall issue a notice summoning the creditor giving the notice referred to in Section 5 **to appear before the Court within seven days;** the notice to be so issued shall also be accompanied by a copy of such application.

(3) The Court **may make a decision to void or not to void** the notice issued pursuant to Section 5 no later **than seven days after** the date of appearance of the creditor pursuant to Sub-section (2) or after the date of expiration of the time prescribed for the appearance before the Court where the creditor has failed to make such appearance.

(4) The Court may issue an order to void the notice issued pursuant Section 5 on the following condition:

(a) There is a clear dispute as to whether the creditor has extended debt to the company or not; or

(b) The debt due to be paid by the company to the credit does not appear to be payable immediately.

(5) Where the Court issues an order pursuant to Sub-section (4), no notice that is issued to pay the debt can be given to the company again on the same matter nor can an application be made for the institution of insolvency proceedings until the condition set forth in that Sub-section continues to exist.

(6) Where the Court does not issue an order pursuant to Subsection (4), the company shall pay the debt of creditor no later than thirty five days from that date.

7. **Company deemed to have become insolvent:** (1) Save as proved otherwise, a company shall be deemed to have become insolvent on the following condition:

(a) The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or

(b) The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or

(c) The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

(2) Nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other matter that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

8. Application for insolvency proceedings: (1) Notwithstanding anything contained in Section 4, no application may be made to the Court for insolvency proceedings in relation to the following company without obtaining prior approval of the following authority:

(a) In the case of a bank or financial institution carrying on banking and financial business, the Nepal Rastra Bank, or

(b) In the case of an insurance company carrying on insurance business, the Insurance Board formed pursuant to the Insurance Act, 2049(---), or

(c) In the case of a company which cannot undergo voluntary liquidation without approval of the competent body or authority, except that mentioned in Clause (a) or (b), such authority.

(2) Every application to be made for insolvency proceedings in relation to a company mentioned in Sub-section (1) shall be accompanied by a copy of the approval given by the authority set forth in that Sub-section for that purpose.

9. Action on application: (1) Where an application is made to institute, or cause to be instituted, insolvency proceedings in relation to any company pursuant to Section 4, the Court shall register the application where it has been made duly and so appoint the date for hearing the same that such hearing can take place within fifteen days.

(2) Except where a company itself makes an application for insolvency proceedings, after the registration of an application referred to in Sub-section (1), a notice shall be issued in the name of the concerned company to submit statements in writing, if any, for not instituting such proceedings within seven days and be delivered to the registered office of such company.

(3) Where the Court considers reasonable, it may, prior to the hearing on an application referred to in this Section, and as per necessity, order the authority set forth in Sub-section (1) of Section 8 to submit statements of reasons, if any, for not instituting any proceedings as requested by the applicant prior to the date appointed for hearing and shall publish a notice thereof at least twice in any daily newspaper of national circulation so that the shareholders, creditors of the concerned company or any other persons having dealing with the concerned company and the Stock Exchange, as well, where such company is enlisted in the Stock Exchange get such information.

(4) Any company or person that receives a notice issued or published pursuant to Sub-section (2) or (3) shall submit statements in writing, accompanied by the reason, if any, for not instituting the insolvency proceedings of the concerned, within the time specified by the Court.

10. Decision to be made upon keeping on hearing: (1) Notwithstanding anything contained in the laws in force, the Court shall keep on hearing an application made pursuant to this Chapter after commencement of the hearing on the application on the day appointed for the hearing on the application pending the final settlement thereof and make a decision thereon.

Provided that this provision shall not prevent the keeping of hearing on that matter on the day on which the Court remains open where the hearing cannot be completed or decision cannot be made on the day of hearing because of time constraint.

(2) Upon the completion of hearing referred to in Sub-section (1), the Court shall make an order to institute or not to institute insolvency proceedings in relation to the company concerned.

(3) In making an order pursuant to Sub-section (2), the Court shall order to appoint an insolvency professional as an inquiry official for the purposes of making insolvency related inquiry.

(4) In making appointment of an inquiry authority pursuant to Subsection (3), a person whom the Court thinks fit, out of the persons whose names are included in the list approved by the Office for that purpose, shall be appointed.

11. Power to issue interim order: (1) Where, in making hearing on an application made to the Court pursuant to Section 4, it appears that there exists in the company any of the following situations which may prejudice the interests of the creditor or any other person having dealing with the company, the **Court may, on an application by the concerned party or at its own discretion, issue an interim orde**r:

(a) The assets of the company have been sold and disposed of wrongfully or there exists a possibility of such sale and disposal;

(b) The management of the company has not been carried out properly;

(c) Any legal action is going to be instituted or such action is going to be enforced or there exists a possibility of such enforcement in such a manner as to prejudice the assets of the company.

(2) In issuing an interim order pursuant to Sub-section (1), the Court may issue order restraining from doing any or all of the following acts:

(a) Transferring, selling and disposing of, or otherwise mortgaging or pledging, any assets of the Company, other than that business of the company which it has been carrying on in the ordinary course of business;

(b) Transferring the shares of the company in any manner or altering the status of the shareholders of the company in any manner;

(c) Withholding or foreclosing any assets of the company by any person; or

(d) Instituting any legal action or keeping on such action or taking any action or foreclosing by any creditor or person against the assets of the company or any assets owned or possessed or foreclosed by the company.

(3) Where an order is issued by the Court pursuant to Sub-section

(2), information thereof shall be given to the concerned company, company registrar and Office, and where the Court thinks fit, it may also issue order requiring to publish such information in a daily paper of national circulation in a manner that the general public can gat such information.

(4) The Court may, if it considers necessary, issue order to appoint any appropriate person as the interim administration of the company for the interim management of the company during the currency of the interim order.

(5) The functions, duties and powers of the interim administrator appointed pursuant to Sub-section (4) shall be as prescribed by the Court at the time of such appointment.

(6) Notwithstanding anything contained elsewhere in this Act, where the Court issues order for inquiry into insolvency proceedings or dismisses the application, the interim order issued pursuant to this Section shall ipso facto be ineffective.

12. Application not to be withdrawn: Notwithstanding anything contained in the laws in force, an application made to the Court for insolvency proceedings pursuant to Section 4 cannot be withdrawn except as permitted by the Court.

Inquiry into Insolvency Proceedings

13. To inquire into insolvency proceedings: (1) Where the Court issues order to inquire into insolvency proceedings pursuant to Sub-section (3) of Section 10, the inquiry official shall

independently inquire into the financial situation of the concerned company in order to determine the following:

(a) Whether or not there should be issued an order for immediate liquidation of the company by the reason that its financial situation cannot be improved;

(b) Whether or not the period of inquiry as referred to in Section 14 should be extended;

(c) Whether or not there should be issued an order for the restructuring of the company through the restructuring program;

(c) Whether or not the company has become or is likely to become insolvent.

(2) The inquiry official shall make inquiry pursuant to Sub-section (1) and submit an inquiry report to the Court within the period specified by the Court, and such report shall contain, inter alia, the resolution, if any, adopted by the meeting of creditors, the company's report and evaluation and recommendation made by the official.

14. **Power to extend period of insolvency proceedings**: (1)Where the inquiry officer, showing a reasonable reason why the financial situation of the company cannot be inquired into within the period of inquiry as specified pursuant to Sub-section (2) of Section 13, makes an application to the Court for the extension of that period, the Court may, if it finds the reasonable ground , extend the period as appropriate.

(2) Where the period of inquiry is extended pursuant to Subsection (1), the information thereof shall be given to the concerned company.

15. Management of company during inquiry period: (1) Notwithstanding anything contained in the laws in force, the board of director of the company shall carry out the management and ordinary transactions of the company during the period of inquiry of insolvency proceedings, under the regular supervision of the inquiry official.

(2) Notwithstanding anything contained in Sub-section (1), where the inquiry officer submits to the Court a report indicating that the board of directors of the company has not operated the company properly, the Court may issue an order to remove the board of directors and order the inquiry officer to carry out the management and ordinary transactions of the company.

(3) Where the Court orders the inquiry officer to carry out the management and ordinary transactions of the company pursuant to Subsection (2), the inquiry officer shall carry out the transactions accordingly.

(4) Where any special transaction such as the sale of the assets or business of the company shall be carried out in the course of operating the ordinary business of the company pursuant to Sub-section (3), an application setting out the reason therefore shall be made to the Court for

permission, and where the Court issues an order granting such permission, the inquiry officer may carry out such transaction.

16. Report to be made by director: A person who has held the office of director of the company at the time when the Court has issued an order to inquire into insolvency proceedings pursuant to Sub-section (3) of Section 10 or during the period of one year prior thereto, shall submit to the Court a report on the financial situation and transactions of the company as at the time of his or her retirement, in the prescribed format.

17. Power to raise loans: (1)Where the inquiry officer considers the need of any amount to keep on the company or operate the ordinary transactions of the company, the inquiry officer may borrow loans from any person, with or without furnishing necessary security.

(2) Any loans borrowed pursuant to Sub-section (1) shall be deemed to be the amount spent during the period of inquiry into insolvency proceedings and such amount shall be paid in order of priority as provided in this Act.

Provided that where the security furnished by the company to borrow a loan has already been furnished as a security with any person, the order of priority shall not apply in relation to the claim for security except in the case where the inquiry official has made an agreement of a person entitled to claim the same.

18. Report to be submitted by inquiry officer : (1) The inquiry officer shall inquire into the financial and business situation of the company and submit a report thereof to the Court within the period of inquiry.

(2) The inquiry officer shall determine any one matter set forth in Sub-section (1) of Section 13 and make a recommendation report referred to in Sub-section (1) containing the reasons and grounds for such determination, and such report shall contain, inter alia, the actual financial situation of the company, details obtained by the inquiry official upon making inquiry and his or her opinion and findings.

(3) Where the recommendation made pursuant to Sub-section (2) has been submitted to the meeting of creditors, whether a majority of the creditors attending such meeting has accepted such recommendation or not shall also be mentioned.

(4) A copy of the report submitted pursuant to Sub-section (1) shall be sent to each of the concerned company and the Office; and the concerned company and the Office shall make arrangements to maintain the report so received that the shareholders, directors and creditors of the Company may inspect such report.

19. Ipso facto suspension: (1) Notwithstanding anything contained in the laws in force, where the Court issues order to institute insolvency proceedings in relation of any company pursuant to

Sub-section (2) of Section 10, any of the following acts or actions shall not be done or taken; and any acts or actions being done or taken but not completed shall ipso facto be suspended:

(a) Transferring, selling and disposing of the shares of the company or altering the status of any shareholder;

(b) Transferring, selling and disposing of any assets of the company or mortgaging or pledging the same as collateral in any manner;

(c) Foreclosing any assets of the company or realizing any security according to any judgment or order;

(d) Preempting any property leased to the company by the lessor or instituting any legal action in relation thereto;

(e) Paying any debt whose payment was outstanding or which had become payable at the time when the court made order to institute insolvency proceedings pursuant to Sub-section (2) of Section 10 or pledging of a security in consideration thereof; and

(f) Transferring or withdrawing moneys in the fund of the company.

(2) Notwithstanding anything contained in Sub-section (1), where any person makes an application to the Court claiming that the automatic suspension of any transaction pursuant to the said Sub-section will cause a loss to that person, the Court may, if it holds that the statements of the applicant are reasonable and that this does not prejudice the interests of the company or its creditors, issue an order to do any transaction.

20. Prohibition on cutting down essential services: Notwithstanding anything contained in the laws in force, where the Court orders the institution of insolvency proceedings in relation to any company pursuant to Sub-section (2) of Section 10, no institution or person providing essential services such as electricity, drinking water, drainage, gas and telephone or any other telecommunication service to such company shall stop or cut down such services during the period between the date of the said order and the date of completion of the said proceedings, except without permission of the Court.

21. Meeting of creditors to be convened: (1) The inquiry officer shall, before submitting his or her report to the Court, convene a meeting of the creditors of the company to discuss his or her report in order to know the views of the creditors on the future plan of the company which has become insolvent, and every person who is identified as a creditor of the company from the accounts and other records of the company shall also be invited to attend such meeting.

(2) A notice indicating the venue, date, time and agenda of the meeting shall be given to every person identified as a creditor under Subsection (1) in advance of at least seven days, and the notice shall also be published at least two times in a daily newspaper of national circulation.

(3) While giving a notice pursuant to Sub-section (2), it may be given by a letter, telex, telefax, e-mail or any other means of electronic communication which can be recorded.

(4) Where any person other than a person mentioned in Sub-section (1) makes any claim against the company as a creditor, the inquiry official may ask that person to submit evidence thereof and detailed description of the claim against the company.

(5) The inquiry official may dismiss the claim of a person who fails to submit the evidence or description referred to in Sub-section (4); and where the claim is so dismissed, such person shall not be entitled to attend the meeting of creditors.

Provided that a person shall not be considered to be a creditor of the company by the reason only that the person has taken part in the meeting of creditors.

(6) The inquiry official shall chair the meeting of creditors.

(7) The meeting of creditors shall make decision by majority. In the event of a tie, decision shall be made by lot. The inquiry official may ascertain the voting right of creditors in proportion to the claim made on the debts due to be paid immediately by or payable by the Company and specify the mode of voting.

(8) The directors of the company or the officers invited by the inquiry official may participate in the meeting of creditors. Provided that they shall not be entitled to take part in voting.

(9) Except where any concerned person makes an application to the Court showing the reasons and grounds that injustice has been done to that person, no question may be raised in any court about the meeting of creditors and the business executed by it.

22. Power to Court to make order: (1) The Court may, if it considers appropriate, make any of the following orders, within seven days after the receipt of the report submitted by the inquiry officer pursuant to Sub-section (1) of Section 18, the resolution adopted by the meeting of creditors or the restructuring scheme submitted by the company or any other resolution adopted:

(a) To immediately liquidate the company;

(b) To implement the restructuring program of the company;

(c) In the event of possibility of improvement without liquidating the company immediately, to stay until the period specified by the court;

(d) To extend the period of insolvency proceedings as specified by the Court for the submission of report by making further inquiry; or

(e) To quash the order issued pursuant to Sub-section (2) of Section 10.

(2) Where an order is made under Sub-section (1) to liquidate the company or implement the restructuring scheme, the Court shall make an order to appoint an insolvency practitioner as the liquidator of the company or to operate the restructuring scheme of the company and implement the liquidation or restructuring scheme of the Company; and the person so appointed shall perform such act within such period as specified by the Court at the time of his or her appointment.

(3) Notwithstanding anything contained elsewhere in this Section, where the inquiry officer makes an application for any of the following orders as per the understanding reached between any company which has become insolvent or of which situation requires its immediate liquidation or showing the reason that even though a company has become insolvent, there is a situation that the proposal on the restructuring scheme prepared for the improvement of the company can be considered in a meeting of creditors to be convened pursuant to Chapter-4, the Court may, if it considers so appropriate, make such order:

(a) To end the inquiry into insolvency proceedings before the expiry of that period;

(b) To waive the requirement to convene the meeting of creditors by the inquiry official; or

(c) To liquidate the company or carry out the restructuring of the company.

(4) Where the Court considers it reasonable to make any order other than that mentioned in Sub-section (1) or (3), it may also make such order.

Restructuring Scheme of Company

Section 2 (e) defines “restructuring” as a process to be adopted under the Act in order to a company which may become insolvent because of financial difficulty.

23. Restructuring program to be prepared: (1) Where the Court makes an order to restructure any company pursuant to Sub-section (2) of Section 22, the restructuring manager shall prepare a restructuring scheme of the company in writing.

(2) The scheme prepared pursuant to Sub-section (1) shall contain the following programs:

(a) To capitalize the debt of the company and alter the capital structure;

(b) To pay the claims of creditors by selling any portion of the assets of the company;

(c) To change the nature of claims of creditors of the company and issue securities for the same;

(d) To get the creditors of the company to participate in capital investment by issuing shares in consideration for their claims;

(e) To amalgamate the company with any other company;

(f) To change the management of the company; or

(g) To do any such other act which the Court considers appropriate to restructure the company.

24. To call meeting of creditors: (1) The restructuring manager appointed by order of the Court to make restructuring of the company pursuant to Subsection (2) of Section 22 shall give a notice, meeting the requirements set forth in sub-sections (2) and (3) of Section 21, to all creditors to submit their respective claims, along with their respective proofs and evidences, no later than 15 days after the manager has commenced the business, and such notice shall be published in a daily newspaper of national circulation for at least two times; and such notice may also be put on the website.

(2) All creditors who have any kinds of credit claims against the company shall submit to the restructuring manager statements of credit claims with or without security, along with evidence substantiating such claims no later than fifteen days after the issuance of the notice as referred to in Sub-section (1).

(3) No later than fifteen days after the receipt of statements of claims pursuant to Sub-section (2), the restructuring manager shall call a meeting of creditors, by fulfilling the requirements set forth in sub-sections (2) and (3) of Section 21. In calling such meeting, a copy of the restructuring program shall be sent along with that notice.

(4) The restructuring manager shall chair the meeting called pursuant to Sub-section (3).

(5) The meeting of creditors may be conducted and adjourned as per necessity. Provided that such meeting shall not be adjourned in a manner that it exceeds the period of restructuring.

(6) The directors of the company may attend the meeting of creditors and answer the questions raised by the creditors in relation to the business and financial situation of the company.

(7) The meeting of creditors called pursuant to Sub-section (3) shall discuss the details of restructuring program presented by the restructuring manager and adopt a resolution on any of the following matters, subject to Sub-section (7) of Section 21:

(a) To adopt, with or without amendment, the proposal on restructuring submitted by the restructuring manager, or

(b) To immediately liquate the company without accepting the resolution referred to in Clause (a).

(8) Notwithstanding anything contained in Sub-section (7), the secured creditor shall not be entitled to vote.

(9) The restructuring program adopted and approved pursuant to Sub-section (7) or the resolution adopted to reject the program and liquidate the company shall be submitted to the Court for approval; and if the Court issues order approving that resolution, it shall be implemented.

25. Report to be submitted by restructuring manager: (1) The restructuring manager shall, within the period of restructuring, submit to the Court a report, accompanied by the transactions, assets and financial situation of the company and its restructuring program, if any proposed.

(2) The report referred to in Sub-section (1) shall, where a restructuring program is proposed, state the following matters in relation to such program.

(a) summary and analysis of the proposed program;

(b) Details of effects likely to be caused to the creditors of the company from the implementation of the proposed program;

(c) A comparison between the consideration and effects that would have been available to the creditors if the company had been liquidated immediately and the consideration effects that may be available to the creditors on the implementation of the restructuring program; and

(d) Opinion and description, accompanied by the finding of the restructuring manager that the company would not be insolvent if the restructuring program was implemented.

(3) There shall be no formal form and structure of a restructuring program prepared pursuant to Sub-section (1), except the set forth below:

(a) All details of the program to be implemented by the company in the future and written details of the relevant proposal;

(b) Details of the matter that the creditors of company will get more benefits if the company is not liquidated immediately but restructured and if the program is implemented;

(c) Details of the matter that no portion of the proposed program is illegal or prohibited by the laws in force;

(d) Details that if the program is implemented, the company will be rescued from insolvency or will not become insolvent.

(4) The program prepared pursuant to this Section shall also contain details of payment of expenses incurred during the inquiry period of insolvency proceedings or the restructuring period and of the remuneration of the inquiry officer or the restructuring manager.

26. To make information in the event of failure to submit details of restructuring program: (1) Where it is not possible to submit the details of the restructuring program of the company to the Court within the restructuring period, the restructuring manager shall make an application, accompanied by the reasons, to the Court.

(2) Where an application is made pursuant to Sub-section (1), the Court may, if it considers to be reasonable, invalidate the order to make restructuring and issue an order to liquidate the company.

27. Claim and objection to approved restructuring program: (1) A creditor who is not agreed with the proposal of restructuring program approved pursuant to Sub-section (7) of Section 24 may make an application of claim and objection within seven days, setting out the following grounds and reasons:

(a) The restructuring program approved by a majority in the meeting of creditors is not in the interest of the creditors other than the secured creditors;

(b) A serious irregularity has been committed in calling or conducting the meeting of creditors, and the program approved by that meeting is not in the interest of the creditors other than the secured creditors;

(c) Any false or misleading information has been given or material information has been concealed in relation to the company or its restructuring program.

(2) Where an application referred to in Sub-section (1), the Court shall order the company and the restructuring manager to submit written statements in relation thereto within a period of seven days.

(3) On receipt of written statements referred to in Sub-section (2) or on the expiry ration of the period for the submission of such written statements, the Court shall hear the application referred to in Sub-section (1) and may, if the application is found to be based on grounds, invalidate to make ineffective the resolution on the restructuring program adopted in the meeting of creditors.

(4) If the Court invalidates to make ineffective the resolution adopted in the meeting of creditors and approved pursuant to Sub-section

(3), the Court shall issue order to liquidate the company immediately.

(5) Information of the order issued pursuant to Sub-section (3) or (4) shall be given to the concerned company and the restructuring manager.

28. Consequence of approval of restructuring program by Court: If the Court issues an order to approve the restructuring program adopted by the meeting of creditors pursuant to Sub-section (9) of Section 24, the program shall be binding on all creditors of the company, directors and shareholders of the company, other than the secured creditors of the company; and the restructuring period shall end on that date.

29. Not to affect secured creditors: (1) No restructuring program adopted by a meeting of creditors and approved by the Court pursuant to this Chapter shall, except on the following condition, prevent the secured creditors from executing or otherwise dealing the security:

(a) Where the secured creditor votes in favor of the restructuring program or otherwise gives his or her consent that such program will be acceptable to him or her; or

(b) Where the Court orders that that program shall be binding to the secured creditor.

(2) The Court may, if it is satisfied with the following matters, issue order referred to in Clause (b) of Sub-section (1):

(a) Where the secured creditor executes the security that he or she has taken, it may substantially prejudice the achievements to be made from the implementation of the restructuring program;

(b) Where such program adequately protects the right of the secured creditor to the security, and the security.

30. Not to affect the right of owner of any property or of any lessor: (1) No restructuring program adopted by a meeting of creditors and approved by the Court pursuant to this Chapter shall, except on the following condition, prevent the owner of any property used or possessed or owned by the company or the lessor of such property if it has been leased from executing the right to such property or returning the same:

(a) Where the owner or lessor of such property votes in favor of such program or otherwise gives his or her consent in writing that such program will be acceptable to him or her; or

(b) Where the Court orders that the program shall be binding to the owner or lessor of such property.

(2) The Court may, if it is satisfied with the following matters, ssue order referred to in Clause (b) of Sub-section (1):

(a) Where the owner or lessor of such property gets back that property, it may substantially prejudice the achievements to be made from the implementation of the restructuring program;

(b) Where such restructuring program adequately protects that property and the right of the owner or lessor of such property.

31. Restructuring manager is to operate company: (1) The restructuring manager shall operate the company during the currency of the restructuring period.

(2) In operating the company pursuant to Sub-section (1), the manager may exercise the following powers:

(a) Management and control of the business, properties and transactions of the company;

(b) Termination, sale and disposal of any business or property of the company;

(c) Doing or exercising any such act or power that the company or its officer may do or exercise.

(3) In exercising the powers referred to in Sub-section (2), the restructuring manager shall have power to inspect all books of account, ledgers, records, accounts and documents of the company.

(4) In doing or exercising any act or power set forth in this Section, the restructuring manager shall act in capacity of an agent of the company.

(5) If so sought by the restructuring manager, the director and other officer of the company shall provide any kind of such assistance as may be necessary for the management and control of the company.

(6) No director and officer of the company shall, except with written direction of the restructuring manager, exercise any power or do any act of the company in capacity of the director or officer of the company.

(7) The director of the company shall provide such information about the company and its business, property and transaction to the restructuring manager as sought by the restructuring manager.

32. Power of restructuring manager to borrow loan: (1)Where, in acting as the manager of the company, the restructuring manager considers any amount to be necessary to keep on running the company or operate the business and transaction of the company, he or she may borrow loan with or without furnishing the company's property as security.

(2) The amount of loan borrowed pursuant to Sub-section (1) and terms thereof shall be as set forth in Section 17.

33. Ceiling of remittance of loan of company:

Where as per the agreement of creditors, the restructuring program provides for the remission or alteration in the terms of any loan or any portion of the loan not secured, such remission or alteration may be made in accordance with that program.

34. Implementation of restructuring program: (1) The company shall be responsible for implementing the restructuring program adopted by the meeting of creditors and approved by the Court pursuant to this Chapter.

(2) The Court shall designate the restructuring manager for the supervision and management of the implementation of the program referred to in Sub-section (1).

35. Alteration in and amendment to restructuring program: (1) Where it appears that the restructuring program cannot be implemented wholly or partly at the time of implementation of that program but that program can be implemented if it is altered or amended, the restructuring manager shall call a meeting of creditors in order to alter or amend that program.

(2) Where the meeting called pursuant to Sub-section (1) adopts a resolution altering or amending the program, it shall be submitted to the Court for approval.

(3) Where it is reasonable to approve the program submitted pursuant to Sub-section (2) for the interest of creditors, the Court may order to that effect.

(4) The program approved pursuant to Sub-section (3) shall be implemented as per such alteration or amendment.

36. Termination of restructuring program: (1) Where the company has already implemented the restructuring program or the Court, on application by the restructuring manager, makes an order to terminate the program because of the company's failure to implement it, such program shall terminate.

(2) Where the Court issues an order to terminate the restructuring program because of the company's failure to implement it pursuant to Subsection (1), it shall also issue an order to liquidate such company.

Liquidation of Company

37. Liquidation of company on issuance of order for liquidation:

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

(2) Following the making of order pursuant to Sub-section (1), the liquidation proceedings of the company shall be deemed to have commenced.

38. Consequences on the commencement of liquidation proceedings: (1) On the commencement of the liquidation proceedings of any company, the following provisions shall govern the following matters in relation to such company:

(a) Where the director and officer of the company are relieved of office, the liquidator shall exercise all such powers as may be exercisable by the director and officer of the company in relation to the management of that company;

(b) The liquidator shall take in his or her custody and control all assets, accounts and books of account of the company, except the properties in possession of secured creditors;

(c) Except as ordered otherwise by the liquidator, the service of all employees appointed by the company shall terminate.

(2) The provision relation to ipso facto suspension set forth in Section shall, except for the following matter, apply during the period of currency of liquidation proceedings:

(a) Implementation of the right of secured creditors to execute pursuant to this Act; or

(b) Implementation of the right of the lessor of any property leased to the company to redeem the property pursuant to this Act.

39. Conversion of liquidation of company into restructuring program:

(1)Where, based on the study and examination of the business and assets of the company, nature of the goods or services to be produced by the company and market potentiality thereof, the liquidator thinks that the restructuring program of the company can be adopted by a meeting of creditors and approved, the liquidator may make an application, accompanied by the reasons, to the Court for an order to keep pending the order on liquidation of company issued by the Court pursuant to this Act for a certain period of time and to implement the restructuring program pursuant to this Act.

(2) Where the Court is satisfied with the contents of the application received pursuant to Sub-section (1), it may issue an order to suspend the order on liquidation of a company issued previously for any certain period of time and implement the restructuring program.

(3) Where an order is issued pursuant to Sub-section (2), the order shall be implemented pursuant to this Act.

40. Functions, duties and powers of liquidator: (1) The functions, duties and powers of the liquidator in addition to the other provisions set forth in this Act shall be as follows,:

(a) To institute or defend any case or legal action on behalf of the company;

(b) To appoint employees to assist in the discharge of his or her functions;

(c) Where any installment on any share of the company is due, to make a call on the shareholder for payment of such installment;

(d) To do and execute, or cause to be done and executed, all such acts and deeds or documents as required to be done and executed on behalf of the company and in the name of the company and use the seal of the company for that purpose;

(e) To borrow loans against security of the assets of the company;

(f) Where the liquidator considers that the sale and disposal of any property or termination of any contract or liability will render benefits to the company, to sell and dispose of such property or terminate such contract or liability;

(g) To enter into compromise with any creditor of the company or any person who claims to be a creditor of the company in relation to the claim made by such creditor or person;

(h) To enter into compromise with any person against whom the company may make a claim in relation to any loan, liability or any other claim;

(i) To sell the assets of the company and distribute the proceeds of such sale pursuant to this Act; and

(j) To perform, or cause to be performed, all such other acts as may be necessary to liquidate the company.

(2) It shall be the duty of the liquidator to perform the following functions, in addition to those set forth in Sub-section (1):

(a) To collect, protect and sell the assets of the company;

(b) To examine the business and financial situation of the company;

(c) To accept debt claim of any creditor subject to Chapter-6;

(d) To distribute the proceeds of sale of the assets of the company subject to the order of priority determined for the payment of liability pursuant to this Act;

(e) To call and conduct the meeting of creditors;

(f) To prepare a report on his or her acts and actions and present it to the Court and the Office;

(g) To facilitate the cancellation of registration of the company; and

(h) To examine or inquire into whether any director or employee or shareholder of the company or any person has committed any fraud, cheating or deception against the company or its creditors and institute necessary legal action against such person.

(3) In addition to the functions, duties and powers set forth in Subsection (1) or (2), the liquidator may also perform other functions such as to get back any property of the company if such property is used by any person or to institute legal action to get back such property or amount involved in a void transaction.

Provided that the liquidator shall not be entitled to make such expenses as may not be payable from the assets of the company.

(4) Even though the company does not have adequate amount to pay necessary expenses or remuneration to the liquidator for the exercise of the powers or performance of the duties set forth in Sub-section (1), (2) or

(3), the liquidator shall exercise such powers and perform such duties.

(5) Where the liquidator faces any difficulty with the exercise of any power or the performance of any duty pursuant to this Chapter, the liquidator may make an application to the Court for the removal of such difficulty; and where an application is so made, the Court may, if it holds the application to be reasonable, remove difficulty.

41. Money to be lent by creditor: (1) Where any act to be done by any company which has become insolvent may render or yield benefit or advantage to the creditors, any creditor of such company may advance money to the liquidator to do such act.

(2) Any amount borrowed pursuant to Sub-section (1) shall be paid from the amount received from such act.

(3) Any creditor may make an application to the Court for any order for making payment of a debt claim accepted by the company from the amount received pursuant to Sub-section (1).

(4) Where an application is made pursuant to Sub-section (3), the Court may, if it considers reasonable that such loan can be repaid from the amount referred to in Sub-section (1), make an order for that purpose.

42. Report to be submitted by liquidator: (1) The liquidator shall prepare a progress report on the proceedings carried out in relation to the company and submit it to the Court and the Office no later than three months after the date of his or her appointment.

(2) The report submitted pursuant to Sub-section (1) shall state the following matters, in addition to other matters:

(a) The amount of issued capital of the company, capital that the shareholders have undertaken to subscribe and paid-up capital;

(b) Estimated value of the assets and liabilities of the company;

(c) Opinion of the liquidator in relation to the reason for financial failure of the company;

(d) Opinion of the liquidator on the need to further examine or inquire into the promotion, incorporation of the company or the affairs of the company and its directors and shareholders;

(e) Such other necessary matters as the liquidator considers appropriate.

43. To call meeting of creditors: (1) The liquidator shall, prior to preparing his or her report pursuant to Section 42 and thereafter from time to time as per necessity, call a meeting of creditors of the company.

(2) A meeting of creditors shall be called pursuant to Sub-section

(1) by fulfilling the requirements set forth in sub-sections (2) and (3) of Section 21.

(3) The liquidator shall chair the meeting of creditors.

(4) The provisions of Section 24 shall apply, mutatis mutandis, to the other matters relating to the meeting of creditors.

44. Power to form committee of creditors:

(1) A meeting of creditors held pursuant to Section 43 may form a committee consisting of a maximum of five creditors in order to assist the liquidator in relation to the liquidation of the company.

(2) The scope of work of the committee formed pursuant to Subsection

(1), rules of procedures relating to its meeting or other necessary matters shall be as specified by the meeting of creditors at the time of its formation.

45. To give time limit for submission of debt claim: (1) The liquidator shall give a notice with the time limit of fifteen days to all creditors of the company which has become insolvent to submit their respective debt claims in the prescribed format.

(2) The notice given pursuant to Sub-section (1) shall be published at least twice in a newspaper of national circulation.

(3) The liquidator may reject any claims of the creditors who have not made claim within the time limit referred to in Sub-section (1).

Provided that where any creditor makes an application, accompanied by the reason for failure to submit his or her claim within that time limit, to the liquidator, the liquidator may accept such claim if the contents of such application are found reasonable.

46. Power of the Court to make order in relation to liquidation of company: Notwithstanding anything contained elsewhere in this Chapter, the Court may at any time issue the following order in respect of any company which is undergoing liquidation proceedings:

(a) To suspend or terminate the liquidation of the company;

(b) To require to hand over the assets of the company to the liquidator;

(c) To pay any call made for payment of installment;

(d) Where there is a doubt that any person is possessing or using any property of the company, to stop such possession or use; or

(e) To arrest any person who causes any hindrance in or obstruction to the performance of functions or duties or the exercise of powers by the liquidators.

47. Cancellation of registration of company: Any liquidator appointed to liquidate any company pursuant to this Chapter shall, while liquidate the company, cancel the registration of the company by following the procedures determined by this Act or by other laws in force.